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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

INDIANA SUPREME COURT.

HENRY W. NISWONGER, Appt.,
v.
STATE OF INDIANA.

(— Ind. —, 102 N. E. 135.)

Drugs — sale by physician.

1. A sale of cocaine by a duly licensed physician without a written prescription violates a statute making it unlawful for any person to sell cocaine except upon a written prescription of a duly licensed physician.

Note. — Right of physician to sell drugs without a prescription.

NISWONGER v. STATE arose under a statute making it unlawful for any druggist "or any other person" to sell cocaine except upon the written prescription of a duly registered physician, veterinary, or dentist, and it was held that under such a statute, no one, not even a duly licensed physician, has a right to sell cocaine without a prescription.

Only one other case has been found passing upon the right of a physician to sell drugs without a prescription, and that case is in harmony with the NISWONGER CASE. In *State v. Jones*, 18 Or. 256, 22 Pac. 840, the statute prohibited the sale or giving away of certain named drugs except to those who should present a prescription for the same from a physician or a regularly qualified pharmacist, and required the parties so selling to retain the prescription and keep it open for public inspection, and further provided that physicians or pharmacists who should prescribe any of the drugs named in the act should keep a record, which should be open to public inspection, of all cases in which they had prescribed such drugs, stating the date of prescription, the name and residence of the patient, the disease for which the drug was prescribed, and how much and how often the patient was instructed to use medicine containing
46 L.R.A.(N.S.)

Evidence — sale of drugs — procurement by police.

2. Upon prosecution of one for illegal sale of drugs, evidence is admissible that the sale was procured by the prosecuting witness with money furnished by the police for the purpose of affecting the credibility of the evidence of the prosecution.

New trial — discretion to overrule.

3. There is no abuse of discretion on the part of the trial court in overruling a motion for new trial in a criminal case which is not filed until eighty days after rendition of the judgment, where the statute requires it to be filed within thirty days from the date of the verdict.

(June 17, 1913.)

the drug. It was held that under such a statute, proof that one who is charged with selling one of the prohibited drugs (morphine in this case) without a prescription is a physician, is not enough to exonerate him. Under such a statute, the mere fact that he is a physician does not give him the right to sell such drugs without any other prescription than such as he may orally make to the patient at the time of the sale. Unless he shows that he prescribed the drug and kept the required record, he is in no better position than any other illegal seller.

In *People v. Moorman*, 86 Mich. 433, 49 N. W. 263, a physician was charged with selling drugs without having a license as a pharmacist as the statute required, and it was said that under the statute which exempted from its operation only practising physicians who "did not keep open shop for the retailing, dispensing, or compounding of medicines or poisons," if a physician wished to keep open shop, or in other words a drug store, he must come under the same regulations as other persons. He has no more right than any other person to step into a drug store and to compound or sell drugs, medicines, or poisons to one not his patient. It may be that he is as competent to do this as a registered pharmacist, but he has no vested right to do so.

H. C. Sh.

APPEAL by defendant from a judgment of the Circuit Court for Allen County convicting him of selling cocaine in violation of the drugs act. Affirmed.

The facts are stated in the opinion.

Mr. John H. Aiken, for appellant:

A physician may furnish his patients with medicine as he may in his professional capacity deem proper without a prescription.

Burns's Anno. Stat. 1908, § 9734.

There is not crime without a criminal intent.

Fritz v. State, — Ind. —, 99 N. E. 727;

Osburn v. State, 164 Ind. 262, 73 N. E. 601.

Criminal pleadings must state all facts necessary to show a violation of a criminal statute.

Littell v. State, 133 Ind. 577, 33 N. E. 417; State v. Feagans, 148 Ind. 621, 48 N. E. 225; State v. Buskirk, 18 Ind. App. 629, 48 N. E. 872.

Where there is a total want of evidence on a material issue, the Supreme Court will reverse the judgment.

Lee v. State, 156 Ind. 541, 60 N. E. 299; Shular v. State, 160 Ind. 300, 66 N. E. 746; Bruce v. State, 87 Ind. 450.

Messrs. Thomas M. Honan and Thomas H. Branaman for the State.

Spencer, Ch. J. delivered the opinion of the court:

Appellant was tried by the judge of the Allen circuit court, without a jury, on the charge of having unlawfully sold cocaine, in violation of the act of 1911 pertaining to the sale of drugs. Acts 1911, p. 45. From a judgment of conviction, he prosecutes this appeal.

The act of the legislature on which this prosecution is based provides "that it shall be unlawful for any druggist or any other person to retail, sell, or barter or give away any cocaine, . . . except upon the written prescription of a duly registered physician, licensed veterinarian, or licensed dentist, . . . except, however, that such cocaine, . . . may lawfully be sold at wholesale upon the written order of a licensed pharmacist or licensed druggist, duly registered practising physician, licensed veterinarian or licensed dentist."

Appellant first insists that the court erred in overruling the motion to quash each count of the affidavit on which this action was based. This affidavit is in two counts; but for the purposes of the question before us it is necessary only to set out the first count, which is as follows: "Count 1. Walter H. Immel, being duly sworn, upon his oath says that on the 16th day of May, 1912, at the county of Allen, 46 L.R.A.(N.S.)

and the state of Indiana, Henry W. Niswonger, who was then and there a druggist, did then and there unlawfully sell to one John Burton at and for the price of \$1, one eighth of an ounce of cocaine, the said sale not being then and there made upon the written prescription of any duly registered physician, licensed veterinarian, or licensed dentist, the said Henry W. Niswonger having then and there a license as a physician and a license as a pharmacist."

Without deciding whether appellant has properly presented any question as to the sufficiency of the affidavit, it is apparent that the offense defined in the statute applies to all persons; and if a physician, although duly licensed, commits the act charged in this affidavit, he is not excepted from the operation of the law. The statute in question prohibits the sale, barter, or giving away of cocaine except under certain conditions, and it was not intended to exempt licensed physicians from its terms. There is nothing in the act which will authorize a physician to operate a drug store and, as such druggist, to sell cocaine indiscriminately to any one applying therefor without having a written prescription as required by law. Such prescription is a prerequisite to any sale of either of the drugs mentioned in the statute, and must be retained on file by the person making such sale. There was no error in overruling the motion to quash the affidavit.

It is next contended that the circuit court erred in overruling appellant's motion for a new trial. There was some evidence of the sale as alleged, and that it was made without a prescription therefor. Whether such testimony carried conviction was a matter resting exclusively with the court which tried the case, and the sufficiency thereof cannot be determined here. Freese v. State, 159 Ind. 597-604, 65 N. E. 915.

The remaining assignment is that the court erred in overruling the second or supplemental motion for a new trial. The original motion for a new trial was overruled and the judgment rendered on June 22, 1912. Appellant then prayed an appeal to this court, which was granted, and an appeal bond was regularly filed and approved on said date. The execution of the judgment rendered was thereby stayed, and appellant was given ninety days in which to prepare and file his bill of exceptions. On September 10, 1912, appellant filed his supplemental motion for a new trial, the substance of which motion is that the witness John Burton was given the money with which to purchase the cocaine from appellant by a police officer of the city of Fort Wayne, for the purpose of securing

evidence against appellant of his violation of the cocaine act, *supra*. The motion stated that said Burton was intimidated, threatened, and coerced by said police officer, and forced to make the purchase of the cocaine, for the purpose of making a successful prosecution against appellant.

The record of the evidence introduced at the trial shows that this matter was gone into at that time, and was properly presented to the trial court for the purpose of affecting the credibility of the witness. While this method of securing evidence is not to be wholly commended or approved, it is sometimes true that the conditions surrounding the commission of crime are such as to make the securing of proper and competent evidence as to such act a very difficult task. When evidence is secured in the manner suggested by appellant's supplemental motion for a new trial, the method so employed and the credibility of the witness securing the same may properly be considered by the trial court or jury in seeing that justice is done. It must be presumed that such facts were so considered by the Allen circuit court in the trial of this case.

Furthermore, in our Code of Criminal Procedure it is provided (§ 2158, Burns's Anno. Stat. 1908) that "the motion for a new trial . . . must be filed within thirty days from the date of the verdict or finding." While the matter of permitting a defendant to file a supplemental motion for a new trial in a case involving his life or liberty is within the sound discretion of the trial court, as was said in *Dennis v. State*, 103 Ind. 142-147, 2 N. E. 349, 5 Am. Crim. Rep. 469, we are constrained to hold that it would not be an abuse of such discretion to refuse to entertain such motion in a case involving a misdemeanor only, where the same was not filed for eighty days after the rendition of the judgment. Here the circuit court entertained such motion, and did not err in overruling the same.

The judgment must be affirmed, and it is so ordered.

Cox, J., concurs in conclusion.

KENTUCKY COURT OF APPEALS.

L. B. BLALOCK et al., Appts.,
v.

J. E. ATWOOD.

(154 Ky. 394, 157 S. W. 694.)

Trespass — tree on boundary — action for removal.

1. A property owner whose title runs to 46 L.R.A. (N.S.)

the center of the street may maintain an action against the adjoining property owner for removing a tree between the sidewalk and the curve, which was on the boundary line between the two lots.

Damages — destruction of tree.

2. An allowance of \$275 for the malicious destruction by a property owner of a healthy and symmetrical shade tree 24 inches in diameter, on the boundary between his own and his neighbor's property, will not be interfered with, where evidence tends to show that the value of the neighboring property was diminished from two to five hundred dollars by the act.

(June 13, 1913.)

APPEAL by defendants from a judgment of the Circuit Court for Graves County in plaintiff's favor in an action brought to recover damages for the alleged wrongful cutting of a shade tree. Affirmed.

The facts are stated in the opinion.

Messrs. Hollifield & Gardner, for appellants:

The tree in controversy was a part of the street.

Covington v. Schlosser, 141 Ky. 838, 133 S. W. 987; *Hawesville v. Hawes*, 6 Bush, 232, 7 Mor. Min. Rep. 193; *West Covington v. Freking*, 8 Bush, 121; *Jacob v. Woolfolk*, 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415; 2 *Elliot, Roads & Streets*, 1911 ed. § 872; *Hoffman v. Shepherdsville*, 18 Ky. L. Rep. 302, 36 S. W. 522.

Messrs. Johnston & Wyman, for appellee:

The action lies.

Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; *Bright v. Palmer*, 20 Ky. L. Rep. 771, 47 S. W. 590; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Russellville Home Teleph. Co. v. Com.* 33 Ky. L. Rep. 132, 109 S. W. 340.

The fact that land is a highway does not justify acts by a private individual which the town had a right to do.

Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; *Hunt v. Rich*, 38 Me. 195.

Mr. R. O. Hester also for appellee.

Note. — Property rights in trees on or overhanging boundary line.

I. Trees on boundary line.

a. Character of ownership, 4.

b. Rights and remedies of parties.

1. Right to remove, 4.

2. Right to compel removal, 4.

3. Right to trim to line, 4.

4. Right to injunction, 5.

5. Right to maintain trespass or replevin, 6.

II. Trees near boundary line, 6.

The earlier cases on this question have been collected in the note to *Hickey v. Michigan C. R. Co.* 21 L.R.A. 729.

Settle, J., delivered the opinion of the court:

This is an appeal from a judgment entered upon a verdict of \$275 damages, which appellee recovered of appellants in the court below for a trespass committed by the latter. A former appeal in this case was dismissed, because of the appellants' failure to file the transcript in the office of the clerk of this court twenty days before the first day of the second term of the court next after the granting of the appeal as provided by § 738, Civil Code. *Blalock v. Atwood*, 148 Ky. 828, 147 S. W. 748. The present appeal was granted by the clerk of this court.

It appears from the record that the appellant Blalock and the appellee, Atwood,

own and reside upon adjoining lots situated on Cherry street in the city of Mayfield. The lots were originally included in the one block which belonged to the common grantor of the present owners. Appellee has owned and resided upon his lot thirteen years; the appellant Blalock has owned and lived upon his lot only two or three years. The action was brought against appellants, L. B. Blalock, Bill Smith, and Cal Harris, Smith and Harris being Blalock's employees, to recover damages for the destruction by them of a shade tree, known as a silver leaf poplar, which stood in the sidewalk in front of the lots in question and partly upon each lot. The amount of the damages claimed was \$500. The object of the action and character of the injury alleged are stated in the

I. Trees on boundary line.

a. Character of ownership.

Trees on a boundary line between adjoining tracts of land are owned in common by the owners of the respective tracts (*Yoakum v. Davis*, 162 Mo. App. 253, 144 S. W. 877); and this is true whether they are marked as boundary trees or not (*Quillen v. Betts*, 1 Penn. (Del.) 53, 39 Atl. 595; *Phillips v. Brittingham*, — Del. —, 77 Atl. 984).

Although it is stated in *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383, that the adjoining owners are tenants in common of such trees, the doctrine of *Robinson v. Clapp*, *infra*, is approved therein.

Some doubt is thrown on the doctrine of tenancy in common in *Robinson v. Clapp*, 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939, where it is stated that "it will be evident, we think, that the tenancy in common in a tree is of a peculiar nature, if there be such a tenancy at all. It would really seem to come to this,—that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps rather identical with, the part which is upon his land; and in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole."

A hedge set along, but not on, the line between landowners, which grows into such size that the trunks of the trees constituting the hedge crowd across the line onto the land of the other owner, becomes the property of the adjoining landowners in common. *Yoakum v. Davis*, *supra*.

b. Rights and remedies of parties.

1. Right to remove.

Where a row of cypress trees is growing on the boundary line between adjoining owners, one such owner cannot cut down every alternate two of such trees until 46 L.R.A. (N.S.)

he has cut down one half the entire row. *Scarborough v. Woodill*, *supra*.

A landowner who cuts down and removes a tree directly upon the boundary line is liable in trespass for so doing. *Quillen v. Betts*, *supra*.

A landowner who enters upon the adjoining property to cut line trees, or who, without being thereon, aids or abets anyone in the cutting of such trees, is liable in damages to the adjoining owner. *Phillips v. Brittingham*, *supra*.

It is not required of an adjoining landowner to prove that the trees were cut with a wrongful intent, but it is sufficient if it be shown that the cutting was done without a justifiable cause or purpose, though it was done accidentally or by mistake. *Ibid*.

2. Right to compel removal.

A landowner who has set out a hedge on the boundary line cannot thereafter compel the adjoining landowner to remove the same, even though such adjoining landowner has assumed the care and maintenance of the hedge, and it is claimed that the roots and shade of the growing trees injuriously affect the productiveness of the plaintiff's land. *Harndon v. Stultz*, 124 Iowa, 440, 100 N. W. 329. By consent of the adjoining landowner in this case, the plaintiff was allowed to remove the hedge.

3. Right to trim to line.

It is stated in *Scarborough v. Woodill*, *supra*, citing *Washb. Real Prop.* 3d ed. § 7a, 6th ed. § 14, that neither of the adjoining owners is at liberty to cut away the tree without the consent of the other, nor to cut away the part which extends over his land, if he thereby injures the common property in the tree.

But it is held in *Robinson v. Clapp*, 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939, that one of the owners may cut off the branches up to the line, even though that would be practically to the trunk of the tree. It is stated farther that if in fact the trunk divides itself as the tree extends upward

following excerpt from the petition: "That on or about said date [August, 1911] the defendants, L. B. Blalock, Bill Smith, and Cal Harris, over the repeated and continued protest and objections of the plaintiff, wantonly, wilfully, knowingly, unlawfully, forcibly, and in a high-handed and oppressive way and manner, without any regard whatever for the rights of this plaintiff, entered upon said lot or land and cut the limbs and body and dug up by the roots and removed and destroyed one very large and very valuable shade tree, which tree stood at least two thirds, if not entirely, on plaintiff's side of the line, and was a shade tree, a protection, and an ornament to plaintiff's dwelling house and premises. . . ."

The answer of appellants, in effect, admitted the removal and destruction of the tree, but denied the averments as to the manner in which it was done; also denied that the tree was to any extent on appellee's lot, or that he was damaged by its removal, and alleged that appellants possessed the right to remove it. Such of the averments of the answer as were of an affirmative nature were controverted by appellee's reply. Appellants complain that the verdict is flagrantly against the evidence; that the jury should have been peremptorily instructed to find for appellants; and that the damages awarded were unauthorized by the evidence, and so excessive in amount as to indicate that the jury were influenced by passion and prejudice.

into two or more parts of similar size with more of a perpendicular than horizontal extension, each of those parts should be regarded as a portion of the trunk. In this case an injunction was sought, and it was held that the order should not extend farther than to restrain the owner from cutting any portion of the trunk and any further cutting of the branches or of the roots than he might lawfully have done had the trunk stood wholly upon his neighbor's land, but reaching to the boundary line. In a second appeal of this case, reported in 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504, the trial court found that if the trunk of the tree was not touched, but the roots and branches were cut off up to the boundary line, the tree would probably die, but if it did not, it would, after such branches were cut, be unsightly and of no practical value to the adjoining landowner, and an injunction was refused to restrain the landowner from cutting away half the trunk and clearing away the branches and roots to the dividing line. Upon the appeal this action of the trial court was affirmed.

A hedge growing on the boundary between private property and that of the state may be trimmed to the boundary line by the lessees of the state without incurring any liability in damages. *Bright v. New Orleans R. Co.* 114 La. 679, 38 So. 494.

Compare with *Harndon v. Stultz*, *supra*, where the action was to compel the removal of the entire hedge, and not to have it trimmed or cut back.

4. Right to injunction.

It has been urged that injunction will not lie to restrain the cutting of trees on a boundary line, as the parties are tenants in common. *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383. But it is held in this case that where the act of the defendant is not a legitimate enjoyment of the estate, he may be enjoined from cutting the trees.

The court here took judicial notice of the flora and climatic conditions of the country, 46 L.R.A. (N.S.)

and from this and the testimony, which showed that the trees in question were cypress trees, presumed that the cutting of such cypress trees for firewood, on the boundary line of an orange orchard in southern California, was not a legitimate enjoyment of the estate in such trees, and issued an injunction to restrain the cutting.

Injunction lies at the suit of one lot owner in a rural or suburban locality, to restrain the owner of the adjoining lot from cutting a tree on the boundary line between the properties, and on the pavement line thereof. *Comfort v. Everhardt*, 35 W. N. C. 364.

Injunction will lie to restrain a landowner from cutting every alternate two trees until he has cut one half of the entire number of a row of trees on the boundary line between him and an adjoining landowner. *Scarborough v. Woodill*, *supra*.

In *Tanner v. Wallbrunn*, 77 Mo. App. 262, a mandatory injunction was denied where the adjoining landowner had, about the date of the institution of the suit, cut away the branches of the tree to the extent that they overhung the plaintiff's buildings, as it is stated that the plaintiff thereby obtained all the relief he was entitled to. The court states that even had the adjoining landowner refused to cut off such overreaching limbs, the plaintiff had the legal right to do so, and having this right it was his duty to avail himself thereof before resorting to the extraordinary remedy of injunction.

In *Tanner v. Wallbrunn*, *supra*, an injunction was denied to a landowner to compel the removal of roots from a near-by tree, where there was no evidence of any damage done by such roots.

In *Robinson v. Clapp*, 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939, the court states in an action in which an injunction was sought to restrain the cutting of a line tree, that "it might perhaps fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land—thereby depriving him of the opportunity to build upon it as de,

In our opinion none of these contentions is sustained by the record. As to the first, it is sufficient to say that the weight of the evidence was to the effect that the tree removed by the appellants was in part on the land of the appellee and in part on that of the appellant Blalock; three fourths of it being on the lot of the former, and one

fourth on the lot of the latter. This fact was established, not only by the testimony of witnesses familiar with the line dividing the two lots, but also by a surveyor who ran the lines of the lots. Moreover, it was shown by several of appellee's witnesses that a year or more before the removal of the tree the appellant or his son, who was his

sired—would be likely to produce a greater irreparable injury to the defendant than such removal, and the consequent destruction of the life of the tree, would cause the plaintiff, and that therefore the equitable remedy of injunction, which is not adapted finally to adjust the rights of the parties, should have been refused, and the contestants left to settle such rights in methods pertaining to the legal, and not the chancery, jurisdiction. We are inclined to think such elements of discretion enter into this matter that we ought not to disturb the conclusion of the trial court upon it." In a second appeal of this case, reported in 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504, an injunction was refused, as stated above.

5. Right to maintain trespass or replevin.

The action of trespass *quare clausum fregit* lies in favor of a landowner against his adjoining landowner for cutting down and carrying away a line tree. *Miller v. Holland*, 13 Pa. Co. Ct. 622.

The action in *Quillen v. Betts*, 1 Penn. (Del.) 53, 39 Atl. 595, was in trespass, but no special attention is given to the form of action.

A landowner cannot maintain replevin against the owner of the adjoining land, to recover fence posts cut by such adjoining owner out of a hedge on the boundary line. *Yoakum v. Davis*, 162 Mo. App. 253, 144 S. W. 877.

II. Trees near boundary line.

As will be seen by reference to the note to which this is supplementary, the landowner over whose land branches from a near-by tree overhang may remove the branches to the boundary line, on the theory that they are a nuisance.

This right is recognized in *Tanner v. Wallbrunn*, supra, but it is there held that an order in injunction which commands not only the destruction of the overhanging branches, but would destroy the tree itself, is erroneous. The building on the complainant's property was about 3 inches from the division line, and about 3½ feet from the trunk of the tree on the adjoining landowner's property. About the date of the institution of the suit, the adjoining landowner had cut away the branches of the tree to the extent that they overhung the plaintiff's buildings, and this being all the plaintiff was entitled to, the judgment of the lower court was reversed.

And if done without trespassing on the 46 L.R.A. (N.S.)

adjoining land, the removal may be effected without notice, notwithstanding the branches may have so overhung for more than twenty years. *Lemmon v. Webb* [1895] A. C. 1, 64 L. J. Ch. N. S. 205, 71 L. T. N. S. 647, 59 J. P. 564, 11 Reports, 116, affirming [1894] 3 Ch. 1.

An action lies against a landowner for allowing trees to overhang the adjoining land, where injury results to the crops of the adjoining landowner. *Smith v. Giddy* [1904] 2 K. B. 448, 2 B. R. C. 897, 73 L. J. K. B. N. S. 894, 91 L. T. N. S. 296, 20 Times L. R. 596, 53 Week. Rep. 207.

So, in *Ackerman v. Ellis*, 81 N. J. L. 1, 79 Atl. 883, it is held that trees which overhang the premises of another are a nuisance, and the person over whose land they spread is entitled to his action for damages against the person who is responsible for their presence there.

If, in removing the overhanging branches, trespass is committed, a liability is incurred.

Thus, a landowner who has cut the limbs of a tree standing on the adjoining owner's land about 3 feet from the line, close to the body of the tree, is liable in damages, unless he was acting under a license from the adjoining owner. *Newberry v. Bunda*, 137 Mich. 69, 100 N. W. 277. The license claimed in this case was one implied from an agreement between the plaintiff and the defendant as to the rebuilding of the line fence. The tree stood adjacent to that portion of the fence assigned to the plaintiff, but it was claimed that it was necessary, in order to fix the line upon which the fence was to be located, to line through the entire distance, and that, in order to do this, it was necessary to cut the limbs from the tree. As to whether or not a license existed under these circumstances was held to be a question of fact, and the court refused to disturb the finding of the jury in favor of the defendant.

The building regulations of the District of Columbia, which, after providing for the building or repairing of division fences, contain a provision that the new fence must be a rough board fence with tight or close joints, do not authorize the destruction of a division hedge located entirely on the land of one of the parties. *Slye v. Guerdum*, 29 App. D. C. 550.

The defendant in *Slye v. Guerdum*, supra, claimed that the plaintiff should have declared in case instead of in trespass, but he was held to have waived this objection by introducing evidence in his behalf after his motion to this effect had been overruled.

W. A. E.

immediate grantor, caused the fence between the two lots to be rebuilt, in doing which the new fence was moved 6 or 8 inches further over on appellee's lot, by the manner in which the posts were reset, and by wholly placing the purlins and other material of which the fence was constructed on the side of the posts next to appellee's lot, instead of on the side thereof next to the appellant Blalock's lot, as they were placed on the posts of the old fence.

We do not find that the evidence furnished by the appellants' witnesses conduced to prove that the tree was not in part on appellee's side of the line dividing the two lots. It was more particularly directed toward showing that the present fence stands precisely where the old one stood, and that the tree was not as much as three fourths of it on appellee's side of the line. We are convinced that the evidence authorized a verdict for the appellee.

Appellants' contention as to the peremptory instruction rests upon their claim that the tree removed by them was a part of Cherry street, and therefore appellee had no property right therein. The law gives no support to this contention. Along the east side of Cherry street in front of the lots of appellee and the appellant Blalock is a pavement, between the outer edge of which and the street curbing is a narrow grass plot, and on this grass plot the tree removed by the appellants was situated. The third line of appellee's deed calls to run with the line of Blalock's lot from the rear of both lots, 225 feet to Cherry street; thence north and with the east line of Cherry street, 92 feet to the beginning, also on Cherry street. Appellee's deed therefore carried the front line or boundary of his lot to the center of Cherry street, subject to the use of the entire street and sidewalk by the public; and if the city authorities of Mayfield should discontinue the street and sidewalk, appellee's title to 92 feet in width, to the center of the street, of the ground now included in the street and sidewalk could not be questioned.

In *Williams v. Johnson*, 149 Ky. 409, 149 S. W. 821, the city of London having, by proper authority, converted a public road within its limits, upon which the appellants' lots fronted, into a macadamized street, and in doing so abandoned the use of part, but at no point more than the whole, of the old roadbed in front of the lots, the appellee, their grantor, by actions in ejectment against appellants severally, sought to recover such part of the old roadbed as lay between their lots and the new street, upon the ground that its abandonment as a public highway entitled him to same. We held, however, that as the deeds by which ap-

pellee conveyed the lots described them as fronting and abutting on the old road, and the street was substituted for the old road, its construction and establishment by the city operated to include the abandoned roadbed in appellants' lots, respectively, and extend the boundaries thereof to the edge of the street. In the opinion it is said: "It seems to be the universally recognized rule that the conveyance of land bordering on a public highway conveys title to the center of the highway, subject to its use by the public, whether it is so expressed in the deed or not; and where a conveyance, or a bond to convey, designates the public highway as one of the boundaries of the tract, it will, in the absence of language showing a contrary intention, be construed as including the highway itself to the center or middle thereof. *Tiedeman Real Prop.* 3d ed. § 601; 2 Washb. *Real Prop.** 636; 14 Cyc. 1181; 2 Ballard, *Real Prop.* § 48; *Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; *Silvey v. McCool*, 86 Ga. 1, 12 S. E. 175; *Firmstone v. Spaeter*, 150 Pa. 616, 30 Am. St. Rep. 851, 25 Atl. 41; *Hawesville v. Lander*, 8 Bush, 679; *Schneider v. Jacob*, 86 Ky. 106, 5 S. W. 350; *Jacob v. Woolfolk*, 90 Ky. 429, 9 L.R.A. 551, 14 S. W. 415; *Bright v. Palmer*, 20 Ky. L. Rep. 772, 47 S. W. 590; *Hommell v. Lewis*, 23 Ky. L. Rep. 2299, 66 S. W. 1041; *Coppin v. Manson*, 144 Ky. 634, 139 S. W. 860; *Ballard, etc. v. Louisville*, 3rd Ky. Ms. Opinions, 31.

In *Schneider v. Jacob*, 86 Ky. 106, 5 S. W. 350, we held that where the owner of land adjacent to a city exhibits a map of it, laying it out into building lots, streets, and alleys, and sells the lots as bounded by such streets or alleys, this is an immediate dedication of the streets and alleys to the use of the purchaser and to the public, although they have not been actually opened; and where a lot thus sold fronts on a street, and the deed calls for the street as the boundary, the title passes to the center of the street, subject to the right of the public to the use; and if the street is never opened, the purchaser is entitled to hold to the center of the strip of ground thus described as a street.

The reasons for the rule in question are thus given in the opinion: "The purchaser of the lot, doubtless, would not have purchased it but for the usual benefits of the street; he therefore pays an increased price for the lot. He purchases the lot with the understanding that he may build houses fronting on the street, with windows, doors, and doorsteps, and that the doorsteps may extend beyond the line of the street; also that he may construct vaults below the surface of the street; and vaults in cities of

considerable size are nearly always constructed under the sidewalks and they are sometimes extended to the center of the street. Their construction as depositories for fuel and other necessities is highly necessary. Shade trees, posts, awnings, etc., are also necessary protections and conveniences. If the grantor held the property right in the street up to the dividing line between the street and the lot, he could deprive his vendee of the right of ingress from the streets into his house, and exit from it, of light and air, and of planting shade trees, and erecting posts and awnings, and of constructing vaults. . . . For these reasons the correct rule seems to be that where the lot fronts on a street, and the deed calls for the street as the boundary, the title passes to the center of the street, subject to the right of public use. . . . The fact that the description only brings the lot to the edge of the street can make no difference, for the description which thus brings the lot to the edge of the street must be merely understood as specifying the land that the purchaser may hold and use as exclusively his own, and as defining the line at which the public easement begins, the purchaser owning, subject to that easement, to the center of the street. *Paul v. Carver*, 26 Pa. 223, 67 Am. Dec. 413."

If, as the above authorities hold, appellee's deed, calling, as it does, to run with the east side of Cherry street, carries the front boundary of his lot to the center of the street, and conveys him the title to the ground included in the street to the center thereof, subject to the public easement, it necessarily also passed to him the title to the entire sidewalk in front of his lot, subject to the public easement; and if the shade tree removed by appellants from the sidewalk was in part on his side of the line dividing his lot from the lot of the appellant Blalock, his title to such part of the tree could not be questioned. This being true, the appellants, notwithstanding the fact that the tree was also in part on Blalock's side of the division line, had no right to remove the tree without appellee's consent, and in doing so they committed a trespass.

In *Griffin v. Bixby*, 12 N. H. 464, 37 Am. Dec. 225, it was held that "a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other."

The fact that the shade tree in question stood on the border of the sidewalk, where it afforded shade for the benefit of those who traveled the sidewalk, did not interfere 46 L.R.A. (N.S.)

with the appellee's right to protect it from destruction, or with his right to recover damages for the injury done his property right therein by the act of appellants in destroying it. *Musch v. Burkhart*, 83 Iowa, 301, 12 L.R.A. 486, 32 Am. St. Rep. 305, 48 N. W. 1025. In *Russellville Home Teleph. Co. v. Com.* 33 Ky. L. Rep. 132, 109 S. W. 340, we held that it was an indictable offense under the statute for the telephone company to unnecessarily cut shade trees standing on the side of a highway on the land of one who had given it permission to erect its line and poles thereon, saying in the opinion: "They stood upon Orndorff's land on the border of the public highway, and trees upon the highway are valuable for the shade they make for the benefit of those who travel the highway; and the owner's right to protect them from the ax was not lessened by the fact that other persons using the highway in common with him got the same enjoyment he received from the shade afforded by the trees when standing."

Having, as we think, properly disposed of the first and second grounds urged by appellants for a reversal, we will now consider the third and final complaint, that the verdict is excessive. We regard the complaint as without merit. According to the evidence, the tree was 24 inches in diameter, symmetrical in form, free from disease or blemish, and of sufficient size and height to afford excellent shade and at the same time greatly ornament appellee's premises. The value of such a tree is very great, and we are not surprised that the witnesses introduced in appellee's behalf so regarded it. Several of them testified that its loss to appellee greatly reduced the vendible value of his property. Some of them saying, in substance, that its fair market value, whether sold for cash or on reasonable credit, was less by \$250 or \$300 after the destruction of the tree than was its value before, and others placed the difference or deterioration in the value of the property at a larger sum, and one or more of them as high as \$500. But, in addition to the actual damage to appellee's property by the destruction of the tree, the wanton and malicious character of the trespass committed by appellants in destroying the tree authorized the jury to award appellee exemplary damages. The conversation had with the appellant Blalock by appellee, and his responses to the requests to spare the tree made of him by the latter, illustrate the animus, wantonness, and violence with which the trespass was committed. The testimony of appellee as to the conversation referred to was corroborated by others.

and much of it undenied by the appellant Blalock.

Manifestly, under the averments of the petition and the evidence, the case was one for the recovery of exemplary as well as actual damages, and we have been unable to find in the record any cause for holding that the \$275 damages awarded by the jury is in any sense excessive; nor is it apparent that anything occurred during the trial to inflame the passions or excite the prejudices of the jury toward the appellants.

The instructions gave the jury, in substantially correct terms, all the law required for their guidance in arriving at a verdict, and no material error is shown in the admission or rejection of evidence.

The conclusion we have reached makes it unnecessary for us to pass upon appellee's motion to strike the bill of exceptions from the record.

Judgment affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. HUGO SCHWARTZKOPF et al., Respts.,
v.

CITY COUNCIL OF BRAINERD, Appts.

• (121 Minn. 182, 141 N. W. 97.)

Mandamus — charges against officials — hearing.

Section 12 of the city charter of Brainerd

Headnote by PHILIP E. BROWN, J.

Note. — Mandamus to compel exercise of the power to remove or suspend public officer.

The early cases on this question are collected in the note to State ex rel. Davern v. Rose, 28 L.R.A. (N.S.) 194.

As shown in the earlier note, the cases generally announce the rule that the exercise of the power to remove or suspend a public officer, where the duty to act in the premises is clearly established, can only be enforced by the courts in so far as they may compel action on the part of the officer or board, to pass upon the sufficiency of the charges or investigate the conduct complained of, but that they cannot compel further action where the officer or the board has a discretion in the matter.

Thus, mandamus will lie to compel a city council to order an election for the recall of some of its members sought to be removed from office, in the manner provided by the city charter, upon the presentation of petitions requesting such an election, where they are duly filed and there are no objections to their sufficiency. Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719.

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imposes no duty upon the city council to entertain and hear a petition filed by citizens and taxpayers, whether specially interested or not, preferring charges against city officers and demanding their removal; and hence an alternative writ of mandamus to compel the council to fix a time and place for a hearing upon charges so preferred was demurrable.

(April 18, 1913.)

APPEAL by defendants from a judgment of the District Court for Crow Wing County granting a writ of mandamus to compel them to hear charges against members of the water board. Reversed.

The facts are stated in the opinion.

Mr. M. E. Ryan, for appellants:

Since the charter provision does not "specially enjoin" the governing body so to entertain charges, it is a discretionary matter, and the relators have no "clear legal right" to the same.

Abbott, Mun. Corp. § 635, p. 1548; Wish-ek v. Becker, 10 N. D. 63, 84 N. W. 590; Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; Re Kane, 71 Misc. 163, 129 N. Y. Supp. 990; Gamble v. State, 61 Fla. 233, 54 So. 370; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; 26 Cyc. 162.

For reasons of sound public policy, governing bodies should not be compelled to hear charges formulated and preferred by private citizens.

Chouteau v. Rice, 1 Minn. 121, Gil. 97; Gleason v. University of Minnesota, 104

It will be observed that in STATE EX REL. SCHWARTZKOPF v. BRAINERD, the right to the writ of mandamus was denied, although it only sought to compel the hearing of the charges. In this case, however, unlike those upholding the right to mandamus to compel action or a hearing of the charges, the respondent was vested with discretion, not only as to the ultimate question of removal, but also as to the preliminary question whether the charges should be heard. As shown in the earlier note, mandamus will not ordinarily lie to control the decision of the officer or board on the ultimate question of removal, even when it is proper for the purpose of compelling action on their part.

Thus, mandamus will not lie to compel the court to enter an order ousting a public officer from office for an admitted violation of the Code, which makes the taking of illegal fees a ground for removal from office, where the proceedings for removal are quasi criminal in character and the question of guilt or innocence of accused is one exclusively for the judge. State ex rel. Rowe v. District Ct. 44 Mont. 318, 119 Pac. 1103, Ann. Cas. 1913 B, 396.

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Minn. 359, 118 N. W. 650; State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; Dill. Mun. Corp. 5th ed. §§ 486, 1489; State ex rel. Holder v. Lamberton, 37 Minn. 362, 34 N. W. 336; State ex rel. Zeglin v. Carver County, 60 Minn. 510, 62 N. W. 1135; State ex rel. Howie v. Northfield, 94 Minn. 81, 101 N. W. 1063; 26 Cyc. 200, 239, 240, 279, 280; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773.

Mandamus does not lie to compel an official to reverse a decision already rendered in the exercise of discretionary power.

19 Am. & Eng. Enc. Law, 2d ed. 781; People ex rel. Demarest v. Fairchild, 67 N. Y. 335; People ex rel. Wooster v. Maher, 141 N. Y. 330, 36 N. E. 396; Lewright v. Bell, 94 Tex. 556, 63 S. W. 623; McLaughlin v. Burroughs, 90 Mich. 311, 51 N. W. 293; State ex rel. Davern v. Rose, 140 Wis. 360, 28 L.R.A.(N.S.) 194, 122 N. W. 751.

Mandamus will not be granted where it is obvious that it will prove futile and practically unavailing.

State ex rel. Gold v. Secrest, 33 Minn. 381, 23 N. W. 545; State ex rel. Lum v. Archibald, 48 Minn. 328, 45 N. W. 606; State ex rel. Mortensen v. Copeland, 74 Minn. 371, 77 N. W. 221.

Messrs. Russell & Barron, for respondents:

The city council of the city of Brainerd, vested with the power to remove a member of the water and light board, must proceed to hear charges formulated and preferred by private citizens, where those charges involve grave and serious abuses in public office.

State ex rel. Currie v. Weld, 39 Minn. 426, 40 N. W. 561; State ex rel. Townsend v. Park Comrs. 100 Minn. 150, 9 L.R.A. (N.S.) 1045, 110 N. W. 1121; State ex rel. Lum v. Archibald, 43 Minn. 328, 45 N. W. 606; People ex rel. Chilcoat v. Harrison, 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913 A, 539; State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118.

Philip E. Brown, J., delivered the opinion of the court:

Prior to any of the occurrences disclosed in this proceeding, Brainerd framed and adopted a charter for its government as a city, and still continues to be so governed. Among other things this charter provides:

"Sec. 12. Every person appointed to any office by the city council or mayor, or elected to any office by the people, may be removed from such office by a vote of two thirds of all the aldermen authorized to be elected. But any officer elected by the people or appointed by the mayor shall not be removed except for cause, nor unless
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first furnished with a copy of the charges, nor until such person shall have reasonable opportunity to be heard in person, or by council in his own defense. The city council shall fix the time and place for the trial of such officer, of which not less than ten days' notice shall be given to such officer and to the aldermen, and shall have the power to compel the attendance of witnesses and the production of papers, and to hear and determine the case; and if such officer shall refuse or neglect to appear and answer such charges, the city council may declare such office vacant. Among such causes shall be continued absence by aldermen without leave, from three successive regular meetings of the city council, or a member of a board from the meetings of such board, or neglect of duty of any officer."

"Sec. 46. The city council shall examine, audit, and adjust the accounts of all the city officers and agents of the city at such times as they may deem proper, and also at the end of each fiscal year and before the term for which the officers of said city were elected or appointed shall expire; and the city council shall require and may compel by proceedings in court each and every such officer and agent to exhibit his books, accounts, and vouchers for such examination and settlement, and if any such officer or agent shall refuse to comply with the orders of said council in the discharge of his said duties in the pursuance of this section, or shall neglect or refuse to render his accounts or present his books or vouchers to the city council or a committee thereof, it shall be the duty of the city council to declare the office of such person vacant; and the city council shall order suits and proceedings at law against any officer or agent of said city who may be found delinquent or defaulting in his accounts or in the discharge of his official duties, and shall make a full record of such settlements and adjustments."

On December 5, 1911, one of these relators, with others, filed with the city council a petition praying the council to investigate and audit the water and light board, under § 46 of the charter above set out. Thereafter a committee was appointed by the council to conduct the investigation, which committee filed a report. The council, however, determined to prefer no charges against any city official involved in the proceeding. On September 3, 1912, these relators filed with the council a verified petition, alleging, among other things, that they were resident citizens of the city and were consumers of its water and light; that they petitioned for and in behalf of themselves and all other citizens of the city and consumers of its water and light; that dur-

ing the investigation and audit of the water and light board referred to sworn testimony was taken before the council, and that the evidence adduced during such investigation was amply sufficient to require the council to remove the president of the water and light board; that all allegations set out in the petition as founded on information and belief were based upon such sworn testimony so taken. The petition charged the president of the water and light board with being the president of a banking corporation organized under the laws of the state and doing a banking business in the city, and that such bank had established, as the petitioners were informed and believed, "banking relations with certain members of the city council and members of said board, and [had] loaned money to certain members of the city council and of said board, and has otherwise entered into financial transactions with the intent to influence the said members of the city council and members of said board to vote favorably on propositions involving" the bank and the president of the water and light board. The petition further charged, on information and belief, that between December 25, 1909, and January 1, 1910, the said president paid to one of the aldermen of the city \$5, "with intent to bribe, influence, and corrupt" such alderman, and to procure his favorable vote on matters in which the president of said board was interested; and a like transaction between the president and another alderman was similarly charged as of date June 1, 1911. Allegations were also made that the president, in May, 1911, made a trip to St. Paul, with another member of the board, expending \$57.41 of the board's money without authority, and that he entertained such other member of the board on such trip "with intent to influence and corrupt" him and to procure his vote on matters in which the president was interested; and, further, that he made presents to members of the board as and for his bank, at the expense of the board, was guilty of extravagance and neglect of duty in the renting of rooms for the board's use, and in allowing the city attorney to write insurance on the property of the board, and was guilty of malfeasance in taking the opinion of such attorney concerning the validity of a city contract, knowing that such attorney was counsel for the other party to the contract. Other charges of malfeasance, nonfeasance, and incompetency were made, the whole petition covering more than six pages of the paper book, and closing with a prayer demanding that the council should, pursuant to § 12 of the charter, proceed forthwith to remove the said president, and should declare his office vacant.

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On September 16, 1912, the city council adopted a resolution "that there is no cause for the granting of said petition or for proceeding thereunder, and that said petition be and the same is hereby denied." Whereupon the relators presented their petition to the district court for an alternative writ of mandamus, setting out, in substance, the facts above recited, and making the petition of September 3d and resolution of September 16th a part thereof, and praying, on behalf of themselves and of all other taxpayers and residents of the city and of consumers of its water and light, that a writ of mandamus should issue commanding the city council to fix a time and place for the hearing of such charges, and to comply with § 12 of the charter in all respects. Thereafter, and on September 26, 1912, an alternative writ was issued, reciting the matters stated, commanding the city council, immediately after the receipt of the writ, to fix a time and place for the hearing of the charges preferred in the petition in accordance with § 12 of the charter, or to show cause, etc. On the return day the council appeared and moved to quash the writ on the ground of the insufficiency of the facts alleged in the petition and writ to constitute a cause of action, and likewise demurred on the same ground. The court denied the motion to quash and overruled the demurrer, and from the order so made the council appealed.

1. The demurrer challenged the adequacy of the facts relied upon by the relators to warrant the granting of the relief demanded (*State ex rel. McGill v. Cook*, 119 Minn. 407, 138 N. W. 432), and, for the purposes of this appeal, all the allegations of the writ must be taken as true, so that, if under any reasonable construction thereof the relators are entitled to relief, the order appealed from must be affirmed. If, in connection with these propositions, we keep in mind the elementary principles determinative of the right of resort to the remedy of mandamus, and also the precise question underlying the present controversy, no difficulty in reaching the correct conclusion should ensue. Of these, then, in order:

Where the matter involved relates merely to the enforcement of a private right, the relator must be the person interested in having such right enforced; but where the object is the enforcement of a public duty, not due to the government as such, any private citizen may move to enforce it. The rule is thus laid down in *State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N. W. 561; and in the note to *State v. Gardner*, 98 Am. St. Rep. 866, it is stated as follows: "Where the relief is sought merely for the protection of private rights, the relator must

show some personal or special interest in the subject-matter, since he is regarded as the real party in interest, and his rights must clearly appear. On the other hand, where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result; it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws." See also *People ex rel. Chilcoat v. Harrison*, 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913 A, 539.

Nevertheless, as declared in *Lauritsen v. Seward*, 99 Minn. 313, 324, 109 N. W. 404, 409, in defining the function of the writ of mandamus at the time of the adoption of our Constitution: "It issued only to command and compel the performance of clearly defined duties which were already prescribed by law. 8 Enc. Laws of England, 96, and cases there cited. The present 'existence of a legal right or obligation is the foundation of every writ of mandamus.' Lord Campbell, *Ex parte Napier* (1852) L. R. 18 Q. B. 692, 695, 21 L. J. Q. B. N. S. 332, 17 Jur. 380. No new duty was created by the writ; it was neither a law nor the source of law; it never commanded the performance of an act which was unauthorized in the absence of the writ. Its office was to compel the performance of a plain and positive existing duty, and it issued only upon the application of one who had a clear right to demand the performance of such duty. It issued only to compel a party to do that which it was his duty to do without the command of the writ, and the obligation had to be both peremptory and clearly defined." The writ still has precisely the same office. "A writ of mandamus," said Chief Justice Start, in *State ex rel. McGill v. Cook*, 119 Minn. 407, 138 N. W. 432, 434, "will issue only to compel the performance by an inferior tribunal, corporation, board, or person of an act which the law specifically enjoins as a duty resulting from an office, trust, or station."

We are indebted to Mr. Justice Marshall for the following, from *State ex rel. Runge v. Anderson*, 100 Wis. 523, 527, 42 L.R.A. 239, 76 N. W. 482, 483: "Before the petitioner for a writ of mandamus is entitled thereto, he must show more than that there is a public wrong specially injurious to him. He must show that such wrong consists of some failure of official duty clearly imposed by law, and that there is no other adequate specific legal remedy. The duty must be positive, not discretionary, and the right must be so clear as not to admit of any

reasonable controversy. These principles are so elementary as not to call for discussion or support by a citation of authorities."

Having stated the relevant principles, let us next define the question to be determined. It is not one of the expediency or wisdom of broadening the powers or duties of the municipal council concerning the disciplining of its officers for misconduct, or whether such body, with that end in view, may of its own motion investigate charges against city officers preferred by citizens; but, as there clearly is no common-law or general statutory obligation, the sole inquiry ultimately involved narrows to this—to state the question most favorably to the relators: Have we here any charter provision which in terms imposes the duty upon the council of doing the identical thing ordered to be done by the writ, or from which such must necessarily result by fair and reasonable construction, interpretation, or implication? If so, then the court's order must be sustained; otherwise, it cannot be.

The relators claim to find such in the provisions of § 12 of the charter above quoted. We cannot so hold; for, even though it be conceded that the relators have a proper status as such so far as concerns their interest in the matter, yet, in our opinion, the charter imposes no positive duty upon the council in the matter of the removal of city officers, except that when, in the exercise of the disciplinary discretion vested in the council by the first portion of § 12, it undertakes to remove an officer appointed by the mayor or elected by the people, it must furnish him with a copy of the charges preferred against him, shall give him an opportunity to be heard, and "shall fix a time and place for the trial,"—such latter provisions being mere limitations upon the power of removal previously conferred, and not being intended to impose upon the council any duty, either to prefer charges of its own motion, or to entertain and hear petitions for removal presented by outsiders, whether citizens and taxpayers or not. The provision that "any officer elected by the people or appointed by the mayor shall not be removed except for cause" is likewise a mere limitation upon the general power of removal previously conferred. It is clear from an analysis of § 12 that every duty prescribed therein is imposed by way of restriction upon the power granted in the first sentence thereof, and all tests lead to this conclusion. Charter provisions of this kind are not unusual, being inserted simply to empower the council, if it be so disposed, to discipline its members, appointees, and city officers. Neither is there anything to warrant

us in reading into the charter a provision authorizing citizens to file the charges or to compel investigations. The charter was the handiwork of the people of the city, and it is an extraordinary circumstance, if it was their intention to compel the council to investigate charges such as here involved, that no procedure to that end is even suggested, and no safeguards are provided.

Our conclusion is that § 12 enjoins no duty upon the council to fix a time and place for the hearing of the charges preferred by the relators.

The order appealed from is reversed.

MISSOURI SUPREME COURT.

STATE OF MISSOURI, Resp.,

v.

ROY LARKIN et al., Appts.

(250 Mo. 218, 157 S. W. 600.)

Appeal — refused instructions — general charge.

1. Refusal to give requested instructions is not error where the court has fully covered the question in its general charge.

Homicide — liability of bystander.

2. The mere presence of a woman when her paramour kills her husband, at a place to which the latter had followed them, does not render her guilty of homicide.

Trial — comment of prosecuting attorney — failure of accused to deny facts.

3. The prosecuting attorney may comment in his argument to the jury upon the failure of accused to deny incriminating facts when on the witness stand, although

the statute permits him to be cross-examined only as to matters to which he has referred in his examination in chief.

Homicide — presumption from killing — self-defense.

4. The presumption of murder which arises from the wilful intentional killing of one man by another does not prohibit the latter from showing that the killing was done in self-defense.

Same — self-defense — paramour of wife.

5. One is not deprived of the right of self-defense when attacked by another, by the fact that he has enticed the latter's wife from her home for illicit purposes.

Criminal law — trial — instruction — self-defense.

6. The mere fact that a man who killed another had enticed the latter's wife from her home for illicit purposes does not justify an instruction that he would not have the right of self-defense if he provoked or voluntarily sought, brought on, or engaged in the difficulty with deceased.

Evidence — homicide — beer bottle.

7. Upon trial of one for homicide in killing the husband of a woman with whom he was found in company after dark, under a tree, at which place the homicide occurred, beer bottles found there at the time are admissible in evidence.

Appeal — statements in argument — error.

8. It is not reversible error for the prosecuting attorney to comment in argument to the jury upon the failure of accused in a murder case to call a witness, although it is a matter of inference that he might not have been in a position to see what occurred.

(May 20, 1913.)

Note. — Right of self-defense against attack due to defendant's illicit relations with wife or other relative of assailant.

The general rule applicable to self-defense in homicide is stated in 21 Cyc. 800, as follows: "Justifiable homicide in self-defense occurs where a person, without any fault on his part in bringing on the contest or struggle, kills another under at least an apparent necessity, in order to save himself from death or great bodily harm. Excusable homicide in self-defense occurs where a person, in the course of a sudden affray or combat in which he has become engaged with another, necessarily or under a reasonable apprehension of danger, kills the other to save himself from death or great bodily harm. To justify or excuse a homicide on the ground of self-defense, the slayer must believe and have reasonable grounds for believing that he is in imminent danger of death, great bodily harm, or some felony, and that there is a necessity to kill in order to save himself therefrom," and "he must not have been 46 L.R.A. (N.S.)

the aggressor or provoker of the difficulty." Most of the cases falling within the present note involve the element of provocation as barring the right to set up self-defense; the view taken by some of the courts being that illicit relation of the kind herein under consideration is such a provocation as precludes the setting up of self-defense as a justification for a killing done by the paramour in repulsing an attack by the deceased. Another element which enters into the determination as to whether or not self-defense may be set up is whether the husband was justified in making the attack.

The question of justification upon the part of the deceased as affecting the right of the accused to set up self-defense was touched upon in *STATE v. LARKIN*, it being there said that the husband was not justified in making an attack upon the accused and that he would have been guilty of manslaughter at least had he killed the accused; but the court intimated that had the husband been justified, it would have precluded the setting up of self-defense by the accused.

A PPEAL by defendant from a judgment of the Circuit Court for St. Francois County convicting them of murder in the second degree. Reversed.

Statement by Faris, J.:

Defendants were jointly tried on the charge of murder in the second degree in the circuit court of St. Francois county on the 16th day of June, 1912, and, being found guilty, the punishment of each of them was assessed at imprisonment in the penitentiary for the term of ten years. From this conviction, after the usual motions for a new trial and in arrest of judgment, they jointly appealed.

Defendant Ida Belle Harris was the wife of one Henry Harris, who, as the evidence

discloses, was shot to death by defendant Roy Larkin in St. Francois county on May 3, 1912. The information charges defendant Larkin with murder in the first degree, and defendant Ida Belle Harris is jointly charged as accessory thereto before the fact. The state elected, however, to waive the charge of murder in the first degree, and to proceed against defendants for murder in the second degree.

The facts of the case are few and simple. Practically none of the testimony adduced on the part of the state was denied by the defendants, and likewise practically none of the testimony adduced by the defendants was denied by the state. The facts of the homicide, in brief, are about as follows: Deceased, Henry Harris, was by occupation

And the effect of the element of justification was in issue in *Drysdale v. State*, 83 Ga. 744, 6 L.R.A. 424, 20 Am. St. Rep. 340, 10 S. E. 358, wherein the court, in holding that a husband may attack for intimacy with his wife in his presence, raising a well-founded belief from the improper or unjustifiable conduct of the defendant that an adulterous act is just over or about to begin, and that the adulterer, though in imminent danger, cannot defend himself by using a deadly weapon, said that "A man surprised by the husband immediately after an actual, or immediately before an intended adulterous connection can lawfully defend himself against the husband's violence by flight only, or at least by means short of deadly. He cannot stand his ground and shoot or cut to repel the husband's attack upon him, though it may be a dangerous attack. Whatsoever the law would justify the husband in doing under such circumstances, it would not justify the adulterer in preventing by homicide or attempting homicide; perhaps not otherwise than by making his escape," but that "circumstances which would lead a husband to believe that a man has just been engaged in the guilty act, or is about to engage in it, would not deprive the man of the right of self-defense on the spot, unless he himself was chargeable with giving rise to such circumstances by his own improper or unjustifiable conduct." But in *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990, the rule announced in *Drysdale v. State*, supra, was qualified by holding that if a husband, knowing of his wife's criminal infidelity, deliberately lays a trap for her paramour by pretending to him and her that he, the husband, is going on a journey, when it is his purpose not to go, but to conceal himself and lie in wait at or near his home for the purpose of killing the paramour in case he should be caught in the guilty act, at the same time expecting and designing so to catch him, the paramour has a right to defend himself against a deadly assault made by the husband under such circumstances, although the assault be made whilst the guilty act is in progress; and if the hus-

band be killed as matter of necessity to prevent his assault from resulting in death, the homicide is justifiable. This decision is based upon the fact that the act of the husband was in no sense justifiable, for it was not to prevent the adultery, he being consonant of previous similar acts, but to obtain revenge; whereas in the *Drysdale* Case it did not appear that there was any previous adultery or circumstances other than that the husband, upon discovering the intimacy, immediately assaulted the paramour under such circumstances as to render his act justifiable. And in *Brown v. State*, 135 Ga. 656, 70 S. E. 329, the decision in the *Drysdale* Case was again limited to cases where the attack was justifiable because of an impending or progressing wrong, and it was held that a father was not justified in attacking one who had previously had criminal intercourse with his daughter; that being guilty of wrong in the past did not deprive the defendant of the right of self-defense; and therefore that if the father assaulted defendant after the consummation of the sexual act, and to avenge such conduct, the defendant would not have forfeited his right of self-defense.

The first view above referred to is illustrated by the case of *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92, 21 So. 211, wherein, in holding that illicit intercourse with the deceased's wife was such a wrong as took away from the paramour the right of self-defense in case the husband attacked him, the court said: "If, as in the case at bar, the paramour, in order to save his own life from the consequences of the deadly passions of the husband, excited by the wrong of the former, slays the husband, he can in no sense be said to have been free from fault in bringing about the mortal encounter; the fatal result, to the contrary, is traceable directly to his own wrong, and he cannot justify his act by an invocation of the doctrine under which one free from fault and unable to retreat is authorized to save his own life, by destroying that of another." This rule was followed with approval in *State v. Emerson*, 78 S. C. 83, 58 S. E. 974, wherein it was held that to hold illicit

a miner, engaged in labor at the time of his death upon what is called the "night shift." His work required him to leave his home about 9 o'clock every night. His wife, Ida Belle Harris, who is one of the defendants here, for some weeks prior to the killing had been in the habit of permitting to visit her and of entertaining during the absence of the deceased the defendant Roy Larkin, who was a bartender in one of the saloons of Flat River. There is no direct and positive evidence that the defendants sustained toward each other illicit relations; but the inference that they did so is patent from the record. On the night of the homicide, deceased after preparing his lunch, and about the hour of 9 o'clock, left his home for the purpose of going to

his work. Some thirty minutes after deceased left, defendant Larkin came to the home of the deceased, bringing with him four bottles of beer. For some little time, thirty minutes or more perhaps, defendant Larkin sat in the kitchen of the home of deceased and talked with defendant Ida Belle Harris and one Cora Carrow, the hired servant of the Harris's. During the conversation he drew from his pocket a pistol, and laid the same upon a chair. When Larkin left the kitchen, he returned the pistol to his pocket, and accompanied by Mrs. Harris left the house, going with her, as the subsequent testimony shows, to a point some 91 yards distant from, and southeast of, the house of deceased. Shortly after the defendants had left the house

intercourse with a man's daughter in his home was such an act as would be reasonably calculated to stir the passion of the father, and provoke an attack on the spot such as would deprive the paramour of the right of self-defense should he kill the father in resisting such attack, although the father had killed the paramour under such circumstances would have been guilty of manslaughter at least.

So, in *State v. Martin*, 9 Ohio S. & C. P. Dec. 778, it was held that if the jury should find that the defendant's debauchery of the deceased's wife and daughter was the direct cause of the deceased's attack upon the defendant, he had so far put himself in the wrong by provoking the attack that he would not be justified in killing in repelling the attack, unless he retreated as far as he could, and avoid the conflict by every available means that did not increase his danger.

And in *Dabney v. State*, supra, in holding that if a paramour arm himself with a deadly weapon in contemplation that the husband would interfere with his having illicit intercourse with the wife, and for the purpose of taking life should it become necessary to save his own in the course of such interference, and he does in fact take the life of the husband, while so interfering, in pursuit of such intent, he cannot set up self-defense, but is guilty of murder, the court said: "It is also a too elementary and familiar principle of law to need discussion or reference to authorities, that if one entering upon the commission of a wrongful act has in contemplation that another will or may interfere with his enterprise, arms himself with a deadly weapon with the intent to take the life of that other should it become necessary to save his own in the course of such interference, and who in fact does take the life of the person so interfering in pursuance of such intent, is guilty of murder in the first degree; the intent to kill under the conditions contemplated constituting the 'formed design' sufficient and necessary in murder, when the circumstances of the act do not justify the design, and the wrongfulness of the act in which the slayer was engaged at the time the necessity to

strike arose precluding all justification of the design." So, in *State v. Emerson*, supra, it was held, following *Dabney v. State*, supra, that if the paramour of the deceased's daughter arm himself in anticipation of the father interfering with his purpose to have illicit intercourse with such daughter, and with the intent to take life should it become necessary to save his own in the course of such interference, and, during the course of such an interference he did kill the father, he would be guilty of murder. And to the effect that if the defendant produced the occasion for the purpose or in order to have a pretext for killing, the killing will be murder, no matter to what extremity the defendant was reduced, see statements in *Varnell v. State*, 28 Tex. App. 56, 9 S. W. 65, and *Franklin v. State*, 30 Tex. App. 628, 18 S. W. 468.

And in *Ridgell v. State*, 1 Ala. App. 94, 55 So. 327, it was held that the mere fact that accused had had improper relations with deceased's daughter would not deprive him of the right to claim freedom from fault, so as to permit him to set up self-defense in a prosecution for having killed the father while repulsing an attack prompted by the statement of the defendant, when told that he was too familiar, that he would do as he pleased.

In Texas, where by statute a husband is justified in slaying a person when taken in the act of adultery with the wife and before they have separated, and by adjudication a distinction is made between the so-called perfect and imperfect right of self-defense, it is held that the wrong does not entirely remove the right of self-defense. This distinction and its application is well illustrated by the case of *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795, wherein, in holding erroneous an instruction to the effect that an adulterer is not justified in resisting an attack by the husband of the adulteress, it is said: "Evidently the court must have based this charge upon the converse of the proposition stated in art. 567 of the Penal Code, which declares that 'homicide is justifiable when committed by the husband upon the person of anyone taken in the act of

of deceased together, the latter returned from his work and went into the north room of his dwelling, where he obtained from a drawer of a sewing machine a 32-caliber revolver. Deceased was heard to enter the house and go into the north room, by Cora Carrow and a young man by the name of Ames, who was in the kitchen visiting the said Cora, and with whom she was talking. Upon hearing the movements of deceased, Ames and Miss Carrow left the kitchen and passed through the house to the front porch, where they intercepted deceased. At this time deceased had the 32-caliber pistol in his hand and was heard to make threats against defendant Larkin, to the effect that he intended "to get the son of a bitch." Both Miss Carrow and Ames remonstrated with deceased, and endeavored to prevent him from going to the point where defendants then were; but they were unable to prevail on him to return. Shortly after deceased left his home seven pistol shots were heard by Miss Carrow and witness Ames coming from the direction toward which the deceased had gone. Thereupon Miss Carrow and Ames got a lantern and went to a point outside of the premises of deceased, and as stated, 91 yards distant

therefrom, and found deceased dead from a gunshot wound. Defendant Ida Belle Harris, when Miss Carrow and Ames came to the scene of the killing, was holding the head of her husband in her lap, and was crying or screaming. Miss Carrow said to defendant Mrs. Harris, "See what you have caused?" and Mrs. Harris replied, "Yes; Henry is killed; and I am the whole cause of it." Defendant Larkin was standing by, and witness Ames said to him: "That looks pretty bad." Larkin replied, "I had to do it, for he was shooting at me;" or, as the witness Miss Carrow puts it, Larkin said: "Yes, I shot him; but I couldn't help it; he was shooting at me." The uncontradicted testimony is that as stated, seven shots in all were fired; the two first shots were not so loud as the third shot; the third shot being followed by another shot, apparently of lesser volume, after which there were three loud reports in quick succession.

It is not contended by the state that defendant Mrs. Harris had any physical part in the killing of deceased. Defendant Larkin admits the killing, and urges self-defense. He says: "I seen it was either him or me, and I shot to hit." The only evidence which tends to show the guilt of Mrs.

adultery with the wife, provided the killing take place before the parties to the act of adultery have separated.' In other words, the controlling idea intended to be conveyed by the court, according to our construction of the language used, seems to have been that, because the law would justify the husband in taking the life of the adulterer under the circumstances named in the statute, it would follow that the adulterer must submit to the infliction of death thus attempted to be executed upon him, and that he was not even authorized to resist an attack upon his life by the injured husband, much less plead such deadly attack by way of justification or self-defense if, in resisting such attack, he was compelled to take the life of the injured husband to save his own. "Thus it appears that the court has attempted to make the legal status of the defendant depend upon what might or would have been the law with reference to the act of deceased, had the situation of the parties been reversed and the latter had taken the life of the former. In no possible state or case would such a rule of deduction be a fair or conclusive criterion in the administration of criminal law. The accused is always guilty or innocent from his own standpoint; that is, his personal, individual acts with relation to the matter charged. . . . "But the right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law, regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-

defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned. . . . How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its

Harris is found in the testimony of the witness Miss Carrow, who says that Mrs. Harris talked to her on three or four occasions about deceased, saying that she (Mrs. Harris) "wished she was free; that she didn't see no more peace of her life; that she had had no satisfaction and she would rather if he (deceased) was clear out of the way," and that "if he was to get killed in the mine or hurt in any way Roy Larkin would take care of her;" and upon another occasion when Miss Carrow remonstrated with defendant Mrs. Harris as to her relations with defendant Larkin, and said to her, "If I was you I would be afraid to talk to him like you do, I would be afraid Mr. Harris would turn back some time and catch him," that Mrs. Harris said "she would talk to him (Larkin) until the world looked level."

Defendant Mrs. Harris did not take the stand. All of the evidence offered on behalf of defendants came from the testimony of defendant Larkin, who said in substance that on the night of the killing he left the saloon of one Romine, where he was employed as a bartender, and went to a point near the place of the killing, where he met Mrs. Harris. Near the scene of the homi-

cide there seems to have been a widely spreading red haw tree, called by the witnesses a "thorn tree." As to what transpired between the defendants after they met at the haw tree, or as to how long they remained there before deceased came, the record is silent. Defendant Larkin stated in his testimony that the first information he had of deceased's presence came from hearing footsteps as of some one running tolerably fast; that deceased came up and said to him, "Larkin, you son of a bitch, I am going to kill you." That thereupon deceased fired at him twice; that he then ran and while running discharged his pistol once, firing off to one side, but without aiming at deceased; that he, Larkin, got behind a little thorn bush, and that while there deceased shot at him again, and that thereupon he began shooting at deceased. Near the thorn tree in question, and some 20 yards from the point where deceased was killed, four beer bottles were found the next morning, one of which was empty and the other three full.

As to the facts which transpired immediately at the time and place of the killing, no witness on either side testifies, except defendant Larkin. His testimony leads to

commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide, and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law. . . . "If defendant was taken by deceased in the act of adultery with his wife, and to avenge the wrong deceased made a dangerous or murderous assault upon him, in resisting which he took the life of deceased, under such state of facts defendant would be guilty of manslaughter, because he was committing a misdemeanor which was the cause of and brought about the necessity for the homicide." And in *Varnell v. State*, 26 Tex. App. 56, 9 S. W. 65, the rule that where no felony but a misdemeanor only is intended, one will be permitted to urge his extremity in order to reduce a killing to manslaughter, and that where not even a misdemeanor is intended the perfect right of self-defense arises, was adhered to, it being held that, since the copulation of the defendant and the deceased's daughter, although morally wrong, constituted no offense against the laws of the state, the defendant's right of self-defense against an attack by the father was perfect; the assault being not to prevent, but to revenge, what had shortly before occurred. And in *Franklin v. State*, 30 Tex. App. 638, 18 S. W. 468, the rule of per- 46 L.R.A. (N.S.)

fect and imperfect self-defense was again adhered to, it being held that conduct of the defendant, such as being found in the deceased's home at 2 A. M. under circumstances indicating that the purpose was carnal knowledge of the deceased's wife, was such as was calculated to provoke an attack from the husband, and that therefore the right of self-defense was imperfect, and a killing in resisting an attack so provoked, manslaughter. So, in *Nicks v. State*, 46 Tex. Crim. Rep. 241, 79 S. W. 35, where, from one view of the evidence it appeared that the defendant went to deceased's house for the purpose of having carnal intercourse with the latter's wife, which provoked an assault upon him by the deceased, it was held that the issue of imperfect self-defense was raised, and that it was the duty of the court to charge on manslaughter. But in *Pannell v. State*, 54 Tex. Crim. Rep. 498, 113 S. W. 536, where it appeared that defendant's carnal intercourse with deceased's wife was prior to the time of the homicide, and that the defendant had tried to evade difficulty with the deceased, it was held that the defendant's right to self-defense under such circumstances were perfect. For another case in which the court referred to the obvious evading of a probable difficulty as affecting his right of self-defense, see *STATE v. LARKIN*.

The general question of homicide in defense of family and relations is treated in the notes to *Bailey v. People*, 45 L.R.A. (N.S.) 145, and *Morrison v. Com.* 67 L.R.A. 529.

G. J. C.

the inference that he met Mrs. Harris at the thorn tree in question; while the testimony of Miss Carrow for the state leads to the inference that he left the house with Mrs. Harris, and presumably went with her to the thorn tree. This is the only contradiction presented by the record, and arises, it may be, from a failure of Larkin to state as to whether he had been at the house of deceased on the night of the homicide, but prior thereto.

The pistol with which Larkin was armed, and with which he killed deceased, is shown by the evidence to have been a 38-caliber pistol, while the one with which deceased left his home is shown to have been a 32-caliber pistol. That the two first reports were less loud than the third is uncontradicted; but there is no evidence in the record as to the relative loudness of the reports of pistols of different calibers. Many matters which from this distance it would seem might have been shown with clearness appear darkly and vaguely, and rest largely upon inferences.

Upon the trial the court gave, among others, instruction numbered 6, which is as follows: "The court instructs the jury that if you find and believe from the evidence that defendant Roy Larkin provoked or voluntarily sought, brought on, or engaged in the quarrel or difficulty with the deceased with the purpose of taking advantage of him and of taking his life, or of doing him some great bodily harm, then and in that event there is no self-defense in the case, however imminent the peril of the defendant may have become in consequence of an attack made upon him by the deceased." At the close of the state's testimony defendant Ida Belle Harris offered an instruction in the nature of a demurrer to the evidence as to her, which instruction was by the court refused. Again, at the close of all of the testimony, Mrs. Harris prayed an instruction that the jury be directed to find her not guilty, which instruction was also by the court refused.

During the argument of the case the prosecuting attorney used this language: "Roy Larkin got on the stand, and didn't say one word about what Mrs. Harris said that he said about taking care of her in case Henry Harris was killed." Thereupon defendant objected that the above statement of the prosecuting attorney was a comment on what the defendant did not testify to in this case. To this objection the court said: "Try to confine your argument within the record; proceed." Defendant duly saved his exceptions to the above remarks and to the ruling of the court thereon, and thereupon the prosecuting attorney continued as follows: "He took the stand, and testified

in his own behalf after having heard that statement fall from the lips of this witness, and he absolutely failed to say that he didn't make that statement to Mrs. Harris." Defendant Larkin, by his counsel, again objected, and asked the court to rebuke the prosecuting attorney. The court said: "The court has said to stay within the record and that should not be commented on." Whereupon defendant's counsel said: "I say, your honor, that it is the court's duty to reprimand counsel for making such remarks, and it is the court's duty to keep him within the record; and I except to the ruling of the court."

During the argument of the case the prosecuting attorney used this language: "Where is the little girl? The testimony all shows that she was there, and did they put her on the stand?" Counsel for defendant: "I object and except to that remark, and ask that it be excluded, and that the court instruct the jury to disregard it. The Court: Let it be excluded, and the jury will not consider it." The little girl referred to in the above excerpt was the thirteen-year-old daughter of deceased, Henry Harris, and the defendant Ida Belle Harris. Her whereabouts at the moment of the killing rests almost wholly in inference. From the context it would appear that she had gone to bed some considerable time before defendant Larkin came to the home of deceased, and that perhaps the coming of her father into the room subsequently and his obtaining the pistol and leaving the house awakened her, and that she arose, dressed herself, and followed after him, perhaps immediately preceding Miss Carrow and the witness Ames, to the scene of the killing. It would thus appear from the fact that she had been in bed, and that she is next definitely accounted for when she is heard calling to Miss Carrow from a point in the direction of the place of the killing, and asking that a lantern be brought, and from the fact that when seen at the place of the killing she was dressed.

The above statement is substantially what was shown upon the trial; and, as heretofore stated, there is no contradiction between the facts shown by the defendants and the facts shown upon the part of the state, except that noted above, and which inferentially arises from the statement of Miss Carrow that defendant Larkin was in the kitchen of deceased's home on the night of the killing some hour or more prior thereto, and the statement of the defendant that he met Mrs. Harris at the thorn tree on the night in question. This contradiction may be more apparent than real, and may arise, it would seem, from the failure or neglect of defendant Larkin to state all

the facts. If further facts shall become necessary to make clear what is said touching the case, they will be adverted to in their proper order.

Messrs. T. M. Jackson, J. H. Malugen, and Benjamin H. Marbury, for appellants:

The mere presence of a person while the alleged crime was being committed by another, will not, in the absence of some word or act of approval or encouragement, make her guilty of that crime.

State v. Valle, 184 Mo. 551, 65 S. W. 232; State v. Orrick, 106 Mo. 120, 17 S. W. 178, 329.

The trial court should have directed a verdict of not guilty.

State v. Nelson, 98 Mo. 414, 11 S. W. 997; State v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; 12 Cyc. 186.

One accused of a crime should not be convicted on a mere suspicion of guilt.

State v. Lentz, 184 Mo. 243, 83 S. W. 970.

The right of the prosecuting attorney to comment upon the testimony of the defendant, who has offered himself in his own behalf, extends no further than his right to cross-examine him in regard to matters testified to by him in his direct examination.

Rev. Stat. 1909, § 5242; State v. James, 216 Mo. 403, 115 S. W. 994; State v. Deitz, 235 Mo. 335, 138 S. W. 529; State v. Patterson, 88 Mo. 90, 57 Am. Rep. 374; State v. Potts, 239 Mo. 415, 144 S. W. 495; State v. Chamberlain, 89 Mo. 133, 1 S. W. 145.

Remarks relative to the little thirteen-year-old daughter of Ida Belle Harris, co-defendant, not being put on the witness stand by appellants, were prejudicial.

State v. Deitz, 235 Mo. 341, 138 S. W. 529; State v. Johnson, 76 Mo. 121; State v. Taylor, 134 Mo. 157, 35 S. W. 92; State v. Rose, 178 Mo. 25, 76 S. W. 1003; State v. Potts, 239 Mo. 415, 144 S. W. 495.

Messrs. John T. Barker, Attorney General, and William M. Fitch, Assistant Attorney General, for the State.

Faris, J., delivered the opinion of the court:

1. Among the contentions made by the defendant, and not adverted to in the above statement, is that the court erred in refusing to give an instruction which defendant asked, on the presumption of innocence and reasonable doubt. No error is to be predicated upon this alleged point, for the reason that the court had already fully and correctly instructed on this phase of the case, and the instruction asked by defendants in that behalf was properly refused.
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2. It is contended on behalf of defendant Ida Belle Harris that one of the two requested instructions in the nature of demurrers to the evidence should have been given by the court. Since both of these alleged errors go to the question of whether there was sufficient proof upon which to sustain the conviction of Mrs. Harris, the two points may be considered together. It will be noted that there is no contention made by the state, nor is there one word of proof to sustain such a contention had it been made, that Mrs. Harris actually participated in any physical manner whatever in the shooting and killing of her husband. That she was present at an agreed rendezvous with her paramour, Larkin, when deceased appeared and interrupted the meeting between her and her codefendant, Larkin, there is no doubt, but we need not cite authorities that mere presence at the scene of a killing, without more does not constitute that aiding, abetting, assisting, encouraging, or advising such killing required by the law to constitute guilt. The attitude in which she was found when first seen after the killing, and her language and apparent remorse, inferentially negative any active participation by her. All that is shown connecting her in any wise, with the most reprehensible condition of affairs shown by this record, are the statements shown in evidence by the testimony of Miss Carrow as coming from her, and which are set out in the above recital of facts. In the cross-examination of Miss Carrow, however, which we have not set out, the latter specifically says that Mrs. Harris made no threats that she was going to kill her husband or to procure his killing by anybody else, or that she had any plans for having him killed. That her conduct was most reprehensible goes without saying, that she was guilty of adultery is by fair inference to be deduced from the record; but there is a distinction between reprehensible and even adulterous conduct, and murder in the second degree, of which she was convicted. We are not called upon to characterize her conduct; but upon the record we are clear that her conviction was not warranted from the testimony, and that the court erred in refusing to so instruct the jury. What is said above renders it unnecessary to deal with the further objection of defendants that the court erred in instructing the jury as to the law touching accessories before the fact.

3. Defendants strenuously urge that the court erred in permitting the prosecuting attorney to comment upon the failure of defendant Roy Larkin, who took the stand as a witness in his own behalf, to deny certain statements which the prosecuting at-

torney averred had been made by him to Mrs. Harris. Leaving for a moment the broad and ever-recurring question of the right of prosecuting attorneys to comment upon the failure of a defendant who takes the stand, to testify to facts within his knowledge, or to facts and statements attributed to him, we might say in passing that upon the record and outside of this question there is no warrant in the testimony for the statement of the prosecuting attorney. The record nowhere says that defendant Larkin had ever said to Mrs. Harris that he would take care of her if Henry Harris were dead. All the record does show on this point comes from the witness Miss Carrow, who says in substance that Mrs. Harris told her that if Harris were dead Larkin would take care of her (Mrs. Harris). In our view the chief vice in the utterance of the prosecuting attorney in this behalf arose from the fact that he was not correctly quoting what the record showed. The mere fact that Mrs. Harris had made the statement to Miss Carrow to the effect that her codefendant Larkin would take care of her in the event of her husband's death does not show or indicate necessarily that such statement was predicated upon a promise of defendant Larkin so to do. The statement may have been made on the part of Mrs. Harris as an inference from his attentions to her, or as a mere boast of conditions which would necessarily arise from her conquest. At least Mrs. Harris did not say that she made the statement as the result of any suggestion to that effect from Larkin, or by reason of any promise on Larkin's part so to do. This objection is an eternally recurring one, and is present in practically half of the appeals in criminal cases with which we are required to deal. It has been said in a late case (*State v. Ferrell*, 233 Mo. 452, 136 S. W. 709) that the inhibition of comment upon counsel for the state as to the failure of a defendant when a witness upon the stand to testify upon any fact in issue, or to deny any fact testified to by another witness, has been the settled law of this state since the decision in the case of *State v. Graves*, 95 Mo. 510, 8 S. W. 739. The learned judge who wrote the opinion in the case of *State v. Ferrell*, supra, from which we quote above in substance, says, however, that the statute upon which this ruling is based does not in express terms deny the right of the state so to comment. That this is the correct view there can be no doubt, when we consider the history of the law and the language used by the statutes, which the learned judge in question had in mind. Prior to the year 1877 the common law prevailed in this state as to the evidence

of a defendant on trial upon a criminal charge. Such defendant was incompetent to testify in his own behalf. So the common law stood until the year 1877 (*Laws 1877*, p. 356), when a statute was passed changing the common-law rule and granting defendant the right or privilege of being sworn as a witness in his own behalf. When first written and passed, this statute contained two pertinent sections, which read as follows:

"Section 1. No person shall be rendered incompetent to testify in criminal causes by reason of being the person on trial or examination; but any such fact may be shown for the purpose of affecting his or her credibility: Provided, that no person on trial or examination shall be required to testify, except as a witness on behalf of the person on trial or examination: And, provided further, that the neglect or refusal of the person on trial or examination to testify in the cause shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the cause, nor shall the same be considered by the court or jury before whom the trial takes place.

"Sec. 2. If the accused shall not avail himself of his right to testify in any case, it shall not be construed to affect his innocence or guilt."

In 1879 this law was amended into its present form, and was made to read as it now stands, as follows:

"Sec. 5242. No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness: Provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his own behalf, or on behalf of a codefendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case: Provided, that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in relation to such husband and wife.

"Sec. 5243. If the accused shall not avail himself or herself of his or her right to testify, or the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise

any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

Every state in the American Union, except the state of Georgia, has either prior to or subsequent to the enactment of our statute in 1877 passed similar statutes conferring competency upon the accused as a witness for himself in a trial upon a criminal charge. In passing we may say that in Georgia the accused is permitted without being sworn to make a statement to the jury; and in Washington he may be either sworn as a witness in his own behalf, or he may make a statement without being sworn, at his election. In more than half of the states the common-law bar is raised, and the accused is made competent to testify by statutes in substance providing that "he may, at his own request, and not otherwise, testify for himself in any criminal trial or proceeding, but his failure or neglect or refusal so to testify shall create no presumption against him, nor shall the same be referred to by the prosecuting attorney in his argument of the case." In Iowa, by statute, any reference in argument to the failure of a defendant to take the stand as a witness in his own behalf by the prosecuting attorney is made a misdemeanor. We have carefully examined the statutes and holdings, upon this question, of more than thirty states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand, except in our own state and in California, where the question has been sometimes doubted, the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable. *Solander v. People*, 2 Colo. 56; *State v. Tatman*, 59 Iowa, 471, 13 N. W. 632; *Stover v. People*, 56 N. Y. 315; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835, 30 N. W. 626; *Comstock v. State*, 14 Neb. 205, 15 N. W. 355; *State v. Staley*, 14 Minn. 118, Gil. 75; *Cotton v. State*, 87 Ala. 103, 6 So. 372; *Clarke v. State*, 87 Ala. 71, 6 So. 368; *Lee v. State*, 56 Ark. 4, 19 S. W. 16; *McCoy v. State*, 46 Ark. 141; *Brashears v. State*, 58 Md. 567; *McFadden v. State*, 28 Tex. App. 241, 14 S. W. 128; *Lienburger v. State*, — Tex. Crim. Rep. —, 21 S. W. 603; *Parker v. State*, 62 N. J. L. 801, 45 Atl. 1002; *State v. Harrington*, 12 Nev. 46 L.R.A. (N.S.)

125; *State v. Ulsemer*, 24 Wash. 659, 64 Pac. 800; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496; *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88; *State v. Glave*, 51 Kan. 330, 33 Pac. 8; *Toops v. State*, 92 Ind. 13; *Com. v. McConnell*, 162 Mass. 499, 39 N. E. 107. The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on in the event he does not become a witness in his own behalf is therefore, we find, universal; but, on the contrary, the rule that if he does go upon the witness stand he then stands in the precise attitude of any other witness is, except in this state, and, as stated in California, where the rule is subject to some doubt, also universal. Mr. Wharton in his learned and able work on Criminal Evidence lays down in the tenth edition thereof the rule that such comment is allowable; to this statement of the text he cites no exceptions, and correctly quotes the Missouri courts as entertaining like views. *Wharton, Crim. Ev.* 10th ed. § 435a. This assumption of Mr. Wharton is based upon the holding of this court in *State v. Testerman*, 68 Mo. 414; *State v. Anderson*, 89 Mo. 330, 1 S. W. 135. Mr. Underhill also like (Underhill, *Crim. Ev.* 68); also, so says Mr. Best (*Best, Ev.* 283). Between the taking effect of the above-quoted act of 1877 and the amendments thereof in 1879, no doubt was entertained by this court as to the right of comment upon what a defendant testifying for himself either said, or failed or neglected to say. But subsequent to the amendment quoted this court, Judges Sherwood and Brace for years dissenting, began to hold that comment by the prosecuting attorney upon the failure or neglect of a defendant, even when he testified for himself upon the stand, to deny or to explain any fact in the case testified to by any other witness, was reversible error. The only thing in our statute urged as limiting the right of comment was said to be the following, to wit: "And shall be liable to cross-examination as to any matter referred to in his examination in chief." Yet our statute now under discussion, remarkable to say, contains other language qualifying the above proviso, which language is not found in any other of the statutes of the states of the Union examined by the writer. This language is the following, to wit: "And may be contradicted and impeached as any other witness in the case."

Thus, we note our legislature by these two statutory clauses, which are utterly contradictory in practice, has gone farther in favor of the restricted judicial construction, as well as farther against it, than

has the legislature of any other state in the Union. This contradiction in practice arises from the now well-settled rule that in cross-examination the defendant may be asked if he has ever been convicted of a felony or other crime. *State v. Spivey*, 191 Mo. 87, 90 S. W. 81; *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027; *State v. Thornhill*, 174 Mo. 364, 74 S. W. 832. This, of course, upon the theory of impeaching his credibility as a witness; an impeachment effected indubitably by a plain violation of the clause of the statute limiting defendant's cross-examination. We are not criticizing the rule or learning in the cases cited; we are merely suggesting the palpable contradiction, *arguendo*, as a reason why, if we are to be logical, we should be uniformly logical. For many years, and in practically every jurisdiction in the American Union, it has been vehemently urged in perhaps more than a hundred cases that the right of the state to cross-examine a defendant who at his own request, and not otherwise, takes the stand as a witness in his own behalf, is limited by the constitutional inhibition against self-incrimination. But, without citing cases, it may be said that this question is now well settled against the contention urged. The contention that, absent a statute such as we have, cross-examination is limited by the constitutional rule against self-incrimination, has been exploded utterly on the ground that there is sufficient protection against self-incrimination, when it is provided that a defendant may or may not testify for himself, according as he may desire. If he desires to save himself from cross-examination, he may do so by refusal, failure, or neglect to become a witness for himself. This provision has been held to be an absolute protection so far as the constitutional right is concerned. The defendant waives the right of protection against self-incrimination by electing to become a witness for himself; so becoming a witness he may be cross-examined by the state, in the absence of a statute, to any extent, whether his answers may tend to convict him or not. When our statute conferring competency upon a defendant to testify for himself was first enacted, it did not contain, it will be noted, any provisions limiting the state in its right to cross-examine him. When this statute was enacted, the constitutional question of self-incrimination arising from an unlimited privilege of cross-examination had not been settled by adjudication. Evidently the law-makers when they placed this clause in our present statute were laboring under the fear that the absence of such a provision would invade the defendant's constitutional rights. By the 46 L.R.A.(N.S.)

terms of the clause of our statute forbidding cross-examination, the constitutional privilege against self-incrimination is expressly provided, without the necessity for a reference of the point to a judicial construction now well and abundantly settled.

Section 5243, *supra*, of our statute, as do the statutes of a great majority of the other states in the Union, in substance, provides that "if the accused shall not avail himself . . . of his . . . right to testify . . . on the trial of the case, it shall not be construed to affect the innocence or guilt of the accused, nor . . . raise any presumption of guilt, nor be referred to by any attorney in the case." Nothing is clearer, when we consider the history of this legislation, when we consider that at common law the defendant could not testify in his own behalf, and that the two sections of our statute were intended to modify the common law, and when we consider the rule that this modification of the common law ought to go no further in its construction than its terms expressly provided, than that there is no legal or statutory prohibition against comment by the prosecuting attorney in any case, if in fact the accused does avail himself of his right to testify. In logic and reason it is no argument against this view that the state, by an express statutory provision, is precluded from cross-examination of the defendant upon any matter other than that about which he shall himself testify in his examination in chief. The right of the defendant to testify when he takes the stand as to all and singular the pertinent facts and issues is absolutely unlimited. If a witness in a case shall have testified to statements made by a defendant, or shall have testified to incriminating facts and circumstances, it is absolutely in the power of the defendant to contradict, or explain, or put his own construction on such facts and statements and circumstances. As a witness upon the stand, defendant has the power to touch upon any phase or feature of the case, and it is no valid argument to say that this provision put into the statute, as would appear, on account of the fear of the lawmakers that absent such a provision the cross-examination of the defendant might trench upon his constitutional rights against self-incrimination, in any way affects this condition. Other states, as we have seen, without having in their statutes the provision that a defendant testifying for himself "may be contradicted and impeached as any other witness in the case," have, yet with practical unanimity, held that, if a defendant avails himself of his right to testify, he then stands as any other witness, and his

silence in explaining and his failure to deny or contradict incriminating facts, statements, or circumstances may be fully commented on by the prosecuting attorney. It is our duty to construe our own statutes as we find them in the light of their language, intent, and logic. There is no valid reason for the construction which has long been put by this court upon this provision of our statute. It is in absolute conflict with the rule announced by the text-writers, and diametrically in conflict with the holdings of at least forty-six states in this Union on this identical question. In Iowa, as has been noted, there is a statute making the prosecuting attorney guilty of a misdemeanor if he refers to the failure of the defendant to take the stand and testify in his own behalf, but if the defendant does take the stand, and does make himself a witness for himself, the right of comment upon the defendant's failure to deny, or contradict incriminating facts, statements, or circumstances is left absolutely open to the state. *State v. Tatman*, 59 Iowa, 471, 13 N. W. 632. Time and again, ever since the rule announced in *State v. Graves*, 95 Mo. 510, 8 S. W. 739, which is now criticized, was first enunciated, this question has been up for ruling. It needlessly, and in the writer's view erroneously, reverses more cases than any other single point which we are called on to review. It is no new doctrine that is here announced (*State v. Anderson*, 89 Mo. 330, 1 S. W. 135) and even subsequent to the holding in *State v. Graves*, *supra*, it was said by Judge Sherwood in *State v. Musick*, 101 Mo. loc. cit. 271, 14 S. W. 214, that "these statements made by the state's witnesses were not denied by defendant, and therefore stand admitted, as much so as if the defendant had admitted them in terms. His previous preparations; his threats; his coming from behind the counter with weapon drawn and ready, as well as Burnett's vain efforts to interpose, all stand admitted." In that case and therefore in this utterance all of the judges of this court apparently agreed; for it was an opinion *in banc*, in which all concurred. Indeed, for eleven years after the statute in question was first passed by our legislature, the right of the state, through its prosecuting attorney, to comment, when the defendant took the stand as a witness for himself, upon his failure to deny or explain incriminating statements, facts, or circumstances was never denied. *State v. Emory*, 79 Mo. 463; *State v. Dickson*, 78 Mo. 447; *State v. Hopkirk*, 84 Mo. 288; *State v. Anderson*, 89 Mo. 330, 1 S. W. 135. For years subsequent to the rendition of the opinion in *State v. Graves*, *supra*, where the contrary doctrine to the 46 L.R.A. (N.S.)

one discussed here was first enunciated in this court, the cognate rule above referred to of presumption arising as a matter of law from the failure of the defendant to deny incriminating facts or circumstances was fully recognized. *State v. Musick*, 101 Mo. 271, 14 S. W. 212; *State v. Paxton*, 126 Mo. 514, 29 S. W. 705; *State v. Alexander*, 119 Mo. 461, 24 S. W. 1060; *State v. Patrick*, 107 Mo. 174, 17 S. W. 666; *State v. Taylor*, 134 Mo. loc. cit. 127, 35 S. W. 92; *State v. Good*, 132 Mo. loc. cit. 125, 33 S. W. 790; *State v. Jackson*, 95 Mo. loc. cit. 657, 8 S. W. 749. It is difficult to see why, if such a presumption is as a matter of law entertained against a defendant when he takes the stand as a witness in his own behalf, such presumption might not be commented on by the prosecuting attorney in a case where the defendant likewise becomes a witness in his own behalf. We concede that, if there were any restrictions whatever placed upon the defendant as to the nature or extent of his testimony when he has elected to become a witness for himself, then there would be some reason in the rule. But there is no such restriction upon him. His right to explain, deny, and contradict is as unlimited as the rules of evidence, and as broad as the issues pertinent to the matter under inquiry. In order to reach this conclusion, we must perforce read into § 5243 words that have not been placed in that section by the legislature. We must make the first clause of that section read: "And if the accused shall not avail himself of his . . . right to testify, on any question, point, fact, or circumstance, then," etc. When we consider that the statute in question changes the common law, it is difficult to see our warrant for reading into this section words that the legislature has not in express language placed therein. We conclude that the case of *State v. Graves*, *supra*, which enunciated the rule that no comment shall be made by the prosecuting attorney or other counsel for the state on the failure of the defendant to testify about, or to deny or contradict, any statement, fact, or circumstance in the case, as well as other cases in this state which announce the same rule, following the case of *State v. Graves*, ought to be overruled and no longer followed in this behalf. We conclude, therefore, that the point made by defendant touching the comment of the prosecuting attorney, so far as the objection thereto was applicable to the facts, was allowable, and that the court committed no error in the premises.

4. The defendant Larkin, with whom the above views considered we are alone concerned, contends that under the facts in

this case the giving of instruction No. 6 set out in the statement herein was error. This instruction was based upon the theory that defendant Larkin in some wise "provoked, or voluntarily sought, brought on, or engaged in the quarrel or difficulty with the deceased, with the purpose of taking advantage of him, and of taking his life, or of doing him some great bodily harm." Can it be said upon the facts in evidence upon this record that there was testimony upon which to bottom this instruction? That in a proper case a proper instruction as to voluntarily provoking or seeking a difficulty may be given, we have no doubt. This question is so well settled that we need cite no authorities in support thereof. But in order to make proper the giving of such an instruction as this, which, if the facts support it, practically takes away from the defendant the right of self-defense, depends on the facts and circumstances of the case; and the pertinent inquiry here is whether there was in the record sufficient facts to show that defendant Larkin did voluntarily engage in the difficulty which resulted in the death of deceased. The testimony for the state shows that Larkin on the night in question had been at the home of deceased for no good purpose. The whole trend of the testimony indicates that he sustained, and had been for some weeks sustaining, illicit intercourse with the wife of deceased, Larkin's codefendant here. The testimony indicates that as a rule this illicit intercourse was not had in the home of the deceased, but that the defendants adjourned to some suitable spot in the vicinity. Such an adjournment was apparently had on this occasion; for we note that after some conversation in the kitchen both of the defendants left the house of deceased. Whether they left together or not is not clear from the record. From this lack of clearness arises, it would seem, the apparent contradiction between the testimony of defendant Larkin and the testimony of Miss Carrow. Whether they went together to the fatal thorn tree or not, or whether Mrs. Harris went by herself to the thorn tree after she and Larkin left, and later was joined there by Larkin, makes no difference. They had both left the house of deceased. The facts show that they were seeking the darkness, and not light; that they were evading a probable difficulty, and not seeking to bring it on. The fact that Larkin and his codefendant had left the premises of deceased and gone out to uninclosed and unimproved property presumably, and so far as the record shows, belonging to others, shows that so far as the physical encounter was concerned defendant Larkin was avoid-

ing the same, and not bringing it on or seeking to bring it on. Had he remained in the home of deceased, where he had no right to be, and where he unlawfully was, there might be some sort of a peg upon which to hang such a theory. But he left the home of deceased and went with or met (it matters not which) his codefendant and guilty paramour at a place distant therefrom and where he might well be supposed to have believed the deceased would not come, and of which he might well have believed the deceased would have no knowledge. The whole testimony shows that the deceased came back to his home, armed himself, and left his home armed and threatening; that he hunted up defendant, and whether deceased fired first or defendant fired first is, outside of whatever corroborating circumstances there may be in the loudness of the respective reports of the pistols, a matter resting on defendant's testimony alone. Since the defendant Larkin at the point where the difficulty occurred was not on the premises of deceased, but on the premises of others, distant from the home of deceased, wherein does this case differ from a case which would have been presented if deceased, hearing that defendant Larkin was in company with the wife of deceased upon a public street, or any other public place, or even private place, should have armed himself as he did, and go threatening defendant Larkin as he did, to seek him and kill him?

It is true that under the well-settled law in this state murder in the second degree is to be presumed from the simple fact of the wilful intentional killing of one man by another, nothing further appearing (*State v. Lane*, 64 Mo. 319; *State v. Gassert*, 65 Mo. 352; *State v. Stoeckli*, 71 Mo. 559; *State v. Frazier*, 137 Mo. 319, 38 S. W. 913; *State v. Anderson*, 98 Mo. 461, 11 S. W. 981; *State v. Harris*, 76 Mo. 361), yet such presumption, while it attaches to the acts of the defendant here, does not prohibit him from showing, if he may, and can, that in such killing he acted in self-defense. It is not the duty of this court to enforce what is very commonly called the "unwritten law." The legislature of this state has not seen fit to enact into a statute this "unwritten law." It is our duty to enforce the law as we find it, and as written by the legislature, and not as we might otherwise write it, or as we might desire it to be. If the uncontradicted facts, as shown by the state in this case, are true, the inferences arising therefrom corroborate the statement of defendant Larkin. The written law is, and the law which we must enforce says, that even if the deceased had discovered his wife and her codefendant

Larkin in *flagrante delicto*, and, being overcome by his passion, had shot and killed defendant Larkin, that yet under the strict letter of the law he would not go acquit. He would have been guilty even then, however human his passion and failing in that behalf would have been, and however much it might be said that the sympathies of a man for men might go out to him; he would yet have been guilty of manslaughter in the second degree. *State v. Holme*, 54 Mo. 153. The theory of the state in this case that no right of self-defense existed under the facts here in favor of defendant Larkin is not tenable. Such a theory would be tenable only if the law were that if deceased had killed Larkin, instead of Larkin having killed deceased, that deceased would be guilty of no crime, or at least of no felony. But since, as we have seen, even had the facts been thus reversed, instead of as they are, deceased would not have been guiltless, but, on the contrary, would have been guilty of manslaughter in the second degree, so, the right of self-defense still inured to Larkin, however outrageous and morally reprehensible and indefensible his conduct and actions might have been, and in fact were. The court properly instructed, therefore, under the facts and circumstances shown in evidence, that Larkin was entitled to his right of self-defense, and so instructing the court ought not, under the facts shown by the record, to have given instruction No. 6, and thus have limited defendant's right in this behalf. In our view, under all of the facts and circumstances in this case, the giving of instruction No. 6 constitutes such error as must result in the reversal of this case.

As this case is to be retried, we might say that there is no merit in the objection of defendant to the introduction of the beer bottles, about which defendants so bitterly complain. Nor is there any objection to the comment of the prosecuting attorney as to the failure of the daughter of defendant Ida Belle Harris to testify in this case, although it is a matter of inference clearly arising from the fact that she was perhaps not in a position to see what occurred at the immediate place of the homicide. *Underhill*, *Crim. Ev.* 68. In passing, it may be said, since this case is to be retried, that many points rest in dark and obscure inference only. If it be a fact, as urged in argument of learned counsel for defendant, that there is a difference in the loudness of reports of pistols of different calibers, this point might be elucidated rather than left in vague inference, as it now appears of record; and if it be the office of courts, as we assume it is, to search out and find the truth, some definite and certain

evidence might be shown upon the retrial as to the condition of the pistol of deceased; whether it was loaded or unloaded; whether, if it be a fact, that it had been recently fired or not, and the place of finding such pistol. Such showing would tend materially to elucidate the relative positions of the state and the defendant, and to show, it may be, more unmistakably, his guilt or innocence.

Upon the submission of this case, suggestion *ore tenus* of the death of defendant Ida Belle Harris pending her appeal was made, but, the state not confessing the fact, the point was laid aside for proof, which, being subsequently furnished, shows the fact of her death, and as to her therefore the cause abates.

It results from what has been said that this case ought to be reversed and remanded for a new trial as to defendant Roy Larkin. Let it be so ordered.

Brown, P. J., and Walker, J., concur.

IOWA SUPREME COURT.

CATHERINE E. DUFFY, Appt.,

v.

BANKERS' LIFE ASSOCIATION OF DES MOINES.

(— Iowa, —, 139 N. W. 1087.)

Insurance — failure to forward application — negligence.

1. An insurance company is chargeable with the negligence of his agent in failing for an unreasonable time to forward an application and medical report for acceptance or rejection.

Trial — jury — delay in passing on application for insurance.

2. The jury must determine whether or not a delay of a month by an insurance company in passing upon an application for insurance, when it passes upon other applications from the same locality in nineteen days, is unreasonable.

Insurance — negligence of applicant — effect.

3. One who has applied for insurance and passed a satisfactory examination, upon the assurance that the insurance will be in force from the time of the medical examination, is not *per se* in fault in failing to

Note. — As to liability of insurance company for negligent delay in passing upon or issuing policy until after loss, see note to *Boyer v. State Farmers' Mut. Hail Ins. Co.* 40 L.R.A. (N.S.) 164.

As to effect of delay in passing upon application, see note to *Northwestern Mut. L. Ins. Co. v. Neafus*, 36 L.R.A. (N.S.) 1211.

make inquiry in case the policy is not promptly issued.

Evidence — sufficiency — issuance of insurance policy.

4. That an application for insurance, if passed on, would have been accepted, may be found from evidence that the applicant was young, his character good, his occupation not hazardous, and that he had passed a satisfactory examination and been recommended by the examining physician.

Insurance — failure to act upon application — liability.

5. An insurance company which is acting under a state franchise is liable in damages for losses caused by its failure promptly to act upon an application for life insurance received upon its own solicitation, and accompanied by the requisite premium.

Parties — neglect to act upon application for insurance — right to sue.

6. The administrator, and not the beneficiary named in the application, has the right of action for neglect of an insurance company to act upon an application for life insurance within a reasonable time, so that the opportunity to obtain insurance is cut off by the death of the applicant.

(February 18, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Poweshiek County in defendant's favor in an action brought to recover damages for neglect to act upon an application for life insurance. Reversed in part.

The facts are stated in the opinion.

Messrs. Bray & Shifflett and O. M. Brockett, for appellant:

The solicitation and receipt of the application and membership fee, and issuance of the receipt therefor, created a binding obligation upon the part of the insurance company to act honestly and promptly in the due course of its business upon said application; the breach of such obligation or duty was an actionable wrong, and resulted in a cause of action arising therefrom for the resulting damages.

Winchell v. Iowa State Ins. Co. 103 Iowa, 189, 72 N. W. 503; Atkinson v. Hawkeye Ins. Co. 71 Iowa, 340, 32 N. W. 371; Walker v. Farmers' Ins. Co. 51 Iowa, 679, 2 N. W. 583; Boyer v. State Farmers' Mut. Hail Ins. Co. 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, 87 Kan. 293, 123 Pac. 742; Northwestern Mut. L. Ins. Co. v. Neafus, 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026.

Such obligation or duty having been created by the transaction between the applicant and the company for a consideration, and for the benefit of the plaintiff as the proposed beneficiary, the cause of action

arising from its breach inures to her, and she is the owner and holder thereof.

Johnson v. Collins, 14 Iowa, 63; First Nat. Bank v. Rowley, 92 Iowa, 530, 61 N. W. 195; German State Bank v. Northwestern Water & Light Co. 104 Iowa, 717, 74 N. W. 685; 9 Cyc. 374, 378.

Mr. I. M. Earle, for appellee:

Where it is expressly agreed in the application that there shall be no contract of insurance until the delivery of the policy, mere delay cannot become actionable, because applicant knows there will be no contract until he gets his policy. If the delay seems unusual, he can make inquiry; if unreasonable, he can revoke his application.

1 Cooley, Briefs on Ins. p. 444; Kohen v. Mutual Reserve Fund Life Asso. 28 Fed. 705; McCully v. Phoenix Mut. L. Ins. Co. 18 W. Va. 782; McMaster v. New York L. Ins. Co. 40 C. C. A. 119, 99 Fed. 856; Wilcox v. Sovereign Camp, W. O. W. 76 Mo. App. 573; McLendon v. Woodmen of World, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36; Paine v. Pacific Mut. L. Ins. Co. 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689; Ray v. Security Trust & L. Ins. Co. 126 N. C. 166, 35 S. E. 246; Metropolitan L. Ins. Co. v. Howle, 68 Ohio St. 614, 68 N. E. 4; Michigan Mut. L. Ins. Co. v. Thompson, 44 Ind. App. 180, 86 N. E. 505; 1 Joyce, Ins. § 98; Misselhorn v. Mutual Reserve Fund Life Asso. 30 Fed. 545; Hawley v. Michigan Mut. L. Ins. Co. 92 Iowa, 593, 61 N. W. 201; Reserve Loan L. Ins. Co. v. Hockett, 35 Ind. App. 89, 73 N. E. 842; 25 Cyc. 719; 16 Am. & Eng. Enc. Law, 855; Lathrop v. Modern Woodmen, 56 Or. 440, 106 Pac. 328, 109 Pac. 81; Lee v. Prudential L. Ins. Co. 203 Mass. 299, 89 N. E. 529, 17 Ann. Cas. 236; Barker v. Metropolitan L. Ins. Co. 188 Mass. 542, 74 N. E. 945.

There can be no recovery for the loss against an insurance company, unless, either,

1st. There was a contract of insurance, or

2d. The applicant had the right to suppose there was such contract.

It cannot rest on "negligent failure to contract."

1 Cooley, Briefs on Ins. p. 427; Niblack, Ben. Soc. p. 283; 1 Bacon, Ben. Soc. § 270; 19 Cyc. 599; 25 Cyc. 714; 16 Am. & Eng. Enc. Law, 851; Harp v. Granger's Mut. F. Ins. Co. 49 Md. 307; Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 163; New York Union Mut. Ins. Co. v. Johnston, 23 Pa. 72; Misselhorn v. Mutual Reserve Fund Life Asso. 30 Fed. 545; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64; Brink v. Merchants' & F. United Mut. Ins. Asso. 17 S. D. 235, 95 N. W. 929; More v. New York Bowery F. Ins. Co. 130 N. Y. 537, 29

N. E. 757; *Richmond v. Travelers' Ins. Co.* 123 Tenn. 307, 30 L.R.A.(N.S.) 954, 130 S. W. 790; *Modern Woodmen v. Owens*, — Tex. Civ. App. —, 130 S. W. 858; *McLendon v. Woodmen of World*, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 39; *Ross v. New York L. Ins. Co.* 124 N. C. 395, 32 S. E. 733; *New York L. Ins. Co. v. Babcock*, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273; *St. Paul F. & M. Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, 89 N. W. 997.

The administratrix can recover only what applicant could have recovered, if suit had been brought by him before his death.

McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217; *Schoep v. Bankers' Alliance Ins. Co.* 104 Iowa, 354, 73 N. W. 825; *Brown v. Iowa Legion of Honor*, 107 Iowa, 439, 78 N. W. 73; *Re Wiltsey*, 122 Iowa, 428, 98 N. W. 294; *Iowa State Traveling Men's Asso. v. Moore*, 19 C. C. A. 662, 34 U. S. App. 670, 73 Fed. 750; *Major v. Burlington, C. R. & N. R. Co.* 115 Iowa, 309, 88 N. W. 815; 13 Cyc. 22, 105.

Declaration of soliciting agent is not admissible to vary contract.

Dryer v. Security F. Ins. Co. 94 Iowa, 471, 62 N. W. 798; *Providence Sav. L. Assur. Co. v. Elliott*, 29 Ky. L. Rep. 552, 93 S. W. 659; *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 692; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. ed. 674; *Fowler v. Preferred Acci. Ins. Co.* 100 Ga. 330, 28 S. E. 398.

Unusual delay is evidence of rejection.

More v. New York Bowery F. Ins. Co. 130 N. Y. 537, 29 N. E. 757; *Connecticut Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454; *Brink v. Merchants' & F. United Mut. Ins. Asso.* 17 S. D. 235, 95 N. W. 929; *St. Paul F. & M. Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, 89 N. W. 998; *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. 72; *Ross v. New York L. Ins. Co.* 124 N. C. 395, 32 S. E. 733.

It was as much the duty of the applicant to inquire as for the company to notify.

Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 163; *Winchell v. Iowa State Ins. Co.* 103 Iowa, 189, 72 N. W. 503.

Death revokes the application.

Paine v. Pacific Mut. L. Ins. Co. 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 692; 1 Bacon, Ben. Soc. § 268 A.

No estoppel unless applicant had the right to believe himself insured.

Richmond v. Travelers' Ins. Co. 123 Tenn. 307, 30 L.R.A.(N.S.) 954, 130 S. W. 790; *Misselhorn v. Mutual Reserve Fund Life Asso.* 30 Fed. 545; *Brink v. Merchants' & F. United Mut. Ins. Asso.* 17 S. D. 235, 95 N. W. 930.
46 L.R.A.(N.S.)

Ladd, J., delivered the opinion of the court:

The plaintiff is the widow of Joseph M. Duffy, who departed this life July 9, 1911. He had applied to the defendant association on June 8th preceding for a certificate of membership therein, stipulating the payment of an indemnity of \$2,000 upon his death; but the association had failed to accept or reject the application, and, in this action, recovery of that amount as damages is sought by plaintiff, who was named as proposed beneficiary in the application, on the ground "that defendant negligently failed to take any action upon said application before the death of said Joseph M. Duffy, and negligently failed to either to issue to him a certificate of insurance as provided for therein, or to reject said application and give him notice thereof in sufficient time to enable him to procure other insurance," and, in consequence of such negligence, she was deprived of the benefit of the insurance. The widow, as a duly appointed and qualified administratrix, filed a petition of intervention, wherein she prayed judgment for damages to the estate of deceased, on the grounds: "That defendant's said agent carelessly and negligently failed to send the application of said decedent to the home office of the defendant association after he had been examined by defendant's examining physician at Tama, Iowa; that, in consequence of such negligence on the part of said agent, no policy or certificate of life insurance was issued to said applicant by the defendant association; that, if said application had been forwarded by said agent to the home office of the defendant association as soon as said applicant was examined by defendant's examining physician at Tama, Iowa, the defendant association would have issued and delivered a policy or certificate of life insurance for \$2,000 to said applicant before he died, and such insurance would have been in force at the time of his death." At the conclusion of plaintiff's evidence, the court directed a verdict for the defendant, and this is the only ruling of which complaint is made.

The facts admitted or proven on the trial first should be stated. The defendant is a mutual assessment insurance association. T. P. Rogers, at the time in question, was its general agent, and had authority from the association to take the application and receive the notes hereinafter mentioned. Duffy's application for membership in the association closed in words following:

I agree to accept the certificate of membership issued hereon, and that the same shall not take effect until said certificate

(signed by the secretary or assistant secretary) is issued and received by me during my continuance in good health. This application and the certificate issued thereon, together with the articles of incorporation and by-laws (not reducing the insurance provided), which may be hereafter adopted, shall constitute the agreement or contract between me and the said association. I certify that I have carefully read the foregoing application. [Signature of the applicant in his own handwriting]

Joseph M. Duffy.

This was at the date mentioned, and at the same time the applicant executed to Rogers his promissory note for \$17 as membership fee required to be paid when making such application, and delivered to Rogers a guaranty deposit note for \$34 required by the articles of corporation and by-laws of defendant. For these Rogers gave Duffy a receipt in the words following:

The Bankers' Life Association of Des Moines, Iowa.

I have this day taken the application of Mr. J. M. Duffy, of Tama, Iowa, for \$2,000 insurance in the Bankers' Life Association, upon which he has given his guaranty note for \$34, and paid in cash January 9, 1912, \$17, all of which is to be returned promptly if the application is declined. The first quarterly payment on the insurance applied for will be due January 31, 1912.

T. P. Rogers, Solicitor.

Dated at....., June 8, 1911.

On the back of this receipt, this appears: "Agents should not promise that certificate will be issued in less time than is reasonably assigned to do the work, as disappointment may result, especially as frequently occurs an extra amount of business comes in a bunch. The home office does all it can to expedite the issue, and the agent can add material help if he will see that all applications are properly completed and full information given. If delay is unusual, write for cause."

Rogers informed Duffy at the time that he could go to the office of Dr. Thompson within a day or two for examination, and the application would then be sent to the association, and explained to him that the notes would be returned if the applications were rejected. To his inquiry as to how soon the insurance would be in force, Rogers responded, "Upon the passage of the physical examination required by their physician." Rogers left the application with Dr. Thompson the same day, and two days later Duffy called and was examined by that physician, who informed the applicant that

he had passed a satisfactory examination, and that he (the doctor) had recommended him for membership of the association.

As required by defendant's rules, the physician mailed to Dr. Will, medical director of defendant, on the same day, a slip of paper signed by him showing that he had made the medical examination of Duffy, and this reached defendant's office June 12, 1911. Rogers had been in the habit of calling at Thompson's office for the application with the examination, and the doctor left these on the desk for him, where it remained until he learned that Duffy had drowned, whereupon the physician mailed them to defendant. The medical examination disclosed that Duffy, who was thirty-two years of age, was in fine physical condition. He is conceded to have been a man of good habits, good financial ability, and of good moral character. He had done all that was required of him to obtain the insurance. The defendant was actively engaged through its agents in soliciting members of the association to whom certificates of insurance might be issued, and on an application of one Herman, procured by Rogers, June 5, 1911, defendant issued a certificate June 24th following. The defendant paid the \$17 note out of its funds, and caused it to be canceled July 28, 1911, after the association had been advised of the claim now made against it in this action, and it tendered the surrender of the guaranteed deposit note.

It is to be observed that the petition does not proceed on the theory that, from the retention of the application and unreasonable time without acting thereon, acceptance of the application is to be presumed, nor on the theory that defendant is estopped from denying such acceptance because of having misled the applicant in some way. See *Winchell v. Iowa State Ins. Co.* 103 Iowa, 189, 72 N. W. 503. The action is not based on contract, either express or implied, but solely on tort; the theory of the plaintiff being that, having solicited and received the application for insurance, it owed the applicant the affirmative duty either of rejecting the application, or of accepting it within a reasonable time, and upon breach of such duty it is liable for all damages suffered in consequence of such breach. Let us first ascertain whether the evidence was sufficient to carry the issues involved in such a claim to the jury.

I. Might defendant have been found to have been negligent? The association was responsible for the conduct of Rogers when acting within the scope of his agency, and it is admitted that he allowed the application to lie on the physician's desk a month lacking a day, though it was his duty to

forward it promptly to the association. But he was not alone at fault, for the association was aware as early as June 12, 1911, that the application had been taken, and yet did nothing in the matter during the twenty-seven days intervening prior to his death. In the case of another application taken at about the same time and in the same vicinity, there was a delay of but nineteen days in issuing the certificate. We think whether defendant in the exercise of ordinary diligence should have passed on the application prior to Duffy's death was fairly put in issue. The association was bound by the acts of its agents, and chargeable with any consequences that resulted from the failure of Rogers to promptly forward the application and physician's report. In other words, if the association was under a duty to promptly act on the application, and notify Duffy, as we think it was, it cannot shield itself from the responsibility by the fact that the application and medical report had not been received by it, and therefore it could not act. See *Northwestern Mut. L. Ins. Co. v. Neafus*, 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026. The possession of these by its agent had the same effect as if they were in the possession of the association at its home office. Assuming then that the application and medical report had been promptly forwarded by the agent, and that the application was not accepted or rejected within the time intervening prior to his death, it seems manifest that whether this was an unreasonable delay was for the jury to determine, and we so hold.

II. But it is argued that it was as much the duty of the applicant to inquire, as it was that of the insurer to give the information, and this or similar expressions will be found in several decisions holding that mere silence on the part of the insurer is not as strong evidence of acceptance as of rejection. Whether this were so or not, as bearing on whether an acceptance should have been inferred, it cannot be said that the duties of the parties were reciprocal. The applicant had done all he could or was required to do in the matter. He had the right to assume that the application would be forwarded immediately after the medical examination, and was so assured. This, with the suggestion that the certificate would be in effect after passing the physical examination, was well calculated to lull him into supposed security. Moreover, about all he could have done was to withdraw his application and apply to another insurer for a policy, and this, one who has applied to a company of his choice would quite naturally hesitate to do. Under the circumstances, it cannot be said, as a matter

of law, that the deceased was at fault in not stirring defendant to action by inquiry as to the cause of delay, or in not withdrawing his application. At the most, this also was an issue appropriate for the determination of the jury.

III. Assuming, then, that the defendant was negligent, and Duffy without fault, as the jury might have concluded, can it be said that but for such negligence a certificate of insurance would have been issued? We think the jury might have found that, in all reasonable probability, had the association passed upon the application, it would have been accepted. Duffy was a young man of thirty-two years, his medical examination was satisfactory, and the physician had recommended him; his employment as a farmer was not hazardous, and his character all that could be desired. The association was actively soliciting members, and it seems to us that the record leaves little, if any, doubt but that, had the association ever passed on the risk, it would have been accepted and the certificate issued. As observed in *Continental Ins. Co. v. Haynes*, 10 Ky. L. Rep. 276: "It is to be assumed that the company will accept the risk if advantageous to it, which it must be, if fairly and honestly contracted for, because that is the business in which it is engaged, and that is the object for which its agent acted, and therefore to allow it, under the reservation of the right to approve, to reject simply because a loss has occurred, would destroy the mutuality of the contract and inflict upon one party the misfortune he had provided against."

Contingencies might have arisen, as suggested by counsel for appellee, which would have led to a different conclusion, as, upon inquiry, it might have been ascertained that applicant was so venturesome or reckless in his conduct as to render him an undesirable risk. It is enough to say that the record contains no intimation that such was the fact, and it ought not to be inferred that other than the truth would have been elicited by any inquiries which the insurer might have prosecuted. If the applicant was of such disposition or temperament that the association would not, if it had acted, have accepted the application and issued the certificate, then no injury can be said to have resulted from the delay. Whether or not in all reasonable probability the certificate would have been issued, had the association acted on the application, can only be determined from the record as presented to the court.

But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in

the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public, to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects and supervises their business. Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish, or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon, or suffer the consequences flowing from their neglect so to do. Otherwise the applicant is unduly delayed in obtaining the insurance he desires, and for which the law has afforded the opportunity, and which the insurer impliedly has promised, if conditions are satisfactory. Moreover, policies or certificates of insurance ordinarily are dated as of the day the application is signed, and, aside from other considerations, the insurer should not be permitted to unduly prolong the period for which it is exacting the payment of premium without incurring risk. What was said in *Northwestern Mut. L. Ins. Co. v. Neafus*, supra, is pertinent: "If in this case there was evidence that the company was induced to reject the application for the sole reason that Neafus had died before it acted upon it, or to show that his application, except for the fact of his death, would have been approved, we would have a very different question. We think there is a sound and well-defined distinction between a case in which the application under no circumstances would have been accepted, and a case in which it would have been accepted except for the fact that the applicant died before it was acted upon, and after the company had a reasonable time in which to act. While the application and receipt are to be treated merely as a proposal for insurance, that it is with the company at its election to accept or reject, it may well be said that the company must act honestly and fairly on the application submitted to it, and which it impliedly at least agreed to accept, if satisfactory to it; and that if an application is satisfactory, and the company, if it had acted in a reasonable time, would have accepted the risk, it should not be allowed, after holding the application for an unreasonable time, to reject it, solely because of the death of the applicant. But, treating the case as we find it in the record, the 46 L.R.A.(N.S.)

delay, however unreasonable it may have been; cannot be construed into an acceptance of an application that no well-managed company, in the ordinary course of its business, would have accepted."

In *Boyer v. State Farmers' Mut. Hail Ins. Co.* 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, recovery for the amount of insurance applied for was awarded, because of negligent delay in not issuing the policy until after the loss, and in a note to the case as reported in 40 L.R.A.(N.S.) 164, the annotator says that "whatever the decision of the jury may be on this question [delay], it cannot be doubted that the proposition that an insurer should be held liable for a loss sustained by an applicant for insurance because of the negligence of the insurer's agent in failing to forward the application within a reasonable time is sound."

In *Walker v. Farmers' Ins. Co.* 51 Iowa, 679, 2 N. W. 583, the trial court instructed the jury that, if the agent had only the power "to receive and forward applications to the company for their approval or rejection, then, as such, he would be held to the use of ordinary diligence, and the defendant would be liable for his negligence in the performance of such duty; and if you find that said agent neglected to forward such application for rejection or approval within a reasonable time, considering all the circumstances, then the defendant must be held liable for any loss occasioned by such neglect." Of this, the court said: "It may be, but the point we do not decide, that defendant is liable for the neglect of its agent, as contemplated in this instruction; but in order to recover for such negligence, the action must be based thereon and the petition must so declare." And the instruction was held to be erroneous for that no such issue was raised on the pleadings. We are inclined to the opinion that the principle announced in this instruction is sound, and that the facts of the case were such as to require its application.

IV. The application named plaintiff as his beneficiary, and, had the certificate issued, likely she would have been named therein as such. But there was no contract, and the negligence, if any, was that of failing to discharge a duty owing the deceased. Had the certificate issued, whether plaintiff or someone else were beneficiary would have been optional with the insured, and as the injury, if any, was to him, his representative alone can maintain the action for resulting damages. See *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

As to plaintiff the judgment is affirmed. Because of the error in not submitting the

issues to the jury, the judgment against the intervener is reversed.

Preston, J., takes no part.

Petition for rehearing overruled.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Reapt.,
v.

BENJAMIN ROSENTHAL, Appt.

(197 N. Y. 394, 90 N. E. 991.)

Receiving stolen goods — statutory provision — liability.

1. A statute providing for punishment of

Note. — Receiving stolen property: statute making failure to inquire as to possessor's right, equivalent to guilty knowledge.

PEOPLE v. ROSENTHAL seems to be a case of first impression as to the precise question under annotation, and the decision in that case, that a statute which makes junk dealers guilty of criminally receiving stolen property where they purchase wire and metal stolen from railroads, telegraph, and telephone companies without making diligent inquiry as to the possessor's right to sell same, is constitutional, would seem to be based on a just and proper construction of the constitutional provisions claimed to have been violated.

In affirming the judgment of the New York court of appeals in PEOPLE v. ROSENTHAL the Supreme Court of the United States (228 U. S. 280, 57 L. ed. 212, 33 Sup. Ct. Rep. 27) said: "When it is conceded that such a dealer may be properly subjected to punishment as a criminal if he receives stolen property without actual knowledge that it has been stolen, and merely because charged with notice of circumstances such as would have put an honest or prudent man upon inquiry, it needs little argument to vindicate legislation with respect to particular kinds of personal property that the legislature, in its wisdom, presumably deemed to be more susceptible of theft than other property, when that legislation but adds the further requirement of diligent inquiry by the dealer with respect to the right of the seller.

"It is urged as a criticism that the statute directs the junk dealer's inquiry to the question of the legal right of the seller to sell rather than to the question of an original larceny. It ought to be unnecessary to say that if goods have in fact been stolen, a diligent inquiry into the right of the present possessor to make sale or delivery of them will very surely tend to disclose the larcenous origin of his title. In- 46 L.R.A.(N.S.)

one who received stolen property knowing it to have been stolen, or who, being a junk dealer, buys or receives certain kinds of property without ascertaining by diligent inquiry that the person selling it has a right to do so, does not, by the latter provision, make the receiver liable to punishment unless the property had been stolen.

Junk dealers — statute — regulation — equal protection of the laws.

2. Confining to junk dealers the duty of making inquiry as to ownership before purchasing certain kinds of property, under penalty of punishment for receiving stolen property in case it proves to have been stolen, does not deprive them of the equal protection of the laws.

Same — equal protection of the laws.

3. The legislature may, without being guilty of unconstitutional class legislation, require junk dealers to make inquiry as to

direct questions in such a case will very probably bring out the truth as readily and as surely as the plump inquiry—"Did you steal these goods?" Or at least, the legislature might so presume. For of course all such matters rest in legislative discretion.

"Counsel suggests that diligent inquiry by a junk dealer respecting the legal right of one offering certain wire or other goods for sale might lead to perplexing questions that only a court of last resort could properly determine. The obvious answer is that a method of inquiry that would bring to light, in rare instances, even the occult and doubtful point in a vendor's title, would, if systematically adhered to, be reasonably sure in a greater number of instances to develop the fact that the goods under investigation had been acquired by theft.

"We have said enough to indicate the character of the arguments employed in the effort to show that the act of 1903 is wholly arbitrary and constitutes so groundless an interference with the citizen's liberty of contract as to bring it within the denunciation of the due process of law clause of the 14th Amendment. It seems to us that the object of the legislation is well within the legitimate bounds of the police power of the state."

The statute considered in PEOPLE v. ROSENTHAL has some analogy in statutes which make an act or thing in itself harmless a substantive offense; e. g., statutes requiring curtains on the doors or windows of saloons to be drawn back so as to expose the interiors during the hours the saloons are required to be closed. There is also an analogy on the civil side to be found in bulk-sales statutes, declaring that sales of goods in bulk shall be fraudulent and void where the purchaser fails to make diligent inquiry as to creditors of the vendor. Generally as to constitutionality and construction of such statutes, see notes in 2 L.R.A.(N.S.) 331, and 20 L.R.A.(N.S.) 160.

J. H. B.

the ownership of certain classes of property offered for sale which, because of its peculiar nature and situation, is peculiarly subject to larceny without possibility of its being adequately watched and guarded.

Receiving stolen goods — duty to investigate — test of liability.

4. The legislature may make the proper discharge, by junk dealers, of the active duty of making inquiry as to the ownership of property offered to them for sale, the test of their criminality for receiving stolen property, in case the property proves to have been stolen.

Former jeopardy — second indictment.

5. One indictment for an offense is not a bar to a second, where the statute provides that the second shall supersede the first.

Same — absence of arraignment.

6. One is not put in jeopardy by an indictment upon which he is not arraigned and to which he does not demur or plead.

(February 8, 1910.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Monroe County Court convicting him of receiving stolen goods, and from certain orders directing a resubmission of the case to a grand jury, denying a motion to quash the indictment, and denying a motion in arrest of judgment. Affirmed.

Statement by Vann, J.:

Appeal from an order of the appellate division of the supreme court in the fourth judicial department, entered August 5, 1909, which affirmed a judgment, of the Monroe county court rendered upon a verdict convicting the defendant of the crime of receiving stolen goods without diligent inquiry; and affirmed three orders, the first made by the county judge of Monroe county directing a resubmission of the case to a grand jury, the second from an order of the Monroe county court denying a motion to quash the indictment, and the third from an order of said court denying a motion in arrest of judgment.

On the 26th of March, 1908, the defendant was indicted by a grand jury in attendance at a trial term of the supreme court sitting in the county of Monroe, for the crime of criminally receiving stolen property, in that he, being a junk dealer, purchased stolen copper wire belonging to a telephone company, without ascertaining by diligent inquiry that the person or persons selling the same to him had a legal right to do so. The indictment was sent to the Monroe county court for trial, and on the 7th of May, 1908, while the indictment was still 46 L.R.A. (N.S.)

in force, but before any plea had been entered or motion made in relation thereto, upon the application of the district attorney, founded on his own affidavit, the county judge of Monroe county made an order at chambers directing that the charge be resubmitted to the grand jury of that county then in session in connection with a trial term of the supreme court. On the 23d of May a second indictment was found, containing four counts, the first of which was for substantially the same crime described in the indictment found on the 26th of March preceding. After the second indictment had been sent to the county court, and on the 11th of June, 1908, a motion was made to quash the same upon the ground that the grand jury had no jurisdiction to find it. On the 18th of June said motion was denied, and on the 15th of December the defendant pleaded guilty to the first count of the second indictment; the other three counts being dismissed. When arraigned for sentence, he made a motion in arrest of judgment upon the ground that the court had no jurisdiction over the subject-matter of the count in the indictment to which he had pleaded guilty, and that the facts stated in that count do not constitute a crime. The motion was denied, and the court sentenced the defendant to be imprisoned in the Monroe county penitentiary for two months, and, in addition thereto, that he pay a fine of \$250, or, in default thereof, that he be committed to said penitentiary for thirty days additional. Thereupon the defendant appealed from the judgment of conviction, from the order denying the motion in arrest of judgment, from the order of the Monroe county judge resubmitting the case to the grand jury, and from the order denying his motion to quash the indictment. The appellate division unanimously affirmed the judgment and each of said orders, and the defendant now appeals to this court.

Messrs. Wile & Oviatt, for appellant:

The amendment is vicious because it applies only to junk dealers.

People v. Beattie, 96 App. Div. 383, 89 N. Y. Supp. 193.

It is vicious, because it protects only the property of railroad, telephone, gas, and electric companies.

Shaver v. Pennsylvania Co. 71 Fed. 931.

It makes a test of criminality something which seldom can be ascertained by the junk dealer, and imposes on the junk dealer the possibility of a criminal prosecution in connection with every innocent transaction he undertakes.

1 Lewis's Sutherland, Stat. Constr. 2d ed. p. 176; United States v. Reese, 92 U. S.

214, 23 L. ed. 563; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The order resubmitting the case to the grand jury was void, and the second indictment, being based on a void order, was a nullity.

Re Gardiner, 31 Misc. 364, 64 N. Y. Supp. 760; People v. Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630.

Mr. F. F. Zimmerman, with Mr. H. H. Widener, for respondent:

The indictment is valid, the court having jurisdiction to find it.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; People v. Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630; People v. Wilson, 151 N. Y. 409, 45 N. E. 862; People v. Palmer, 109 N. Y. 117, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; People v. Adler, 140 N. Y. 335, 35 N. E. 644.

An act of the legislature will not be declared unconstitutional unless the incompatibility of the legislative enactment with the Constitution is manifest and unequivocal.

People ex rel. Carter v. Rice, 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921; People ex rel. Henderson v. Westchester County, 147 N. Y. 1, 30 L.R.A. 74, 41 N. E. 563; People v. Steele, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541.

The judgment of conviction should be affirmed.

St. John v. Andrews Institute, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708; Greenwald v. Weir, 59 Misc. 431, 111 N. Y. Supp. 235; People ex rel. Bernard v. McKee, 59 Misc. 369, 112 N. Y. Supp. 385; Hathorn v. Natural Carbonic Gas Co. 128 App. Div. 33, 112 N. Y. Supp. 374.

Vann, J., delivered the opinion of the court:

The indictment in question was found under § 550 of the Penal Code as amended in 1903 by chapter 326 of the Laws of that year. As amended it reads as follows: "Sec. 550. Criminally receiving property.—A person who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who cor-

ruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation has been committed within the state, whether such property were stolen or misappropriated within or without the state, *or who being a dealer in or collector of junk, metals, or second-hand materials, or the agent, employee or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company without ascertaining by diligent inquiry that the person selling or delivering the same has a legal right to do so*, is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than \$250, or by both such fine and imprisonment." The part printed in italics was added by the amendment, no other change being made, and the section, as thus amended, was re-enacted in the Penal Law (Consol. Laws, chap. 40), § 1308. The defendant claims that the amended portion does not describe an offense, and that it is unconstitutional, because it applies only to junk dealers, protects only the property of railroad, telephone, telegraph, gas, and electric light companies, makes a test of criminality something which can seldom be ascertained by the junk dealer, and imposes on him the possibility of a criminal prosecution in connection with every transaction he undertakes, as well as the necessity of ascertaining the legal right of the seller, regardless of the fact whether or not the property has been the subject of a larceny.

The first question to be considered is, What does the amendment mean? The entire section, including the amendment, consists of a single sentence divided only by commas. It provides for the punishment of any person who receives stolen property knowing it to have been stolen, or who corruptly and for a consideration conceals any property knowing it to have been stolen, and then, in the same sentence, for the punishment of a person who, being a dealer in junk, buys or receives stolen wire or metals of a certain kind belonging to a railroad or other company named, without making diligent inquiry to ascertain that the person selling the same had a legal right to do so. While the amendment alone does not read in that way, we think that when the entire sentence is read together, as ob-

viously it should be, it shows this to have been the intention of the legislature. Prior to the amendment, the legislature had provided for the punishment of one who receives stolen property knowing it to have been stolen, which under our decisions means not only actual knowledge, but also constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred. *People v. Wilson*, 151 N. Y. 403, 45 N. E. 862; *People v. Downing*, 84 N. Y. 478, 485. It had also provided for the punishment of one who corruptly conceals property knowing it to have been stolen. By an act passed the day before the amendment in question, it had defined the "junk business" as "the business of buying or selling old metal," and had required junk dealers, except in cities of the first class, not only to take out a license, but, when purchasing such property, to procure a written statement from the seller "as to when, where, and from whom he obtained" the same, and file it with the sheriff or chief of police. Laws 1903, chap. 308. By the next chapter, passed on the same day, it had prohibited junk dealers from purchasing from "any child under the age of sixteen years." Laws 1903, chap. 309. These provisions, however, still left a dangerous loophole for unscrupulous junk dealers, who might outwardly conform to the law and yet be guilty of receiving stolen property knowing or having reason to know it had been stolen, when it would be difficult, if not impossible, owing to the nature of the business and the way it is carried on, to prove knowledge or circumstances imputing knowledge. The legislature is presumed to have been familiar with current history and the decisions of the courts, which show that property of a certain kind, such as copper, brass, iron, etc., is frequently stolen from railroad, telegraph, and similar corporations, which cannot adequately protect it because it is scattered through the country along extensive lines of transportation or communication, and which is exposed to view and caption by the evil-minded, who find their best market in the shops of certain junk dealers. These secondhand materials are usually of such shape and form as to indicate at a glance use and ownership by a corporation of the kind specified. The legislature obviously intended to afford the special protection needed by owners of this kind of property by placing those dealing in it, when secondhand, under the risk of buying at their peril unless they make diligent inquiry to ascertain whether those offering it for sale had the legal right to sell it. This intention, while somewhat awkwardly expressed, as well as the intention to make

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the entire sentence apply to stolen property, is reasonably clear when the history of legislation, the evil needing redress, and the context are taken into account. The successive steps taken by the series of statutes show that the object of the legislature was to afford all the protection possible against the evil of receiving stolen property when the receiver either knew or should have known that it was stolen. By adding the duty of diligent inquiry before purchasing, it protects the junk dealers who in good faith comply with the statute, and provides for the punishment of those who do not.

Under this construction, the attack upon the substance of the indictment has no foundation, for the statute upon which it rests is not open to objection under either Constitution, state or Federal. The legislature had the power to confine the amendment to junk dealers, because they are way wise and furnish the chief, if not the exclusive, market for stolen property. It had power to provide special protection to property of a certain kind widely used and owned by all corporations of a certain class, because such property, owing to its situation and nature, and such owners, owing to the impossibility of adequately watching and guarding it, need special protection as shown by long experience. While it makes the proper discharge of an active duty a "test of criminality," all that it requires is good faith and honest inquiry, and that is no more than is required by the common law in some cases, especially in the purchase of commercial paper under certain circumstances. The junk dealer is not responsible for the truth of what he ascertains by inquiring, but he runs the risk if he purchases without diligent inquiry to ascertain the truth. The legislature had the right to declare a junk dealer who purchases stolen property of a kind that is the constant subject not only of larceny, but of sale to junk dealers, guilty of a crime, whether he actually knew it had been stolen or not, provided he did not try to find out by making diligent inquiry.

The second indictment was regularly found, and it superseded the first. The Revised Statutes provided that "if there be at any time pending against the same defendant, two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed." 2 Rev. Stat. 1st ed. pt. 4, chap. 2, title 4, art. 2, § 42. The first indictment, therefore, was not of itself a bar to the second. *People v. Fisher*, 14 Wend. 9, 14, 28 Am. Dec. 501. The section quoted was expressly excepted from the repealing

act passed on the 5th of June, 1886, and is now § 292a of the Code of Criminal Procedure, Laws 1886, chap. 593, p. 829; Laws 1909, chap. 66, § 1, p. 84.

The people take nothing from the order of resubmission, which was a nullity, as the county judge held and as all now concede. No order to resubmit, however, was necessary, for the grand jury had jurisdiction to reindict without one. The defendant was not put in jeopardy by the first indictment, as he was not arraigned thereunder, nor did he demur or plead thereto. If he had demurred and the demurrer had been sustained, a second indictment could not have been lawfully found without an order of resubmission as authorized by the Code of Criminal Procedure, which has modified the practice at common law in this regard to some extent. Code Crim. Proc. §§ 327, 329. By the express command of the statute a judgment sustaining a demurrer is a bar to a further prosecution for the same offense unless such an order is made. Id. § 327. No order to resubmit is required, however, unless the defendant has been put in jeopardy under a former indictment. Even if the indictment is set aside on motion, it is not a bar to a further prosecution, although the defendant is entitled to be discharged from custody, "unless the court direct that the case be resubmitted to the same or another grand jury." Id. §§ 317, 320.

We find no error in the record that affects the judgment of conviction. The appeal from the order of resubmission is dismissed, but the other orders and the judgment of conviction are affirmed.

Cullen, Ch. J., and Willard Bartlett, Hiscock, and Chase, JJ. concur: Werner, J., not voting. Edward T. Bartlett, J., absent.

Affirmed by the Supreme Court of the United States, December 2, 1912, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27.

MAINE SUPREME JUDICIAL COURT.

FREDERICK TUELL

v.

INHABITANTS OF MARION.

(— Me. —, 86 Atl. 980.)

Municipal corporation — obstruction of navigation — liability.

1. A municipal corporation which obstructs navigation in a navigable stream by the construction and maintenance of a bridge across it without legislative authority is liable in damages to one specially injured by the obstruction.

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Nuisance — obstruction of navigation — special injury.

2. An injury different from that suffered by the public at large from the obstruction of a navigable stream, which will entitle the person injured to damages, is shown by the fact that he was in possession of certain logs which he had contracted to float past the obstruction, and that his use of the stream was unreasonably interfered with by the obstruction, so that he was compelled to incur expense in hiring extra hands and to suffer delay in his work.

(May 27, 1913.)

EXCEPTIONS by defendants to rulings of the Supreme Judicial Court for Washington County overruling a demurrer to a complaint filed to recover damages for loss caused by the alleged negligent obstruction of a navigable stream. Overruled.

The facts are stated in the opinion.

Messrs. Ashley St. Clair and James H. Gray, for defendants:

Plaintiff shows no special injury.

Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; Williams's Case, 5 Coke, 73; Lansing v. Smith, 8 Cow. 146; 2 Wood, Nuisances, §§ 653, 654; Dudley v. Kennedy, 63 Me. 465; Sedgw. Measure of Damages, 28, 29, 152, 153; Smart v. Aroostook Lumber Co. 103 Me. 37, 14 L.R.A. (N.S.) 1083, 68 Atl. 527; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482; Blood v. Nashua & L. R. Corp. 2 Gray, 137, 61 Am. Dec. 444; Willard v. Cambridge, 3 Allen, 574; Quincy Canal v. Newcomb, 7 Met. 276, 39 Am. Dec. 778; Brightman v. Fairhaven, 7 Gray, 271; Smith v. Boston, 7 Cush. 254; Brainard v. Connecticut River R. Co. 7 Cush. 510; Franklin Wharf Co. v. Portland, 67 Me. 58, 24 Am. Rep. 1; Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569; Norcross v. Thoms, 51 Me. 503, 81 Am. Dec. 588; Frost v. Washington County R. Co. 96 Me. 76, 59 L.R.A. 68, 51 Atl. 806.

Mere obstruction is not sufficient.

Baxter v. Winooski Turnp. Co. 22 Vt. 114, 52 Am. Dec. 84; Hatch v. Vermont C. R. Co. 28 Vt. 142; Iveson v. Moore, 1 Ld. Raym. 486; Rose v. Miles, 4 Maule & S. 101, 16 Revised Rep. 405; Greasely v. Coding, 2 Bing. 363, 9 J. B. Moore, 489, 3 L. J. C. P. 262; Paine v. Partrich, Carth. 194.

Note. — As to private right of action for obstruction of navigable stream, see notes to Viebahn v. Crow Wing County, 3 L.R.A. (N.S.) 1126, and David M. Swain & Son v. Chicago, B. & Q. R. Co. 38 L.R.A. (N.S.) 763. A somewhat analogous question is presented in the note to Sholin v. Skamania Boom Co. 28 L.R.A. (N.S.) 1053, as to interference with one's use of a highway as a special damage which will sustain an action by him against the wrongdoer.

A bridge in a public highway is not necessarily a nuisance, even if it occasion some inconvenience.

2 Farnham, Waters, p. 1290.

Messrs. C. B. Donworth and E. C. Donworth for plaintiff.

Haley, J., delivered the opinion of the court:

This is an action on the case to recover damages alleged to have been sustained by the plaintiff by reason of the defendants' negligence in carelessly constructing and maintaining two bridges, with the abutments thereto, across Cathance stream in the town of Marion, and by permitting them to fall into a condition of dilapidation, and by negligently omitting to provide said abutments with proper and suitable wings, and that thereby the navigation of said stream was unreasonably obstructed.

Cathance stream is alleged to be a non-tidal, floatable stream, a public highway through the town of Marion, and that during the time complained of the plaintiff was engaged in floating logs and lumber down said stream to a mill pond below said bridges, and that by reason of the obstruction, caused by said bridges and abutments, the passage of said logs and lumber was greatly obstructed and delayed, and the plaintiff put to the expense of employing more men than he otherwise would have done but for said obstruction, and put to other expenses, which are specified in the declaration.

At the return term of the writ the defendants filed a general demurrer to the declaration, which, after joinder by the plaintiff, was overruled by the presiding justice. To this ruling the defendants excepted, and the case is before this court upon their exceptions.

The defendants rely upon two rules of law to sustain their demurrer:

First. That a common-law action cannot be maintained to recover special damages sustained by one against a municipal corporation or a town for damages received through its neglect or omission to perform a public or corporate duty, and that the statutes of this state do not authorize an action for the causes set forth in the declaration.

Second. That the cause of complaint, *viz.*, an obstruction to the navigation of Cathance stream, constituted a public nuisance, and the plaintiff has not suffered such special damages thereby as gives him the right to maintain this action.

1. The general rule is that municipal corporations are not liable to a private action for their neglect to perform, or their negligent performance of, corporate duties 46 L.R.A.(N.S.)

imposed by statute; but if the acts complained of are not authorized by statute, and are done by authority of the municipal corporation, or are afterwards ratified by the corporation, they are liable, as an individual would be for the same wrongful acts. *Keeley v. Portland*, 100 Me. 265, 61 Atl. 180, 18 Am. Neg. Rep. 440; *Woodcock v. Calais*, 66 Me. 234; *Anthony v. Adams*, 1 Met. 284; *Small v. Danville*, 51 Me. 359; *Deane v. Randolph*, 132 Mass. 475; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157. The law only exempts them from neglect, or their negligent performance of, their public or corporate duties imposed by statute.

The declaration alleges, and the demurrer admits, that Cathance stream is a navigable stream and a public highway for all persons to go upon, and that the town constructed and maintained the bridges and the abutments in such condition that they were an obstruction to the navigation of said stream.

Navigable streams are public highways, that all persons have the right to pass over, to carry and to float logs, timber, and other merchandise upon; and, they being public highways, cities or towns have no right to obstruct the navigation thereof, unless they are given the right, or the duty is imposed by statute. As stated in *Com. v. Coombs*, 2 Mass. 492: "A navigable river is a common right, a public highway; and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public." *Arundel v. McCulloch*, 10 Mass. 71; *State v. Anthoine*, 40 Me. 435; *State v. Freeport*, 43 Me. 198; *Rogers v. Kennebec & P. R. Co.* 35 Me. 319; *Cape Elizabeth v. Cumberland County*, 64 Me. 456.

The building and maintaining of the bridges complained of not being duties imposed upon the town by the general law, the town cannot justify their construction or maintenance, if an obstruction to navigation, except by an act of the legislature; and the pleadings do not show that they were authorized by the legislature to erect and maintain the bridge. The declaration does contain the allegation that the town "was liable to keep in repair, and did then and there maintain them;" but the liability alleged is a statement of law which the demurrer does not admit. There are no facts stated in the declaration which authorize that conclusion.

In *Cumberland & O. Canal Corp. v. Portland*, 62 Me. 504, the court said: "The declaration avers, and therefore the demurrer admits, that the city of Portland did the acts complained of. Those acts are, *prima facie*, acts of trespass. No justifica-

tion or excuse being shown, the plaintiffs are entitled to judgment." In this case the declaration avers and the demurrer admits that the defendants did the acts complained of. They were acts that obstructed the navigation of the public highway. Even when a town is authorized by the legislature to erect a bridge across navigable waters, unless it is constructed as authorized by the act in a reasonable and proper manner, and it is an obstruction to navigation, the town is liable. The legislative authority, under color of which bridges are built across navigable streams, contemplates its being done in a reasonable manner, and does not justify their erection so as to obstruct navigation, unless it is reasonably necessary so to do, or the act expressly authorizes the construction in such a manner as to obstruct navigation; for damages that result, or a careless or unreasonable exercise of their power, are not treated as having been contemplated by the act conferring the authority. *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Deane v. Randolph*, 132 Mass. 476; *Wood, Nuisances*, §§ 750, 754, and 757.

2. Has the plaintiff alleged that he sustained special damages, different from those suffered by the community at large, either to his person or property, from the public nuisance alleged in the declaration to have been created by the obstruction of Cathance stream? If he has, he has stated a cause of action; otherwise he has not.

The declaration alleged that on April 1, 1909, and on each and every other day between said date and the 1st day of June next following, he was in possession of 1,600,000 feet of logs, lumber, and timber, with the owners of which he had contracted to float and drive down said Cathance stream, passing through and under said bridges to the mill pond of the Dennyville Lumber Company, and also alleged the same facts as to the year 1910, except that in 1910 the amount of logs, lumber, and timber is stated to have been 1,200,000 feet, and that by reason of the unreasonable obstruction of said stream caused by the negligent acts of the defendants, above referred to, the use of said stream was thereby unreasonably interfered with, and he was put to the expense of hiring additional men, and was delayed in floating the logs, lumber, and timber, and thereby incurred other additional expenses.

To sustain their position the defendants rely upon cases which state that the party bringing the action must have sustained damages different from those sustained by the community at large, and urge upon us the case of *Blood v. Nashua & L. R. Corp.* 2 Gray, 137, 61 Am. Dec. 444, as a case on 46 L.R.A.(N.S.)

all fours with the case at bar. In that case there was a stone bridge erected by the defendants across Stony brook, and the plaintiffs owned a mill privilege on that stream, and the erection of the bridge prevented the floating of logs to the mill of the plaintiffs. The case was sent to referees, and they awarded, subject to the opinion of the court, among other things, "damage caused by it being rendered more laborious and expensive to get logs, for the use of . . . [its] mill, from Merri-mac river up Stony brook, under the stone bridge, than it had been under the pile bridge," and the court held that the plaintiff was not entitled to the damages found by the referees for that cause, stating: "The obstruction of a public right of way is a public, not a private, wrong; it may affect those near the obstruction much more than the rest of the public; but the damage sustained by those near it differs in degree only, not in kind."

The case does not show that the plaintiff had been put to any expense, or that he had attempted to use the passage. The fair inference from the report of the referees is that they awarded the damages because it had made the way impassable, not for special damages that he had actually sustained.

In this case the damages alleged are damages suffered by the plaintiff different from those suffered by the community at large. The community only suffered the damage of not having the stream open to navigation,—a damage common to all. The plaintiff suffered the same damages that the community suffered, and, in addition thereto, he alleges other damages by reason of the obstruction to navigation; those damages being the expense that he was obliged to incur to pass the logs and lumber over the public highway, to wit, Cathance stream.

It is alleged that the plaintiff sustained special damages by attempting to use the public highway, and for those damages, being special and different from those suffered by the community, if the allegations of the declaration are proved, unless the obstruction was lawful, he can maintain this action. *Smart v. Aroostook Lumber Co.* 103 Me. 50, 14 L.R.A.(N.S.) 1083, 68 Atl. 527; and cases cited; *Wood, Nuisances*, § 632; *McPheters v. Moose River Log Driving Co.* 78 Me. 329, 5 Atl. 270; *Dudley v. Kennedy*, 63 Me. 465; *Rogers v. Kennebec & P. R. Co.* 35 Me. 319; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157.

Exceptions overruled.

**NORTH CAROLINA SUPREME
COURT.**

STATE OF NORTH CAROLINA

v.

ROBINSON ROGERS et al., Appts.

(— N. C. —, 78 S. E. 293.)

Jury — number — waiver in criminal case.

One who pleads "not guilty" to an accusation of murder is entitled to be tried by a jury of twelve men, which he cannot waive even by consenting to proceed with eleven in the jury box when one is found mentally unfit.

(Clark, Ch. J., dissents.)

(May 28, 1913.)

Note. — Effect of consent of defendant in criminal case to proceeding with less than twelve jurors.

This note is supplemental to the note to *State v. Bates*, 43 L.R.A. 59, and in so far as concerns cases where the trial was commenced before a full jury, to the note to *Jennings v. State*, 14 L.R.A.(N.S.) 862.

For validity of waiver of jury trial in criminal action, see the note to *Re McQuown*, 11 L.R.A.(N.S.) 1126.

For right to substitute another for a juror becoming disabled or incompetent in a criminal case, see the note to *Dennis v. State*, 25 L.R.A.(N.S.) 36.

The defendant in felony cannot consent to proceeding with less than twelve jurors, either at the beginning of the trial (*Thompson v. State*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, a case arising in a territory of the United States), or later, after the trial has commenced before a full jury (*State v. Simons*, 61 Kan. 752, 60 Pac. 1052; *STATE v. ROGERS*).

So, it was held in *Jones v. State*, 52 Tex. Crim. Rep. 303, 124 Am. St. Rep. 1097, 106 S. W. 345, that a provision of the Constitution to the effect that if, pending the trial, a juror died or was disabled from sitting, the remainder of jurors should have the power to render a verdict, did not authorize the defendant in a murder case to consent to the discharge of a juror on account of a death in his family.

(It may be noted that in the *Thompson Case*, supra, the only waiver was by non-action, but the decision of the court was put on broad grounds.)

In this connection reference should be made to a Louisiana case where it was held that an accused might not assent, either by consent or nonaction, to a jury of twelve where the Constitution provided that his offense should be tried before a jury of five, or by the court if the jury was waived, *State v. Beebe*, 127 La. 493, 53 So. 730, where there was nonaction on the part of the accused, and the charge was an assault with a dangerous weapon with intent to murder.

46 L.R.A.(N.S.)

A PPEAL by defendants from a judgment of the Superior Court for Haywood County convicting them of manslaughter. Reversed.

Statement by Brown, J.:

Before impaneling the jury, the solicitor announced that he would not ask for a verdict of murder in first degree. One of the jurors was taken ill, and the trial proceeded with eleven jurors. The defendants were convicted of manslaughter and sentenced to the penitentiary. In apt time they moved in arrest of judgment as well as for a new trial upon the ground that they were not tried by a lawful jury of twelve men. His Honor, upon such motion, rendered the following judgment:

The same was held on a writ of habeas corpus in *State v. Reeves*, 128 La. 37, 54 So. 415.

It is a general rule that the full number of jurors may be waived in misdemeanor, and this has been recently held where the trial commenced with twelve jurors (*Com. v. Beard*, 48 Pa. Super. Ct. 319; *Com. v. Hawman*, 48 Pa. Super. Ct. 343), and where the statute so provided (*State v. Wells*, 69 Kan. 792, 77 Pac. 547).

But, on the other hand, it was held in *Dickinson v. United States*, 86 C. C. A. 625, 159 Fed. 801 (a case which commenced with the full number of jurors), that a defendant on trial for an offense which, while declared by the United States Revised Statutes to be a misdemeanor, is an infamous crime, may not waive the full number of jurors on his trial.

There is some difference in the authorities as to whether an accused who may waive a jury can consent to less than the lawful number of jurors. In *People v. Lane*, 124 Mich. 271, 82 N. W. 897, where the statute permitted a waiver of juries in cases before a justice of the peace, it was held that as an accused might entirely waive the trial by jury he might consent to be tried by less than the statutory number of six.

So, in *Mackey v. State*, — Tex. Crim. Rep. —, 151 S. W. 802, it was held that the statute allowing a jury to be waived in misdemeanor cases allowed the accused in such cases to agree to a jury of less than the statutory number of six.

And in *Dalton v. State*, 6 Okla. Crim. Rep. 85, 116 Pac. 954, the court was of the opinion that one who had a right to waive a jury of twelve might agree to be tried for a misdemeanor by a jury of six.

But it is the rule in New York that the fact that the defendant may waive a trial by jury in a misdemeanor case does not give him the right to consent to trial by less than the statutory number of six, and that such consent will be a waiver of a jury. *People v. Bent*, 151 App. Div. 734, 136 N. Y. Supp. 276.

B. B. B.

"Findings of Fact.

"As the ground for a new trial contained in said two affidavits of defendants, to wit, that they were tried by a jury composed only of eleven men, the court is of the opinion that the defendants are not entitled to any finding of fact on this matter, and so holds; but, if the supreme court is of a contrary opinion, then he makes the following findings of fact:

"That this case was called for trial on Wednesday morning of the first week, when the solicitor moved for a continuance on the ground of the absence of two witnesses to the shooting; one being sick in bed in Canton and the other in South Carolina. Defendants resisted the continuance and insisted on a trial at this term, and the court denied the motion for continuance. That the entire afternoon was consumed before a jury was selected. That the defendants did not exhaust their peremptory challenges. That the jury, after being impaneled, was in charge of an officer for the night, who was duly sworn. That Thursday morning, before any evidence had been offered, the solicitor asked that the jury be excused, and, in the absence of the jury, stated to the court that, since the adjournment, he and counsel for the defendant had discovered that one of the jurors selected was subject to fits; that he had recently been in Johns Hopkins Hospital and had a part of his brain removed, and that he was liable to lose his mental balance if subjected to much mental strain; and that in the opinion of counsel he was not mentally competent to sit on the jury. That the state was willing to call in another juror or to make a mistrial or to get an entirely new panel. That counsel for defendants insisted on proceeding with eleven men, and thereupon it was agreed in open court by the defendants speaking in open court through their counsel and the solicitor for the state that the case would proceed with eleven jurors, and that the clerk should make no record of the fact that one of the jury had been excused by consent. That defendants waived their right to have a full panel, and that no point should ever be raised that only eleven men were in the jury box. And thereupon the court excused said juror and directed the trial to proceed. That the two defendants are men of more than ordinary intelligence; that McCracken is about twenty-seven or twenty-eight years of age, and the defendant Rogers, about forty years of age, and their families are prominent and wealthy. That both these defendants are possessed of sufficient mental capacity to understand and did understand that both they and their counsel were entering into

said agreement and electing to proceed with eleven jurors by their assent, and that the court consented to this course.

"These defendants were represented by four able and experienced counsel, one of whom has filled the office of solicitor for two terms. That the trial proceeded through Thursday, Friday, Saturday, and on Monday the court delivered the charge to the jury; that the defendants were present during this time, during the sessions of court (being under good bonds, the court did not order them in custody during the progress of the trial); that the jury returned their verdict Monday afternoon. At the request of defendants' counsel, the court gave them until Wednesday of the second week before pronouncing the judgment of the court, and on Wednesday the defendants again stated that they were not ready, and asked for another day, so the court gave them until Thursday, A. M. On Thursday the defendants filed said affidavits, and this was the first time it was suggested that they would attempt to repudiate their solemn agreement. That the defendants were represented by the same counsel throughout the entire term of court. That the defendants did not ask to discharge their original counsel, nor did said counsel ask to withdraw from the case, but the same counsel who made the agreement made the motions aforesaid for a new trial.

"Wherefore the court is of the opinion that, by their conduct, defendants are estopped to set up the claim that there were only eleven men in the jury box, and the court denies the motion, and the defendants except. Wherefore the court denies the motion, and the defendants except."

Messrs. W. T. Crawford, Bryson & Black, J. M. Queen, and J. W. Stamey for appellants.

Messrs. T. W. Bickett, Attorney General and T. H. Calvert, Assistant Attorney General, for the State:

There can be no waiver of a trial by twelve jurors, the constitutional number.

State v. Lewis, 142 N. C. 626, 7 L.R.A. (N.S.) 669, 55 S. E. 600, 9 Ann. Cas. 604; Walser ex rel. Wilson v. Jordan, 124 N. C. 633, 33 S. E. 139; Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57; State v. Scruggs, 115 N. C. 805, 20 S. E. 720; State v. Stewart, 89 N. C. 563, 4 Am. Crim. Rep. 111; State v. Holt, 90 N. C. 749, 47 Am. Rep. 544.

Brown, J. delivered the opinion of the court:

It is elementary that a "jury," as understood at common law and as used in our Constitutions, Federal and state, signifies

twelve men duly impaneled in the case to be tried. A less number is not a jury. *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580. In *Lamb v. Lane*, 4 Ohio St. 167, Chief Justice Thurman said: "That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." Opinion of Justices, 41 N. H. 550; *United States v. 1,363 Bags of Merchandise*, 2 Sprague, 85, Fed. Cas. No. 15,964; *United States v. Philadelphia & R. R. Co.* 123 U. S. 113, 31 L. ed. 138, 8 Sup. Ct. Rep. 77. In *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720, it is held that "the jury provided by law for the trial of indictments is composed of twelve men; a less number is not a jury, and a trial by jury in a criminal action cannot be waived by the accused." In *State v. Stewart*, 89 N. C. 564, 4 Am. Crim. Rep. 111, an indictment for assault and battery, Justice Ashe says: "It is a fundamental principle of the common law, declared in 'Magna Charta,' and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' Art. 1, § 13. The only exception to this is where the legislature may provide other means of trial for petty misdemeanors with the right of appeal. . . . The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner,"—citing 1 Bishop, *Crim. Law*, 759. In *State v. Holt*, 90 N. C. 750, 47 Am. Rep. 544, an indictment for cruelty to animals, it is held that a jury trial cannot be waived by the defendant in a criminal action.

The defendant may plead guilty, or *nolo contendere*, or autrefois convict, and of course the impaneling of a jury is unnecessary; but when he pleads not guilty in cases, such as this, where a trial by jury is guaranteed by the organic law, he must be tried by a jury of twelve men, and he cannot waive it. *State v. Moss*, 47 N. C. (2 Jones, L.) 66; *Cancemi v. People*, 18 N. Y. 128. It would have been much safer for his Honor to have followed the settled precedents of this court, and have discharged the jury and impaneled another.

Innovations in settled methods of procedure are generally unwise, especially in criminal cases. In this connection it is well to remember the words of Chief Justice Merrimon: "A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice, by inadvertence and lack of due consideration. . . . In the economy of

time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right." *State v. Holt*, supra.

New trial.

Clark, Ch. J., dissenting:

The Constitution, art. 1, § 13, provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Section 19 of the same article provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The right to trial by jury is beyond controversy, both in civil and criminal cases.

There can be no controversy either that the jury here referred to means "twelve men," not because there is any reference to trial by jury in *Magna Charta*, or that it would have any authority if there was, but because our Constitution, made by our people for our own government, provides for a jury, and the word "jury" must be given the signification which it had at that time, which was a jury of "twelve men." In some states a jury now may consist of less than twelve and in several a unanimous verdict is not required. The Supreme Court of the United States in passing upon this matter has held, in several cases, that the number that should compose a jury, and whether unanimity should be required or not, is entirely a matter for the people of each state, and that the 14th Amendment does not impose any restrictions upon the states in this regard. The requirement in the 5th and 6th Amendments to the Federal Constitution of a jury trial is held also to apply only to the Federal courts. This matter has been fully discussed and has been settled in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; and many other cases.

In *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494, in sustaining a conviction by a jury of eight as provided by the Constitution of Utah, Mr. Justice Peckham reviews the authorities to the above effect, approves them, and says, among other things: "It is emphatically the case of the people by their organic law, providing for their own affairs, and we are

of opinion they are much better judges of what they ought to have in these respects than anyone else can be. The reason given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado Case* for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide their organic law for the change of both or either." See also Cooley, *Const. Lim.* 7th ed. 455 et seq.

Neither the Federal Constitution nor *Magna Charta* has any bearing upon the subject. There have been law writers and judges who have stated that *Magna Charta*, chap. 39, guaranteed the right of trial by jury; but this view originated at a time when historical statements were received with less investigation than at present. *Magna Charta* was but one of several agreements made between King John (and later by his son Henry III.), on the one side, and the insurgent barons, on the other. *Magna Charta* was sealed (not signed) on Friday, June 19, 1215, in the meadow of Runnymede (then a little island) on the river Thames 3 miles below Windsor Castle and in sight from its towers. It was an agreement between the King, on the one hand, and the great barons, on the other. The words therein, *judicium suorum parium*, had no reference to a trial by jury. McKechnie, *Magna Charta*, 158, 456, 457; 1 Pollock & M. *History of English Law*, 392, 581. About fifty years before, at the Assizes of Clarendon, 1166, Henry II. instituted the germ of the grand jury which at first consisted of twelve men (1 Pollock & Maitland, 131); but thorough investigation has shown that the petty jury was not known in England till nearly 150 years after *Magna Charta*. At first the verdict was rendered by a majority; that is seven was a valid verdict. Britton, I. 31. There had been further back, in remoter times, instances in which the witnesses were called upon to aid the judicial officer in passing upon a criminal offense. But that cannot be mistaken for the jury, which, when gradually instituted, soon became of the fixed number of twelve, and from which witnesses are excluded. *Magna Charta* could not refer to the "jury," which was then unknown.

Besides, the word *judicium* does not mean "jury," but "judgment." McKechnie, *Magna Charta*, 407. What the barons meant in *Magna Charta* was not that everyone should have the right to an impartial trial by jury, for at that time juries were

unknown, and the common people had indeed less consideration from the mail-clad barons than from the King. What the barons did stipulate for was a "special privilege" for themselves. The King, when in need of money, had been in the habit of sending his officials and judges to try charges, most often trumped up, against wealthy barons, and extorted large supplies out of them. Therefore this stipulation in *Magna Charta* granted the special privilege that, when the King had any charge against one of their order, he should not send his judges against them, but the charge must be tried by men of their own order, i. e., by barons. They were to be convicted and sentenced, not by the King's judges, as the common people were, but they were subject only to *judicium suorum parium*; i. e., to the "judgment of their equals." The common people might be tried by the judges, who were all appointed by the King and removable at his pleasure. But they made him agree that when he had any charge against barons they should be tried and judged "by their peers;" that is, by men of their own order. The judges were commoners, and not the peers or equals of the barons, who would have scorned the idea of being tried by them. 1 Pollock & M. *History of English Law*, 152, 539, 581. The judges were the equals of other freemen and could try them. As to the vast masses of the people who were not even freemen, they were guaranteed no trial except in the barons' courts, who were practically their owners. The barons, therefore, in stipulating for a trial of "every freeman" by their peers, were stipulating for a special privilege exempting them from the jurisdiction of the King's courts. This privilege, under the circumstances, may have been very necessary for their protection, for the judges were the King's agents. But the provision cannot be lauded as guarantying to us "trial by jury," which was then an unheard of institution, and to which the barons would under no circumstances have submitted. In McKechnie on *Magna Charta*, the original sources of information are marshaled and interestingly discussed.

King John possessed no power he could confer upon or withhold from the people of this state. No agreements made between him and his barons, which were constantly broken, can restrict or bind us. *Magna Charta* and other similar contracts between them are of interest as historical documents of a stage far below ours in the development of human rights. They confer no rights upon us, still less do they restrict our right to self-government. We base our right to this, not upon the grant of any King, but upon the inherent power to gov-

ern ourselves, restricted only by the Constitution and laws which we ourselves have made. These old documents are useful only to explain the meaning of words which we have used.

It is universally held that in civil cases trial by jury is simply a right or privilege, and can be waived, unless there is some statute forbidding it. 24 Cyc. 149; 17 Am. & Eng. Enc. Law, 2d ed. 1097; and numerous cases cited by both. Embraced in these decisions is also, as a corollary, the proposition that in civil cases by consent less than twelve may find a verdict.

In criminal cases there is a wide diversity in the courts. In some states it is held that a jury can be waived in all criminal cases, as in civil cases, and in others it is held that a jury cannot be waived except in misdemeanors, and in still others it has been held that a jury cannot be waived in any criminal case. There is nearly the same diversity as to the right, in criminal cases, of the defendant to agree that the verdict may be rendered by less than twelve men, or dispensing with unanimity, except that there are two or three states which, while holding that a jury cannot be waived, yet hold that by consent of the defendant the jury may consist of less than twelve men, when, as in this case, otherwise there would be a mistrial. The authorities on these propositions may be found in 24 Cyc. 150, 153, and 17 Am. & Eng. Enc. Law, 2d ed. 1098, in numerous cases there cited. For centuries in criminal cases a defendant retained his right to the ancient mode of "trial by battle," and could not be tried by a jury except by his consent. Hence the formula we still retain, "How will you be tried," and the reply, "By God and my country," i. e., by a jury. 1 Legal Hist. Essays, 657.

As the right to a trial by jury is guaranteed equally by the Constitution in civil and in criminal cases alike, it is difficult to understand why, if it is a requirement, and not merely a privilege, it can be waived in one class of cases, and not in the other. This distinction is not based upon the Constitutional phraseology, but upon the view which has happened to be taken by the incumbents of the bench in each state. Among the states which hold that a jury trial can be waived in criminal cases are Arkansas, Connecticut, Iowa, Kentucky, Louisiana, Nevada, New Jersey, Massachusetts, Michigan, Missouri, Minnesota, and Pennsylvania. Among the cases on the point whose reasoning is most worthy of consideration are *State v. Kaufman*, 51 Iowa, 579, 33 Am. Rep. 148, 2 N. W. 275, 2 Am. Crim. Rep. 626; *Com. v. Dailey*, 12 Cush. 80; *Murphy v. Com.* 1 Met. (Ky.) 365; *State v. Sackett*, 46 L.R.A. (N.S.)

39 Minn. 69, 38 N. W. 773; *Com. v. Sweet*, 4 Pa. Dist. R. 136; *State v. White*, 33 La. Ann. 1219; and there are others.

In this state it has been held that, while in civil cases a jury trial can be waived, this cannot be done in criminal cases. *State v. Stewart*, 89 N. C. 564, 4 Am. Crim. Rep. 111; *State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544. *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720, holds, as in *State v. Holt*, that a jury trial cannot be waived; but it does not directly pass on the point whether by consent a verdict may not be rendered by a lesser number, though that is a reasonable inference.

There can be no reason shown, upon the face of the Constitution, why a jury trial should be held to be a privilege in civil cases but an ironclad requirement in criminal. We, however have, as just said, no case in which it has been expressly held that the trial, at the request of the defendant, cannot proceed with eleven jurors. It should seem that it could, as the Constitution also guarantees the defendant a right to a "speedy trial." Among able opinions to this effect are: *Shaw, Ch. J.*, in *Com. v. Dailey*, 12 Cush. 80; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773; *Simpson, Ch. J.* in *Murphy v. Com.* 1 Met. (Ky.) 365. To similar purport: *State v. Borowsky*, 11 Nev. 119; *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34, 3 Am. Crim. Rep. 238; *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, 2 N. W. 275, 2 Am. Crim. Rep. 626. The following cases also hold valid the waiver of any jury in criminal cases: *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27; *Dillingham v. State*, 5 Ohio St. 280; *Edwards v. State*, 45 N. J. L. 419; *Ward v. People*, 30 Mich. 116, 1 Am. Crim. Rep. 565; *State v. Mansfield*, 41 Mo. 470; *State v. Cox*, 8 Ark. 436; and there are others.

It was at the instance and by the request of the defendants in this case that, one of the jurors becoming incapacitated, no mistrial was entered, and it was agreed that the case should proceed with eleven jurors and that no entry should be made. The judge finds as facts that "the solicitor moved for a continuance on ground of the absence of two witnesses to the shooting; one being ill and in bed, and the other in South Carolina. The defendants resisted the continuance and insisted on a trial at this term, and the court denied the motion for continuance. The defendants did not exhaust their peremptory challenges. The jury was impaneled and an officer sworn, Wednesday. The next morning, before any evidence had been offered, the solicitor asked for the withdrawal of a juror because, since the adjournment, he and the counsel for the defendants had ascertained that one of

the jurors was subject to fits and that counsel did not think he was mentally competent to sit on the jury; that the state was willing to call in another juror, or to make a mistrial, or to get an entirely new panel. Counsel for defendants insisted on proceeding with eleven men, and thereupon it was agreed in open court, the defendants speaking in open court through their counsel, and the solicitor for the state, that the case would proceed with eleven jurors, and that the clerk should make no record of the fact that one of the jury had been excused by consent; the defendants waived their right to have a full panel, and stated that no point should ever be raised that only eleven men were in the jury box; and thereupon the court excused said juror and directed the trial to proceed. The two defendants are men of more than ordinary intelligence, McCracken being twenty-seven or twenty-eight years of age, and the defendant Rogers about forty years of age, and their families are prominent and wealthy. Both these defendants are possessed of sufficient mental capacity to understand, and did understand, that both they and their counsel were entering into said agreement and electing to proceed with eleven jurors by their assent, and that the court consented to this course. These defendants were represented by four able and experienced counsel, one of whom has filled the office of solicitor for two terms." The trial occupied four days. No objection was made as to the juror being excused until two days after the verdict. The defendants did not ask to discharge their counsel, nor did counsel ask to withdraw, and the same counsel who made the agreement made the motion in arrest of judgment upon the ground that it was invalid.

The prisoners have had every right and privilege which is guaranteed them by the Constitution. They thought it was to their benefit to proceed with eleven jurors, and asked that it should be done. The courts may well scrutinize closely all offers to waive a jury trial in criminal cases, because the defendants may act unadvisedly in some cases, and the consequences may be serious; but this should not cause the Constitution to be construed differently as to the trial by jury in civil cases and in criminal cases.

In the present case the court finds as facts that the prisoners were men of intelligence and means, and were represented by several able counsel, one of whom was formerly solicitor for that district for eight years. The prisoners do not show that they suffered any detriment in the course of the trial. They have had a fair trial, and 46 L.R.A. (N.S.)

they have been deprived of no constitutional right.

A defendant has a constitutional right to a speedy trial by jury. Yet he waives this provision by obtaining a continuance. A plea of guilty dispenses with a jury trial altogether. Why, therefore, cannot a defendant agree to accept a verdict by eleven jurors when he has competent counsel and is himself intelligent, and both his counsel and himself think it for his interest to do so? Especially when this is done with the consent of the court and the solicitor representing the state. There is nothing to indicate that the prisoners suffered any prejudice from the absence of the other juror, and they ought not to obtain any benefit by their breach of good faith.

TENNESSEE SUPREME COURT.

ALBERTA BENNETT, by Next Friend,
Appt.,
v.

NASHVILLE TRUST COMPANY.

(— Tenn. —, 153 S. W. 840.)

Trust — modification by equity — hastening payment.

Equity may direct the present payment to the beneficiary of the income of a fund placed in trust to accumulate until she reaches a specified age, if intellectual promise, the need of education, and necessitous circumstances, unforeseen by the testator, have wrought such a change in her condition that the creator of the trust would have so directed had he foreseen the situation in which she finds herself.

(February 22, 1913.)

Note. — Power of court to hasten enjoyment of trust fund.

The question with which this note is concerned is as to the power of a court of equity to break in upon the terms of a trust which neither expressly nor impliedly authorizes such a course to be taken, by directing all or a part of the income or principal of the trust estate to be handed over to or expended for the benefit of the beneficiaries of the trust before the time fixed for its enjoyment. It does not include decisions as to the power of the court to break in upon the terms of the trust in other ways; as, by authorizing leases for a longer term than is permitted or contemplated by the creator of the trust, or by authorizing the sale of trust property and reinvestment of the proceeds for the purpose of increasing the income therefrom.

As to the power of the court to change the number of trustees designated in the instrument creating the trust, see note to *Barker v. Barker*, 1 L.R.A. (N.S.) 802.

A PPEAL by plaintiff from a decree of the Chancery Court for Davidson County dismissing a bill filed for permission to use the income of a trust fund for the alleged necessities of the minor beneficiary. Reversed.

The facts are stated in the opinion.

Mr. James T. Miller for appellant.

Mr. T. M. Steger for appellee.

Williams, J., delivered the opinion of the court:

Charles B. Weakley, of Davidson county, left a will containing the following clauses pertinent to the issues for determination, to wit:

"Fifth. To Alberta Bennett I give one thousand (\$1,000) dollars to be held by my

executor for her with all accumulations until Alberta attains the age of twenty-five years, when said sum with all accumulations is to be paid to her."

"Ninth. I nominate and appoint the Nashville Trust Company as executor of this my last will and as testamentary trustee to execute the directions herein contained, and my said executor is hereby vested with full power to sell and dispose of any part or all of my estate for the purpose of carrying into effect the provisions of the will."

In intervening clauses various devises and legacies were made, to which the language in the latter portion of the ninth clause refers.

Alberta Bennett, a minor, by next friend, filed a bill in equity in which it is alleged

As to the right of a trustee to execute a lease to extend beyond the terms of the trust, see note to Hubbell v. Hubbell, 13 L.R.A. (N.S.) 497.

As to the power of the court to control discretion vested in a trustee, see note to Trout v. Pratt, 8 L.R.A. (N.S.) 398.

The cases all agree that where peculiar circumstances have arisen not expressly provided for by the trust instrument, and not anticipated by its author, the court in the emergency that has arisen has jurisdiction to sanction acts by the trustees which in ordinary circumstances they would have no power to do. As said in *Curtiss v. Brown*, 29 Ill. 201, in which the question was as to the power of the court to order the sale of nonproductive property: "Exigencies often arise not contemplated by the party creating the trust, and which had they been anticipated would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency."

It is not the convenience or even the benefit of the beneficiaries which will move the court to hasten enjoyment of trust funds, but the necessity of varying the terms of the trust in order to give effect to the ultimate intention of its creator. See *St. Paul's Church v. Atty. Gen.* 164 Mass. 188, 41 N. E. 231; *Mills v. Michigan Trust Co.* 124 Mich. 244, 82 N. W. 1046; *Ruggles v. Tyson*, 104 Wis. 500, 48 L.R.A. 809, 79 N. W. 766, 81 N. W. 367; and *Biddle's Appeal*, 99 Pa. 525, elsewhere set forth.

This power is most frequently exercised where property is held in trust for infants who have not sufficient means for their maintenance or proper education.

In one of the early decisions upon this subject (*Harvey v. Harvey*, 2 P. Wms. 21), a father had devised all his property to his eldest son; charged with the payment of a sum of money to each of his younger children when they should attain the age of twenty-one years, but made no provision for

their maintenance during minority. Application having been made in behalf of the younger children for maintenance, the master of rolls decreed that they should recover maintenance, observing that "these being vested legacies, and no devise over, it would be extreme hard that the children should starve when entitled to so considerable legacies, for the sake of their executors or administrators, who, in case of their deaths, would have the said legacies. That in this case the court would do what, in common presumption, the father if living would, nay ought to have done, which was to provide necessities for his children. That a court of equity would make hard shifts for the provision of children; as where younger children were left destitute, and the eldest an infant, equity would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children; and for the same reason, the court would likewise take a latitude in this case; that since interest was pretty much in the breast of the court, though the will were silent with regard to that, yet it should be presumed that the father who gave these legacies intended they should carry interest, if the estate would bear it: for everyone must suppose it to have been the intention of the father, that his children should not want bread during their infancy. Nay, that for this reason it had been held that, though a legacy were devised over in case of the legatee's dying before twenty-one, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance, with this difference only, that where the estate has appeared to be small, the court, in whose discretion it always lies to determine the quantum of interest, has ordered the lower interest."

And in *Aynsworth v. Pratchett*, 13 Ves. Jr. 321, where the infant beneficiaries of a trust created by the will of their father were entitled to the fund absolutely upon majority, and only £30 each per annum was given by the will to their mother for their maintenance, and her own income was only £100 under the will, an increase of the

that she, the minor beneficiary, is a girl of intellectual promise now in high school in Nashville, and that it is necessary in order to the completion of her education that permission be granted to use currently the income of the trust fund affected by clause 5 of the will. The situation and necessitous condition of the minor are set forth.

The Nashville Trust Company, trustee, answered that it was advised that it was its duty to hold the fund under the fifth clause, with accumulations, until the minor complainant arrived at the age of twenty-five years; no other disposition being warranted.

The special chancellor to whom the cause was submitted decreed that a court of chan-

cery was powerless to grant the minor the relief prayed, he being of opinion that the will unalterably fixed the status of the trust so that no allowance could be made for the minor's necessities, or to her at all, until she arrived at the age indicated by the will.

Nothing else appearing, it may be conceded that the special chancellor properly construed the fifth clause to effect a postponement until her twenty-sixth year of a distribution to or use by the minor of the income from the trust fund.

But is it a sound contention that under no circumstances can a court of equity order any part of such accumulations to be presently applied to the necessities of the

amount granted for maintenance was allowed.

The fact that the testator has provided a common fund for the support and education of the beneficiaries and the support of their parents will not preclude the court from increasing such allowance beyond the amount contemplated by the testator, where an additional allowance is needed for their maintenance and education. *Newport v. Cook*, 2 Ashm. (Pa.) 332.

In *Hallinan v. Hearst*, 133 Cal. 645, 55 L.R.A. 216, 66 Pac. 17, it was held that a minor beneficiary of a fund, contributed by the public to aid the families of members of the fire department who were killed in the discharge of their duty cannot compel payment of his share faster than it is required to relieve his necessities and contribute to his support.

Where there is a legacy by a parent to his children, or a grandparent to his grandchildren, or by one standing *in loco parentis*, equity may decree an allowance of interest if necessary for the support of the infant, whether the legacy be fixed or contingent on the attainment by the infant of a certain age. *Seibert's Appeal*, 19 Pa. 49; *Leiby's Appeal*, 49 Pa. 182; and see *Mole v. Mole*, 1 Dick. 310, where maintenance was allowed to an infant out of a legacy bequeathed to him by his father, although the will was silent as to maintenance, but directed an accumulation until he attained twenty-one years; and if he died before, the whole was given to another. But compare *Kime v. Welfft*, 3 Sim. 533; *Lomax v. Lomax*, 11 Ves. Jr. 48, 8 Revised Rep. 84; and *Errington v. Chapman*, 12 Ves. Jr. 20, hereinafter set forth, in which a contrary view appears to have been taken.

And where the welfare of the child requires, and especially where the legacy is a small one, the court will permit an encroachment upon the principal. See *Barlow v. Grant*, 1 Vern. 255; *Ex parte Green*, 1 Jac. & W. 253; *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840; *Re Muller*, 29 Hun, 418; *Stephens v. Howard*, 32 N. J. Eq. 244; and *Re Potts*, 1 Ashm. (Pa.) 340.

And *Re Bostwick*, 4 Johns. Ch. 100, it 46 L.R.A. (N.S.)

was held that the capital of infant remaindermen's estate may be broken in upon for their maintenance and education where the life tenant joins in the application.

In *Stephens v. Howard*, 32 N. J. Eq. 244, the court said: "The source of the power is easy to trace. It is found in the fact that the infant is the absolute owner of the property, no other person having either a present or prospective legal interest in it; and that, if the present enjoyment of the property is withheld, the infant must suffer, possibly for the advantage of some person who has no interest in the infant and was never thought of by the testator as a possible recipient of his bounty."

But in *Walker v. Wetherell*, 6 Ves. Jr. 473, the master of the rolls doubted whether the capital of an infant's estate should be broken in upon for purposes of maintenance and education, although the power of the court to authorize it was conceded.

Where under the provisions of a will the income only of a trust estate is to be used for the support of the beneficiaries, who were testator's wife and child, the court will not order a trustee to sell a portion of the estate to raise funds for that purpose, although it is likely that if the testator could have looked into the future and foreseen that the estate would not be productive of sufficient income, he might have framed his will differently. *Mills v. Michigan Trust Co.* 124 Mich. 244, 82 N. W. 1046.

In *Ruggles v. Tyson*, 104 Wis. 500, 48 L.R.A. 809, 79 N. W. 766, 81 N. W. 367, it is said that the fact that it would be for the best interest of infant owners of the estate in remainder to allow them an immediate benefit therefrom to maintain and educate them does not warrant a disturbance of the scheme intended to postpone such benefit to a later time; but that it is the necessity that something shall be done to guard against the danger that the title in remainder may be prevented from reaching them at all, which calls into activity the equity power of the court.

It has also been held in numerous instances that equity may make an allowance out

beneficiary, however exigent, imperative, and unanticipated they may be?

In the minor's bill of complaint, it was asked that proof be taken to show the character and extent of her necessities. If a reference had been ordered and executed respecting such, and it had appeared that circumstances unforeseen by the testator had wrought such a change in her condition as that she was practically destitute, is it a sound contention that the arm of equity is too short to reach to and remedy her plight by a current application towards her needs, of the income from a fund that is her own; and this because of the restriction imposed by the testator on mere management? We think not.

It is to be noted that what is asked in

complainant's behalf will not, on grant, affect the rights of any other legatee or beneficiary under the will. The quantum of her estate as *cestui que trust* is not to be enlarged. The court's action to the end sought would merely touch the management or mode of user, and would not proceed to even that limited extent if it were not made clearly to appear in proof that an exigency existed not contemplated by the creator of the trust, which, had it been in anticipation by him, would in likelihood have been provided for. A court of equity, acting *in loco parentis* or occupying the place of the trust creator, in such case, does what it conceives would have been done by the creator had he foreseen the situation of his beneficiary, in a substitution of another

of the income of a trust estate for the support of an infant *cestui que trust* although the instrument creating the trust contains no provision for maintenance and there is a direction that the income shall accumulate. *Mole v. Mole*, 1 Dick. 310; *Rhoads v. Rhoads*, 43 Ill. 239; *Knorr v. Millard*, 52 Mich. 542; 18 N. W. 349; *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877, 14 Atl. 490; *Tompkins v. Tompkins*, 18 N. J. Eq. 303; and *Newport v. Cook*, 2 Ashm. (Pa.) 332; *Pitts v. Rhode Island Hospital Trust Co.* 21 R. I. 544, 48 L.R.A. 783, 79 Am. St. Rep. 821, 45 Atl. 553.

It is within the power of a court possessing general equity powers to authorize a trustee to appropriate the interest, or even part of the principal, of a fund placed in his hands for accumulation, in trust for a minor until such minor arrives at full age, for the education and maintenance of such minor, where there is no other property of the minor adequate for these purposes, where the minor is of tender age, without any parent living, and where there is no devise over, and no third person interested in the fund. *Re Potts*, 1 Ashm. (Pa.) 340.

In *Havelock v. Havelock*, L. R. 17 Ch. Div. 807, 50 L. J. Ch. N. S. 778, 44 L. T. N. S. 168, 29 Week. Rep. 859, where there was an absolute direction for accumulation for twenty-one years of property worth £10,000 a year, thereafter to be held in trust for a certain person and for his eldest son and other sons in tail, it was held that as the father was possessed of only a moderate income, the sum of £2,700 per annum should be allowed him for the benefit of his two infant sons.

In *Rhoads v. Rhoads*, 43 Ill. 239, in speaking of the power of the court to anticipate the time of payment of a legacy left by a parent on trust to accumulate for his children, so far as it may be shown to be necessary for the maintenance of the beneficiaries, the court said: "This does not subvert the will, or tend to defeat the intention of the testator, for his children were the darling objects of his solicitude, and were he living, he would undoubtedly make ample provision for them. A court of chancery

may do what it is evident from the will the testator would do if living."

The same rule applies where the beneficiary, although of full age, is feeble-minded. *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840.

As a general rule, an allowance will not be made where the interest of the beneficiary is a contingent one, or where, though vested, it is liable to be defeated by the happening of some event before the period fixed for enjoyment, so that the right of some other person will be affected by the allowance,—unless, indeed, all persons likely to be affected join in the application. This rule, however, is subject to certain qualifications. One of these exists where the beneficiaries compose a class some of whom will absolutely take the fund, and all have an equal chance of taking or surviving. Another is that if there is a clear intention to be gathered from the whole instrument that the beneficiary is to have maintenance, the court will order it, though there is a gift over. So, also, where the gift is by a parent or grandparent to children having no means of maintenance; although the cases are at variance on this point.

In *Marshall v. Holloway*, 2 Swanst. 432, Lord Eldon said: "The court has never gone farther than this, that though the words of the will do not authorize the application of interest to the maintenance of the infants, yet if it can collect before it all the individuals who may be entitled to the fund, so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance; but if the will contain successive limitations under which persons not in being may become entitled, it is not sufficient that all the parties then living, presumptively entitled, are before the court, for none of the living may be the parties eventually entitled to the enjoyment of the property. In such a case, the order would be, in effect, to give for the maintenance of one person the property of another."

In *Kime v. Welcott*, 3 Sim. 533, where there was an express direction for accumulation during minority of infants (the tes-

course of management in order to the complete realization of his purposed bounty. If this be not competent to be done by a court of equity, it is not difficult to contemplate a situation in which the testator's purposed benefit would be defeated entirely; for example, a seizure of the beneficiary by a disease that would inevitably make her its victim before she had reached the age of twenty-five years.

The concept and doctrine may be of comparatively recent declaration and application, but the principle involved commends itself to the court as consonant with justice and the development of an equity system along lines of sound polity.

In *Denegre v. Walker*, 214 Ill. 113, 105 Am. St. Rep. 98, 73 N. E. 409, 2 Ann. Cas.

tator, their father, understanding that other ample provision had been made for the children, which proved to be a mistake), with a gift over if no child lived to be twenty-one years of age; and it appeared that there was the possibility of issue unborn who might be entitled to the accumulated fund, —it was held that it would not be proper to affect their rights by an allowance for maintenance.

In *Lomax v. Lomax*, 11 Ves. Jr. 48, 8 Revised Rep. 84, where a petition was presented for maintenance out of the interest of a legacy to the children of testator's daughter, to be vested when the youngest child should attain the age of twenty-one years, Lord Eldon refused the application, saying: "If all die under twenty-one and a child not yet in existence should come into existence and attain that age, that child clearly would take the whole interest as well as the principal. Therefore I may [not] give it to these children who may never become entitled to it."

In *Errington v. Chapman* 12 Ves. Jr. 20, where legacies with interest were given to grandchildren on their attaining the age of twenty-one years, with a gift over in case neither attained that age, maintenance was refused, though it appeared that the father was unable to furnish it.

But compare, with the three cases last preceding, *Mole v. Mole*, 1 Dick. 310; *Seibert's Appeal*, 19 Pa. 49; and *Leiby's Appeal*, 49 Pa. 182, *ubi supra*.

Where there is a devise over, the court will not direct an allowance for the maintenance and education of a minor to be made out of the fund to which he is to become entitled at majority. *Re Potts*, 1 Ashm. (Pa.) 340.

Where there is a gift over in case of the death of legatees before becoming of age, an allowance will not be made, although they are in straitened circumstances. *Miles v. Wister*, 5 Binn. 477. In this case the court said: "The word 'share' will very properly comprehend the aggregate sum of principal and interest, and I cannot conceive any reason why the testator should intend to separate one from the other in the 46 L.R.A. (N.S.)

787, quoting from *Marsh v. Reed*, 184 Ill. 263, 56 N. E. 306, the supreme court of Illinois, having under consideration the validity of a ninety-year lease of premises by a trustee in respect of which the testator had stipulated in his will "that no lease or demise shall be for a longer term or period than ten years," said: "The donor clothed the trustee with authority to rent the property and to collect the rents therefrom during the continuation of the trust, and in so doing placed a limitation upon the duration of any lease of the property to be made by the trustee. The effect of the decree is to enlarge the powers of the trustee in this respect, leaving the subject-matter of the trust in all other respects unimpaired. In other words, the decree

devise over. That being the case, it would be a manifest violation of the will, to order the payment of the interest to any of the legatees during their minority; it would be paying to one person what, in case of death during minority, was directed by the testator to be paid to another. The withholding the interest may be extremely inconvenient to the legatees, who appear to be pinched for a living, though not entirely destitute of support. But they must remember that their relation from whose bounty these legacies flow had a right to direct the course of them."

It is essential to the granting of an application for maintenance and education that the infant should have such an absolute title or interest in the trust or its income that the right of no other person will be affected by the allowance. Unless he has such an interest, the consent of any person entitled in remainder, whose estate may be diminished in value by the allowance, must be had before the application will be entertained. *Pitts v. Rhode Island Hospital Trust Co.* 21 R. I. 544, 48 L.R.A. 783, 79 Am. St. Rep. 821, 45 Atl. 553.

So, also, in *Re Davidson*, 6 Paige, 136; *Re Ryder*, 11 Paige, 185, 42 Am. Dec. 109; and *Deen v. Cozzens*, 7 Robt. 178, it was held that the court has no power to allow maintenance to infants out of a fund which may, on the happening of a contingency, belong to some other person.

Where the interest of minor remaindermen in a trust estate is a contingent one, equity will not make an allowance to them for their maintenance and education from the trust estate during the existence of the life tenancy. *Ruggles v. Tyson*, 104 Wis. 500, 48 L.R.A. 809, 79 N. W. 766, 81 N. W. 367.

In some cases maintenance has been allowed where there was a direction for accumulation of income during the minority of infants, with a gift over in case none attained full age (*Greenwell v. Greenwell*, 5 Ves. Jr. 194; *Cavendish v. Mercer*, 5 Ves. Jr. 195, note, 5 Revised Rep. 27; and *Fendall v. Nash*, 5 Ves. Jr. 197, note); though Lord Chancellor Loughborough in the case

does not defeat the trust, but was entered upon the theory that its provisions were necessary to carry into execution the design of the donor. The requirement that the leasing should be for periods not longer than ten years was, no doubt, dictated by the belief of the donor that the rental value of the property would increase, and that short terms of letting the property for rent would best conserve one of the ends he designed to secure; namely, to provide an income for his wife and his children. The business judgment of the donor was no doubt correct at the time, but in this instance, as is so frequently true in other cases, it is demonstrated that it is not within the power and judgment of man to in-

fallibly anticipate future events and direct that which shall be the wiser course to be pursued in after years. The question being one which relates merely to the better or more judicious mode of managing and controlling the subject-matter of the trust in order that the design and wishes of the donor may be more completely accomplished, the stringent rule which properly obtains when the application is to divest the trustee of title to the property which is the subject-matter of the trust and vest such title in direct opposition to the will of the donor ought not to be given full application."

In *Knorr v. Millard*, 52 Mich. 542, 18 N. W. 349, it was held that, where a bequest is contingent upon the coming of age of the

first cited observed that he feared it would be his will, and not the testator's.

But in *Errat v. Barlow*, 14 Ves. Jr. 202, 9 Revised Rep. 273, *Greenwell v. Greenwell* and *Fendall v. Nash*, supra, were disapproved by Lord Eldon, who states: "The result is that if the chance of surviving [among several children] is equal among all, and no other interest that upon any contingency would take effect would be defeated, maintenance shall be allowed out of the interest; but it is impossible to give it where, in any event, under the operation and construction of the will, that interest may possibly belong to other persons."

But the court will decree an allowance for the education of beneficiaries out of a trust estate directed to be accumulated, where, although there is an executory limitation over in event of death of any of the beneficiaries without issue before the time fixed for enjoyment, they compose a class some of whom will absolutely take the fund, and all have an equal chance of taking or surviving. *Newport v. Cook*, 2 Ashm. (Pa.) 332.

Wherever children born and to be born have a common interest in a fund, the fund if necessary may be applied for the maintenance of the children. *Haley v. Bannister*, 4 Madd. Ch. 275, 20 Revised Rep. 299.

And in *Ex parte Kebble*, 11 Ves. Jr. 604, 8 Revised Rep. 250, Lord Eldon said: "The case in which maintenance has been allowed, though not given by the will, is where there are children some or one of whom must take the property and all have an equal chance by surviving and a present interest, but cannot be done if there is a gift over; or if the children are not all the persons among whom it is to go."

So, also, in *Knorr v. Millard*, 52 Mich. 542, 18 N. W. 349, where testator directed that a bequest to the children of a certain person or their survivors should be placed at interest by the executor and equally divided when they became of age, the children of any child dying under age to receive their parent's share, it was held that advances from the accumulation so provided for, if necessary for the support of the beneficiaries, might be made by the court on

proper application. It was said: "But inasmuch as these bequests are not contingent except as to time of payment, and as the chances of all the children are equal, the power has been recognized in the court of chancery, in its administration of trusts, to provide for making necessary advances out of the income when the infants are otherwise likely to suffer, even where by the terms of the trust itself an accumulation is contemplated. . . . Our statutes have expressly provided for the application of this same doctrine to trusts in land. Comp. Laws § 4106 [How. Stat. § 5556]. We see no reason why, on a proper original application to the circuit judge sitting in equity, on a petition with sufficient showing, he may not, if in his opinion the exigency warrants it, give such relief as will be proper, under such safeguards and conditions as will secure its honest use."

An allowance necessary for the maintenance of an infant may be ordered by a court of equity out of the income of a trust in the residue of an estate, created by a will giving the trustee discretion to apply a portion of such income to the education of the infant, but making no provision for his maintenance, where the mother of the infant is the only other person entitled to any other part of the income, and she joins in a request for the allowance. *Pitts v. Rhode Island Hospital Trust Co.* 21 R. I. 544, 48 L.R.A. 783, 79 Am. St. Rep. 821, 45 Atl. 553.

If there is a clear intention to be gathered from the whole will that the beneficiary is to have maintenance, the court will order it, although there is a gift over. *Longwith v. Riggs*, 123 Ill. 258, 14 N. E. 840. In this case the beneficiary was a feeble-minded daughter of the testator, for whom he devised a share in his estate in trust to apply the annual income therefrom to her support, further providing that upon her death the estate bequeathed to her should be equally divided among the other children.

The power of a court of equity to provide for the maintenance and education of an infant beneficiary out of a trust fund where no provision therefor has been made by the creator of the trust is in some

legatee, a court of equity has power to provide advancements out of the income where a minor beneficiary is about to suffer, and and this although the trust itself contemplates an accumulation until such beneficiary comes of age the court saying: "We see no reason why . . . [the court] sitting in equity on a petition, with sufficient showing, . . . may not, if in . . . [its] opinion the exigency warrants it, give such relief as will be proper." See also, *Re Potts*, 1 Ashm. (Pa.) 340; *Re New* [1901] 2 Ch. 534, 85 L. T. N. S. 174, 70 L. J. Ch. N. S. 710, 50 Week. Rep. 17; 39 Cyc. 316, 443.

As we conceive the true rule to be, indicated above, the court will only so direct

a use of such income in behalf of a beneficiary where an exigency, nonexistent at the creation of the trust, has arisen, which exigency is one not then anticipated by the testator; for, if the testator saw or foresaw the plight of his beneficiary, and yet intended that his gift should be withheld until she matured in age, we would deem it to be beyond the power of the court to alter a purpose thus declared.

In dismissing the bill on the chancellor's construction of clause 5 of the will, without referring the case to the master for precedent proof and report as was prayed by complainant the court below erred. Reversed and remanded.

jurisdictions expressly affirmed and extended by statute.

In England, an act known as Lord Cranworth's act was passed in 1860, being 23 and 24 Vict. chap. 145, § 26, which provides: "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant or otherwise to apply for or towards the maintenance or education of such infant the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not."

This provision was superseded and extended by the conveyancing and property act (44 and 45 Vict. chap. 41) section 43 of which provides: "Where any property is held by trustees in trust for an infant, whether for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance, education, or benefit the income of that property or any part thereof, whether there is any other fund applicable to the same purpose or any person bound by law to provide for the infant's maintenance or education or not. . . . This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

Such "a contrary intention" is not evidenced by a direction to accumulate the income of an infant's trust fund, such direction being held to be intended to preserve the income, and not to prevent the applica-

tion of it to their benefit if necessary. *Re Thatcher*, L. R. 26 Ch. Div. 426, 53 L. J. Ch. N. S. 1050, 32 Week. Rep. 679.

In New York, it is provided by statute that where the rents and profits of real estate or the income of personal property are directed to be accumulated for the benefit of a minor, when such minor shall be destitute of other means of support or education the supreme court at special term, and, where such accumulation has been directed by a last will and testament, the surrogate court of any county in which such last will and testament has been admitted to probate, upon the application of such minor or his guardian, may direct a suitable sum out of the moneys accumulated to be applied for his support or education.

This provision was applied in *Re Fritta*, 19 Misc. 402, 44 N. Y. Supp. 344, where a will was construed as creating a trust for the accumulation of the rents and profits of an estate during the minority of the devisee.

And in *Re Wagner*, 81 App. Div. 163, 80 N. Y. Supp. 785, this statutory provision was held applicable notwithstanding a gift over in event of the death of the beneficiary before arriving at the age of twenty-one years; the court basing its conclusion upon the circumstance that under the provisions of the New York statutes a direction to accumulate, to be valid, must be for the benefit of an infant and terminate at or before the expiration of the minority, so that in any event the infant must be entitled to the income.

A like conclusion was reached in *Re Lehman*, 2 App. Div. 531, 37 N. Y. Supp. 1086, although the will contained a gift over in event of the death of the legatee during minority.

While the power of courts of equity to hasten enjoyment of a trust fund is most frequently exercised for the benefit of infants, it has also been exercised in other cases where the exigencies of the situation have seemed to demand it.

In *Pennington v. Metropolitan Museum of Art*, 65 N. J. Eq. 11, 55 Atl. 468, a testator had given real and personal property

in trust to apply the income therefrom (1) to the payment of all taxes and assessments and other impositions upon the trust fund; (2) to the payment of \$500 annually to each of two persons as long as he should live; (3) to use and apply the remainder in improvements upon the real estate held in trust, and, if there should still remain a balance, to pay it to the Metropolitan Museum of Art for the purpose of founding or increasing an endowment fund. Upon the death of the longest liver of the two annuitants, the entire trust estate was given to the Metropolitan Museum. The income of the whole fund having become insufficient to discharge the annual taxes imposed upon the real estate in the trust, and there being no reason to anticipate that the income would thereafter become sufficient to pay the taxes and other impositions, thereon, the Metropolitan Museum, upon a bill for relief filed by the trustees respecting the disposition and management of the trust fund, joined with the trustees in praying that it might be put in immediate possession of the real estate in the trust, undertaking to exonerate the trustees thereafter from the payment of any taxes, etc., thereon. It appeared that if the trustees could be relieved from the burden arising from the requirement to pay the impositions on the real estate included in the trust, the income from the personality included therein would not only suffice to pay the annual legacies, but would leave a large surplus. The value of the trust estate was so large that it was clear that the testator's sole purpose could not be to secure the annual payment of the comparatively paltry sums given to the annuitants; but in probability he contemplated that the income from the personal estate and such of the real estate as produced income would always be sufficient to satisfy the primary charges imposed thereon and the annual sums directed to be paid, and that his purpose was to keep the nonimproved and nonincome-producing real estate in the trust until its termination, when the ultimate beneficiary would receive it with the benefit of the unearned increment. To grant the prayer that immediate possession of the real estate might be given would, therefore, effect a change in the scheme of the trust as devised by the testator. It was held that if the testator did not anticipate and provide for the income being exhausted by the impositions upon the real estate, and if by a change of the scheme of the management of the trust the benefits intended for the annuitants and the residuary beneficiary might be carried out, a court of equity, with the consent of the latter, had the power to direct and instruct the trustees to so change the scheme of the trust as to effectuate the testator's intention. The court said: "It cannot, however, be open to doubt that a court of equity, in dealing with trusts, has a right to break in upon and thwart the expressed will of the creator of the trust in some cases. A notable example of such a case is 46 L.R.A. (N.S.)

when the trustee, to whom the creator of the trust has expressly given power of management and control, becomes incompetent, or is misconducting himself, to the peril of the trust and those interested therein, this court has never hesitated to remove such a trustee and to substitute its own appointee. The reason for such action is evidently necessity, and its purpose is to carry out the expressed intention of the creator of the trust, which intention is imperiled if his appointment of a trustee cannot be revoked for good reasons, and a trustee substituted by the decree of the court. If trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate to wholly prevent the benefits intended by its creator, and they seek instructions and directions as to their duty, I think that instruction and directions for a course of conduct which, though differing from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case. The benefits intended for the beneficiaries are the main subjects of consideration. The modes in which those benefits may be attained are incidental, and necessity may require a change of mode to produce the intended effect. The power of the court may well be exercised in a case of evident necessity. How far it may extend on other grounds need not be considered. It is not improper to add that I should find extreme difficulty in applying even the doctrine of necessity to a case where the creator of the trust has plainly disclosed an intent to limit the benefit he intended, by an adherence to a course of conduct expressly mapped out, in the management of the trust. In the present case, if we assume that the testator contemplated a situation such as now confronts the trustees, and made express provision for it, how could it be maintained that any necessity existed requiring the court to direct the trustees to take another course of conduct on the mere ground that it would be more beneficial than that course which the testator prescribed?"

In *Re Colson, Kay*, 133, 2 Eq. Rep. 257, 23 L. J. Ch. N. S. 155, 2 Week. Rep. 111, where a testator created a trust in certain personal property, to continue for sixty years, or, if the law would not allow that, then during the lives of his two sons, and of the survivor, and for a further period of twenty-one years, the income of which was to be used in keeping in repair property devised to his sons in tail, and further directed that the surplus income should be paid to the person who should for the time being be in possession of such property under the devise in his will during the continuance of the trust, and after the expiration thereof he directed the trustees to pay over the trust fund, one half to the person then in possession of each of the farms devised, provided that such persons were one of his sons or a descendant of one of his sons, and, if not, then he gave it over.

The sons by joining with their eldest sons in a disentailing deed having cut off the entail, it was held that as the testator intended that whoever took the estates for an absolute interest should have the fund as well, and the law having enabled the parties to accelerate the interest in the real estate, the enjoyment of the fund must be accelerated also.

Where there is an absolutely vested gift made payable at a future event, as upon the legatee's attaining a certain age, or upon the decease of an annuitant, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee. *Wharton v. Masterman* [1895] A. C. 186, 64 L. J. Ch. N. S. 369, 11 Reports, 169, 72 L. T. N. S. 431, 43 Week. Rep. 449; *Saunders v. Vantier*, 4 Beav. 115; *Josselyn v. Josselyn*, 9 Sim. 63; *Rocke v. Rocke*, 9 Beav. 66; *Gosling v. Gosling*, *Johns. V. C. (Eng.)* 265, 5 Jur. N. S. 910; *Coventry v. Coventry*, 2 Den. & S. 470, 13 L. T. N. S. 83, 13 Week. Rep. 985; *Re Jacob*, 29 Beav. 402.

This principle is as applicable where the legatee is a charity as where he is an individual. *Wharton v. Masterman* [1895] A. C. 186, 64 L. J. Ch. N. S. 369, 11 Reports, 169, 72 L. T. N. S. 431, 43 Week. Rep. 449.

It is difficult to tell whether this doctrine is based upon the idea that the postponement of enjoyment is invalid for repugnancy to the gift, or whether it is simply an exercise of the power of equity over the trust. The former idea seems to have been entertained by the vice chancellor in *Gosling v. Gosling*, *Johns. V. C. (Eng.)*, 265, who said: "The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age,—unless, during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment,—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits there has been an intestacy,—the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

But where the testator has devised his estate in trust for all his children to be ac-

cumulated for fifteen years, the court will not direct the trust fund to be paid over to the beneficiaries who are or who shall become of age, on the ground that one of the sons has no trade or profession by which to live and no means, and one of the daughters is a widow, with a family of small children, and without means except as may come to them through the estate; although it may, on a proper case being made out, order the trustee to anticipate the time of payment under the will so far as it may be shown to be necessary for the maintenance of the devisees. *Rhoads v. Rhoads*, 43 Ill. 239.

Where an accumulation of a trust fund for a charitable purpose is directed, the courts will interpose to prevent an unreasonable accumulation. See *Brigham v. Peter Bent Brigham Hospital*, 67 C. C. A. 393, 134 Fed. 513; *Girard Trust Co. v. Russell*, 102 C. C. A. 592, 179 Fed. 446; *Duggan v. Slocum*, 34 C. C. A. 676, 63 U. S. App. 149, 92 Fed. 806; *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346, 26 Atl. 896; *Odell v. Odell*, 10 Allen, 1; *St. Paul's Church v. Atty. Gen.* 164 Mass. 188, 41 N. E. 231.

To authorize interference by a court of equity with an accumulation directed by a testator for a charitable purpose, the accumulation should be unreasonable, unnecessary, and to the public injury. It is not enough that the trustees are not desirous to continue it, or that anyone in behalf of the charity asks that it be not continued. The court must be satisfied that there is a good cause why the testator's directions should not be carried out. *St. Paul's Church v. Atty. Gen.* 164 Mass. 188, 41 N. E. 231.

In *Biddle's Appeal*, 99 Pa. 525, where a testator devised his estate in trust to permit a certain person to occupy certain premises during her lifetime, and out of the income of the rest of his estate to pay insurance, taxes, and divers annuities, and after the death of the life tenant and of the annuitants to convey and transfer the whole estate, with the accumulations, to a charity, the court refused to sanction a transfer, before the death of the life tenant and the annuitants, of the residue remaining after setting aside a fund the interest whereof was sufficient to pay such taxes, insurance, and annuities. The court said: "Why, then, shall the clear and explicit directions of the testator be disobeyed? His right to postpone the time when the hospital shall enjoy the fruit of his bounty cannot be denied. It is not in conflict with any principle of public policy, of religion, or morality, and does not impinge on any statute. Full effect must therefore be given to the clear intent of the will. *Bainbridge's Appeal*, 97 Pa. 482. Reasons satisfactory to the testator induced him to withhold all aid from the hospital until the time when the whole trust of the executors was to be determined. In giving construction to this will, we need not seek for the motive of the testator. It was not necessary for him to state it, and

he has not. His beneficiaries have no right to inquire his reasons for giving at once to some, and after a long interval, to others. He may have thought it for the best interests of the hospital to withhold his aid until he could give it the whole residuary fund of his large estate. He may have thought its future necessities would be greater than the present. In the absence of reasons stated by him, we must not conjecture some, and thereby prevent the reasonable and natural meaning of the language used. As was said in *Bainbridge's Appeal*, supra, the testator may have thought, as the good man of the honest house said to the laborer who complained of the inequality of the payment, is it not lawful for me to do what I will with mine own? It is of no consequence that we may think the testator might well have given a portion of his estate to the hospital on his death, or at some earlier period of time, than expressed in his will. He thought otherwise, and the opinion of others as to what he ought to have done cannot be substituted for what he did do."

E. S. O.

MISSISSIPPI SUPREME COURT.

MOBILE & OHIO RAILROAD COMPANY,
App't.,

v.

MRS. SALLIE D. MORELAND.

(— Miss. —, 61 So. 424.)

Damages — punitive — refusal to permit passenger to leave train.

Punitive damages may be awarded against a railroad company which refuses to stop a train upon request at a flag station at which a passenger is entitled to alight.

(March 31, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Wayne County in plaintiff's favor in an action brought to recover damages for defendant's refusal to permit plaintiff to leave its train at her destination. Affirmed.

The facts are stated in the opinion.

Mr. Carl Fox, for appellant:

By reason of an inadvertent failure to stop a train at a station where a passenger has a right to disembark, the railroad company does not lose all of its rights with respect to the running of the train.

Yazoo & M. Valley R. Co. v. Hardie, 100

Note.—As to measure of damages for carrying passenger beyond destination, see notes to *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17 L.R.A.(N.S.) 1226; and *Ft. Smith & W. R. Co. v. Ford*, 41 L.R.A.(N.S.) 745. 46 L.R.A.(N.S.)

Miss. 132, 34 L.R.A.(N.S.) 740, 55 So. 42, 967.

It is not required to stop between stations.

Mississippi & T. R. Co. v. Gill, 66 Miss. 39, 5 So. 393.

Mr. J. M. Boone, also for appellant:

Where the act is done without any bad intention, there is no ground under which punitive damages can be awarded.

Philadelphia, W. & B. R. Co. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223, 8 Am. Neg. Cas. 348; *Yazoo & M. Valley R. Co. v. Hardie*, 100 Miss. 132, 34 L.R.A.(N.S.) 740, 55 So. 42, 967; *Alabama & V. R. Co. v. Lowry*, 100 Miss. 860, 57 So. 289.

Messrs. Heidelberg & Heidelberg for appellee.

Cook, J., delivered the opinion of the court:

Shubuta and Boyce are two near-by villages, situated on the railroad of appellant. Plaintiff below, appellee here, purchased a ticket at Shubuta which entitled her to carriage from that station to Boyce, and then embarked upon one of appellant's passenger trains. This ticket was delivered to the conductor of the train. Boyce was a flag station, at which the trains did not stop to take up passengers unless flagged; but tickets were sold from other stations to Boyce, and whether it was a flag station, or a station at which all trains stopped, can have no significance in this case, as appellee had the same right to have the train upon which she had taken passage stopped long enough for her to disembark, as she would have had had her destination been a regular stop. When the train reached Boyce, appellee, discovering that she was being taken by her station, immediately informed the flagman that she had a ticket to Boyce, and asked that the train be stopped. The flagman replied that he would not stop the train. Appellee insisted, telling him that she was anxious to stop in order that she might send her daughter to Shubuta to take her place at the bedside of a grandchild, then dangerously ill. The flagman still declined to stop the train, but leisurely left the coach, apparently in search of the conductor, and soon thereafter the conductor came into the coach, where he found appellee in tears and much distressed. Appellee besought the conductor to stop the train, telling him also, why she desired to reach her daughter immediately. The conductor also refused to stop the train, because, in his opinion, he would by doing so violate the laws of the state.

Appellee then said that she would see

if something else could not be done, and, according to her testimony, the conductor "sneeringly" said, "You can sue the company." Appellee was carried on to the next station and furnished transportation back to Boyce, after having remained at this station about three hours. It appears from the evidence of the conductor that he could have stopped the train when requested in about one-half minute. The excuse given for failure to stop the train at Boyce was inadvertence and forgetfulness. It seems that the conductor at first denied that appellee had a ticket, but, discovering his error, he finally admitted the fact. In this state of the record, the trial court by its instructions authorized the jury to find exemplary damages. The verdict of the jury was for plaintiff, assessing her damages at \$500.

The instruction authorizing the jury to find punitive damages is complained of by appellant, and Yazoo & M. Valley R. Co. v. Hardie, 100 Miss. 132, 34 L.R.A.(N.S.) 740, 742, 55 So. 42, 967, is relied on for a reversal. Without commenting on this case, we think it is easily distinguishable from the present case. In that case the passenger demanded that the train be backed to the station, and the court decided, for the reasons given in the opinion, that she did not have the right to make this demand under the circumstances disclosed by the record. Whether the court correctly announced the law in that case is not now before us, as in this case the passenger merely preferred the reasonable request that she be permitted to get off the train, and she did not even demand that she be put off at the place where the company contracted with her to stop its train long enough for her to alight with safety. The record shows that appellee's rights under her contract of carriage were entirely ignored, and when an opportunity was offered appellant's servants to right the wrong they capriciously and orsually declined to make amends.

It is insisted that there was an utter absence of evidence to establish any inference of insult; and while we do not concur with appellant's counsel in this contention, we think under the undisputed facts of this case the refusal of appellant's servants to comply with appellee's reasonable demand, courteously made, was tantamount to a wilful and wanton disregard of appellee's contractual rights and defendant's plain duty as a common carrier of passengers.

Affirmed.

46 L.R.A.(N.S.)

SOUTH CAROLINA SUPREME COURT.

B. M. SALLEY, Respt.,

v.

H. L. COX, Appt.

(— S. C. —, 77 S. E. 933.)

Landlord and tenant — cropper — abandonment of crop — effect.

A cropper forfeits all interest in the crop by voluntarily abandoning it without reasonable cause or excuse.

(Woods, J., dissents.)

(April 1, 1913.)

Note. — Tenant's or cropper's abandonment of crop as affecting rights and interests therein.

I. Introduction, 53.

II. Voluntary abandonment.

a. Croppers, 53.

b. Tenants.

1. Rights of landlord or tenant in general, 55.

2. Rights as against purchaser, creditor, or lienor, 56.

c. Miscellaneous, 58.

III. Involuntary abandonment, 59.

I. Introduction.

This note includes cases of voluntary and involuntary abandonment, in other words, cases where the cropper or tenant was ejected, as well as where he voluntarily abandoned the crop or premises. It does not, however, deal with the general question of "away going" crops or emblements, where the question was as to the tenant's right to growing crops upon his leaving the premises at the expiration of his term. Cases of tenancies at will are also excluded, the same being included in a note to Evans v. Watkins, 41 L.R.A.(N.S.) 404, on right of tenant at will to crops. The note does not deal with the question of the respective rights of a tenant and purchaser of the premises at foreclosure or execution sale, except where it appeared that the sale was followed by an abandonment or eviction of the tenant.

Upon the question in general as to the right to emblements as between landlord and tenant, see notes to Lafferty v. Schuykill River East Side R. Co. 3 L.R.A. 124, and Batterman v. Albright, 11 L.R.A. 800.

As to measure of damages for forcing cropper from premises, see note to Crews v. Cortez, 38 L.R.A.(N.S.) 714.

II. Voluntary abandonment.

a. Croppers.

As to relation of a cropper to the landowner, i. e., as servant or tenant, see note to Bourland v. McKnight, 4 L.R.A.(N.S.) 698.

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Charleston County in plaintiff's favor in an action brought to recover a share in a crop which had been raised by plaintiff on defendant's land. Reversed.

The facts are stated in the opinion.

Mr. Edwin J. Blank, for appellant:

Plaintiff was a mere laborer in the employ of the defendant, and he had no interest in the crop.

Carpenter v. Strickland, 20 S. C. 1; Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680.

Mr. F. F. Herndon for respondent.

Hydrick, J., delivered the opinion of the court:

Plaintiff brought this action to recover the value of his share of a cotton crop raised on defendant's land, and also the

value of certain small crops which belonged to him individually. He alleged that defendant compelled him to leave his place in August, and refused to allow him to gather the crops, and that defendant had gathered and appropriated them to his own use. Defendant denied that he had compelled plaintiff to leave, and alleged that, having violated the terms of the contract, plaintiff abandoned the crop and left, and he was put to the expense of raising and harvesting it, and, after deducting said expense and plaintiff's indebtedness to him, there was nothing left of plaintiff's share.

There was sharp conflict in the testimony as to whose fault caused the breach of the contract. Defendant's attorney requested the court to charge: "It is incumbent upon the plaintiff to show by prepon-

In 12 Cyc. 979, a cropper is defined as one who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor; and it is said that if the language of the contract imports a present demise of any character, by which any interest in the land passes to the occupier, or by which he obtains the right of exclusive possession, the relation of the parties becomes that of landlord and tenant; but if the contract does not contain language importing a conveyance of any interest in the land, or by its express terms the general possession is reserved by the owner, the occupant becomes a mere cropper; that a cropper has no legal possession of the premises further than as an employee, and that, before division, the whole crop is the property of the landowner, and the cropper has no legal title to any part thereof which he can assign or convey, or which can be subjected to the payment of his debts.

The rule laid down in *SALLEY v. COX*, that if a cropper, without reasonable cause, voluntarily abandons a crop, he loses all interest therein, is supported by the decision in *Thigpen v. Leigh*, 93 N. C. 47, where the point in issue was whether one who had an agricultural lien upon the crop for advances to the cropper could recover from the landowner, who had cultivated and marketed it after its abandonment, a balance remaining after deducting the rent and expenses of caring for the crop; and it was held that since, by his advances, the plaintiff acquired no right of property in the crop, but only the right to have his advances repaid out of the cropper's share, and the cropper had lost all interest by his abandonment, there was nothing left upon which the lien could operate and out of which the demand could be satisfied, and therefore the lienor could not recover. The latter had declined an offer of the landowner to allow him to carry the crop to completion, but this is referred to only as showing that the justice of the case in this instance was also with the landowner. For a somewhat similar case, where the relation of the

parties was that of landlord and tenant, see *Wheat v. Watson*, 57 Ala. 581, under "Tenants," *infra*.

But it has been held that where a cropper justifiably abandons a crop by reason of the landowner's refusal to comply with the contract, and the latter takes possession and disposes of the crop, he must account to the cropper for the value of his share. *Young v. Gay*, 41 La. Ann. 758, 6 So. 608, where the cropper abandoned the crop on account of the landowner's failure to advance money according to the contract for removing the crop, and it was held that the landowner who disposed of the crop, must account to the cropper for his share, determined in this instance according to the value of the crop as it stood in the field when the contract was terminated by the wrongful act of the landowner.

A farm hand who had agreed with the owner to work for a certain length of time, in consideration of a stated sum per month and the use of an acre of land, and who, after planting a crop upon the acre, leaves the service without cause, forfeits his interest in the growing crop. *Butler v. Rice*, 17 Hun, 406. It was held that the landowner was entitled to the crop, although, in a previous action by him against the laborer for damages for breach of contract, he had recovered for the seed and for work done upon the land in preparing it for the crop.

In the abstract reported in the case of *Kenna v. Nugent*, Ir. Rep. 7 C. L. 464, it was said that, "where the herd of the evicted tenant held as a part of his wages and had sown with oats and potatoes 3 roods of the evicted farm, . . . the evicted tenant was entitled to avail himself of these crops as emblements."

Since, until division, the landowner is the legal owner of the entire crop, he can recover in replevin that part of it which the cropper harvests and removes against his objection, where it has been cared for by him after abandonment by the cropper. *Kelly v. Rummerfield*, 117 Wis. 620, 98 Am. St. Rep. 951, 94 N. W. 649.

derance of evidence that he executed his part of the agreement as alleged in the complaint; and if he has failed to do so, or did not carry out and execute his part of the agreement, or voluntarily abandoned said crop, you must find for defendant." The court declined to charge this request, but charged, in response thereto, as follows: "If the plaintiff had a contract with the defendant and abandoned the crop, and made it necessary for the defendant to gather it, the defendant would be allowed to charge whatever it cost him to gather the crop. I will go to that extent and charge you that."

We think his Honor erred in so charging; for in the connection in which it was given, the instruction necessarily implied that, even though plaintiff voluntarily abandoned the crop, he would be entitled

to share in the surplus, after payment of all expenses of gathering it. When a cropper voluntarily abandons a crop, without fault on the part of the landowner, he forfeits all interest therein. 12 Cyc. 981. A moment's reflection, in which the situation of the parties to such a contract is considered at its various stages, from the making to the completion thereof, will show that the rule announced by the circuit court might work great injustice to the landowner. Suppose, for instance, the cropper voluntarily abandons his crop and contract in the early spring, just after it is planted; under this ruling, the landowner would be compelled either to lose the fertilizer and seed which had been put into the ground, and, perhaps, also the use of his land and the stock and implements which he had procured and set apart for

b. Tenants.

1. Rights of landlord or tenant in general.

Where a tenant renting on shares unjustifiably abandons a growing crop, under circumstances which amount to a surrender or termination of the lease, he loses all interest in the crop. *Kiplinger v. Green*, 61 Mich. 340, 1 Am. St. Rep. 584, 28 N. W. 121; *Preston v. Smallwood*, 48 N. Y. S. R. 199, 20 N. Y. Supp. 504.

In *Kiplinger v. Green*, supra, the court said that the particular name or nature of the plaintiff's holding could make no difference in the law applicable to the case; that whether the contract was called a lease or a cropping agreement, its construction and its effect, as far as the plaintiff's claim to the crop was concerned, were the same; that whatever right he could legally claim must rest upon the provisions of the contract, and when he voluntarily abandoned the farm and forfeited the contract, he could no longer claim any rights under it; that there was no theory of the law under which one could recover a share of the crop under a contract which he had, upon his own motion, repudiated; and that when he abandoned the premises and surrendered the contract, the crop became a part of the land and went with it.

In *Bettis v. Key*, — Tex. Civ. App. —, 128 S. W. 1160, the rule was laid down that if it appears from the evidence, taken as a whole, that a tenant upon shares intended to abandon the crop, although he did not abandon the premises, the landlord had the right to enter and save the crop; and it was held accordingly that an instruction was error that, unless the contract gave the right of re-entry, the landlord had no right to enter the premises to work the crop, unless the tenant abandoned it and the premises, and by his acts and declarations clearly showed his intention to the landlord not to occupy further the premises and work the crop.
40 L.R.A. (N.S.)

In *Carpenter v. Jones*, 63 Ill. 517, it was said that annual crops planted by a tenant whose tenancy is for an uncertain period are regarded in many respects as personal property, liable to become part of the realty if the tenant voluntarily abandons or forfeits possession of the premises.

Under a lease providing for a cash rent to be paid out of the first of the crop picked by the tenant, a landlord has the right, upon the tenant's abandonment of the crop at the commencement of the picking season, to gather and prepare it for market and deduct the expense of preserving it from waste and preparing it for market, as well as the rent. *Fry v. Ford*, 38 Ark. 246.

But it has been held that a landlord has no right to pick a tenant's crop without his consent, although the landlord is to receive a certain share of the crop as rent, and it is wasting and likely to be destroyed unless promptly gathered. *Wadley v. Williams*, 75 Ga. 272. It does not appear, however, that there had been a total abandonment by the tenant.

A landlord is not entitled to compensation for gathering his share of a crop, if it is through his own fault that the tenant fails to gather it. *Garnett v. Jennings*, 19 Ky. L. Rep. 1712, 44 S. W. 382.

In *Cunningham v. Skinner*, — Tex. Civ. App. —, 97 S. W. 509, it was said that when the tenant abandoned the crop, the landlord had the right and authority to take charge of it, gather and market it, and apply the proceeds to an indebtedness due him from the tenant.

And in *Myer v. Roberts*, 50 Or. 81, 12 L.R.A. (N.S.) 194, 126 Am. St. Rep. 733, 89 Pac. 1051, 15 Ann. Cas. 1031, the court said that when the estate of a tenant is forfeited, or the tenancy terminated by some act of his, and the landlord re-enters, the tenant is not entitled to the growing crops, but they pass to the landlord with the title to the land. The issue in that case, however, was as to the rights of the landlord against one whose labor had matured the crop through the aid of an injunction wrongfully issued.

the use of the cropper, or employ other help and carry the crop to completion. Yet, if he did the latter, he would have to share the profits with the cropper, whose abandonment of his crop and breach of his contract were without cause or excuse. A different rule would apply if the abandonment was due to his misfortune or to some just cause; but where it is done voluntarily, and without reasonable cause or excuse, the cropper is certainly not entitled to share in the crop so abandoned.

It is but fair to the learned judge to say that the request above quoted was improperly presented, in that it was done orally, and in the midst of the charge, and therefore he had no opportunity whatever to consider it. Under the circumstances, he

would have been fully justified in refusing to consider it at all.

The rule of court requires that requests to charge must be presented in writing, and before the argument begins. This was intended to give the trial judge opportunity to consider them during the argument to the jury. The rule also provides that, at the close of the argument, such additional requests as have been suggested by the course of the argument may be presented; and it would be proper for counsel, at the close of the charge, to present such additional requests as have been suggested by the charge, and that it is the proper time to call the attention of the court to errors or omissions in the charge which counsel reasonably suppose are due to in-

In *Davis v. Eyton*, 7 Bing. 154, 4 Moore & P. 820, 9 L. J. C. P. 44, it was held that a landlord who re-entered upon breach of a condition in a lease against incurring a debt upon which judgment should be rendered and execution issued was entitled to the growing crops, because the lease was forfeited by the tenant's own act.

If a tenant, after the expiration of his lease, expressly tenders to the landlord that part of the crop which remains unpicked, and declares his intention not to pick the same, and relinquishes his right thereto, he cannot afterward recover for it from the landlord, although the right of the tenant under some circumstances, to gather his crop after the expiration of the tenancy, is recognized. *Huggins v. Reynolds*, 51 Tex. Civ. App. 504, 112 S. W. 116.

Although, upon surrendering the premises before the end of a year, a tenant for cash rent who holds from year to year reserves a growing crop, he is not entitled to the same as emblements, where it matures after expiration of the year, the surrender is accepted, and the reservation is never assented to by the landlord. *Hetfield v. Lawton*, 108 App. Div. 113, 95 N. Y. Supp. 451.

The assignees of a bankrupt tenant, who refused to accept the lease, are entitled to a growing crop, where the lease provides that the tenant shall have a "going-off" crop "from the end or other sooner termination of said term." *Ex parte Maundrell*, 2 Madd. Ch. 315, *Buck, Bankr.* 83.

2. Rights as against purchaser, creditor, or tenant.

In *Kiplinger v. Green*, 61 Mich. 340, 1 Am. St. Rep. 584, 28 N. W. 121, while it was held that, by unjustifiably abandoning the premises and thereby forfeiting the lease, a tenant on shares lost all interest in a growing crop, the court said that, if one in good faith had purchased from the tenant his share of the crop before the surrender of the premises, he would have been entitled to harvest the crop under the tenant's agreement with the landlord, because of equities which the tenant could not as-

sert after the rescission of the contract, the crop being considered, while the contract was in force, as personal property subject to sale or levy as such.

It has been held that one who purchases from a tenant a growing crop at a time when there has been no breach or forfeiture of a contract for cash rental acquires a valid title, although the tenant subsequently defaults and surrenders the premises to the landlord. *Nye v. Patterson*, 35 Mich. 413; *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935.

Where the landlord and tenant are tenants in common of a growing crop, the title of a purchaser of the tenant's share is not defeated by a subsequent agreement between the landlord and tenant terminating the lease, and providing that the landlord "shall retain all the crop." *Crosby v. Woleben*, 149 App. Div. 337, 134 N. Y. Supp. 328. The landlord was, however, allowed his expenses in harvesting and marketing the tenant's share.

In the absence of a forfeiture clause in a lease for noncompliance with its provision, a purchaser of a growing crop from a tenant, upon the latter's abandonment of the premises, acquires a valid title thereto, although the tenant has failed to do certain clearing which was the consideration for the lease. *Dayton v. Vandoozer*, 39 Mich. 749.

Where a tenant for a year sells a growing crop and surrenders possession of the premises to the landlord before the expiration of the year, the purchaser acquires no title if the crop is of such a nature that it does not mature until after the expiration of the term. *Bain v. Clark*, 10 Johns. 424. The ground of the decision, however is simply that a tenant for a fixed term, in the absence of special contract, has no right to emblements, and therefore that a purchaser from him acquires no title thereto.

In *Enley v. Nowlin*, 1 Baxt. 163, where a tenant upon shares, after the cultivation of the crop was completed, but before it was matured, sold his interest therein without the landlord's consent, and moved away, it was held that this was not a breach of the lease, so as to entitle the landlord, as

advertence, oversight, and perhaps other causes. But the circumstances would be rare, indeed, which would warrant counsel in interrupting the judge while he is charging the jury, for such purpose.

Reversed.

Gary, Ch. J., and Watts and Fraser, JJ., concur.

Woods, J., dissenting.

The plaintiff, a share cropper on the land of the defendant in 1910, brought this action, alleging that about the 17th of August the defendant ordered him to leave the place and afterwards appropriated the entire crop to his own use. The defendant alleged: (1) "That plaintiff secretly dis-

posed of a part of the crop, and, after being warned by the defendant not to repeat the performance, plaintiff abandoned said crop and disappeared without attending to the duties he assumed by agreement, and that defendant was put to the expense of raising and harvesting the crop;" and (2) "that, after deducting the costs and expenses of making and harvesting said crop, and the indebtedness of plaintiff to defendant, there was no profit to be divided, but, to the contrary, defendant sustained a loss." On the issues thus made, the plaintiff recovered judgment for \$200, from which the defendant appeals.

The question of the rights of landowners and their croppers in their dealings with each other is interesting and important, be-

against the purchaser, to the tenant's share in the crop.

A landlord who, contrary to the terms of the lease, is compelled to harvest his share of the crop, owing to the tenant's abandonment of the premises, is entitled to a lien for the value of his labor, upon the tenant's share as against a purchaser thereof, under a statute giving the landlord a lien for his rent upon all crops grown on the premises, since the labor in gathering the crop is a part of the rent which the tenant has agreed to pay. *Secrest v. Stivers*, 35 Iowa, 580.

It has been held that where a lease contains simply a condition against assignment thereof, a breach of the condition does not work a forfeiture of a growing crop so as to entitle the landlord thereto, as against one who, without actual knowledge of the condition, purchases the tenant's share, and at the same time takes an assignment of the lease. *Collier v. Cunningham*, 2 Ind. App. 254, 28 N. E. 341. The assignee was allowed to recover from the landlord the value of the share purchased, less the landlord's expenses in harvesting the crop, the landlord having evicted the assignee.

In *Sallade v. James*, 6 Pa. 144, where, after recovery of a judgment against him, the landlord rented land to a tenant for a term of two years at an annual rental payable in advance, and the tenant sowed a crop upon the land, but, pursuant to notice upon sale of the premises under the judgment, abandoned them at the end of the year, it was held that the purchaser was entitled to the growing crops.

Since the possessory right in the crop reverts to the landowner upon abandonment of the premises by a tenant renting on shares, a bill of sale of the crop from the tenant, which is not delivered to the vendee until after the abandonment, is within the statute of frauds rendering invalid a sale of personal property unless accompanied by possession. *Maclary v. Turner*, 9 Houst. (Del.) 281, 32 Atl. 325.

Upon abandonment of the premises, a landlord upon shares has a right to re-enter and harvest a crop in order to prevent its going to waste, and where his expenses in

doing so exceed the market value of the crop, the tenant has no interest therein which his creditors can reach. *Charles v. Davis*, 59 Cal. 479.

In *Shahan v. Herzberg*, 73 Ala. 59, where the consideration appears to have been a cash rent, and the tenant voluntarily surrendered the premises to the landlord, to complete the cultivation and harvest of the crops, and to reimburse himself if possible for rent and advances, it was held that the tenant had no attachable interest in the crop, but that it passed to the landlord as an incident to the restoration to possession and to the termination of the tenancy.

Where the amount of the unpaid rent and the expenses of the landlord in completing cultivation and marketing a crop which has been mortgaged by a tenant and then surrendered to the landlord on account of arrears of rent, exceed the value of the crop, the mortgagee can recover nothing from the landlord. *Clements v. Mathews*, L. R. 11 Q. B. Div. 808, 52 L. J. Q. B. N. S. 772.

Where there was a conflict in the evidence as to the circumstances under which a landlord on shares took possession of the land and harvested the crop, although he testified that the amount realized from the sale of the tenant's share was not sufficient to pay the costs of completing the leasing contract, it was held in *Perry v. Beaupre*, 6 Dak. 49, 50 N. W. 400, an action by a prior mortgagee of the tenant for conversion of the tenant's share, that there was no error in refusing to direct a verdict for the landlord, and in submitting the case to the jury.

Where a crop sowed upon rented land with the lessee's permission was abandoned by the sower, and harvested by the lessee after expiration of the lease, it was held that a creditor could not attach it as the property of the sower. *Hall v. Shannon*, 19 Mo. 401. The court said that, upon the abandonment of the land, the crop went with it as an incident; but that it was not necessary to decide whether or not the sower might not have an interest in the crop for the value of his services in planting it and for the seed.

cause a large part of the lands of the state is cultivated under contracts like the contract here involved.

According to the plaintiff's testimony, the agreement was that the defendant should furnish the land, the fertilizer, and live stock; that the plaintiff should cultivate and gather the crop, and that the crop should be equally divided. The only difference between the parties as to the contract was that the defendant testified that the plaintiff, in addition to cultivating and gathering the crop, was to pay \$5 an acre rent. Taking the view of the contract most favorable to the appellant, it was a contract for the payment of wages in the form of a share of the crop, the plaintiff sustaining the relation to the defendant of

a laborer for hire. The plaintiff had no right of property in the crop until it should be divided, and therefore could not maintain an action to recover his specific share before division, but did have the right to sue for breach of the defendant's contract to make a fair division and turn over his share of the crop. *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *Carpenter v. Strickland*, 20 S. C. 1; *Loveless v. Gilliam*, 70 S. C. 391, 50 S. E. 9. The action was therefore properly brought; and as the circuit judge charged, it necessarily involved an accounting between the plaintiff and the defendant as to their transactions under the contract.

The point mainly relied on to support the appeal is the refusal of the circuit

Where a tenant upon shares abandons the premises and surrenders the crop to the landlord, the latter has a right to sell it, and, as against an attachment creditor of the tenant, whose attachment was issued after the sale, may apply the proceeds to a debt due him from the tenant for advances and for preparing the crop for market. *Gayle v. McDaniel*, 13 Ky. L. Rep. 200.

Where a tenant for cash rent for a period of one year, with the privilege of three additional years, voluntarily abandons the premises before the expiration of the first year, upon their sale on execution against the landlord, he cannot recover from the purchaser for crops which matured after the expiration of the year, and which were harvested by the purchaser. *Dircks v. Brant*, 56 Md. 500. The court said the tenant occupied the same position as if the term had been only one year, and, in the absence of custom, he could not recover for out-going crops.

A case somewhat similar to *Thigpen v. Leigh*, 93 N. C. 47, under heading "Croppers," involving the rights of an agricultural lienor, is that of *Wheat v. Watson*, 57 Ala. 581, the decision, however, not going to the extent of that in the *Leigh Case*. In *Wheat v. Watson*, it was held that a lienor who had declared an offer by the landlord to take possession of a growing crop after abandonment of the premises by a tenant on shares could not attach it as the property of the tenant, the landlord having completed the cultivation. The court said that when the tenant abandoned the premises, it was not the duty of the landlord to let them remain unoccupied and unused, but that he might enter and occupy the property as owner; that it was proper for the landlord to offer the lienor the opportunity of taking the tenant's place, but it was not intended to say that the landlord was bound to do so, or that the lienor was bound to accede to the proposal. But it was not decided whether the lienor might not be entitled to a part of the value of the crops after they had been made and gathered, the court saying that if there remained a surplus besides the rent and ex-

penses of completing the work, it might be that a claim upon this would arise in favor of the lienor.

In *Beckwith v. Carroll*, 56 Ala. 12, it was held that the expenses of a receiver in caring for a crop on land rented by a partnership, which certain members thereof were allowing to go to waste, should be taken out of the proceeds of the crop before payment therefrom of the landlord's rent; although the court said that, as between the landlord and the defaulting tenants, the latter were chargeable with such expenses.

In *Bradford v. Roberts*, 46 Colo. 330, 104 Pac. 391, it was held that a provision in a lease upon shares, that in case the lessee failed to do the necessary work, the lessor might do the same and deduct its cost or value from the lessee's interest in the crop, did not give the lessor a lien upon the lessee's interest for work done upon the lessee's abandonment of the farm, superior to the interest of a mortgagee whose rights were created prior to the abandonment.

c. Miscellaneous.

In the case of *Reynolds v. Reynolds*, 48 Hun, 142, the agreement under which the defendant cultivated upon shares the land of the plaintiff was held not to create the relation of landlord and tenant, and yet to constitute the parties tenants in common of the crop; and it was held that the defendant, by justifiable abandonment of the premises on account of the conduct of the plaintiff, although such conduct did not violate any express term of the agreement or amount to an expulsion, did not forfeit his interest in a growing crop. The court said that the plaintiff, by his action, justified the defendant in treating the contract as broken on the part of the plaintiff, and that the defendant could refuse a further performance on his part and abandon the premises without abandoning the contract; but it was also said that if the defendant had abandoned the premises without justification, the privity between him and the plaintiff would have been destroyed, and, as a legal consequence, the defendant would

judge to charge the following request: "It is incumbent upon the plaintiff to show by preponderance of evidence that he executed his part of agreement as alleged in the complaint; and if he failed to do so, or did not carry out and execute his part of agreement, or voluntarily abandoned said crop, you must find for defendant." After refusing the request, the circuit judge said to the jury: "If the plaintiff had a contract with the defendant and abandoned the crop, and made it necessary for the defendant to gather it, the defendant would be allowed to charge whatever it cost him to gather the crop. I will go to that extent and charge you that; but, as I say, these are matters of everyday occurrence, that are peculiarly within your

power to judge of. You are called upon to do justice between man and man, and you do that, and find a verdict accordingly."

The charge, I think, is well supported by both reason and authority. It is no doubt true that if a share cropper abandon the crop, or so behave as to incur a just discharge by the landlord, at the beginning of the crop year, the breach may be so complete as to warrant the landowner in rescinding, and declaring the contract and the cropper's rights under it at an end. But, on the other hand, if the crop be so advanced by the labor of the share cropper that his labor has been of material value to the landlord, the cropper does not forfeit all his share of the crop, but must submit to such deduction from his share

have lost all title and interest in the growing crop.

In *Harris v. Gregg*, 17 App. Div. 210, 45 N. Y. Supp. 364, upon a concession to that effect, the parties were treated as tenants in common of a crop which the landlord converted after the tenant's abandonment of the farm, and on this ground the landlord was held liable for conversion of the tenant's share, although it was stated that if the plaintiff, in violation of his contract to work the farm upon shares, left it, he thereby lost his right to the emblements.

Where the contract of renting upon shares is such that the relation of landlord and tenant is not created, but the parties are tenants in common of the crop, an abandonment of the growing crop to the landowner does not entitle him to the entire crop, as against a prior mortgagee of the tenant's interest. *Rogers v. Frazier*, — Tex. Civ. App. —, 108 S. W. 727. The court said that when the renter abandoned the crop, the landlord had the right to take possession thereof, cultivate, gather, and prepare it for market, and to defray all necessary expenses incurred out of the renter's share; but that after setting aside his own share and a sufficient amount to pay his expenses in marketing the crop, the balance would be subject to the lien of the mortgage.

Under statute providing that leases created by parol shall have the force and effect of estates at will only, it was held in *Chandler v. Thurston*, 10 Pick. 205, that one who rented land upon shares by a parol contract, and absconded, leaving a growing crop, had no attachable interest therein; and that this was true whether the absconder be regarded as a mere laborer or as a tenant at will. The court said that the property in the crop followed the interest in the soil and became wholly vested in the landowner.

Upon the principle that where a tenancy for an uncertain period is terminated by the act of the tenant, he is not entitled to the growing crop as emblements, it was held in *Talbot v. Hill*, 68 Ill. 106, that a widow who, while in the possession of land of her deceased husband, sowed a crop thereon, 46 L.R.A. (N.S.)

and subsequently joined in a suit for partition, and consented to a sale of the land and payment in lieu of dower, was not entitled as against the purchaser to the growing crop.

Upon the same principle, it was held in *Bulwer v. Bulwer*, 2 Barn. & Ald. 470, 21 Revised Rep. 358, that a parson who resigned a living was not entitled to growing crops.

And in *Moyle v. Ewer*, 2 Bulst. 183, it was said by Lord Coke that if a parson sows the ground and is afterwards deprived or resigns, if the corn is not severed at the time of his successor's coming in, he shall have the title.

In *Dillon v. Wilson*, 24 Mo. 278, the court said that if a widow in possession of land, rent free, sowed a crop and then married, there was no forfeiture of her lease or her crop; and if she afterward went and lived with her husband, that did not deprive her of her right to the crop; but that if the husband and wife abandoned the crop and gave it up to the landlord, and the husband afterward converted it to his own use, he would be liable in damages.

In *Wicks v. Jordan*, 2 Bulst. 213, it was said that if a widow who is to enjoy land during widowhood sows a crop, and afterward takes a husband, she will lose the corn, and the lord shall have it. To the same effect is *Hawkins v. Skeggs*, 10 Humph. 31, in which it was held that a widow to whom lands were bequeathed during her widowhood was not entitled to the crop growing thereon at the time of her marriage. In the latter case the court said that whenever an estate in lands is to be determined on a contingency, if that contingency happen by the act of God, or the adverse party, the tenant is entitled to all growing crops as emblements, but that the contrary rule prevails when the contingency happens from the act of the tenant in possession.

III. Involuntary abandonment.

As against a purchaser of a growing crop at execution sale against the tenant, a landlord who subsequently evicts the tenant and

as will compensate the landlord for the injury inflicted by his breach. So, on the other side, if the landlord without good reason refuse to furnish any land or fertilizer, and thus entirely defeat the cropper's right to cultivate the land under the contract, he could recover of the landowner one half of the crop reasonably expected less any amount the laborer earned, or by reasonable efforts might have earned, during the crop year; and if the landlord should partially fail in his contract, but not to such degree as to warrant the laborer in considering it entirely breached, the laborer could not abandon the enterprise, but would have to proceed with his work, and recover from the landowner such damages as he had suffered from the partial breach. In any such case, it is always a question of fact for the jury to decide whether, under the evidence, a breach of the contract should be regarded final and complete, justifying the other party in treating the contract and his obligation under it at an end; or only such partial breach as to require that the party in default suffer an abatement from the consideration he was to receive, measured by the damage caused by the breach. This principle is stated and applied in *Gray v. Handkinson*, 1 Bay, 278; *Martin v. Seaboard Air Line R. Co.* 70 S. C. 8, 48 S. E.

616; *Godfrey v. E. P. Burton Lumber Co.* 88 S. C. 132, 70 S. E. 396.

The rule has been applied as the just one in contracts between planters and overseers. As is well known, in former times overseers were usually employed for the entire year at a salary fixed for the entire year's service. The overseer's continuous service, like a share cropper's was important from the beginning to the end of the crop year; and his abandonment of the crop or misbehavior rendering his discharge necessary, like that of a share cropper often subjected the landowner to inconvenience and loss. In legal contemplation, the overseer's contract and that of the share cropper stand on the same footing, except that the overseer's wages were generally to be paid in money, while the share cropper gets as wages a part of the crop.

In *Byrd v. Boyd*, 4 M'Cord L. 246, 17 Am. Dec. 740, after much consideration the court laid down a rule, the justice of which is made manifest by the opinion of the court. In that case the overseer was discharged for using abusive language to his employer's daughter. Judge Huger charged the jury that, the contract being for the entire year, if the plaintiff had been properly turned away he ought to recover nothing, but if he had been turned off improperly he ought to recover the whole amount. The reasoning of Judge Johnson,

harvests the crop without the purchaser's consent must establish the defense upon which he relies, that the tenant forfeited the lease before the sale, and that he, the landlord, thereby became entitled to the crop. *Cheney v. Bonnell*, 58 Ill. 268. The court said that the law does not favor forfeitures, and will not imply them from slight circumstances, but that they must be formally and clearly proved.

It was also held in *Cheney v. Bonnell*, supra, that the judgment in the proceedings to evict the tenant was not evidence of a forfeiture of the lease, where the record of the proceedings was not produced, and the oral evidence failed to show that there was any service on or appearance by the tenant.

Upon this principle, that forfeitures must be clearly proved, it was held in *Sullivan v. O'Hara*, 1 Ind. App. 259, 27 N. E. 590, that a tenant against whom judgment was rendered for the landlord in a suit to recover possession, and who left the premises, did not thereby lose his interest in a growing crop, where the judgment against him was not shown to be such as was necessary to effect a forfeiture and eviction for commission of waste, as claimed by the landlord, under a statute providing that in actions for waste judgment of forfeiture and eviction shall be given against the tenant in possession only when the injury to the estate in reversion is equal to the value of the unexpired term, or is done in malice. 46 L.R.A. (N.S.)

And in *Burket v. Miller*, 25 Ind. App. 110, 55 N. E. 500, it was held that a judgment merely for possession of premises in an action of ejectment by a landlord against his tenant was not evidence in a subsequent action by the landlord against a third party to restrain the cutting of a growing crop, that title thereto was in the landlord.

In *Hodgson v. Gascoigne*, 5 Barn. & Ald. 88, it was held that after recovery in ejectment by a landlord against the tenant for arrears of rent, the tenant had no attachable interest in a growing crop planted by him subsequent to the commencement of the action. The court said that after the judgment in ejectment was obtained, the tenant should be considered in point of law as a trespasser from the date of the declaration in ejectment.

In *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, it was held that a purchaser who took possession after foreclosure of a mortgage was entitled to a growing crop, as against a tenant who had knowledge of the mortgage at the time of the making of the lease.

A provision in a contract of lease that if the tenant "voluntarily or involuntarily" leaves the place, he shall forfeit the crop produced by him on the land, does not entitle the landlord to the crop, if, without the tenant's fault, he is forced by the landlord to leave the premises because he buys goods from a person other than the landlord.

in holding that, even if properly discharged, the overseer was entitled to recover for his services so far as they were beneficial to the landowner, is so clear and convincing, and so fully vindicates the charge of the circuit judge in the present case, that we quote from it at length: "The only ground necessary to be considered in this case is the supposed misdirection of the presiding judge in charging the jury that they were not at liberty, under any circumstances, to apportion the compensation of the plaintiff to the services actually rendered, and that they were bound to allow him the stipulated wages for the year or nothing. . . . The relation of employer and overseer is one which the state of the country renders almost indispensably necessary to every planter, and collisions do and must necessarily arise, and it is fit that there should be some settled rule on the subject. When the employer wantonly and without cause turns off his overseer, at a season of the year when it would be impracticable to get employment elsewhere, and his time is wholly lost, I should feel no hesitation in enforcing the rule rigidly, not only as a punishment, but as a just remuneration to the overseer; and so when the overseer abandons the employer without cause, or by his neglect inflicts a loss on him commensurate with the services which he has performed,

he clearly deserves no compensation. There is, however, a third class of cases for which it is necessary to provide, and which are perhaps of the most common occurrence. They are those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable, and that perhaps not immediately connected with the contract, as in the present case. It happens frequently, too, that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I cannot reconcile it to my notions of natural justice that the overseer should not recover a compensation for the services, so far as they were directed, and which have been beneficial to the employer. And I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country. As a matter of expediency I should be disposed to establish it as a rule. This conclusion is, I think, supported by the principle of the exception before noticed, and by the common case in which a party is permitted to prove by way of defense that, owing to some defect in the execution of the work and labor done and performed, the thing is not worth so much as was stipulated for; and the still more comprehensive principle

Williams v. Cocke, — Miss. —, 6 So. 774. The court said that the only "involuntary" leaving of the place, within the fair meaning of the term, must be construed to be an involuntary one forced upon the tenant by the landlord for good and sufficient cause; that, otherwise, the landlord would be the gainer by his own wrong.

In *Hunter v. Jones*, 2 Brewst. (Pa.) 370, the general rule was laid down that a lessee who is ejected by his lessor for forfeiture of the lease on account of breach of a condition therein is not entitled to re-enter and gather a growing crop.

It has been held that where a tenant is ousted by a third party, his right and that of his landlord to the crop cease so far as the right is necessary to maintain an action of replevin for a crop harvested and removed by the party who enters; and that therefore they cannot maintain replevin; but if the entry was unlawful, they might maintain trespass *quare clausum fregit*, and after ejectment, recover for mesne profits. *De Mott v. Hagerman*, 8 Cow. 220, 18 Am. Dec 443.

As against a sublessee who, with knowledge that an action of ejectment is pending against the lessee, under a clause in the lease authorizing re-entry by the lessor in case the rent is not paid, sows a crop upon the land, the lessor is entitled to the crop upon being put into possession upon termination of the ejectment action in his favor, 46 L.R.A. (N.S.)

although at that time the crop has been harvested, but not removed from the premises. *Sampson v. Rose*, 65 N. Y. 411.

In *Fagan v. Vogt*, 35 Tex. Civ. App. 528, 80 S. W. 664, a tenant upon shares who had been evicted by his landlord before the expiration of the term recovered from the landlord the value of his share of the crop; and it was held, upon the principle that if one tortiously takes and converts the property of another, he cannot charge the rightful owner with the labor expended thereon whereby its value is increased, that the landlord was not entitled to charge the tenant with the cost of gathering the crop, which was to have been done by the tenant.

In *Miller v. Havens*, 51 Mich. 482, 10 N. W. 865, the court said that one who purchased a crop from a tenant, and whose rights were certainly not less than those of a sublessee, would be protected against a forfeiture afterward incurred by the tenant and a re-entry by the landlord. And it was held that a recovery of the land by the landlord through summary proceedings against the tenant was not a defense in an action by the purchaser against the landlord for the crop, where the tenant had no notice of the proceedings, and especially where the judgment appeared to be such that it might have been obtained upon other grounds than a breach of a condition in the lease

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that a partial failure of consideration is a good ground of defense. Cases of this description are of very frequent occurrence, and although this question has never been judicially determined, it may be clearly collected from them that the prevailing opinion is favorable to an apportionment. In some cases the jury have found the entire sum, but in most they have apportioned it when the circumstances justified it."

Again in *M'Clure v. Pyatt*, 4 M'Cord L. 26, the court said: "In the case of *Boyd v. Byrd*, decided at the last sitting in Columbia, which was an action by an overseer against his employer, the court determined after great deliberation that, although the contract was to pay a gross sum for the year's services, the jury might, when the parties had differed and separated before the end of the year, apportion the damages to the services actually rendered, if, upon a view of all the circumstances, that course was best calculated to effect substantial justice between them; and that case is referred to for the doctrine of law on the subject."

The authority of these cases was recognized in *Eaken v. Harrison*, 4 M'Cord L. 249, and *Verner v. Sullivan*, 26 S. C. 327, 2 S. E. 391.

Apply this established rule to the present case. When the plaintiff was discharged, or abandoned the crop, on August 17th, the season of cultivation was over, and nothing remained but the work of harvesting and preparing the crop for market. The loss to the defendant could not have been so complete as to warrant him in declaring a complete forfeiture of all the fruit of plaintiff's labor; but, under the rule above stated, it was for the jury to say what compensation the plaintiff ought to have, taking into consideration all the evidence of loss resulting to the landowner from his default. It seems to me clear that the judgment of the circuit court should be affirmed.

TENNESSEE SUPREME COURT.

DUDLEY LUMBER COMPANY, Plff. in
Certiorari,

v.

NOLAN BROTHERS LUMBER COMPANY
FOR USE OF NATIONAL CITY BANK.

(— Tenn. —, 156 S. W. 465.)

Set-off — indorser of note — assigned
claim of maker.

An indorser who, after notice of the assignment for value of an unmatured claim
46 L.R.A. (N.S.)

of the insolvent maker against himself, takes up the note which did not mature until after the assignment, may set off the amount against the claim in the hands of the assignee when it reaches maturity, under a statute permitting a defendant to plead in set-off between himself and the original party, under whom plaintiff claimed which by law has attached to the demand in plaintiff's hands and for which defendant would be entitled to recover against such original party.

(May 10, 1913.)

CERTIORARI to the Court of Civil Appeals to review a decree reversing a decree of the Chancery Court for Shelby County in defendant's favor in an action upon an account for lumber sold and delivered in which defendant sought to set off a note upon which he was liable as indorser for the vendor of the lumber. Reversed.

The facts are stated in the opinion.

Messrs. Jackson & McRee, for plaintiff in certiorari:

The debtor of an insolvent who assigns the obligation may set off, in the hands of the assignee, any indebtedness matured or unmatured, held by him against the assignor upon the day of the assignment.

Howe Sewing Mach. Co. v. Zachary, 2 Tenn. Ch. 478; *Gregory v. Hasbrook*, 1 Tenn. Ch. 220; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 15 L.R.A. 710, 18 S. W. 822; *Waterman, Set-off*, 2d ed. § 435; *Feazle v. Dillard*, 5 Leigh, 31; *Memphis & C. R. Co. v. Greer*, 87 Tenn. 698, 4 L.R.A. 858, 11 S. W. 931.

A surety may proceed against an insolvent principal for indemnity before paying the debt upon which he is surety.

Miller v. Speed, 9 Heisk. 201; *Memphis & C. R. Co. v. Greer*, 87 Tenn. 698, 4 L.R.A. 858, 11 S. W. 931.

The fact that the claim asserted as a set-off had not arisen at the time of the assignment will not prevent an equitable set-off, where it arises subsequently by operation of law or as the result of existing contracts.

Central Appalachian Co. v. Buchanan, 33

Note. — Right of surety or indorser to offset obligation as against assignee of a debt due from him to the principal.

It is not intended to include herein cases involving the right of a surety to offset his obligation as such, against a debt owing by him to his principal in the hands of an assignee or trustee for creditors in insolvency or bankruptcy proceedings against the principal.

As to the particular question of the effect of immaturity of claim at the time of

C. C. A. 598, 62 U. S. App. 195, 90 Fed. 454; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295.

Insolvency is sufficient ground for equitable set-off.

Howe Sewing Mach. Co. v. Zachary, 2 Tenn. Ch. 478; *Gregory v. Hasbrook*, 1 Tenn. Ch. 220; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 15 L.R.A. 710, 18 S. W. 822; *Jones v. Robinson*, 26 Barb. 310; *Fera v. Wickham*, 40 N. Y. S. R. 644, 15 N. Y. Supp. 892; *Schuler v. Israel*, 120 U. S. 506, 30 L. ed. 707, 7 Sup. Ct. Rep. 648; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; *Kentucky Flour Co. v. Merchants' Nat. Bank (Fidelity Trust & S. V. Co. v. Merchants' Nat. Bank)* 90 Ky. 225, 9 L.R.A. 108, 13 S. W. 910; *Memphis & C. R. Co. v. Greer*, 87 Tenn. 698, 4 L.R.A. 858, 11 S. W. 931; *Miller v. Speed*, 9 Heisk. 201; *Central Appalachian Co. v. Buchanan*, 33 C. C. A. 598, 62 U. S. App. 195, 90 Fed. 454; *North*

Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710; *Feazle v. Dillard*, 5 Leigh, 31.

The National City Bank is only entitled to the amount remaining after all just credits have been made.

McKenzie v. Shaffner, 8 Baxt. 410; *Cohen v. Whitman*, 1 Tenn. Ch. 271; *Moseby v. Williamson*, 5 Heisk. 287; *Comfort v. Patterson*, 2 Lea, 671; *Richardson v. Parker*, 2 Swan, 530.

Mr. H. R. Boyd for defendant in certiorari.

Williams, J., delivered the opinion of the court:

This cause is before this court on petition for writ of certiorari to the court of civil appeals to review a decree of that court reversing a decree in favor of the Dudley Lumber Company rendered by the chancery court of Shelby county. The case in the chancery court was heard upon an agreed statement of facts.

On March 24, 1910, Nolan Brothers Lum-

insolvency proceedings upon right of set-off, see note in 25 L.R.A. (N.S.) 393.

As to the effect of immaturity of claim at the time insolvency occurs upon the right of set-off, see note in 17 L.R.A. 456; as to right to set off insolvent's obligation upon a claim in the hands of his receiver, or assignee, or trustee for creditors, see note in 23 L.R.A. 313.

At law—where surety discharges liability after commencement of suit on assigned claim.

At law an offset is generally limited to a subsisting obligation between the parties to the suit, and an assignee of a non-negotiable chose in action only takes subject to this right of offset as it existed at the time of the assignment and notice thereof to the debtor. Hence where the debtor is a surety for the assignor, even though the obligation was due at the time of the assignment, if he had not at that time paid same, he cannot, by subsequently making payment thereof, offset the amount paid, in an action at law against him by the assignee of the indebtedness to his principal.

Thus, in *Cox v. Cooper*, 3 Ala. 256, it is said that an offset to be good must be a subsisting demand at the time of the commencement of the action, and hence a surety has no right of set-off in so far as concerns his liability as surety, until he has discharged his obligation, and until that time, he cannot depend upon same as a set-off to a note payable to his principal and assigned to a third person, although he discharged his obligation as surety after the commencement of the action.

A demand to be available as a set-off in a court of law must be such as the defendant could, at the commencement of the suit, have made the foundation of a separate 46 L.R.A. (N.S.)

independent action against the plaintiff. Hence a surety, discharging his obligation after the commencement of a suit against him by the assignee of his principal of a debt due the latter, has not a set-off available at law. *Goldthwaite v. National Bank*, 67 Ala. 549.

This doctrine is based upon the theory that the contingent liability of a surety is not a liability which he may use in offset to an action by the transferee of a note payable by him to his principal. *Wood v. Steele*, 65 Ala. 436.

The liability of a surety, being a mere contingent liability, is not sufficient, where nothing more exists at the date of the assignment by the principal of a claim against the surety and the former is solvent, to entitle the surety to offset as against the assignee the amount subsequently paid in discharge of his liability as surety. *Follett v. Buyer*, 4 Ohio St. 586.

A suretyship which was not discharged at the time of the assignment of a claim of the principal against the surety, nor at the time of the commencement of an action thereon by the assignee, is only a contingent liability, and does not constitute a demand held by the surety at the time of the commencement of the suit, within the meaning of a statute providing that "a set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off." *Eigenmann v. Clark*, 21 Ind. App. 129, 51 N. E. 725.

Under a statute declaring that no demand shall be set-off, unless for the price of real or personal estate or for money paid, or

ber Company executed its promissory note, payable to the Dudley Lumber Company, to mature May 24th. On April 29, 1910, the Dudley Lumber Company discounted this note with the Michigan Private Exchange Bank, of Grand Rapids, Michigan, indorsing the same. On May 10, 1910, the Nolan Company sold to the Dudley Company a bill of lumber to the amount of \$577.24. On May 12, 1910, the Nolan Company, being insolvent at that time (as well as at the date of the execution of the note), assigned this account for lumber to the National City Bank of Memphis, and that bank on the same day gave due notice of the assignment. This account matured sixty days from the date of its creation. At the maturity of the note, May 24, 1910,

the Nolan Company defaulted in payment, and the Dudley Company, under its obligation so to do as indorser, paid and took over the note. On July 10th, the date of the maturity of the account, the Dudley Lumber Company tendered the National City Bank the amount representing the difference between the account and the note, under a claim of a right to set-off as indorser thus forced to liquidate the note demand of the insolvent Nolan Company. The tender was declined by the bank, which brought suit in the name of the assignor on the assigned account.

The Dudley Company here assigns as error in the decree of the court of civil appeals the holding that it was not entitled

money had and received, or for service done, or unless it is for a sum that is liquidated or that existed at the commencement of the suit and then belonged to the defendant, or unless it is due to him in his own right, an accommodation indorser or surety has no debt against the principal maker until he has paid the amount for which he is liable as surety or indorser, and if such payment is not made until after notice of an assignment of a debt owing to him by his principal, as against the assignee, he is not entitled to off-set payments subsequently made in discharging his obligation as surety. *Backus v. Spalding*, 129 Mass. 234.

And where a surety discharges his obligation after commencement of a suit against him by the assignee of a note payable to his principal, he cannot offset the amount so paid, and such payment constitutes no defense, in part or whole, to the action. *Gildersleeve v. Caraway*, 19 Ala. 246.

And right of offset at law is also denied a surety in *Walker v. McKay*, 2 Met. (Ky.) 294, who pays an obligation after he has notice that his principal has assigned a claim against him, on the theory that the set-off, to be available either in law or in equity, against an assignee, must have existed before notice of the assignment.

—where liability of surety remains undischarged.

It is no defense at law by way of set-off to a suit by the indorsee of a note after maturity, that the maker of the note was the guarantor of a note executed by the indorser of the note in suit, although the note guaranteed is then over due and unpaid. *Ligare v. Hayden*, 51 Ill. App. 69.

A surety on a note must pay a judgment rendered thereon before he can offset same against the indorsee of a note made by him to his principal, although there was an agreement between himself and his principal prior to the transfer of his own note, that he should pay the note upon which he was surety and the amount thereof should

be applied upon his own note. *Billingsley v. Stratton*, 11 Ind. 396.

Effect of express agreement for set-off.

The right of offset may be expressly stipulated for by a surety. In such case he may make the offset as against an assignee of the claim he owes the principal. Thus the maker of a non-negotiable note who guarantees notes of the payee under an agreement that he may offset against his note the amount he may have to pay by reason of his guaranty, where he is compelled to make good his guaranty, is entitled to make such offset against a transferee of his note although the transfer was made prior to his payment of his obligation as guarantor. *Union Nat. Bank v. Hines*, 177 Ill. 417, 53 N. E. 83. See *Billingsley v. Stratton*, supra.

Insolvency as entitling surety to offset at law.

It has been held that the assignee of a non-negotiable chose in action takes subject to the right of the debtor to offset the amount the latter is required to pay in discharge of a judgment rendered against him as surety for the assignor, where at the time of the assignment the latter was insolvent. *Thompson v. McClelland*, 29 Pa. 475. While, under the Pennsylvania practice, equitable defenses are admissible in actions at law, the court styles this set-off as a legal set-off.

In another jurisdiction, however, it is held that the fact that the principal was insolvent, and that his insolvency was known to the assignee of a claim against his surety at the time of the transfer, cannot confer upon the surety the right to set-off the amount paid by him in discharge of his obligation as surety in an action at law by the assignee, since the insolvency of the principal does not change the present rights of the parties, although it may render it more probable that the surety may, by payment, acquire some future claim against the assignor. *Backus v. Spaulding*, 129 Mass. 234.

to set off the note of the Nolan Company, so held by it, against the account.

It is contended that the insolvency of the Nolan Company, at the date of the assignment, makes a case for the application of the doctrine of equitable set-off, and that the Dudley Company, under the obligation of indorser at assignment date, was, prior to the account's maturity, compelled to pay the note, and is entitled to invoke that defense.

The debtor of an insolvent creditor, who has assigned for the benefit of creditors the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured, at the date of assignment. *Nashville Trust Co. v. Fourth*

Nat. Bank, 91 Tenn. 336, 15 L.R.A. 710, 18 S. W. 822.

This right is based on the equity growing out of the insolvency of the assignor, at the time of the assignment; but the opinion in *Nashville Trust Co. v. Fourth Nat. Bank* indicates a distinction between the assignment where it is to a third party on purchase, as here, and where the assignment is one for the benefit of creditors. The court, in discussing the case of *Spaulding v. Backus*, 122 Mass. 553, 23 Am. Rep. 391, said that its "holding . . . is not necessarily inconsistent with the right of set-off as between the original parties, and appears entirely consistent with the decisions of this court that a right of set-off, to be so attached to the debt as to be available

Insolvency as entitling surety to equitable offset.

Insolvency by the weight of authority is held to be a distinct, equitable ground of set-off in favor of a surety as against an assignee of his principal, where the principal was insolvent at the time of the assignment, since under such circumstances the assignment gives to the assignee only the rights that the assignor had, and he is charged with all outstanding equities. Hence the discharge by the surety of his obligation, although subsequent to the assignment, may be used by him as an offset to an action by the assignee of an obligation held by his principal and assigned when insolvent. *Eigenmann v. Clark*, 21 Ind. App. 129, 51 N. E. 725.

As between the principal and surety, courts of equity always lend their aid for the protection of the latter. As soon as the surety's obligation to pay becomes absolute, as by insolvency of the principal, he is entitled in equity to require the principal debtor to exonerate him, and, since an assignee of a claim due the principal from the surety takes same subject to any defense which the surety might have against the principal at the time of the assignment, the surety may make an equitable offset to such claim, of the amount paid by him in discharge of his obligation as surety. *Craighead v. Swartz*, 219 Pa. 149, 67 Atl. 1003.

The insolvency of the principal introduces a new relation between him and his surety, whereby the latter is entitled to retain a debt due to the former, independent of the manner in which it was created, until the principal either releases him from or indemnifies him against his obligation. And where this equity exists at the time of the assignment by the principal of the claim against the surety, the right of the assignee is subject thereto, and if the surety subsequently discharges his obligation as such, he is entitled, in equity, to offset the amount thus paid against the claim of the assignee. *Tuscumbia, C. & D. R. Co. v. Rhodes*, 8 Ala. 212, cited with approval, 46 L.R.A. (N.S.)

in *Goldthwaite v. National Bank*, 67 Ala. 549, to the point that insolvency of the principal is a distinct equitable ground for the allowance of the set-off of demands which at law could not be made available.

Insolvency of the principal entitles the surety to equitable offset, as against the assignee of a debt due by the surety to the principal, of whatever the surety is required to pay in discharge of his obligation as surety, although the assignment is prior to the actual payment by the surety of this obligation. *Williams v. Helme*, 16 N. C. (1 Dev. Eq.) 151, 18 Am. Dec. 580.

And see *DUDLEY LUMBER CO. v. NOLAN BROS. LUMBER CO.* applying the doctrine to an obligation not due at the time it was assigned, and upon which the defendant was liable as surety.

But in *Walker v. McKay*, 2 Met. (Ky.) 294, it is held that to be available in equity as against an assignee, an obligation of the surety must have existed before the assignment, that is, the surety must have paid and discharged his obligation as such; since the principal does not become the debtor of the surety until the latter pays the debt for which he is liable as surety; hence he cannot set up and rely upon the mere fact that he is surety as entitling him to a discount against his own note, whether in the hands of his principal or an assignee; and insolvency alone entitles him to no greater or different relief. This is true, although the surety has paid the obligation of his principal, but not, however, until after he was notified of the assignment by his principal of the claim against him.

Fraud as entitling surety to equitable offset.

A surety against whom a judgment has been rendered for the default of his principal, which he has been compelled to pay, is entitled to the aid of equity to offset the amount thus paid on a judgment against him in favor of an assignee of his principal, where the assignment was simulated and fraudulent. *Wood v. Steele*, 65 Ala. 436.

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against it in the hands of an assignee for value, must be complete and perfect at the date of the assignment. *Gatewood v. Denton*, 3 Head. 381; *Litterer v. Berry*, 4 Lea, 193; *Catron v. Cross*, 3 Heisk. 584." And later in the opinion the court proceeded to treat the case before it as if only the insolvent himself were resisting the set-off, as distinguished from one who took, for value, the assignment.

We deem, therefore, the question for solution in the case at bar to be one not passed upon by the court in that cited case, nor in any subsequent case decided by this court.

There can be no doubt that a surety or indorser, who pays his principal's demand, has status, as such, to enforce an equitable set-off against a demand sued by such principal himself, if that principal be insolvent. There is nothing in any contingent feature incident to the claim of a surety or indorser that defeats the right. *Citizens' Bank v. Kendrick*, 92 Tenn. 437, 36 Am. St. Rep. 96, 21 S. W. 1070, and authorities below cited.

What change is wrought by an assignment, for value, of the demand, followed by notice by the assignee? It was said in *Taylor v. Deakins*, 9 Lea, 523: "It is true, the general rule is that the assignee of negotiable paper for a pre-existing debt is not a holder in the due course of trade without notice, and hence with respect to existing equities he stands in the shoes of the assignor; but the assignee does not continue to stand simply in the shoes of the assignor, especially after notice, so that his right to enforce the payment of the debt may be defeated by the subsequent acts of the assignor or debtor."

In *Moore v. Weir*, 3 Sneed, 46, it was held that such an assignee's condition, as respects the maker of the demand assigned, is no better than that of the assignor, and a mutual debt existing at the date of the assignment, but maturing afterwards, is allowable as a set-off. And this in an action at law.

By the Code (Shannon, § 4639) it is provided that the defendant may plead demands matured when offered in set-off; and any equities between defendant and the original party (assignor) under whom plaintiff claims, which by law have attached to the demand in plaintiff's hands, and for which the defendant would be entitled to recover against such original party.

The indorser company in the case at bar was such before and at the time the account against it was assigned, and before suit was brought, and, when "offered in set-off," it had taken over the note. The assignor was insolvent at the time the note

was executed and indorsed, as well as at the date of the assignment.

In this attitude the indorser had equities between itself and the insolvent assignor attached to the demand, afterwards assigned, so far forth that it could have enforced the retention for its indemnity of any funds belonging to the assignor, principal on the indorsed note, that might be in the indorser's hands; and this without having paid the note. *Citizens' Bank v. Kendrick*, supra; 27 Am. & Eng. Enc. Law, 2d ed. 478.

We hold that the assignment did not operate to defeat the right of the indorser to stand and prevail upon its defense of equitable set-off. We have not here an effort to set off a demand purchased or acquired after the assignment, but the enforcement of a right that antedated the assignment.

The decisions as to when a surety or indorser has a claim which can be used as a set-off are conflicting. In Connecticut it has been held that a surety may set off the amount which he is compelled to pay for his principal after an assignment against debts which he owed the insolvent, and which had passed into the hands of an assignee, the court saying that in equity, in view of the insolvency of the principal, the surety could proceed to compel prompt payment, and that, when the surety did later move to that end, the motion related back to the first moment of the existence of the right, which was prior to the acquisition of any right by the assignee. *Merwin v. Austin*, 58 Conn. 22, 7 L.R.A. 84, 18 Atl. 1029.

A number of cases may be found to the effect that a surety or indorser, who has not, at the time of the assignment, paid the note, has no right to set off its amount against a debt due by him to the assignor. *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965; *Walker v. McKay*, 2 Met. (Ky.) 294; *Nettles v. Huggins*, 8 Rich. L. 273; *Chance v. Isaacs*, 2 Edw. Ch. 348; also see *Richardson v. Anderson*, 109 Md. 641, 25 L.R.A. (N.S.) 394, 130 Am. St. Rep. 543, 72 Atl. 485.

But the contrary is held elsewhere. *Craighead v. Swartz*, 219 Pa. 149, 67 Atl. 1003; *Beaver v. Beaver*, 23 Pa. 167; *Scott v. Timberlake*, 83 N. C. 382; *Williams v. Helme*, 16 N. C. (1 Dev. Eq.) 151, 18 Am. Dec. 580; *McKnight v. Bradley*, 10 Rich. Eq. 557; *Feazle v. Dillard*, 5 Leigh, 31; *Collins v. Jones*, 10 Barn. & C. 777. Also see *Smith v. Felton*, 43 N. Y. 419; *Coffin v. McLean*, 80 N. Y. 560; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Armstrong v. Warner*, 49 Ohio St. 376, 17 L.R.A. 466, 31 N. E. 877; *Eigen-*

mann v. Clark, 21 Ind. App. 129, 51 N. E. 725; 34 Cyc. 751.

We are of opinion that the latter rather than the former line of authorities is more in accord with the principle that underlies our statute and decisions. The element of the time of payment does not figure, if made before the set-off was pleaded; and, as we have seen, in contemplation of equity, rights will be taken to have inhered in the indorser anterior to the assignment. The assignee will not be treated as a quasi holder in due course for value as against such an indorser. Manifestly a court of equity should not hold itself powerless to relieve from loss, in a very real sense fixed on the indorser at the time of the assignment, merely because his demand was not matured in law on assignment date. The trend of the more recent cases appears to be towards the ruling here made, and away from the influence of the rules of the common law as to set-off, sometimes harsh in their exactness.

Chancellor Cooper in *Howe Sewing Mach. Co. v. Zachary*, 2 Tenn. Ch. 478, dealing with a demand assigned for value, cited with approval *Smith v. Felton*, supra; and in the latter case the court said: "Equity will look through the form of the transaction, and adjust the equities of the parties with a view to its substance, rather than its form, so long as no superior equities of third persons will be affected by such adjustment. . . . It is enough that justice and equity demand that the debts should be set off against each other, rather than that the defendants should be made to pay the note, and left to rely upon the estate of an insolvent debtor for the payment of the debt due them. Technical objections, which would be valid at law, will not avail to defeat equitable set-off. . . . The plaintiffs took title to the note, subject to the equitable claim of the defendants, as it existed at the time of the assignment, which was to set off their debt against the note to the amount of the latter, and the legal title will not avail to defeat this prior equity of the defendants."

The indorser company, in such situation as is here disclosed, is in the eye of equity potentially a creditor, and the assignee succeeded only to the rights of the assignor, subject to the prior equity.

The court of civil appeals held that the Dudley Company was not entitled to be treated as a surety, and that, because it came into possession of the note from the Michigan Bank, subsequent to the assignment of the account, "by reassignment, this amounted to a repurchase or new acquisition by it." This is an erroneous view, 46 L.R.A. (N.S.)

even if there had been a formal reindorsement by the Michigan Bank to the Dudley Company, since such reassignment would have been nothing further than an evidencing in form that was true in substance,—that the Dudley Company by payment was in command of the obligation that had been indorsed by it. But the only indorsement in fact made by the Michigan Bank was one to a Memphis bank for collection, and payment was made thereunder at the Memphis bank.

As a further ground of its decision adverse to the Dudley Company, the court of civil appeals states its opinion to be "that § 50 of the negotiable instruments act [Laws 1899, chap. 94] clearly indicates that the indorsee [Dudley Company, treated as such, as above] cannot urge as against an assignee the equities or rights attaching to a note between the date of its execution and its reacquisition by him."

The section referred to is as follows: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he is personally liable." This section should be read in connection with § 121, which provides: "Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own, and all subsequent indorsements, and again negotiate the instrument," etc.

It is clear that there is nothing in the act that bars the indorser company, which paid the note, of its remedy against the maker; and the assignee of the account was not an "intervening party" within the meaning of § 50 of the act. In short, the provisions of the act have no pertinency to the facts of this case.

The writ of certiorari is granted, and the decree of the Court of Civil Appeals reversed. Decree here in accord with the one pronounced by the chancellor.

MISSOURI SUPREME COURT. (In Banc.)

STATE OF MISSOURI EX REL. JOSEPH
A. WRIGHT

v.
EUGENE McQUILLIN, Judge of St. Louis
Circuit Court.

(— Mo. —, 158 S. W. 652.)

Reference — right of referee to resign.

1. A referee is not an officer within a con-

stitutional provision forbidding officers to resign.

Same — bias.

2. A referee should be permitted to resign for cause, such as bias or prejudice in the case.

(Brown and Walker, JJ., dissent.)

(June 28, 1913.)

APPPLICATION for a writ of prohibition to prevent respondent from forcing relator to proceed as referee in a case in which he had been appointed. Granted.

The facts are stated in the opinion.

Mr. Joseph A. Wright in *propria persona*:

The right to resign without the consent of the appointing power is settled.

Missouri Const. § 5, art. 14; State ex rel. Walker v. Bus, 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636; Reiter v. State, 51 Ohio St. 74, 23 L.R.A. 681, 36 N. E. 943; Olmsted v. Dennis, 77 N. Y. 378.

A referee may resign in the absence of a statute forbidding it.

34 Cyc. 809; Brooklyn Heights R. Co. v. Brooklyn City R. Co. 105 App. Div. 88, 93 N. Y. Supp. 849.

Where a judge or referee believes himself prejudiced, he has both the right and is under the duty of resigning.

23 Cyc. 590; 34 Cyc. 809; State ex rel. Lentz v. Fort, 178 Mo. 518, 77 S. W. 741; State v. Gilham, 97 Mo. App. 296.

The writ of prohibition is proper where there is merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question.

St. Louis K. & S. R. Co. v. Wear, 135 Mo. 230, 33 L.R.A. 341, 36 S. W. 357, 658; State ex rel. Kochtitzky v. Riley, 203 Mo. 175, 12 L.R.A. (N.S.) 900, 101 S. W. 567; State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 15 L.R.A. (N.S.) 963, 123 Am. St. Rep. 468, 107 S. W. 487, 14 Ann. Cas. 198.

Messrs. Fordyce, Holliday, & White and Fred Armstrong, Jr., for Eliza P. O'Hara:

A referee has a right to resign.

Brooklyn Heights R. Co. v. Brooklyn City R. Co. 105 App. Div. 88, 93 N. Y. Supp. 849; (Mo.) Const. § 5 art. 14; State ex

rel. Walker v. Bus, 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636; 34 Cyc. 809.

Bias and prejudice on the part of a referee disqualifies him from service.

Caldwell v. Mutual Reserve Fund Life Assn. 30 Misc. 510, 63 N. Y. Supp. 841; Smith v. Dunn, 91 App. Div. 200, 88 N. Y. Supp. 307; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. 71 App. Div. 611, 75 N. Y. Supp. 520.

A refusal to serve disqualifies a referee, and a resignation constitutes a refusal to serve.

Brooklyn Heights R. Co. v. Brooklyn City R. Co. 105 App. Div. 88, 93 N. Y. Supp. 849.

Mr. Edward C. Kehr, with Mr. Eugene McQuinn, for respondent:

"The whole subject of reference is governed by the statute."

Caulk v. Blyth, 55 Mo. 294.

The reference in this case is compulsory, and the parties having failed to agree, the court of its own motion appointed the referee. He accepted the appointment and qualified as such. He thereby became an officer of the court appointing him (Higgins v. Wright, 43 Barb. 461), and as such is subject to its orders and control. (Ford v. Ford, 53 Barb. 525; O'Brien v. New York, 84 N. Y. 657, 84 Hun, 50, 32 N. Y. Supp. 34).

Graves, J., delivered the opinion of the court:

Original action in prohibition. The facts may be thus summarized: On April 5, 1905, there was pending in the circuit court of St. Louis city an action wherein Eliza P. O'Hara, executrix of the estate of Henry O'Hara, was plaintiff, and the firm of Berthold & Jennings were defendants. The suit and a counterclaim filed therein by defendants (both in large sums requiring an extensive accounting between the parties) rendered the case one for compulsory reference. This action fell by allotment to district No. 6 of the St. Louis city circuit court, over which respondent has presided since January 1, 1913. On April 5, 1905, respondent's predecessor appointed relator, Wright, as referee in said cause by the usual order in such cases made, and Wright qualified and proceeded to act, but to what extent does not appear in the record be-

Note. — Right of referee to resign.

There is a dearth of authority on this question.

The Louisiana statute, which provides that arbitrators shall not be allowed to resign their appointment without a good cause, is held to apply only to judicial arbitrators appointed to decide a cause al-

ready pending. Lallande v. Bonny, 13 La. 462.

In Brady v. Kennedy, 65 App. Div. 190, 72 N. Y. Supp. 507, and Brooklyn Heights R. Co. v. Brooklyn City R. Co. 105 App. Div. 88, 93 N. Y. Supp. 849 (referee appointed to take proof of certain facts), the right of a referee to resign is assumed.

J. D. C.

fore us in the instant case. It does appear that a previous referee had taken all the evidence in the case, and Wright was appointed on the death of the first referee. The facts we take from the respondent's return, in so far as they controvert the allegations of the relator's petition. This we do because the case is submitted here upon a motion for judgment on the pleadings. In such case, so far as the facts stated in the return controvert the facts stated in the relator's petition, the return must govern.

On December 31, 1912, the referee Wright, filed his written resignation in said cause, assigning as one of his reasons therefor that he was biased and prejudiced in the cause as to the plaintiff therein. Other reasons we omit. January 2, 1913, the defendants in the cause pending nisi filed their application for a rule upon the referee to report on said cause. This application on January 24, 1913, the court sustained in a summary way, and directed the referee to report forthwith his actions and proceedings in said cause. January 30, 1913, the plaintiff by proper motion and application asked the court to vacate its order of January 24, 1913, and either accept the resignation of the referee or remove him from office, because of his bias and prejudice against her, and appoint another referee in said cause. This application, which was duly verified by oath, contains among other things the following: "That said Joseph A. Wright, the present referee, is prejudiced and biased against plaintiff in this cause, and has expressed a prejudice and bias against plaintiff in this cause, and consequently is not a proper person to act as referee herein, and is not competent to render a report on the merits of the cause." This application, verified as aforesaid by the affidavit of one of plaintiff's counsel, was summarily overruled, and the referee left to make immediate report or take other steps. The referee in this situation applied to this court for a writ of prohibition, and an order to show cause was issued. The return of the respondent does not question the fact of Wright's prejudice and bias. It proceeds on the broad ground that the court can direct Wright to report until such time as the resignation is accepted or he is removed, and, although not in express terms, the return, in fact, denies the right of the referee to resign for any reason. Other matters will be left for the course of the opinion.

I am impressed that both parties to this action have an erroneous view of the law of the case. Relator urges an absolute and unqualified right to resign his position, 46 L.R.A. (N.S.)

and cites us to § 5 of art. 14 of the Constitution, and some case law. The constitutional provision cited has no reference to a referee. This provision has reference to officials of a different kind and character. The section does recognize the absolute right to resign in the class of officers to whom it refers, but relator does not belong to this class. The cases cited likewise do not support the contention, and for the same reasons. Whilst in a sense a referee is an officer of the court, he is not an officer within the meaning of this constitutional provision. A referee is thus defined in 24 Am. & Eng. Enc. Law 2d ed. p. 219: "A referee is a person to whom a cause pending in court is referred by the court to take testimony, hear the parties, and report thereon to the court, and upon whose report, if confirmed, judgment is entered." Another authority, 34 Cyc. 774, thus defines "reference" and "referee." "A reference is a sending of a pending cause or some question therein by the court in which it is pending to a private person to hear and determine the cause or some question therein or to take evidence and report the same, with or without his opinion thereon, to the court. Before there can be a reference there must be an action pending, and generally only matters connected with the pending suit can be referred. The person to whom the reference is made is usually termed a referee; but various other names are given to such persons in different jurisdictions, there sometimes being, however, a difference between a referee and such other person. The term 'auditor,' 'commissioner,' 'arbitrator,' 'examiner,' 'assessor,' etc., are often used. A referee is to be distinguished from a master who is appointed only in equity suits pursuant to the old equity practice, although in some jurisdictions a referee in an equity suit appointed pursuant to statute is now termed a referee rather than a master. In so far such officers perform the duties of a referee, the difference in title may be disregarded, and the title of referee is therefore used generically throughout this article, except where there is a difference of importance between the particular officer and a referee."

No definition brings a referee within the class of officers held in view by the constitutional provision, *supra*. On the other hand, respondent apparently denies the right to resign *in toto*. To our mind the true rule lies between the two extremes. I do not believe that a referee should be permitted to resign for mere capricious or capricious reasons, but that there is a right to resign for good and sufficient reasons, I have no doubt. The right to resign is, in

my judgment, a qualified, rather than an absolute, one. In other words, it is a right dependent upon the reasons for its exercise. If the reason assigned is good and valid the right is there, but not so if the reasons are otherwise. The right of the court to remove a referee for good cause, and the right of the referee to resign for good cause, should go hand in hand. If the one is recognized, the other should be recognized. The thing which would authorize the court to remove the referee should authorize the referee to resign, and force the acceptance of such resignation, if acceptance be necessary.

It is urged that our statute makes no provision for the resignation of a referee, and this is true. Nor does the statute provide for the court's removal of the referee for cause. The only statutory provision is one authorizing the court to appoint another referee in the event the first appointee dies or removes from the state. Rev. Stat. 1909, § 2000. Not a word is said about removing for cause, yet the courts all recognize that a referee may be removed for cause, and one of the chief causes is bias and prejudice. It is also true that our statutes make no specific provision for the resignation of a referee for good cause or reasons, yet it does not necessarily follow that such right does not exist. Our statutes, with regard to references and referees, are but additions to the old chancery idea of masters in chancery. The statutes merely broaden the common-law field for references. For this reason the statutes are not full and complete, but much is left to be gathered from the old chancery rules as to references in chancery. In chancery practice the right to remove a master in chancery for good cause was always recognized, and the same doctrine has been followed under statutory provisions for reference.

In 34 Cyc. 809, the law is thus stated: "A referee is subject to removal by the court, even where appointed by agreement of the parties, but only for good and substantial reasons. For instance, the referee may be removed because of prejudice or bias or misconduct, or by the expression of an opinion on the facts before the hearing." In *Bowen v. Steere*, 6 R. I. loc. cit. 253, Ames, Ch. J., says: "The motion to discharge the rule altogether, upon the ground that two of the referees, after their appointment and before they had heard the case of the claimant, expressed opinions unfavorable to it, demands, on account of the nature of the cause alleged, the careful consideration of the court. Whilst in modern times courts have been more liberal in overlooking honest errors in referees and arbitrators, and mere

defects of form in their reports and awards, they have been more strict in requiring from them the integrity and impartiality which belongs to the judicial character. *Cleland v. Hedly*, 5 R. I. 163; *Strong v. Strong*, 9 Cush. 573. The partiality betrayed by the expression of an opinion by a referee for or against the case of either party before he has heard it would, unless the parties had agreed to waive impartiality in the tribunal selected by them, be a good cause to invalidate his report, and to discharge the rule which appointed him. Under such circumstances the court would be bound to presume, notwithstanding the referee swore that his prejudice did not sway him, that the report was not the result of his fair and deliberate judgment, but of preconceptions, which placed him beyond the influence of both law and fact. *Fox v. Hazelton*, 10 Pick. 275; *Boston Water Power Co. v. Gray*, 6 Met. 131."

So, in the case at bar, what court could say that a fair report had been given by the biased and prejudiced mind of the referee? This, too, in the face of admitted bias and prejudice. In the case of *Goldberger v. Manhattan R. Co.* 3 Misc. 443, 23 N. Y. Supp. loc. cit. 178, it is said: "Referees are judicial officers, charged with a responsible trust. They take the place of the jury as well as of the court, and their finding upon the facts is generally accepted as conclusive. Like jurors or arbitrators, they should be persons entirely unbiased and indifferent between the parties, or their competency to act may, in like manner, be challenged, and any secret understanding as to receiving fees in advance from one party (*Russell, Awards*, 129; *Morse, Arb.* 536; *Redman, Awards*, 93), or any other act of misconduct calculated to bias or influence any one of the referees in his conduct, or to prejudice either party, is generally regarded as ample cause for removal, and for setting aside the award when made. For examples of the stringency of this rule, see *Forrest v. Forrest*, 3 Bosw. 650; *Dorlon v. Lewis*, 9 How. Pr. 1; *Yale v. Gwinits*, 4 How. Pr. 253; *Livermore v. Bainbridge*, 44 How. Pr. 362, affirmed in 47 How. Pr. 354; *Marie v. Garrison*, 1 How. Pr. N. S. 32; *Devlin v. New York*, 7 Daly, 466; *Carroll v. Lufkins*, 29 Hun, 17; *Burrows v. Dickinson*, 35 Hun, 492; *O'Brien v. Long*, 49 Hun, 80, 1 N. Y. Supp. 695. Misconduct or bias upon the part of referees may be of two kinds,—either positive, as by some act that can be directly proved, or inferential, where the circumstances so strongly point to undue influence that the presumption alone will be taken as conclusive."

In the case at bar we have confessed bias toward one of the parties upon the part of the referee. The good faith of this confession is not questioned, and cannot well be questioned. To force a biased and prejudiced mind to try a cause would be a travesty upon justice. Other cases strongly recognizing the right of the court to remove a referee for bias and prejudice will be found cited in 34 Cyc. supra, and we need not go further. As above indicated: "The reason assigned by this referee is the very best of all reasons. The law contemplates a fair and impartial trial of all issues before a fair and impartial tribunal. Jurisprudence despises bias and prejudice in the administration of justice. Bias and prejudice saps the very life blood of even-handed justice. For that reason we exclude proffered jurors from service. For that reason circuit judges are temporarily dethroned, and new judges called to try the cases. In fact, bias and prejudice are shunned at every step of legal proceedings, and rightfully so. Now to the case at bar. The referee openly admits his bias and prejudice as against one of the parties litigant,—and he asks the court to relieve him of the situation to the end that untrammelled justice may prevail. Not only so, but the party aggrieved by the feelings of the referee moves to have him removed and another appointed, and both of these requests are summarily disposed of by the court by an order directing the referee to proceed to report. To my mind such condition is anomalous. All the case law holds that a referee should be removed for prejudice, and yet the court nisi held could neither resign nor be removed. If he can be removed for prejudice, as the case law holds, should we hold that he cannot resign for the same cause? If he can be removed for prejudice, he certainly should be permitted to resign for the same reason." In other words, if the law imposes upon the judge the duty to remove a referee for bias and prejudice, the same law should impose upon the referee the duty to resign for the same cause. This is particularly true because the referee more fully than any other has the knowledge of the condition of his own mind. Bias and prejudice is a good cause for the resignation of a referee, and when such reason is assigned for the act, the resignation should go as a matter of course and right, and not as a mere matter of grace. We shall, however, approach the question from another angle or viewpoint.

II. A referee is but an arm of the court, created by the court, to do things which the court could itself do but for the inconvenience

and time. His qualifications should be along the lines of those required of a trial judge, because he performs duties that otherwise would have to be performed by such judge. Not only should his qualifications be along lines of those required of the trial judge, but the things which disqualify the one to act should disqualify the other. Bias or prejudice has always disqualified the judge in Missouri, and it should likewise disqualify the referee. As to the judge, the rule is tersely stated in 23 Cyc. 590, in this language: "A judge may take judicial notice of matters affecting his qualification, and refuse to act if disqualified within his own knowledge and without any extrinsic evidence of such disqualification; and it is not only the right, but the duty, of a judge to refuse to preside at the trial of a case in which he is disqualified, without regard to the manner of receiving information of his disqualification." So, in the case at bar, if the referee, acting in good faith (and there is nothing to the contrary in this record), discovered that he was prejudiced against one of the parties, he had the right to resign in the interest of justice and fair play. In some states the final reports of referees have been set aside on the ground of bias and prejudice upon the part of the referee.

We have in the case at bar the solemn admission of his bias and prejudice. We have also an affidavit to the same fact, and yet without further information the trial judge summarily directs the referee to proceed to determine the issue between the parties. This should not be,—in the interest of jurisprudence. A referee should have the right to resign for the same reasons and upon the same grounds as would authorize the court to depose him. That such grounds exist in this case is not denied by the respondent's return. With the trial judge it seems to have been a mere question of the right of a referee to resign under any circumstances, and he adjudged that the referee had no such right. We hold that where bias and prejudice is admitted, as in this case, the referee has the right to resign, and the trial court exceeded his authority in directing the referee to proceed further with the case.

Let the writ of prohibition go. Costs to be taxed to relator.

All concur, except Brown and Walker, JJ., who dissent.

Petition for rehearing denied July 10, 1913.

GEORGIA SUPREME COURT.

C. F. KOHLRUSS, Plff. in Err.,
v.
JULIAN ZACHRY et al.

(139 Ga. 625, 77 S. E. 812.)

Corporation — right to hold property — who may question.

1. The general rule is that, where a corporation has acquired possession and title to property, its right to hold it cannot be questioned by a private citizen, but in such a case the state alone can make the question.

Headnotes by HILL, J.

Note. — Right of private persons to contest the power of a corporation to take or hold property.

I. In general.

- a. Generally, 72.
- b. Where corporation has power to hold for some purposes, 75.
- c. Power to hold to a certain extent, 77.
- d. Power to hold a certain time, 77.
- e. No power to hold, 78.

II. Who is seeking to question.

- a. Persons sustaining contract relation, 79.
- b. Persons sustaining no contract relation, 80.

III. Form of action.

- a. Corporation on defensive merely, 81.
- b. Corporation seeking affirmative relief.
 1. In general, 82.
 2. Suit for specific performance, 84.

I. In general.

a. Generally.

The earlier cases on the question annotated are collected in the note to *Hanson v. Little Sisters of the Poor*, 32 L.R.A. 293.

The general questions connected with the right to challenge an *ultra vires* contract of a corporation are not considered herein, the note being confined, as indicated in the title, to the right to question the corporation's power to take and hold property. Promissory notes and other choses in action have in general been excluded, as well as the forms of security that may be taken to secure payment of the same. Some such cases have been included for purposes of illustration, but the note is not intended to be exhaustive of this class. Questions connected with the right to condemn lands have also in general been excluded.

Neither is the doctrine of estoppel treated, although some cases in which the right to contest the power of the corporation is placed on that ground have been included, but in such cases the true ground of decision is shown.
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Same — land contract — defense to specific performance.

2. But where a state statute provides that corporations "shall make no contract, or purchase or hold any property of any kind, except such as is necessary in legitimately carrying into effect" the declared purposes of the corporation, the courts will not aid the corporation to compel specific performance of a contract for the purchase of land which it has no power under its charter to acquire and hold.

Appeal — conflicting evidence — reversal.

3. The evidence was conflicting on material questions of fact, and it does not so clearly appear that the contract sought to be enforced by the corporation was *ultra vires* as to require it to be so declared as matter of law, and to cause the reversal of

Generally, as to the right to contest the power of a foreign corporation to hold property, see note to *Lancaster v. Amsterdam Improv. Co.* 24 L.R.A. 322.

And as to who may take advantage of a statute rendering foreign corporations incapable of taking title to real property, see note to *Hanna v. Kelsey Realty Co.* 33 L.R.A. (N.S.) 355; and see also the case of *Plummer v. Chesapeake & O. R. Co.* 33 L.R.A. (N.S.) 362.

As to right to question the power of a corporation to take by will property in excess of its charter authority, see subdivision of note to *Hanson v. Little Sisters of the Poor*, supra; *Hubbard v. Worcester Art Museum*, 9 L.R.A. (N.S.) 689; and supplemental note to *Kennett v. Kidd*, 44 L.R.A. (N.S.) 544.

It is held generally in some cases that none but the state can be heard to question the right of a corporation to take and hold property.

Thus, the right of a corporation which has power to explore for gas, to take a lease of oil right, can be questioned only by the state, and not by a subsequent lessee of the same rights. *Harris v. Independence Gas Co.* 76 Kan. 750, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123. The court here treats the question more as to the power of the corporation to contract, than as to the rights in question, of power to take and hold property.

The lack of power of a water company to take and accept a grant of a right to maintain a telephone or telegraph system can be taken advantage of only by the public authority, and not by the successors in interest of the grantors. *Northeastern Teleph. & Teleg. Co. v. Hepburn*, 72 N. J. Eq. 7, 65 Atl. 747.

The power of a corporation organized for the purpose of carrying on a general dry goods business, to take an assignment of claims for damages growing out of a conspiracy to defraud,—a matter outside the purposes of its creation, and not authorized by its charter,—can be questioned only by the state, and not by the defendant in the action for damages. *John V. Farwell Co. v.*

the judgment refusing to grant an interlocutory injunction to restrain the corporation from proceeding under such contract.

(Hill, J., dissents.)

(March 13, 1913.)

ERROR to the Superior Court for Columbia County to review an order suspending a restraining order in a suit to cancel a contract for the sale of real estate. Affirmed.

Statement by Hill, J.:

C. F. Kohlruss filed his equitable petition against Julian J. Zachry and the Harlem Oil & Fertilizer Company, and alleged substantially as follows: Petitioner is the

owner and in possession of 404½ acres of described land in Columbia county, near the town of Harlem, which land is worth \$15,000. Petitioner borrowed \$2,300 of Mrs. J. B. Wright, and gave as security for the debt a deed to this land, under the provisions of § 3306 of the Code of Georgia, and received from her a bond to reconvey title to the land when the debt was paid. In September, 1912, petitioner borrowed from Zachry (acting, as now it is claimed, for the Harlem Oil & Fertilizer Company) the sum of \$300, and gave his note therefor, payable sixty days thereafter. As security for the debt, he assigned the bond for title from Mrs. Wright; and at the same time he was requested by Zachry to sign some other paper, the nature of which he cannot

Wolf (John V. Farwell Co. v. Josephson) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109.

The power of a traction company to take and hold a grant of a right of way can be questioned by the state only, and not by a grantee of the traction company's grantor. Knowles v. Northern Texas Traction Co. — Tex. Civ. App. —, 121 S. W. 232.

The power of a corporation to take certain leases of street railway property can be raised only by the state, and not by the municipality, in an action to which the lessees and the lessors are parties, brought by receivers, in whom are vested, under the authority of the court, all the rights and franchises of the lessor corporations which the latter undertook to transfer to the lessees. Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

Apparently, it was on the theory that none but the state can question the right of the corporation to hold property, that *Annell v. Southern Illinois & M. Bridge Co.* 223 Mo. 209, 122 S. W. 709, was decided. In this case it was held that minors who, through their lawfully appointed guardian, have sold land to a corporation and have received the consideration therefor, cannot question the power of the corporation to purchase and hold the land in question.

The power of a railroad company to purchase an island and establish thereon a resort for excursionists cannot be questioned by the grantor of the company, nor his legal representatives, who have retained the consideration paid upon the purchase. *Shelby v. Chicago & E. I. R. R. Co.* 143 Ill. 385, 32 N. E. 438. Nothing is said in this case as to the right to question being confined to the state.

The rule that none but the state can question the power of a corporation to hold property was recognized in *Atty. Gen. ex rel. Askew v. Smith*, 109 Wis. 532, 85 N. W. 512, where a landowner seeking to compel the removal of an obstruction from a lake by a railroad company which had no power to acquire a fee in its right of way, but only an easement, but to which a deed in fee had been made, the landowner claiming that, by 46 L.R.A. (N.S.)

reason of the power of the railroad company to hold only an easement, he became a riparian owner, and was therefore entitled to object to the obstruction.

This doctrine was approved in *United Waterworks Co. v. Omaha Water Co.* 21 Misc. 594, 48 N. Y. Supp. 817, but in the reversal of the decision, in 164 N. Y. 41, 58 N. E. 58, nothing is said on this point.

An exception to the rule that only the state can question the power of a corporation to hold property is suggested in *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656, in case the inability to hold the property results from express statutory prohibition.

Another exception to the general rule is referred to in *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, as existing where the attack by a private person is authorized by expressed legislative permission.

In speaking of the assignment of a cause of action, in *Peru Plow & Implement Co. v. Harker*, 75 C. C. A. 475, 144 Fed. 673, the court states that the title the corporation received may be a defeasible title, but until the state or the assignor directly attacked it, it is impervious to collateral attack by third parties, thus, apparently, recognizing that an assignor might question the power.

In *Hopkins County v. St. Bernard Coal Co.* 114 Ky. 153, 70 S. W. 289, where a number of persons who held a claim against a county, and who assigned the same to a corporation, subsequently joined with the corporation in a suit against the county to recover the claim, and no objection was made to the joinder of parties, and no question presented as to whether the corporation could have sued in its own name alone, it was held that the objection that its purchase of the claim was *ultra vires*, and therefore left no title in it to them, could not be maintained, since the original claimants were before the court and the money would go to them, if not to the mining company, and the county had therefore not been prejudiced by the form of the judgment.

In *Hill v. Rich Hill Coal Min. Co.* 119 Mo.

state, as, at the time he signed the paper, it was in the town of Harlem and he was trying to catch a train then approaching, to return to Augusta. A copy of the paper was not given him. He had previously borrowed from Zachry \$300, and had given his note therefor, and he was then required to assign his bond for title, and to sign another paper which was in the nature of a conditional sale of the land to Zachry, providing that if the note was not promptly paid when due, Zachry was to have the right to purchase the land for the sum of \$7,500, and to deduct therefrom an encumbrance for \$3,000 due Mrs. Julia A. Hull, then holding the legal title to the land, which debt was subsequently taken up by Mrs. Wright. The paper further provided that,

in the case the \$300 first borrowed from Zachry was not paid when due, the land should be surrendered to Zachry, together with all debts due Kohlruss at that time. Zachry importuned petitioner to sell him the land, which he refused to do. On the 19th of November, 1912, the day on which the last \$300 fell due, petitioner tried to reach Zachry at his office in Augusta upon two occasions, to pay the note, but failed to find him, his stenographer reporting that he was not in. Later in the day, Zachry came to petitioner's place of business and said, "How about that note? I suppose I ought to have notified you, but I came around instead." Petitioner was ready then and there to pay the money, but did not have it in his pocket at the moment,

9, 22 S. W. 223, an action by a vendor against his vendee, a corporation, to compel specific performance of a land contract, the right of the vendor to question the power of a railway company which was not a party to the suit, to hold a major portion of the stock in the defendant corporation, thereby influencing its affairs, was denied, the court stating that it is certain that such a matter could not be taken advantage of in a collateral way, but must be investigated by the state in its sovereign capacity.

While it is stated in *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32, an action by a purchaser under a land contract against his vendor, to recover the earnest money paid, on account of a conveyance in the vendor's title by a corporation, that the title of the corporation could be questioned only in a proper proceeding by the state, the real decision in that case seems to be based on the fact that a conveyance had been made by the corporation, and not questioned for some time.

In *Kansas City & S. E. R. Co. v. Kansas City & S. W. R. Co.* 129 Mo. 62, 31 S. W. 451, an injunction was sought by the plaintiff to restrain the defendant from interfering with the plaintiff in the possession of its right of way. The defendant attempted to question the power of a corporate grantor of the plaintiff to acquire any land in the county in which the land in question was situated. This was denied, the court stating that the capacity of that company to acquire a right of way and operate a railroad thereon is a matter that the state only can question, and as that right has not been denied by the state during a period of twenty years, it must be assumed that it was rightful.

The power of a national bank to loan money on the security of personal property can be raised only by the government, and not by one who claims to have been defrauded of the goods by the mortgagor *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796.

In *Daniels v. Belvidere Cemetery Asso.* 193 Ill. 181, 61 N. E. 1031, where a first mortgage had been assigned to a corpo-

ration, and it appeared by the pleading that the same had not been paid, a junior mortgagee was held to have no right in an action by junior mortgagees to foreclose their mortgages, to have the first mortgage canceled on the sole ground that the assignment to the corporation was void for want of capacity of the corporation to receive it. This holding is based on equitable grounds, stating that none of the other junior mortgagees were asking any relief, and the plaintiff in error had acquired no equity or right to appropriate the property of others for her benefit, by having the lien destroyed and removed out of the way of her mortgage, and that, if the assignment to the corporation was a nullity and transferred nothing, the debt would not be paid, and the title which was attempted to be transferred would remain in the assignor.

Where a bank, in violation of statute, accepted a pledge of its own stock as security for a note, and subsequently became insolvent and passed into the hands of a receiver, the maker of the note cannot question the power of the bank to take the pledge of stock. *Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755. The court states that it is of the opinion that the maker of the note might recover the certificate of stock if he had a desire to do so in a suit between himself and the bank during the solvency of the bank, but as the bank had become insolvent and a receiver had been appointed to take charge of its affairs to protect its creditors as well as its stockholders, the maker of the note cannot successfully plead the provisions of the statute and thereby defeat the foreclosure of the pledge. The decision in this case is based partly upon the ground of estoppel, and does not rest entirely upon the theory that no one but the state can question the power of a corporation to hold property.

The power of a corporation to take and hold a lease of land cannot be raised by the lessor, who has dealt and contracted with the corporation in its corporate name, and thereby recognized the corporate capacity to receive the granting question, and has received and retained the consideration for

but would get it at once and pay it immediately; and he asked Zachry where he could find him that day so that he might bring him the money. Zachry replied, "I don't know where I'll be. I don't want you to pay this money anyway. I want that land. I have told you that the amount (specified in the transfer \$7,500) was all the land was worth." Petitioner replied, "I never will sell it." Zachry told petitioner he did not know where he would be later in the day or at night. Petitioner then told Zachry that if he could not find him that night, he would bring the money to Zachry's office the first thing next morning. This petitioner repeated twice, and understood Zachry to reply, "All right." The next day (November 20) he called at the

office of Zachry to pay the note, but Zachry was not in. He again called there on November 21, to pay the note, but Zachry was not in. Being unable to find him in his office, petitioner, on the 22d day of November, 1912, went to the town of Harlem, where Zachry had a place of business, and tendered the money due on the note, which Zachry refused to accept. He again tendered the money on the 23d, which tender was refused. After this, and on the same day, one of petitioner's tenants on the land came from Harlem and informed him that Zachry had gone upon the land and informed the tenant that he was the "boss and the owner of said land," and said, "I have long wanted to get this land, and now I've got it." He added, if petitioner owed

the contract sought to be enforced. *Lemp Hunting & Fishing Club v. Hackmann*, — Mo. App. —, 156 S. W. 791. This decision, also, is placed on the ground of estoppel arising from the lessor having dealt with the corporation.

In some cases the contract by which the corporation acquires the property in question is attacked as *ultra vires*, and no attack is made on the right of the corporation to take or hold the property. In *State Ins. Co. v. Farmers' Mut. Ins. Co.* 65 Neb. 34, 90 N. W. 997, the right to attack as *ultra vires* a contract by which an insurance company obtained an assignment of the unearned premiums on fire insurance policies, upon reinsurance by it of the property, was denied to the company which wrote the first policies, the court stating that the plea of *ultra vires* cannot be interposed by stranger, but only by the state, which authorized the incorporation of the company, or by a party to the contract which the corporation sought to make.

Executory contracts.

In *Harris v. Independence Gas Co.* 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123, the right to question the power of the corporation was held not to exist in anyone except the state, even though the contract is executory. But see *Kennett v. Kidd*, 44 L.R.A.(N.S.) 544, for holding of this court that capacity of a corporation to take by will may be challenged by the heirs.

The contract under consideration in *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, was an executed contract, and in the opinion the rule is stated to be confined to such contracts, although it is not clear that this was intended in its fullest extent, as subsequently the court, in referring to the rights of the corporation under an executory contract, states that the court will not interfere in behalf of a corporation whose rights rest only on an executory contract which it seeks, outside of the provisions of its charter, to have enforced. The position of the court is not therefore clear as to the 46 L.R.A.(N.S.)

rights of a private person to question the power of a corporation to hold property under an executory contract which it is not seeking to have enforced.

And see, further, as to executory contracts under III. b, 2, *infra*.

b. Where corporation has power to hold for some purposes.

Where a corporation has power to acquire real estate for the purpose of its business, its power to hold any particular real estate can be questioned only by the state, and not by an individual. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088; *Hayden v. Hayden*, 241 Ill. 183, 89 N. E. 147; *Lauder v. Peoria Agri. & Trotting Soc.* 71 Ill. App. 475; *Hagerstown Mfg. Min. & Land Improv. Co. v. Keedy*, 91 Md. 430, 46 Atl. 965; *Scott v. Farmers' & M. Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7; *Ray v. Foster*, — Tex. Civ. App. —, 53 S. W. 54.

Dictum of like effect appears in *Hossack v. Ottawa Development Asso.* 244 Ill. 274, 91 N. E. 439, and *Louisville School Board v. King*, 127 Ky. 824, 15 L.R.A.(N.S.) 379, 107 S. W. 247.

Thus, under a statute authorizing the corporation to acquire and hold such land and property as shall be necessary for its purposes, and such other lands as shall be taken in payment of or as security for debt, the holder of a tax deed on certain land cannot, in an action by one who claims to be the owner of such lands, question the authority of a corporation which sold to the plaintiff, to acquire the land in controversy, as under such statute the inquiry whether any particular real property is necessary for the business of the corporation is a matter between the state and the corporation, which does not concern third parties. *Bowman v. Trainor*, 93 Ark. 435, 124 S. W. 1019.

So, where a foreign corporation is given power to hold land for the purposes of its incorporation, the inquiry whether any particular real property, or how much, may be necessary to enable it to carry on the busi-

the tenant anything, he (Zachry) would pay it; that he proposed very soon to sow oats upon the land.

Petitioner charges that Zachry deliberately absented himself on the day the note fell due, in order to prevent petitioner from seeing him and paying the note, and to defraud him out of his land. When he signed the last note for \$300, he had full confidence in Zachry that he would not wrong or take advantage of him; and for this reason he did not take the precaution to read over the paper above mentioned. Before signing it there was nothing said about a conditional sale of the land in the event the note was not paid when due. There was no agreement as to what Zachry should pay for the land, and no thought

of selling the land to Zachry. There was no mutuality of contract in reference to the sale of the land, etc. If Zachry should present the bond for title assigned to him, and demand of Mrs. J. B. Wright a title to said land, which he threatens to do, he would acquire the title to the land, of the value of \$15,000, for \$2,300, and thus defraud petitioner out of many thousand dollars, and cause him irreparable damage, if an immediate remedy is not afforded. He makes a continuing tender to pay the amount of the note, and prays that the defendants be enjoined from entering upon the land of petitioner or exercising any acts of ownership over it, and from paying the debt due by him to Mrs. Wright and acquiring a conveyance from her; and that de-

ness for which it was organized, is a matter between the state and the corporation, and cannot be raised by a defendant in an action to acquire title to land held by the corporation. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348.

So, where the corporation has power to own real estate where it is taken for a debt due it, or is necessary for the transaction of its business, whether or not the corporation exceeded its powers in accepting a conveyance of real estate is a question which can be raised only by the state, and not by one who claims title to the real estate in question. *Cooney v. A. Booth Packing Co.* 169 Ill. 370, 48 N. E. 406.

So, where a corporation is possessed of ample power to acquire real property, and constructs a building thereon for the purpose of transacting therein the legitimate business of the corporation, the lessee of a part of such building cannot, in an action for the rent, set up the lack of power of the corporation to erect the building in question, which it is claimed was purposely constructed much larger than the business of the corporation required. *Rector v. Hartford Deposit Co.* 190 Ill. 380, 60 N. E. 528. See discussion of this case, *infra*, I. e.

The power of a corporation which has power to own and hold real estate for some purposes, to take and hold the interest of a lessor under a lease for a term of thirty years, can be brought into question only by a proceeding instituted in behalf of the state, and cannot be questioned by the lessor or his assignee. *Springer v. Chicago Real Estate, Loan & T. Co.* 202 Ill. 17, 66 N. E. 850.

It seems that the corporation in *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, *supra*, was authorized to hold land for some purposes, and in that case it was held that the right to hold could be questioned only by the state, and not by one who claimed the lands by a deed from a former owner which was sought to be set aside in the action.

The power of a corporation authorized to own and deal in real estate, to hold unsurveyed public land of the United States, can 46 L.R.A.(N.S.)

be raised only by the state, and not by a claimant of such land. *Tidwell v. Chiricahua Cattle Co.* 5 Ariz. 352, 53 Pac. 192.

The power of a corporation whose object is to "obtain an additional water supply for those then owning water rights" in a certain ditch, to purchase the water rights already possessed by its stockholders, can be questioned only by the state, and not by an adverse claimant of the water rights. *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 Pac. 505.

Where a steamboat company authorized to hold real property for wharves, etc., used in the business, purchased a hotel near one of its wharves, it carries a title good as against all the world, except, perhaps, the commonwealth, and the power to hold the property cannot be raised by a guarantor on a bond for rent given by lessees of the hotel property. *Nantasket Beach S. B. Co. v. Shea*, 182 Mass. 147, 65 N. E. 57. The objection to a recovery on the bond was directed more to the claim that the corporation had no power to lease, than that it had no power to hold.

So, it is stated in *Chicago & M. Teleg. Co. v. Type Teleg. Co.* 137 Ill. App. 131, with reference to a lease by a telegraph company of property suitable for telegraphic purposes, that if the company leased more of such property than was necessary for its purpose, the state alone could complain. In the affirmation of this decision, in 236 Ill. 476, 86 N. E. 107, nothing is said as to the right of one other than the state to raise the question of the power of a corporation to hold property.

In an action by a corporation which has power to hold real estate for certain purposes, to recover the rent of certain rooms in a building erected by it, the power of the corporation to lease the rooms and collect rent therefor was held not to be a proper question to be raised in a proceeding wholly collateral. *Dauchy Iron Works v. Gunder*, 150 Ill. App. 604.

The power of a national bank to acquire title to real estate can be objected to only by the government, and not by an individual. *DeWitt County Nat. Bank v.*

fendants be required to accept the money tendered in settlement of the note, and to cancel the same, and to reassign the bond for title held by them as security for the debt, and to produce and cancel any alleged conditional contract of sale of the land from petitioner.

The defendants by their answer denied most of the main allegations in the petitions and, among other things, averred that on September 20, 1912, in Harlem, Georgia, the Harlem Oil & Fertilizer Company advanced to the plaintiff the sum of \$300 as part payment on the purchase price of \$7,500 of the land in controversy, and the plaintiff then and there conveyed all his interest in the land by written instrument, a copy of which is attached to the answer;

that on the same day the parties entered into a written agreement (a copy of which appears in the opinion, *infra*) wherein it was mutually agreed that if plaintiff failed to repay the sum so advanced, in sixty days after the date of the contract, the plaintiff should sell to the Harlem Oil & Fertilizer Company the land in controversy at the agreed price of \$7,500. The plaintiff failed to repay or tender to said corporation the sum of \$300 within the time named in the contract, "whereby all interest and equity of plaintiff in said land was divested, and vested in said corporation." The plaintiff having already conveyed to the defendant company his interest in the land, and having failed to comply with the terms of the contract where-

Mickelberry, 244 Ill. 77, 135 Am. St. Rep. 304, 91 N. E. 86; Minneapolis Threshing Mach. Co. v. Jones, 95 Minn. 127, 103 N. W. 1017; Hall v. Farmers' & M. Bank, 145 Mo. 418, 48 S. W. 1000, affirmed in 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14; First Nat. Bank v. Roberts, 9 Mont. 323, 23 Pac. 718, approved in Barron v. McKinnon, 116 C. C. A. 483, 196 Fed. 933.

Nor can the power of a national bank to acquire a tax bill be questioned by anyone except the government. First Nat. Bank v. Shewalter, 163 Mo. App. 635, 134 S. W. 42.

The power of a foreign railroad company which has complied with the local laws, to hold property, cannot be raised by one to whom the railroad company has conveyed the property. Fayette Land Co. v. Louisville & N. R. Co. 93 Va. 274, 24 S. E. 1016.

The power of a foreign corporation to hold property can be raised only by the state, and not by the defendant in an ejectment suit. Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656.

The same rule has been applied where the corporation is given power to hold stock only upon certain conditions.

Thus, under a statute prohibiting a corporation from buying stock of another corporation unless it is done with the written consent of all the stockholders of both the selling and the buying corporation, the right to question such a purchase rests with the state, and cannot be raised by the vendor. Krell-French Piano Co. v. Dengler, 145 Ky. 202, 140 S. W. 168.

c. Power to hold to a certain extent.

So, where a corporation is entitled to hold to a certain extent, or to a certain per cent of its capital stock, it has been held that the right to hold a particular property cannot be questioned except by the state.

Thus, where a corporation is entitled to hold real estate to an amount not exceeding 25 per cent of its capital stock, the question as to whether or not a coal mining company exceeded its power in taking a long lease of coal land is one between it and the state, and cannot be questioned by a devisee 46 L.R.A. (N.S.)

and trustee of the lessor, who succeeded merely to the rights of such lessor. Henderson v. Virden Coal Co. 78 Ill. App. 437.

So, where land has been acquired by a turnpike corporation in an amount in excess of that which it by its charter was authorized to acquire or own, the right to question the power of the corporation is with the state, and cannot be raised by the vendor of the land. Miller v. Flemingsburg & F. S. Turnp. Co. 109 Ky. 475, 59 S. W. 512.

Where a water company is authorized to hold real or personal property to a certain amount, whether or not it has exceeded the amount of property which it is authorized to hold can be raised only by the commonwealth, and not by the municipality, so as to authorize the latter to take the property of the corporation at any less than its true value upon taking over the franchise and property of the corporation as provided in its charter. West Springfield v. West Springfield Aqueduct Co. 167 Mass. 128, 44 N. E. 1063.

See Daniels v. Belvidere Cemetery Asso. 193 Ill. 181, 61 N. E. 1031, where the corporation was authorized to hold property to a certain extent only.

Nor is this rule changed where it was concealed from the lessors that the corporation was limited by its charter in the purchase and ownership of real estate of a certain per cent of its capital stock, where neither the corporation nor any of its officers in any way participated in the concealment, as the fact that it did not disclose the provisions of its character to the lessors would not be a fraud. Henderson v. Virden Coal Co. *supra*.

d. Power to hold a certain time.

So, where the time which a corporation may hold property is limited, only the state can question its holding after this time.

The power of a national bank to hold real estate after the time limited by statute can be called in question only by the state, and not by one who claimed a tax lien and a deed thereunder on the land. National

by a sale thereof might have been avoided, and conveyance of such interest defeated, this defendant is now the owner and holder of said interest, and entitled to the possession of the uncultivated part of the land, and, on January 1, 1913, will be entitled to the possession of the remainder of the land in controversy. Wherefore it prays, by way of cross petition, that it be declared the owner and holder of the bond for title and all interest of the plaintiff thereunder; that, in case the court should hold that this defendant is not already vested with the title to the land, the plaintiff be required to specifically perform the contract embodied in the instruments above referred to.

In response, to the answer and cross pe-

tition the plaintiff alleged that the written contract set up and relied upon by the defendants was void and wanting in mutuality, and was nonenforceable, because Zachry had no authority to execute the contract in the name of the corporation; and because the Harlem Oil & Fertilizer Company had no charter power to enter into said contract.

Upon interlocutory hearing, the court refused an injunction and the plaintiff excepted.

Mr. William H. Fleming, for plaintiff in error:

A corporation cannot take and hold land except in so far as is reasonably necessary to carry out the objects of its creation.

Bank v. Licking Valley Land & Min. Co. 15 Ky. L. Rep. 211, 22 S. W. 881.

The right of a foreign insurance company to hold land taken upon the foreclosure of a mortgage longer than provided by the Constitution can be raised by the state only and not by one claiming the property in question. Summet v. City Realty & Brokerage Co. 208 Mo. 501, 106 S. W. 614.

The provisions of a statute that a corporation shall not hold real estate for a longer period than ten years, except such real estate as shall be actually occupied by the corporation in the exercise of its franchise, can be enforced only at the interest of the public, and cannot be taken advantage of by a mere squatter upon the real estate, to effect a lapse of title against the corporation for failure to have taken possession of the real estate within the time limited. Pere Marquette R. Co. v. Graham, 136 Mich. 444, 99 N. W. 408.

e. No power to hold.

Some courts have indicated that where the corporation has no power to acquire any property of the kind sought to be acquired, its power may be questioned by anyone.

The exact bearing of the case of Walker v. Taylor, 252 Ill. 424, 96 N. E. 1055, on this question, is not clear. In that case the owner of land conveyed the same to a trustee for a corporation which had no power to hold the land, and subsequently the widow of the grantor, as a stockholder of the corporation and as executrix and devisee of the grantor, brought an action to confirm the transaction and subsequent conveyances of parts of the land had thereunder, and to vest in the stockholders of the corporation an equitable interest in the remaining land. This relief was resisted by the administrator of the estate of the trustee, his answer denying that the deed from the owner to the trustee was void, and that the title remained in the original owner, and alleging further that the trustee had died insolvent, and that the land in controversy belonged to his estate and was subject to his debts.

If the right of the widow to maintain the 46 L.R.A. (N.S.)

bill was denied, the result would be that the undisposed land would go to the creditors of the trustee, as claimed by his administrator. The court holds that, the corporation not having power to acquire title to the land in question by deed directly to it, it could not do so indirectly by having the deed made to a third person for its benefit, and then continues: "The question is not whether a corporation organized for lawful purposes, and having a right to hold real estate for certain purposes, has exceeded its power. In that case, as contended by appellant [the administrator], the question whether the corporation had exceeded its powers could only be raised by the state. But here the company was trying by indirection to exercise powers it never did have, because the law forbade its organization with such powers. It follows that the . . . [corporation] never acquired title by virtue of the deed from Walker and wife, and as Gould represented the corporation he acquired no title." The widow of the grantor, who brought the action as a stockholder of the corporation, and as executrix and devisee of the grantor, was thus allowed to raise the question.

The court in Rector v. Hartford Deposit Co. 190 Ill. 380, 60 N. E. 528, directed its attention more to the question of whether or not the power of the corporation may be questioned in a collateral proceeding, than to that of who may question it. In the course of the opinion, in an *obiter* statement, it approves a statement of law to the effect that the plea of *ultra vires* may be successfully interposed in a collateral proceeding where the corporation is alleged to have performed an act which it was not, under any circumstances, authorized to perform. The action was by a corporation for rent of a building, and the lessee was denied the right to raise the question, on the theory that it was a collateral proceeding and that the corporation had power to hold for some purposes.

But compare with Harris v. Independence Gas Co. 76 Kan. 756, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123, and see also Hill v. Rich Hill Coal Min. Co. 119 Mo. 9, 22 S. W. 223,

10 Cyc. 1096, 1097, 1123; *Case v. Kelly*, 133 U. S. 26, 33 L. ed. 515, 10 Sup. Ct. Rep. 216; *Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. ed. 1038.

Ultra vires contracts that are executory are open to collateral attack.

10 Cyc. 1033; *Thomas v. West Jersey R. Co.* 101 U. S. 85, 86, 25 L. ed. 953; *Screenen Hose Co. v. Philpot*, 53 Ga. 625; *Military Interstate Asso. v. Savannah*, T. B. & I. of H. R. Co. 105 Ga. 420, 31 S. E. 200; *Weed v. Gainesville*, J. & S. R. Co. 119 Ga. 590, 46 S. E. 885.

Mr. Henry C. Roney also for plaintiff in error.

Mr. Hamilton Phinizy for defendants in error.

and *Kansas City & S. E. R. Co. v. Kansas City & S. W. R. Co.* 129 Mo. 62, 31 S. W. 451, *supra*, where the corporation had no power to engage in business other than that expressly authorized in its charter.

II. Who is seeking to question.

a. Persons sustaining contract relation.

The rule that only the state can question the power of a corporation to take and hold property has been applied in numerous instances where the one seeking to question the power of the corporation sustains a contract relation to it.

Thus, one who has granted land to a corporation cannot question the power of a corporation, so as to authorize the setting aside of the deed. *Hayden v. Hayden*, 241 Ill. 183, 89 N. E. 347.

Nor can the grantor question its power, so as to secure reverter of the land after dissolution of the corporation. *Miller v. Flemingsburg & S. F. Co.* 109 Ky. 475, 59 S. W. 512.

Nor can a purchaser of the land from a corporation question the power, so as to defeat a recovery of the purchase price. *Lauder v. Peoria Agri. & Trotting Soc.* 71 Ill. App. 475; *Fayette Land Co. v. Louisville & N. R. Co.* 93 Va. 274, 24 S. E. 1016.

Nor can one who has sold corporate stock to a corporation question the power, so as to render a purchaser from the corporation guilty of conversion of the stock. *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168.

Neither can the assignee of a lease question this power, so as to avoid the making of the valuation of the property as required by the lease. *Springer v. Chicago Real Estate, Loan & T. Co.* 202 Ill. 17, 66 N. E. 850.

Nor can the lessee question the power of the corporation to hold the leased premises, so as to defeat a claim for rent. *Rector v. Hartford Deposit Co.* 190 Ill. 380, 60 N. E. 528.

Nor can a guarantor of the rent question the power in an action by the corporation 46 L.R.A. (N.S.)

Hill, J., delivered the opinion of the court:

The controlling question in this case is whether the Harlem Oil & Fertilizer Company, a corporation, under the laws of this state, can have specific performance of an executory contract for the purchase of farm lands, where the charter of the corporation contains no express power to execute such contract or to acquire such lands. The contract referred to is as follows:

State of Georgia, Columbia County.

Received from the Harlem Oil & Fertilizer Company the sum of three hundred (\$300) dollars, to be applied on the purchase price of the following tract or parcel of land fully described in a bond for

on the bond. *Nantasket Beach S. B. Co. v. Shea*, 182 Mass. 147, 65 N. E. 57. See comment on this case above.

In *Harris v. Independence Gas Co.* 76 Kan. 750, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123, *infra*, the original lessors were joined as coplaintiffs with the lessee, and their right to question the corporate power was denied.

See *West Springfield v. West Springfield Aqueduct Co.* *infra*, where the right of a municipality to take the property of a water company, at the value of property which it was authorized to hold, was denied.

See *Euclid Ave. Trusts Co. v. Hohns*, 24 Ont. L. Rep. 447, where the right of a mortgagor to raise the question of corporate power was denied.

Neither can minors whose lawfully appointed guardian sold land to a corporation question the power of the corporation. *Ansell v. Southern Illinois & M. Bridge Co.* 223 Mo. 209, 122 S. W. 709.

And see also *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123, *infra*.

So, the right of privies of those sustaining contract relations with the corporation, to question its power to take and hold property, has been denied.

Thus, the subsequent grantees of a mortgagor cannot question the right to ejectment of the subsequent grantee of the mortgagee, a corporation, which foreclosed and purchased at the foreclosure sale, on the theory that the corporation had no power to take and hold the property. *Summet v. City Realty & Brokerage Co.* 208 Mo. 501, 106 S. W. 614.

Nor can an heir of the grantor question the power of the corporation in an action in ejectment against the corporation and its grantee. *Hall v. Farmers' & M. Bank*, 145 Mo. 418, 46 S. W. 1000, affirmed in 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14. One count in the petition in this case was in equity.

Nor can the successors in title of grantors defeat the right of the corporation to enjoin the disturbance of an easement, on the theory that the corporation had no power

title given by Mrs. Nannie B. Wright to C. F. Kohlruess, dated June 19, 1912, provided that said sum of \$300 is not repaid to said Harlem Oil & Fertilizer Company within sixty days after date.

It is agreed that if said sum is not paid in the above specified time, the said Kohlruess agrees to sell to the Harlem Oil & Fertilizer Company, who agrees to buy, said tract of land fully described in said bond for titles, at and for the sum of seventy-five hundred (\$7,500) dollars, to be paid as follows: The said Harlem Oil & Fertilizer Company agrees to assume a loan of twenty-three hundred (\$2,300) dollars

on said land, payable to Mrs. Nannie B. Wright, the sum of fourteen hundred and fifty (\$1,450) dollars January 1, 1913, and the sum of thirty-seven hundred and fifty (\$3,750) dollars January 1, 1914. All deferred payments to bear interest from January 1, 1913, at the rate of 8 per cent per annum.

It is agreed that all rents during the year 1912 are to be paid said Kohlruess, and the said Kohlruess shall pay all taxes on the property up to January 1, 1913.

Possession of the uncultivated part of the property may be taken by the purchaser sixty days after date, provided said sum is

to take and hold the property. *Northeastern Teleph. & Teleg. Co. v. Hepburn*, 72 N. J. Eq. 7, 65 Atl. 647.

Nor can a subsequent grantee of the grantor of the corporation question the power of the corporation. *Knowles v. Northern Texas Traction Co.* — Tex. Civ. App. —, 121 S. W. 232.

Nor can a subsequent lessee of rights previously leased to a corporation question the power of the corporation, in an action to cancel the previous lease. *Harris v. Independence Gas Co.* 66 Kan. 750, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123.

Nor can the defendants in an action on claims for damages for conspiracy to defraud, by a corporation, an assignee of the claims, question the power of the corporation to hold them. *John V. Farwell Co. v. Wolf* (John V. Farwell Co. v. Josephson) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 122, 70 N. W. 289, 71 N. W. 109.

Nor can a municipality question the power of a corporation, in an action by a receiver of a certain corporation to quiet the claims of the corporation. *Blair v. Chicago*, 201 U. S. 450, 50 L. ed. 822, 26 Sup. Ct. Rep. 427.

Nor can a prior owner who claims that the corporation secured title as security only defeat the claim of the corporation on the theory that it had no power to hold property. *First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718.

See *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623, *infra*.

So, in *Meholin v. Carlson*, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755, the right to question the power of a corporation to hold a pledge of shares of stock was denied to the pledgor after the insolvency of the corporation. The court is of the opinion that the question may be raised before insolvency by replevining the certificate of shares.

Neither can a trustee for the benefit of creditors of the corporation question the power, so as to authorize the rescission of the contract by which the corporation acquired the property, and the recovery of the purchase price. *Hagerstown Mfg. Min. & Land Improv. Co. v. Keedy*, 91 Md. 430, 46 Atl. 965.

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b. Persons sustaining no contract relation.

The right has also been denied to those who sustain no contract relations to the corporation.

Thus, the holder of a tax lien or a tax deed cannot question the power of a corporation which is seeking to quiet its title to the property. *National Bank v. Licking Valley Land & Min. Co.* 15 Ky. L. Rep. 211, 22 S. W. 881; *Puget Sound Nat. Bank v. Fisher*, 52 Wash. 246, 100 Pac. 724, 17 Ann. Cas. 526.

Nor can the holder of a tax deed question the power of a corporation which conveyed to the one seeking to quiet title. *Bowman v. Trainor*, 93 Ark. 435, 124 S. W. 1019.

Nor can the owner of land question the power of a corporation to hold a tax bill thereon. *First Nat. Bank v. Shewalter*, 153 Mo. App. 635, 134 S. W. 42.

Nor can a claimant of the land raise the question of the power of a corporation which is seeking to quiet its title. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348.

Nor the power of a corporation which is seeking to establish and confirm a title under a burnt records act, and eject the claimant, who is in possession. *Cooney v. A. Booth Packing Co.* 169 Ill. 370, 48 N. E. 406.

Nor can the one claiming the right to possession of the land question the power of the plaintiff's grantor to acquire the land. *Kansas City & S. E. R. Co. v. Kansas City & S. W. R. Co.* 129 Mo. 62, 31 S. W. 451.

Nor can second mortgagees who are seeking to redeem property sold to a national bank at foreclosure proceedings question the power of the bank. *Dewitt County Nat. Bank v. Mickelberry*, 244 Ill. 77, 135 Am. St. Rep. 304, 91 N. E. 86.

Nor can one claiming land under a deed from a former owner, which is being sought to be set aside, question the power of a corporation which has acquired through such former owner. *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 28 Am. St. Rep. 656, 22 S. W. 623.

Nor can a claimant of water rights question the power of an adverse claimant, a corporation, to acquire the rights. *Water*

not paid, and the remaining part of said land on January 1, 1913.

In witness whereof both parties have hereunto set their hands and seal this 20th day of September, 1912.

C. F. Kohlruss. [L. s.]

Harlem Oil & Fertilizer Company [L. s.]

By Julian J. Zachry, Prest.

Signed, sealed, and delivered in the presence of

Dr. A. B. Martin.

W. I. Lazenby, Notary Public,
Columbia County, Ga.

The material part of the charter of the

Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 Pac. 505.

Nor can a creditor of the grantor question the power of the corporation to take, in an action to set aside the deed. Minneapolis Threshing Mach. Co. v. Jones, 95 Minn. 127, 103 N. W. 1017.

Nor can a claimant of a house located on land to which the corporation took title question the power of the corporation to hold the property. Ray v. Foster, — Tex. Civ. App. —, 53 S. W. 54.

Nor can the grantor of a chattel mortgage question the power of the mortgagee, a corporation, to take the mortgage, in an action to set aside the transfer and recover the goods on the ground of fraud. Smith v. First Nat. Bank, 45 Neb. 444, 63 N. W. 796.

Nor can a municipality question the power of a corporation to hold property in excess of that authorized by statute, so as to authorize it to take over the property at a value equal to that of the property which the water company was authorized to hold. West Springfield v. West Springfield Aqueduct Co. 187 Mass. 129, 44 N. E. 1063.

Nor can the vendor of land to a corporation question the right of another corporation not a party to the suit, to hold the stock of the first corporation. Hill v. Rich Hill Coal Min. Co. 119 Mo. 9, 24 S. W. 223.

Nor can adverse lien claimants question the right of each other to hold the property. Scott v. Farmers' & M. Nat. Bank, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

One not a grantor, or a privy in estate under him, was held in Richmond Cotton Oil Co. v. Castellaw, 134 Ga. 472, 67 S. E. 1126, to have no right to enforce a forfeiture of land held by a corporation under a conveyance for railroad purposes, with a condition subsequent therein providing for forfeiture on cessation of such use.

The power of a corporation to take an assignment of a cause of action cannot be questioned by strangers to the contract after it is fully executed. Peru Plow & Implement Co. v. Harker, 75 C. C. A. 475, 144 Fed. 673.

In Evangelical Baptist Benev. & Missionary Soc. v. Boston, 204 Mass. 28, 90 46 L.R.A. (N.S.)

Harlem Oil & Fertilizer Company is as follows: The petitioners seeking "the formation of a corporation to be known as the 'Harlem Oil and Fertilizer Company,' for the purpose of conducting for pecuniary profit the business of buying and selling, both in their own right and on commission, cotton, cotton seed, and all cotton seed products and farm products of all kinds, coal, wood, timber, and lumber; to manufacture and sell cotton seed oil and all substances and commodities obtainable from cotton seed and other agricultural products; to purchase fertilizer ingredients; to make, mix, manufacture, and sell fertilizers; to

N. E. 572, an action against a municipality to abate a tax assessed to the corporation, in which an exemption was claimed against assessment for city, county, and state taxes, the corporation, which was authorized to hold property to a certain extent, was held not to be in a position to claim a statutory exemption for property which it held in excess of that amount. The city is regarded, however, as a public authority representing the state, and it is on this theory that the municipality was allowed in this case to question the power of the corporation to hold property.

See Milton v. Crawford, 65 Wash. 145, 118 Pac. 32, where the purchaser of real estate, in whose vendor's chain of title it appeared that the land was formerly owned by a corporation, objected to the title on this account.

As to the right of a claimant in an ejectment suit, see *infra*, III. b, 1.

III. Form of action.

a. Corporation on defensive merely.

The right to question the power of a corporation to take and hold property has been denied where the corporation is on the defensive merely. Thus, in the following actions the right to question this power was denied to the one seeking thus to question.

—by a grantee of one who had also deeded to a corporation, to try title to the land conveyed. Knowles v. Northern Texas Traction Co. — Tex. Civ. App. —, 121 S. W. 232;

—by a grantor to secure a reverter of land deeded the corporation, after the dissolution of the same. Miller v. Flemingsburg & F. S. Turnp. Co. 109 Ky. 475, 59 S. W. 512;

—by the grantor to set aside a deed of residence property. Hayden v. Hayden, 241 Ill. 183, 89 N. E. 347;

—by minors, by their next friends, to set aside a deed of their guardian to a corporation. Ancell v. Southern Illinois & M. Bridge Co. 223 Mo. 209, 122 S. W. 709. It is not clear, however, that this decision is on the theory that none but the state can question the power of the corporation;

manufacture ice and sell the same; to establish and operate an electric light plant and create motive power and electric light, both for the use of said corporation and for sale to others; and to establish and operate sawmills and to manufacture lumber," it is ordered that said application be granted, and that the petitioners and their associates and successors be vested with "all the rights, privileges, and powers mentioned in said petition."

It will be observed from reading the above language that the charter contains no authority or power on the part of the corporation to own farm lands, or to make any contract for the purchase or holding of such property. Our Civil Code, § 2823 (5), is as follows: "Corporations thus created may

exercise all corporate powers necessary to the purpose of their organization, but shall make no contract, or purchase or hold any property of any kind, except such as is necessary in legitimately carrying into effect such purpose, or for securing debts due to the company." The language of the statute just quoted is clear and plain. By its terms a corporation can make no contract or purchase, or hold any property of any kind, except such as is necessary to the purposes of the organization. The declared purpose of the corporation is as set out in the excerpt from the charter above quoted.

Was the purchase of the farm lands necessary in legitimately carrying into effect such purpose? Mr. Zachry, who was the general manager, president, and treasurer

—by creditors of the grantor to set aside the deed. *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017;

—by a trustee for the benefit of creditors of the corporation, against the vendor for a rescission of the contract and a recovery of the contract price. *Hagerstown Mfg. Min. & Land Improv. Co. v. Keedy*, 91 Md. 430, 46 Atl. 965;

—by a second mortgagee to redeem property sold to a national bank at foreclosure proceedings. *Dewitt County Nat. Bank v. Mikelberry*, 244 Ill. 77, 135 Am. St. Rep. 304, 91 N. E. 86;

—by a claimant to a house on real property to which an agent of the corporation took title for the corporation, against the agent on the theory that, the corporation having no power to hold the property, the agent became responsible. *Ray v. Foster*, — Tex. Civ. App. —, 53 S. W. 54;

—by a subsequent lessee who joins his lessor as complaintiff, to cancel a lease to a corporation. *Harris v. Independence Gas Co.* 76 Kan. 756, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123;

—by a vendor of chattels to recover goods against a corporation, a mortgagee of his vendee, on the ground of fraud. *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796;

—by one against a corporation to question the right of another corporation to hold stock of the former. *Hill v. Rich Hill Coal Min. Co.* 119 Mo. 9, 24 S. W. 223;

—by a municipality to take over the property of a water company at a value not in excess of that of property which the water company was authorized to hold. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063;

—by a vendor of corporate stock to a corporation which was not authorized to hold it as acquired, against a purchaser from the corporation. *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168.

So, in an action the petition in which contained a count in equity and one in ejectment, by the heir of a grantor against a corporation, grantee, and its grantees, 46 L.R.A.(N.S.)

the right to question the power of the corporation to hold property was denied. *Hall v. Farmers' & M. Bank*, 145 Mo. 418, 40 S. W. 1000, affirmed in 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14.

b. Corporation seeking affirmative relief.

1. In general.

The note in 32 L.R.A. 293, 296, reveals some conflict on the question where the corporation is seeking affirmative relief; but the tendency of the later cases—at least other than those involving right to take under a will as to which, see notes in 9 L.R.A.(N.S.) 689, and 44 L.R.A.(N.S.) 544, and those involving suits for specific performance of executory contracts, as to which, see next subdivision—is to extend the rule that no one but the state may question the power of the corporation, to cases where the corporation is seeking affirmative relief.

Thus, in an action in ejectment by the corporation against a claimant of the property, the power of the corporation to hold the property cannot be questioned. *Tidwell v. Chiricahua Cattle Co.* 5 Ariz. 352, 53 Pac. 192; *Pere Marquette R. Co. v. Graham*, 136 Mich. 444, 99 N. W. 408; *First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718; *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.

So, the right has been denied in an action of ejectment by the successors in title of a mortgagee, a corporation, which foreclosed and purchased at the sale. *Summet v. City Realty & Brokerage Co.* 208 Mo. 501, 106 S. W. 614.

This was the holding also in *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088, and in this the holding is contrary to the earlier Illinois case of *St. Peter's Roman Catholic Cong. v. Germain*, 104 Ill. 440, cited in the note in 32 L.R.A. 293. In the earlier Illinois case, the corporation was given power to hold land not exceeding a certain quantity, and the court held that any amount in excess of that

of the corporation, testified that he wanted the land because "around an oil mill there is a great deal of waste, and this tract was bought by me to fertilize it, and bring it up to a high state of cultivation from the waste and fertilizer around the oil mill." Owning a farm to fertilize is not one of the necessary or declared purposes of the corporation. The necessary purposes of the corporation are enumerated in the charter. If the waste and fertilizer were valuable for the purpose named, it could be sold by the corporation.

But it is argued that the state alone can make the question as to the right of the corporation to own and hold the land. This is undoubtedly the general rule. 10 Cyc. 1133; American Mortg. Co. v. Tennille, 87

Ga. 23-30, 13 S. E. 158, 12 L.R.A. 529, and cases cited; Hanson v. Little Sisters of the Poor, 79 Md. 434 (3), 32 Atl. 1052, and note in 32 L.R.A. 293; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845, and note; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 721, 722; South & North Ala. R. Co. v. Highland Ave. & Belt R. Co. 119 Ala. 106 (5), 24 So. 114. Thus, we held in the Tennille Case, supra, under the act of February 28, 1877, which provided that the state would not allow foreign corporations to own 5,000 acres or more of land, unless they should become incorporated under the laws of Georgia, that the state alone could question the right of foreign corporations to hold

was expressly forbidden by the statute, and it followed that other conveyances, deeds, or other contracts made in violation of this prohibition were absolutely void. In the Keegan Case the corporation was given power to acquire any extension of its road by lease, purchase or otherwise, by or with the written consent of its stockholders, and the objection was made that the consent of the stockholders was not shown and no proof was introduced that the land acquired was an extension of the company's road. This distinction between the powers of the corporation in the two cases does not seem to justify a difference in the decision, and although not expressly stated it seems that the Keegan Case overrules the earlier Illinois case.

So actions to quiet title, and actions similar thereto, may be maintained by a corporation, without right in its opponent to question its power to hold the land. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126 (to enjoin an adverse claim from interfering with water rights); *National Bank v. Licking Valley Land & Min. Co.* 15 Ky. L. Rep. 211, 22 S. W. 881 (in the nature of a bill *quia timet*); *Northwestern Telegraph & Teleg. Co. v. Hepburn*, 72 N. J. Eq. 7, 65 Atl. 747 (to enjoin disturbance of an easement); *Puget Sound Nat. Bank v. Fisher*, 52 Wash. 246, 100 Pac. 724, 17 Ann. Cas. 526 (to remove a cloud from title); *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427 (receiver of street railroad company seeking to quiet title to certain franchises).

So, in an action by the grantee of a corporation to enjoin a disturbance of its possession, the power of the corporation to hold the land cannot be called in question. *Kansas City & S. E. R. Co. v. Kansas City & S. W. R. Co.* 129 Mo. 62, 31 S. W. 451.

Neither can the power of the corporation to hold the land be called in question in an action by the vendee of the corporation to quiet title against the holder of a tax deed. *Bowman v. Trainor*, 93 Ark. 435, 124 S. W. 1019.
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Likewise, a corporation may maintain an action under a burnt records act, to establish and confirm its title to certain lands and to eject a claimant in possession, without having its power to hold the land called in question. *Cooney v. A. Booth Packing Co.* 169 Ill. 370, 48 N. E. 406.

So, a corporation which has sold certain lands may maintain an action for the purchase price. *Lauder v. Peoria Agri. & Trotting Soc.* 71 Ill. App. 475; *Fayette Land Co. v. Louisville & N. R. Co.* 93 Va. 274, 24 S. E. 1016. And it may also maintain an action to foreclose a mortgage without having its power to hold the land called in question. *Euclid Ave. Trusts Co. v. Hohs*, 24 Ont. L. Rep. 447.

So, a corporation may maintain an action to enforce the lien of a special tax bill. *First Nat. Bank v. Shewalter*, 153 Mo. App. 635, 134 S. W. 42.

Likewise, without having its power called in question, it may maintain an action to recover rent for a room in a building which was claimed to be much larger than necessary for its purposes. *Rector v. Hartford Deposit Co.* 190 Ill. 380, 60 N. E. 528. And it may also maintain an action against a guarantor of the rent to recover the same. *Nantasket Beach S. B. Co. v. Shea*, 182 Mass. 147, 65 N. E. 67. See comment on this case above.

So, a corporation that has taken an assignment of certain claims for damages for conspiracy to defraud may maintain an action upon the same without having its power to hold the property called in question. *John V. Farwell Co. v. Wolf* (*John V. Farwell Co. v. Josephson*) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109.

And a corporation which is the assignee of a lessor's interest may compel a valuation of the property as provided by the terms of the lease. *Springer v. Chicago Real Estate, Loan & T. Co.* 202 Ill. 17, 66 N. E. 850.

Likewise, a foreign corporation may maintain a condemnation proceeding without having its power to hold the property called in question. *State ex rel. Ami Co.*

land contrary to the provisions of the statute. But this principle has no application to a case where a corporation, by its cross bill, is seeking the aid of a court of equity to enable it to acquire and own lands which by its charter it has no power to acquire and own. 10 Cyc. 1135; *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216; note to *Hanson Case*, supra, 32 L.R.A. 293, 296; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369. The distinction between the two classes of cases is that the courts will not interfere with a contract that is executed, but will refuse to aid a corporation in enforcing a contract for the purchase of land that is merely executory. The contract in the present case is executory. Under its charter powers, the defendant is seeking specific performance of

a contract for the purchase of a plantation consisting of 404½ acres of farm land at the price of \$7,500. It claims to have paid \$300 on the purchase price of the land, and to have assumed a debt due Mrs. Wright of \$2,300, which was to be paid as follows: \$1,450 on January 1, 1913, and the remainder, \$3,750, on January 1, 1914, with interest at 8 per cent per annum on deferred payments. The testimony shows that Kohl-russ, the plaintiff, executed his note to Mrs. Wright for \$2,300, and made her a deed to the land to secure the same. The bond for titles, given by her to Kohl-russ, was transferred by the latter to the corporation, which holds it. If the Wright note should not be paid by the corporation, Kohl-russ is still liable on the note. The note is not paid, so far as the evidence discloses. Nor

v. Superior Ct. 42 Wash. 675, 85 Pac. 669.

See *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32, supra.

The sureties on a promissory note given a corporation for evidence of indebtedness to it, which is secured by a second mortgage on real estate, are not entitled to question the right of a corporation to acquire the real estate in an action by it to enforce payment of the note. *Advance Thresher Co. v. Rockafellow*, 16 S. D. 462, 93 N. W. 652. Nothing is said in this case as to the right of the state alone to question this exercise of power.

2. Suit for specific performance.

Where a corporation is seeking the aid of a court to specifically enforce an executory contract relating to the property, an interested person may contest its power to hold the same. See *KOHLRUSS v. ZACHRY*.

So, it has been held that specific performance of an unexecuted contract providing for the acquisition of the right to construct tracks on the right of way of a railway company, and also to cross the tracks of such railway company, will not be granted to a corporation which has no power to take or receive property for the construction and uses of a railroad. *South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.* 119 Ala. 105, 24 So. 114. This was held in an action in which a successor in interest of the corporation lacking the power was seeking to compel specific performance.

It was held also in this case that the corporation which had succeeded to the rights of the contracting corporation could not seek the aid of a court of equity to perfect its title to, or to obtain possession of, the property, although it possesses the power, the lack of which incapacitated its grantor to take property of the character in question.

In speaking of the right of a successor in interest to maintain specific performance, the court states that unless the defendant has recognized, or in some way estopped

itself to deny, the rights of such successor under the agreement, such successor in interest cannot maintain an action for specific performance, since it succeeded only to the rights of the corporation which lacks the power to hold the land, and if the latter acquired no rights under the agreement, it could transfer none to its grantee.

This exception is referred to also in *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 658, 22 S. W. 623.

But where the contract is executed, and to give a private party the right to question the power would result in gross fraud, the general rule prevails, and the right of the private party to question the power will be denied.

Thus, where the corporation, in reliance upon the contract, directed permanent improvements upon the land to an amount of \$3,000 for the purpose of its corporate business, and the purchase price was only \$60, and the improvements were made with the participation and active assistance of the vendor as one of the company, he will not be permitted to question the power of the corporation to take and hold the property in an action for specific performance. *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123.

The right to have specific performance of an agreement contained in a lease for the renewal thereof, after the payment by the corporation of the amount provided for in the original lease, cannot be questioned by the lessor, since the agreement is executed and the corporation has paid the consideration on which the agreement was given in full. *Lemp Hunting & Fishing Club v. Hackmann*, — Mo. App. —, 156 S. W. 79. This decision, however, is based on the ground of estoppel.

See *Lauder v. Peoria Agri. & Trotting Soc.* 71 Ill. App. 475, supra, where the corporation was seeking to recover the purchase price of land.

See *Evangelical Baptist Benev. & Missionary Soc. v. Boston*, 204 Mass. 28, 90 N. E. 572, where the corporation was seeking the abatement of taxes.

has Mrs. Wright executed a deed under the bond for titles to the defendant corporation; nor does it appear that she took any part in the transaction. The contract, therefore, is not executed, but executory, as to the corporation. The plaintiff is in possession of the land, and the defendant corporation seeks to compel specific performance of the contract by its cross bill. Under such circumstances, the plaintiff can raise the question of authority of the corporation to take the title to the farm lands as being *ultra vires*.

The members of the court concur in the rules of law above announced; but there is not unanimity as to the application of them to the facts of the present case.

The opinion of the members of the court, other than the writer on this subject, is as follows: In the Civil Code, § 2216, is contained a statement of the powers common to all corporations. Among these is: "To receive donations by gift or will, to purchase and hold such property, real or personal, as is necessary to the purpose of their organization, and to do all such acts as are necessary for the legitimate execution of this purpose." By § 2823 it is declared that corporations organized by the superior court "may exercise all corporate powers necessary to the purpose of their organization, but shall make no contract, or purchase or hold any property of any kind, except such as is necessary in legitimately carrying into effect such purpose, or for securing debts due to the company." The word "necessary," as employed in these two sections, is to be given a reasonable construction, and not to be so construed as to hamper and obstruct, or practically prevent, the profitable and reasonable exercise of the corporate powers and the conduct of the corporate business. Thus, many contracts may be made which are not in an absolute sense essential to the conduct of business, and yet may be legitimate as advancing the principal business, or rendering it more profitable. Such contracts would not be invalid. In *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 513, it was said that the land which a canal company may buy is not limited to a mere passage for the canal, but that a reasonable discretion is vested in the company in respect to the purchase. On the other hand, in *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369, it was held that a railroad has no authority to acquire land for purposes of speculation, under a grant of power to acquire and hold sufficient real estate for the construction of its road, and for the erection of depots, engine houses, etc. These cases will serve as illustrations of the principle involved in the case now under consideration.

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If the contract for the purchase of the land involved in the controversy was clearly beyond the corporate power, that question could be raised when it sought to enforce specific performance, and an injunction would be granted to restrain the corporation from taking possession or interfering with the business of the landlord. The evidence on this subject is quite meager. The person who was at once the president, treasurer, and general manager of the corporation testified thus: "As to what I wanted this land for, I will say: Around an oil mill there is a great deal of waste, and this tract was bought by me to fertilize it and bring it up to a high state of cultivation from the waste and fertilizer from the oil mill, and I wanted it for that purpose." It is not very clear whether the witness meant that there were certain products of the mill which would be wasted or lost or not profitably used otherwise than by the purchase of this land, and that it was to be used in connection with the business of the mill, and as necessary for the profitable use of such waste products, or whether such purchase was reasonable in its amount for such corporate purposes. But inasmuch as the landowner was attacking the right of the corporation to have specific performance, and basing his attack on the ground that the purchase was *ultra vires*, the burden of establishing this defense rested upon him. And if the evidence left his defense in doubt, or failed to establish it, the consequent injury fell upon him. The majority of the court are not prepared to hold that, under the evidence, it can be declared, as matter of law, that this contract was *ultra vires*. They think that the judge did not abuse his discretion in refusing to grant the interlocutory injunction prayed. On the subject of whether the transaction really amounted to the securing of a loan or to the making of a sale, the evidence was conflicting, and therefore the judge had the right to exercise his discretion in finding on that subject.

The writer of this opinion cannot concur in the views of the majority of the court just above stated. He is of the opinion that, assuming the contract to have been for the sale of land by the owner thereof to the corporation, the evidence so clearly shows that it was *ultra vires*, because the purchase was not for a purpose necessary to the corporate business, and that, as matter of law, an injunction should have been granted.

Judgment affirmed.

Hill, J., dissents. Beck, J., absent.

The other Justices concur.

IDAHO SUPREME COURT.

PATRICK LUCEY, Resp.,
v.
STACK-GIBBS LUMBER COMPANY,
Appt.

(23 Idaho, 628, 131 Pac. 897.)

Master and servant — felling trees — duty to give warning — power to delegate.

The owner of a lumber camp owes the duty to an employee engaged in building a bridge, to give him warning when a tree which is being cut by other employees is about to fall, which he cannot delegate, and

Note. — Duty to give warning where trees are being felled.

Upon the general question whether the duty of the master to warn or instruct servants is delegable, see exhaustive note to *Anderson v. Pittsburg Coal Co.* 26 L.R.A. (N.S.) 624.

In a number of cases it has been held that the dangers from felling a tree are open and obvious, and consequently the master is under no obligation to warn a servant thereof. *Melton v. E. E. Jackson Lumber Co.* 133 Ala. 580, 31 So. 848 (thirty or forty laborers engaged in clearing right of way of railroad); *Hagins v. Southern Bell Teleph. & Teleg. Co.* 134 Ga. 641, 137 Am. St. Rep. 270, 68 S. E. 428, 20 Ann. Cas. 248 (but one tree felled, and that in an open space); *Anderson v. Columbia Improv. Co.* 41 Wash. 83, 2 L.R.A. (N.S.) 840, 82 Pac. 1037, 19 Am. Neg. Rep. 585 (no warning need be given of falling tree breaking off limbs of the other trees; plaintiff and one other workman only were engaged in the work).

Any failure to give warning of the expected fall of a tree is that of a fellow servant. *Melton v. E. E. Jackson Lumber Co.* supra.

It is to be noted in the foregoing cases that, with the exception of the first cited, the danger was in no wise concealed, and must have been as apparent to the servant as it would have been had any warning been given. In the Alabama case, however, where there were a large number of workmen employed, it would seem as though the application of the rule might work hardship.

In a number of other cases, however, it has been held that where a number of men are engaged in felling trees, there is a non-delegable duty on the part of the master to see that a warning is given to the other workmen who may be within the zone of danger.

Thus, in *Curtin v. Clear Lake Lumber Co.* 47 Wash. 260, 91 Pac. 956, it was held that a lumber company was liable for injuries caused to a sawyer who was struck by a falling limb broken off by a falling tree which a foreman had chopped down in the vicinity without giving the customary warning.

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he will therefore be liable in case the bridge constructor is injured by a tree felled upon him without warning, although those engaged in felling the tree had been instructed to give the necessary warning.

(April 12, 1913.)

APPEAL by defendant from a judgment of the District Court for Shoshone County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. Affirmed.

The facts are stated in the opinion.

So, in *Elenduck v. Crookston Lumber Co.* 121 Minn. 53, 140 N. W. 125, it was held that where a "swamper" whose duty it was to trim the limbs from trees after they had been cut down was injured by a falling tree, of which the usual warning was not given, the master would be held liable, since the duty to give signals of dangers such as that of falling trees was an absolute obligation of the master. The court drew a distinction between the giving of signals where such signals were used solely in directing the movements of machinery, etc., and signals which were relied upon by employees as a means of saving themselves from harm.

So, where the employees of a logging company, who were engaged in felling trees, and the log hauling crew, were at work in different places, and not in sight of each other, the failure of the master to see that a proper warning or signal was given before a large tree fell across the hauling line constituted negligence, since it necessarily exposed the respondent to sudden and unexpected danger; under such circumstances it was the nondelegable duty of the master to see that a signal or warning was given. *Cunningham v. Adna Mill Co.* 71 Wash. 111, 127 Pac. 850.

In *Potlatch Lumber Co. v. Anderson*, 118 C. C. A. 180, 199 Fed. 742, where the defendant had from 150 to 200 men working in the camp near to and about the place of the accident, and the company introduced witnesses to show that it followed a practice of warning men to look out for falling trees, it was a question of fact for the jury as to whether the master had failed to do its duty in respect to warning the men. The court said: "It is but a fair observation that it would be unreasonable to expect a man in a crew of 'swampers' to do his work of cutting down brush and at the same time to protect himself against the danger of trees cut by men in another crew very near by falling upon him, unless the men cutting the trees or someone knowing the danger would give him warning."

In *Erwin v. Missouri & K. Teleph. Co.* — Mo. App. —, 158 S. W. 913, the injuries were caused by a falling tree, but the case turned upon the question whether the method of felling the trees adopted by the master was negligent or not.

W. M. G.

Messrs. Post, Avery, & Higgins and James A. Wayne, for appellant:

No duty to warn existed in this case.

2 Labatt, Mast. & S. 1st ed. § 601; 4 Thomp. Neg. 2d ed. § 4067; Hermann v. Port Blakely Mill Co. 71 Fed. 853; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, 1 Am. Neg. Rep. 747; Martin v. Chicago & A. R. Co. 65 Fed. 384; Cooper v. Milwaukee & P. du Ch. R. Co. 23 Wis. 668; Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362; O'Neil v. Great Northern R. Co. 80 Minn. 27, 51 L.R.A. 532, 82 N. W. 1086; Hussey v. Coger, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; Maltbie v. Belden, 167 N. Y. 307, 54 L.R.A. 52, 60 N. E. 645; Donovan v. Ferris, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519, 7 Am. Neg. Rep. 390; Long v. Coronado R. Co. 96 Cal. 269, 31 Pac. 170, 13 Am. Neg. Cas. 328; Gallagher v. McMullin, 25 App. Div. 571, 49 N. Y. Supp. 734; Portance v. Lehigh Valley Coal Co. 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875; New Pittsburgh Coal & Coke Co. v. Peterson, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7, 14 Am. Neg. Cas. 467; Byrnes v. Brooklyn Heights R. Co. 36 App. Div. 355, 55 N. Y. Supp. 269; Yeaton v. Boston & L. R. Corp. 135 Mass. 418; Texas & P. R. Co. v. Campbell, — Tex. Civ. App. —, 39 S. W. 1104, 2 Am. Neg. Rep. 658; Luebke v. Chicago, M. & St. P. R. Co. 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136; Rex v. Pullman's Palace Car Co. 2 Marv. (Del.) 337, 43 Atl. 246; Lundquist v. Duluth Street R. Co. 65 Minn. 387, 67 N. W. 1006; McNally v. Savannah, F. & W. R. Co. 86 Ga. 262, 12 S. E. 351; Peterson v. Chicago & N. W. R. Co. 67 Mich. 102, 11 Am. St. Rep. 564, 34 N. W. 260; Donnelly v. San Francisco Bridge Co. 117 Cal. 417, 49 Pac. 559, 3 Am. Neg. Rep. 7; Graham v. Detroit, G. H. & M. R. Co. 151 Mich. 629, 25 L.R.A.(N.S.) 326, 115 N. W. 993; McLaine v. Head & D. Co. 71 N. H. 294, 58 L.R.A. 462, 93 Am. St. Rep. 522, 52 Atl. 545.

Messrs. John P. Gray, Therrett Towles, and Frank M. McCarthy, for respondent:

The master must promulgate and enforce rules for giving warning in the vicinity of the places where the servants are engaged.

Potlatch Lumber Co. v. Anderson, 118 C. C. A. 180, 199 Fed. 742; Cunningham v. Adna Mill Co. 71 Wash. 111, 127 Pac. 850; Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, 19 Mor. Min. Rep. 264, 4 Am. Neg. Rep. 195; Koerner v. St. Louis Car Co. 209 Mo. 141, 17 L.R.A.(N.S.) 292, 107 S. W. 481; Mihelich v. Mignery, 155 Mo. App. 325, 136 S. W. 722; Gould Steel Co. v. Richards, 30 Ind. 46 L.R.A.(N.S.)

App. 348, 66 N. E. 68; Curtin v. Clear Lake Lumber Co. 47 Wash. 260, 91 Pac. 956; Kempfert v. Gas Traction Co. 120 Minn. 90, 139 N. W. 145; Wiggin v. Northwest Paper Co. 119 Minn. 273, 137 N. W. 1113.

Sullivan, J., delivered the opinion of the court:

This action was brought to recover for personal injuries alleged to have been sustained by reason of the carelessness in felling a tree which struck the plaintiff and broke his leg while he was in the employ of appellant. The cause was tried by the court with a jury, and the jury returned a verdict in favor of the plaintiff in the sum of \$2,999. Thereupon a motion for judgment was made by the appellant *non obstante veredicto*, which was overruled by the court, and a motion for a new trial was also denied. The appeal is from the judgment and said two orders.

The appellant is a corporation engaged in logging and lumbering in the state of Idaho. It is alleged in the complaint that the respondent was employed at what was known as camp No. 1 of the appellant company, as a laborer blowing out stumps, and on the 23d of August, 1911, was directed to cease work at that camp, and was transferred to another camp known as camp No. 2, and directed by the appellant, together with another man, to build a bridge across a small stream; that the superintendence and control of the work of building said bridge or turn-out, with other work done by the appellant, was under the direction of a foreman, and that said foreman was in direct charge of the work of building said bridge; that it was the duty of plaintiff as a laborer to do such work in such place, and in such manner as the foreman directed; that the duties of the foreman were to do whatever was necessary to determine whether the places where the employees were working were reasonably safe, and to direct the performance of said work in such a manner as was necessary to keep the same safe; that on August 25, 1911, the plaintiff was directed to go to work upon a bridge, and to construct same in the manner directed by the foreman, and while the plaintiff was engaged in said service, deeply engrossed in his work, the appellant caused a large tree, about 12 inches in diameter and about 60 feet in length, to be cut and felled so that the same struck the plaintiff and injured him; that the tree was cut and felled by an employee of the appellant working on the hill above where plaintiff was working; that no notice or warning was given that the tree was about to be felled or was falling until it fell and struck plaintiff; that

plaintiff was deeply engrossed in his work with his back in the direction in which the appellant was cutting the tree; that the plaintiff was unaware of the fact that the tree was being cut where the same might fall on him; that it was the duty of the appellant to give the plaintiff warning of the falling of a tree, in order that he might seek a place of safety and thus protect himself; that no warning whatever was given, and that no notice was given the plaintiff that the tree was about to be cut; that the employee who cut the tree was working under the direction and control of the foreman; that it was carelessness and negligence on the part of appellant to allow plaintiff to become engrossed in his work and at the same time direct another man to go on the hillside above him and cut a tree, and permit the same to be felled without giving plaintiff any notice or warning so as to permit him to escape to a place of safety and avoid danger when the tree was felled; that by reason of the injuries so received, the plaintiff suffered a double compound fracture of both bones of his right leg between the ankle and the knee, and was severely injured, and from which he was still suffering at the time of the trial.

The appellant answered, denying practically all of the allegations of the complaint that would make appellant liable, and pleaded affirmatively contributory negligence and negligence of a fellow servant and assumption of risk.

The evidence in the case was quite brief. The plaintiff testified that he had been working in camp No. 1 under a boss named Mullen; that on August 23, 1911, Mullen told him to go to camp No. 2, which was under the charge of a boss named Radigan; that at camp No. 1 he had been engaged in blowing out stumps and clearing a right of way as a common laborer at \$2.75 per day; that Mullen told him to go up to camp No. 2 and work there two or three days, as they were short-handed there, and to report to Radigan; that on the morning of August 23d, Radigan and plaintiff walked up the gulch, and Radigan told him to work on the skid road; that he told plaintiff to lay poles 3 feet apart, and bury them in the ground, and let about 3 inches stick over, so that a sleigh could slide along on the top; that he kept at that work in the forenoon, and in the afternoon Radigan came along and told him to build a bridge about 30 feet long and 12 feet wide, so that teams could switch out and pass each other; that Radigan told him he would have the timber brought to him; that he was getting \$2.75 a day, the same as at camp No. 1; that Radigan selected the work that he was to do; that Radigan was supposed to go around and

tell the men what to do; that he was the only foreman in the camp; that he hired and discharged men and signed their checks; that the timbers for the bridge were felled and carried to the bridge by an Austrian and another man, who were working under the supervision of Radigan, the names of whom plaintiff did not know; that the bridge was being built in a little gulch with a little creek in it, and there was a stringer on each side of the creek about 30 feet long; plaintiff and his partner were covering the bridge, plaintiff working on one end chopping a notch, and his partner doing the same on the other end, when plaintiff was struck by a falling tree; that the two men who were getting the timber had been felling it up the gulch a ways and bringing the timber down, for a day and a half; that at the time of the injury plaintiff was working on the stringer where Radigan told him to work; that the tree that fell on him came to the right of him; that he did not see any men chopping a tree, and did not know that any men were chopping a tree prior to the time it fell; that he had no warning of the falling tree; that the men "never hollered at all;" that prior to the falling of the tree on him, he had never seen the two men cutting a tree near him; that there were men working all around him in the woods, some skidding logs and others chopping; that every man was supposed to holler "Timber!" and give a man a chance to get out of the way, when a tree was being felled, and that that had been his experience in the camps of the Stack-Gibbs Lumber Company; that he did not remember of ever hearing the foreman of the camp instruct the men to give that kind of a warning or any kind of a warning; that a man was supposed to holler and give a man a chance to get out of the way; that there were skidding teams climbing the hills all the time; that while he was notching the log on the bridge he did not see the men cutting the tree, as they were to the right of him; that he did not know they were in there; that he thought they were up the gulch further; that they had been working up the gulch further; that they had been carrying the logs down on their shoulders to him; that at the time he went to work neither the foreman nor any other person advised him that they were going to cut any timber around close to where he was working; as a result of the tree striking him, his leg was severely broken; he was laid up in bed seven months, and it was still swollen at the time of the trial; that his hospital bill was \$350, of which he had paid \$80, all the money he had; that prior to the accident he had been in good health; that he was fifty-one years

of age; that prior to the time the tree fell there was no warning whatever given him that a tree would fall.

Charley Sanders, an employee of the defendant at the time of the accident, testified that he was working on the skidway something like 100 feet from where plaintiff was working on the bridge; that there were other men working up there swamping and doing other work, and others chopping timber; that when a tree was about to fall, the men were supposed to holler "Timber!" and give the men a chance to get away; that the practice of giving warning in that way had been followed during all the time they had been in the camp; that the men were chopping, swamping, and cutting about 200 feet further up than he was; that he saw the tree fall that struck plaintiff; that he did not hear any warning or notice given that the tree was to be felled; that he saw the tree fall and heard someone holler, someone groaning, and went down there with his cant hook and saw plaintiff and another man lying on the road; that he thought the man who hollered was the man who was hurt with plaintiff; that the tree was about the size of an ordinary telephone pole, about 100 feet long; that as the tree struck the ground it was broken into pieces: that he then went down to the camp to get help; that he could hear chopping all around him where he was working; that the skidway was up about 100 feet above where plaintiff was working; that he had seen the two men cutting timbers for the bridge that day; that the men who were cutting the timbers for the bridge and carrying them to plaintiff had been working that day further up the draw from the camp and beyond where he was working,—farther away from plaintiff than he was.

The physician who treated the respondent testified to the injuries and their permanency.

The testimony of the appellant was directed to the establishment of the proposition that the respondent was in charge of the work of constructing the bridge, and that those who cut the tree that caused the injury were working under his direction. The walking boss of the appellant testified that he had general charge of the camps of the appellant, and that there were from forty to sixty men working in each camp; that each camp had a foreman; that he talked with respondent about going to camp No. 2 to build a scoot road, and look after that work. On cross-examination he testified that the foreman Radigan's duties were to show the men where he wanted them to work and tell them what to do; that he was the man who picked out the work, and directed the men what to do, and how to do

it; that the respondent was a common laborer at camp No. 1, and that he was sent to camp No. 2 to look after the building of the scoot road and a bridge; that the witness had never told respondent that he had been promoted to be a boss; that he told him what he wanted him to do up there; that he told him to report to Radigan, and that Radigan would show him what to do.

Radigan, the foreman at camp No. 2, testified that respondent came there to go to work, and testified as follows:

Q. What conversation did you have with Mr. Lucey about this work?

A. I showed him the work I wanted him to do, and showed him what I wanted him to do it with; I also gave him the men I wanted to work with him.

Q. What did you tell him he was to do?

A. I told him,—I first took him and showed him the place in the road to fix, and then took him and showed him a turn-out place I wanted built first, I believe, and put him to work at it.

He further testified that he told the respondent that the men were to help him, and that respondent was to direct them in their work; that at that time there were about fifty-five men working in that camp. Radigan further testified that he had been along there several times that day; that he noticed the men were cutting the timbers for respondent on the hillside above him; that he noticed them several times in different places on both sides of the gulch in the vicinity of 100 feet; that on the day of the accident they were working about 150 feet from respondent.

On cross-examination he testified as follows:

Q. I will ask you how you happened to know where these men were cutting timber around Lucey?

A. It was my business to know where they were; every time I went through the woods I would also find out where they were.

Q. They were working under you?

A. Yes, sir.

Q. It was your business to see that they were attending to their work?

A. Yes, sir.

Radigan also testified that he was the foreman; that the skidding crew did not have a boss; that there was one other boss in that camp, namely, the respondent; that he did not notify the respondent that he had been promoted to be a boss; that he did not know whether respondent knew he was a boss or not.

It clearly appears that Radigan took the

respondent up there, and told him what he wanted him to do, and how he wanted it done, and that he told the other men what he wanted them to do, and did not inform respondent that he had been made boss or that he had charge of any men.

In rebuttal respondent testified that a man by the name of Mullen was the man who sent him up there to construct the bridge; that the witness Garvison never spoke to him about it, and no one ever told him that he was to have charge of anything or of any men.

The jury rendered a verdict in favor of the respondent for the sum of \$2,999.

Four errors are assigned as the basis for the reversal of the judgment: (1) That the trial court erred in denying appellant's motion for a nonsuit; (2) that the court erred in denying appellant's motion for a directed verdict; (3) that the court erred in denying appellant's motion for a judgment *non obstante veredicto*; (4) that the court erred in denying appellant's motion for a new trial.

It is first contended that the respondent was an experienced woodsman, and had had many years' experience in logging camps, and he testified that it was the custom or rule in the camps of the appellant company to give notice or warning to the men when a tree was about to fall, and that, since it was the custom or rule of the appellant company that the men felling trees, before the tree falls, must "holter" or cry out the word "Timber!" in order to give the men a chance to get out of the way, if the servant neglects to give the signal or warning on felling a tree, such neglect is the fault of a fellow servant, and the employer is not liable for any damage resulting therefrom. The question then is directly presented whether those who felled the tree were fellow servants of the respondent, and whether their neglect to give the signal or warning required to be given on the falling of a tree was the neglect or carelessness of a fellow servant, for which the employer was not liable.

We think the general rule of law is that, when a master is engaged in a complex or hazardous business, he must promulgate and adopt such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties, as will afford reasonable protection to them, and that it is the duty of the master to use reasonable care to see that the rules adopted by him for the safety of his servants are complied with, and, if he fails to do so, he will be responsible for injuries resulting from failure of compliance.

In Potlatch Lumber Co. v. Anderson, 118 C. C. A. 180, 199 Fed. 742, which is a case 46 L.R.A. (N.S.)

quite similar to the one under consideration, after stating the duties of the corporation substantially as above set forth, the court said: "Nor was it disputed that the duties just specified are positive obligations imposed upon the master by law, and that he is liable for the negligent performance of such duties, whether he undertakes their performance personally, or delegates them to another." The court also held that it would be unreasonable to expect a man in a crew of "swampers" to do his work of cutting down brush, and at the same time protect himself against the danger of trees falling on him cut by men in another crew near by, unless the men cutting the trees, or someone knowing the danger, would give him warning. The fact that the appellant company had adopted rules in regard to giving warning would indicate that there was a necessity for such rules and their enforcement. The respondent was employed to construct a certain bridge or turn-out. The appellant undertook to furnish him the poles or timber for that purpose, and the evidence shows that he had no supervision or control over those who felled the timber and delivered it to him for use in constructing the bridge.

In Cunningham v. Adna Mill Co. 71 Wash. 111, 127 Pac. 850, the court held that fallers in a logging camp are not fellow servants of the members of a crew engaged in hauling logs from the woods where they are left by the fallers, and that the employer failing to have proper warning given before fallers of trees cause them to fall across the haulback line, where plaintiff, a member of the hauling crew, is exposed to unexpected danger, is guilty of actionable negligence. In that case the negligence upon which the action was predicated was the failure to give a signal or warning to the person injured, that a tree was about to fall. In the course of that decision the court said: "The evidence shows that respondent and the fallers were working in separate places, at a different character of employment, and that they were not in view of each other. This being true, the failure of the master to see that a proper warning or signal was given before the fallers, whom respondent could not see, caused a large tree to fall across the haulback line, constituted negligence, as it necessarily exposed respondent to a sudden and unexpected danger. Under such circumstances, it was the nondelegable duty of the master to see that a signal or warning was given." As touching upon the question here involved, see Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, 19 Mor. Min. Rep. 264, 4 Am. Neg. Rep. 105, which is a well-constructed case. In the course of the decision the court said: We

conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but as the defendant's responsibility extended beyond the selection of an agent, and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent." Substantially the same doctrine is laid down in *Ondis v. Great Atlantic & Pacific Tea Co.* 82 N. J. L. 511, — L.R.A. (N.S.) —, 81 Atl. 856. That was a case in which there was neglect in giving a warning, and it was held that neglect to give the warning was legally imputed to the employer, as the servants he required to give the warning were not to be regarded in law as fellow servants engaged in a common employment. This doctrine is also recognized in *Koerner v. St. Louis Car Co.* 209 Mo. 141, 17 L.R.A. (N.S.) 292, 107 S. W. 481. In that case it was the foreman's duty to give the warning, but, as we view it, that would make no difference, as the faller of the tree and respondent were not fellow servants in regard to the duty of giving the warning or signal. See also *Kempfert v. Gas Traction Co.* 120 Minn. 90, 139 N. W. 145.

In a very recent decision from Minnesota, — *Elenduck v. Crookston Lumber Co.* 121 Minn. 53, 140 N. W. 125,—the court recognized that where signals are employed in the general work of the master, and are used solely in directing the movement of machinery or instrumentalities connected with the employment, the signals are mere details of the work, and the failure on the part of servants to give them does not charge the master with liability, and held as follows: "But where the place of work is inherently dangerous, and signals are required by orders of the master, or by common custom, for the protection of the employees, and to provide and to maintain for them the safety of their place of work, and are relied upon by the employees as a means of saving themselves from harm, it becomes the absolute duty of the master to give them, and a failure to do so, though the failure be the neglect of a servant engaged in the common employment, renders the master liable to a servant who is injured in consequence of the neglect. This principle of the law of master and servant is thoroughly settled in this state." And further on in the opinion, the court, commenting on the case of *Anderson v. Pittsburgh Coal Co.* 108 Minn. 455, 26 L.R.A. (N.S.) 624, 122 N. W. 794, said: "Counsel's criticisms of the decision in that case are not sound. 46 L.R.A. (N.S.)

They apparently overlook the essential element made the foundation of that decision, namely, the dangerous character of the work, and the necessity of signals for the protection of employees."

In *Anderson v. Pittsburgh Coal Co.* supra, the court said: "The rules of law as to how far the master may delegate his duty to his servant appear in a measure to have been rather rendered uncertain than to have been definitely determined by the mass of decision on this subject. The opinion has been frequently expressed, as in *Brabbitts v. Chicago & N. W. R. Co.* (1875) 38 Wis. 289-299: 'It would be monstrous to allow [the master] to relieve itself from all liability for a breach of that duty [to the servant] by simply charging one of [his] inferior officers or servants with its performance.' This principle has been reiterated times without number by the Wisconsin court and by almost every court in the country. . . . In point of fact the view these and allied authorities have taken is, in large measure, a necessary product of the transition in judicial opinion as to what is the criterion by which it shall be determined who is and who is not a fellow servant. The decisions of courts of other states that, under given circumstances, one servant is a fellow servant of another, are not controlling on this court, unless the criterion by which the relationship is determined is the same as in this jurisdiction, namely, that a fellow servant is one to whom the master has not intrusted the performance of some absolutely nonassignable duty of the master. The Federal courts, having originally announced the test of superior servant, or the doctrine of control, then rejected it, and adopted the separate department theory. It has been quite generally thought that this theory has been, in turn, largely abandoned, and the current test of a vice principal adopted. But in *Peters v. George*, 83 C. C. A. 408, 154 Fed. 634, Judge Gray said that under the modern rule of the Federal courts the theory of vice principal, as determining the liability of a master, has been largely discarded, and that which is to be considered as merely and solely the negligence of a fellow servant turns rather on the character of the act than on the relation of the employees to each other." In *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, 283, 19 Eng. Rul. Cas. 107, Lord Cranworth said: The master is "bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business." More specifically: "No duty required of . . . [the master] for the safety and protection of his servants can be transferred so as to exonerate him from such liability."

If the rule were that an employer can avoid all liability simply by delegating the authority to a servant to give warning of a falling tree, it would be a very easy rule for the employer to follow, to avoid liability, should the servant fail to give the warning and another servant be injured thereby. It is the duty of the master to furnish a reasonably safe place for the servant to work; and, if it requires warning and signals to protect a servant from injury from falling trees cut by other servants, it is the master's duty to see to it that the proper signals are given, and, if the injury is caused by the failure to give the signals, the master is liable. His liability or responsibility extends beyond the selection of a servant or agent to give the signal, and includes the signal itself, and, if the servant neglects to give it, the master must answer for such negligence, as the authority to a servant to give a signal is nondelegable, and the failure to give it is imputed to the master, and the servant employed to give it is not the fellow servant of the injured employee so far as the giving or failure to give the signal is concerned. The master cannot instruct a servant to do or perform a non-assignable or nondelegable duty, and escape liability if the servant neglects to perform such duty, in case injury results to the employee.

We think under the evidence in this case and the law applicable thereto, the appellant was liable for the injuries to the respondent. We therefore conclude that the court did not err in denying appellant's motion for a nonsuit, its motion for a directed verdict, its application for a judgment *non obstante veredicto*, nor in denying its motion for a new trial.

The judgment is therefore affirmed, with costs in favor of the respondent.

Allshie, Ch. J., and Stewart, J., concur.

TENNESSEE SUPREME COURT.

D. M. MEREDITH, Admr., etc., of J. L. Dibrell, Deceased,

v.

CORA A. DIBRELL et al.
and

CITIZENS' NATIONAL BANK OF
CHARLESTON, Intervener, Appt.

(— Tenn: —, 155 S. W. 163.)

Bills and notes — extension of time — reservation of recourse — necessity of notice.

Notice to the surety of reservation of recourse against him is not necessary when permitting the maker to renew a note, under the provisions of the negotiable instruments act that extension of time to the

maker releases the liability of one secondarily liable, unless the right of recourse against him is expressly reserved.

(April 3, 1913.)

APPPEAL by intevener from a decree of the Court of Civil Appeals affirming a decree of the Chancery Court for White County disallowing a claim upon a promissory note in a proceeding to settle the estate of J. L. Dibrell, deceased. Reversed.

The facts are stated in the opinion.

Mr. W. T. Smith for plaintiff.

Mr. J. H. Anderson for defendants.

Green, J., delivered the opinion of the court:

In this suit the estate of J. L. Dibrell, deceased, is being administered and wound up in the chancery court as an insolvent estate.

The Citizens' National Bank of Charleston, West Virginia, has filed a petition in the case to hold said estate liable upon a promissory note, the property of petitioner, which note was executed by C. S. Oldrod, Geo. L. Washburn, and Buch H. Kenney, and signed by the deceased, J. L. Dibrell, as security.

The original note matured after the death of Dibrell, and at its maturity, under the concurrent finding of the chancellor and the court of civil appeals herein, it may be conceded that, by an arrangement between the bank and other parties to the note, a new note was taken, and the time for payment of this obligation extended by valid contract, without notice to the representatives of the deceased.

The chancellor and the court of civil appeals rendered a decree against the bank upon the foregoing facts found by them, overruling another contention made by the bank, which we will now proceed to consider.

Note. — Reservation of rights against party secondarily liable on a bill or note upon granting extension of time to party primarily liable, as preventing discharge of former.

The rule is well settled that if a creditor by a valid and binding agreement, without the assent of a surety, gives further time for payment or performance to the principal debtor, the surety will be discharged. 32 Cyc. 191.

But it is an exception to this rule, equally well settled, that such agreement will not operate to discharge a surety where the agreement itself contains an express reservation of the remedies of the creditor against the surety, or against all persons other than the principal debtor, who may be liable. As stated in effect in *MEREDITH v. DIBRELL*, the framers of the

Only one deposition is taken upon this controversy, that of the cashier of petitioning bank. After testifying to the facts relating to the taking of the renewal note from the other parties to the note, he states that this renewal was taken and this extension given to said parties with the express reservation at the time on the part of the bank of all its rights against the surety, J. L. Dibrell, or his estate.

It is said for the bank that, even though an extension of time be granted upon a valid consideration to the principal debtor, without the knowledge of the surety, such an extension does not release the surety, provided the holder at the time of the extension reserves all rights against the surety.

negotiable instrument act, in adopting such exception, followed a well-settled rule of the common law. *Hodges v. Elyton Land Co.* 109 Ala. 617, 20 So. 23; *Jones v. Sarchett*, 61 Iowa, 520, 16 N. W. 589; *Clagett v. Salmon*, 5 Gill & J. 314; *Sohier v. Loring*, 6 Cush. 537; *Big Rapids Nat. Bank v. Peters*, 120 Mich. 518, 79 N. W. 891; *Miners' & M. Bank v. Rodgers*, 123 Mo. App. 569, 100 S. W. 534; *First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582; *Bailey v. Baldwin*, 7 Wend. 289; *Stein v. Stenidler*, 1 Misc. 414, 49 N. Y. S. R. 450, 20 N. Y. Supp. 839; *Hagey v. Hill*, 75 Pa. 108, 15 Am. Rep. 583; *Viele v. Hoag*, 24 Vt. 46; *Morse v. Huntington*, 40 Vt. 488; *Canadian Bank v. Northwood*, 14 Ont. Rep. 207; *Bank of Upper Canada v. Jardine*, 9 U. C. C. P. 332; *Currie v. Hodgins*, 42 U. C. Q. B. 601; *Ex parte Glendinning*, 1 Buck. Bankr. 517; *Oriental Financial Corp. v. Overend, G. & Co.* L. R. 7 Ch. 142, 41 L. J. Ch. N. S. 332, 25 L. T. N. S. 813, 4 Eng. Rul. Cas. 576; *Owen v. Homan*, 4 H. L. Cas. 997, 1 Eq. Rep. 370, 17 Jur. 861; *Nichols v. Norris*, 3 Barn. & Ad. 41; *Boaler v. Mayor*, 19 C. B. N. S. 76, 11 Jur. N. S. 565, 34 L. J. C. P. N. S. 230, 12 L. T. N. S. 457, 13 Week. Rep. 775, 17 Eng. Rul. Cas. 367; *Boulton v. Stubbs*, 18 Ves. Jr. 20, 11 Revised Rep. 141.

The only reported case found which is opposed to the above authorities is *Gustine v. Union Bank*, 10 Rob. (La.) 412, where it was held that no reservation which a creditor can make in a contract containing a novation of a debt, or allowing a prolongation of time to the principal debtor, can preserve his rights against a surety who was not a party to such contract.

Necessity for notice to party secondarily liable.

The question of necessity for notice to party secondarily liable, of reservation of rights against him, seems to have been discussed in but two cases (*Currie v. Hodgins*, 42 U. C. Q. B. 601, and *Webb v. Hewitt*, 3 Kay & J. 438), and these sustain the decision in *MEREDITH v. DIBRELL*, in holding such notice to be unnecessary.
46 L.R.A. (N.S.)

The negotiable instruments act (chapter 94, § 120, Acts of 1899) provides:

"Sec. 120. Persons secondarily liable, how discharged.—A person secondarily liable on the instrument is discharged:

"(6) By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

The court of civil appeals was of opinion that reservation of the right of recourse against a surety would be unavailing to the holder, and that an extension would release the surety notwithstanding such reservation in the contract with the principal

Reason for rule.

It has been said that this exception is grounded upon the principle that, where a contract expressly reserves the remedy of the creditor against other persons, the surety is in no way prejudiced by the agreement. By entering into such an agreement the principal debtor impliedly consents that what ever remedies his sureties have against him shall remain open to them. They are thereafter at liberty to pay the debt at once and proceed immediately against their principal for reimbursement.

And in *First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582, it was assigned as a reason for this doctrine that the reservation rebuts the implication that the indorser was meant to be discharged; and prevents the rights of the indorser against the maker being impaired. For the indorser, after such an agreement, may immediately pay the debt and bring his action against the maker, and his consent that the creditor shall reserve his remedy against the indorser is impliedly a consent that such indorser shall have recourse against him.

In *Webb v. Hewitt*, 3 Kay & J. 438, it was said that the authorities have settled that, upon any giving of time to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged; for, when the right is reserved the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn around upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial.

And in *Hagey v. Hill*, 75 Pa. 108, 15 Am. Rep. 583, it was said that "the ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers, upon a valid consideration, is held to be a discharge of the indorsers, is solely this, that the holder

debtor, unless the surety were informed of the extension. In this we think the learned court was in error.

The language of the negotiable instrument act seems plain. A binding agreement to extend the time of payment under the act will not release the surety, if made with his assent, or if the right of recourse against him is reserved. In neither of these cases is he released.

Such was the law long prior to the passage of the act in question. If the creditor's rights against the surety are reserved, and this reservation made a part of the contract of extension with the principal debtor, the result is only a qualified extension. While it is true the creditor has obligated himself not to proceed against the principal debtor until the maturity of the extension, he has not changed his relations with the surety at all, since he has especially reserved all rights against him, including the right to sue him at once. Inasmuch as this reservation of rights against the surety becomes a consideration of the contract for extension entered into with the debtor, the latter impliedly agrees that the surety may have all his original rights preserved against him as principal debtor; and while the creditor cannot bring suit against the principal pending the extension, the surety, if he pays the debt, may sue the principal at once. Therefore the surety's contract is not changed, and there is no equitable reason to justify his discharge.

"The ground upon which a surety is held discharged when further time for payment is given the principal debtor is that the rights of the surety are varied, as he cannot then, when the debt is due and payable, make payment, and thus put himself in the

thereby impliedly stipulates not to pursue the indorsers, or to seek satisfaction from them in the intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the indorsers, it will not discharge the latter. In such case the very ground of the objection is removed, for their rights are not postponed against the maker, if they should take up the note."

And in *Salmon v. Clagett*, 3 Bland Ch. 125, it was said: "The giving of time to the principal debtor, with a reservation of the remedies, has, in many cases, the appearance of absurdity; because, when distinctly understood, it seems to be almost a flat contradiction in terms. Such a reservation of remedies, in order to hold the surety bound, must amount to this, that the creditor agrees to give time to the debtor; and yet that they both agree that the surety may, at any time, force the

place of the creditor according to the original implied contract, and enforce repayment from the principal. Where the remedies of the creditor are reserved against the sureties, notwithstanding the new agreement with the principal, the situation of the sureties is not varied, and the rule does not apply. . . . When the creditor proceeds against the surety in such case, and the surety pays, he is then entitled to the place of creditor, as it was originally, and may in turn enforce the principal, who may not set up against the surety the new arrangement with the creditor." *Morgan v. Smith*, 70 N. Y. 537.

"Such an agreement, reserving the remedies, might not in many cases be of the least benefit to the principal debtor, since it leaves him entirely at the mercy of his surety; yet if the parties do so expressly contract, the surety can have no cause to complain that the implied contract has been altered or impaired in any way to his prejudice, and therefore he cannot be discharged." *Salmon v. Clagett*, 3 Bland, Ch. 125.

"It is very obvious that a principal debtor may gain little or nothing by such a composition as this with his creditor, inasmuch as he is left liable to the like proceedings against him by his sureties, which his creditor might have instituted if no composition had been made. But if he pleases to subject himself to that liability by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement." *Sohier v. Loring*, 6 Cush. 537. See *Stearns, Suretyship*, § 92; 1 *Story, Eq. Jur.* § 326; *Byles, Bills* 3d ed. 299; *Brandt, Suretyship*, § 329.

creditor to proceed against the principal by a bill *quia timet*, or, by paying the whole debt, have an assignment of all the securities and proceed immediately himself against the principal debtor, or in any other mode authorized by the assigned securities. Such an agreement, reserving the remedies, might not, in many cases, be of the least benefit to the principal debtor, since it leaves him entirely at the mercy of his surety; yet if the parties do so expressly contract, the surety can have no cause to complain that the implied contract has been altered or impaired in any way to his prejudice; and therefore he cannot be discharged."

As to effect under negotiable instrument law of extension of time to principal, to release a surety, see notes to *Vanderford v. Farmers' & M. Nat. Bank*, 10 L.R.A. (N.S.) 129; *Richards v. Market Exch. Bank Co.* 26 L.R.A. (N.S.) 99; and to *Northern State Bank v. Billamy*, 31 L.R.A. (N.S.) 149.

J. H. B.

Reference to the text-books and cases cited thereunder show that this principle of the law of suretyship has been generally accepted in this country and in England for many years, and it is undoubtedly sound. The negotiable instruments act merely embodied an old rule into the statute.

We do not think that the sureties' remedy under § 3517 of Shannon's Code would be at all embarrassed by the making of such a contract between the principal debtor and the holder of a note. As seen, these contracts do not affect the rights of the surety at all, and while the creditor, by a valid contract of extension, does disable himself from bringing suit in his own interest during that extension against the principal debtor, he would still be required, upon notice given, under Shannon's Code, § 3517, to bring such a suit at the behest of the surety. The debtor has impliedly agreed that all the surety's original rights shall be preserved.

Prior to the adoption of § 3517 of Shannon's Code, a surety could go into equity and compel a suit by the creditor against the principal debtor. This statute merely gives him a more speedy remedy. A contract for extension, such as the one made between the bank and the principal debtors in this case, does not deprive the surety of any rights which he has under the statute or otherwise, and therefore such a contract for extension does not release him from his obligation.

The decree of the Court of Civil Appeals and of the Chancellor will be reversed, and this cause remanded to the Chancery Court of White County for further proceedings.

NEBRASKA SUPREME COURT.

FARMERS' & MERCHANTS' STATE
BANK OF GREENLEAF, KANSAS,
v.

JOHN SUTHERLIN, Appt.

(93 Neb. 707, 141 N. W. 827.)

Chattel mortgage — description — sufficiency.

1. A description in a chattel mortgage, which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property, is sufficiently definite.

Headnotes by LETTON, J.

Note. — As to necessity of recording instrument creating a lien or reserving title to personal property, in state to which property is subsequently removed, see notes to Snider v. Yates, 64 L.R.A. 356, and 46 L.R.A. (N.S.)

Same — taking property out of state — effect.

2. Where a mortgagor removes property from another state into this state, without the consent of the mortgagee, which has been encumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property.

(May 17, 1913.)

APPEAL by defendant from a judgment of the District Court for Gage County in plaintiff's favor in a proceeding to recover possession of a horse. Affirmed.

The facts are stated in the opinion.

Mr. A. D. McCandless, for appellant:

The filing or recording of a chattel mortgage in Kansas, is not constructive notice to creditors and purchasers in Nebraska.

Montgomery v. Wight, 8 Mich. 143; Corbett v. Littlefield, 84 Mich. 30, 11 L.R.A. 95, 22 Am. St. Rep. 681, 47 N. W. 581; Golden v. Cockril, 1 Kan. 259, 81 Am. Dec. 510; Zollikofer v. Briggs, 19 La. 521; Ballard v. Great Western Min. & Mfg. Co. 39 W. Va. 394, 19 S. E. 510; Linde v. Melvin, 11 Vt. 686, 34 Am. Dec. 717; Johnson v. Hughes, 89 Ala. 588, 8 So. 147; Barney & S. Mfg. Co. v. Hart, 8 Ky. L. Rep. 223, 1 S. W. 414; Turner v. Caldwell, 15 Wash. 274, 46 Pac. 235; Blumauer v. Clock, 24 Wash. 596, 85 Am. St. Rep. 966, 64 Pac. 844.

Mr. E. N. Kauffman, for appellee:

The description was sufficient.

Hughes v. Abston, 105 Tenn. 70, 58 S. W. 296; Brown v. Koenig, 99 Mo. App. 653, 74 S. W. 407; Fisher v. Friedman & Co. 47 Iowa, 443; Wade v. Strachan, 71 Mich. 459, 39 N. W. 582; 5 Am. & Eng. Enc. Law, 2d ed. 956; Jordan v. Hamilton County Bank, 11 Neb. 499, 9 N. W. 654; Price v. McComas, 21 Neb. 195, 31 N. W. 511; Wiley v. Shars, 21 Neb. 712, 33 N. W. 418; Rawlins v. Kennard, 26 Neb. 181, 41 N. W. 1004; Buck v. Davenport Sav. Bank, 29 Neb. 407, 26 Am. St. Rep. 392, 45 N. W. 776; Spelts v. Davenport Sav. Bank, 29 Neb. 411, 45 N. W. 777; Norfolk Nat. Bank v. Wood, 33 Neb. 113, 49 N. W. 958; Iowa Sav. Bank v. Dunning, 37 Neb. 322, 55 N. W. 1079; Adams v. Hill, 10 Kan. 627; Mills v. Kansas Lumber Co. 26 Kan. 574; Griffiths v. Wheeler, 31 Kan. 17, 2 Pac. 842; Schmidt v. Bender, 34 Kan. 437, 18 Pac.

Adams v. Fellers, 35 L.R.A. (N.S.) 385. For related questions see references in foot note to Boyer v. M. D. Knowlton Co. 38 L.R.A. (N.S.) 224.

491; *Inter-State Galloway Cattle Co. v. McLain*, 42 Kan. 680, 22 Pac. 728; *City Bank v. Ratkey*, 79 Iowa, 215, 44 N. W. 362; *Jones, Chat. Mortg.* § 299; *Cool v. Roche*, 20 Neb. 550, 31 N. W. 367.

The recording of a chattel mortgage in Kansas according to the laws of that state is constructive notice to a purchaser of the mortgaged property in this state, when the property is taken out of the county and state where executed and recorded, and brought into this state, without the consent of the mortgagee.

Cobbey, Replevin, § 190; *Pennington County Bank v. Bauman*, 87 Neb. 26, 126 N. W. 654; *Snyder v. Yates*, 112 Tenn. 309, 64 L.R.A. 356, 105 Am. St. Rep. 941, 79 S. W. 796; *Gosline v. Dunbar*, 32 N. B. 325; *Hall v. Pillow*, 31 Ark. 32; *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Smith v. McLean*, 24 Iowa, 322; *Simms v. McKee*, 25 Iowa, 341; *Aultman & T. Machinery Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435; *Ord Nat. Bank v. Massey*, 48 Kan. 762, 17 L.R.A. 127, 30 Pac. 124; *Langworthy v. Little*, 12 Cush. 109; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Hundley v. Mount*, 8 Smedes & M. 387; *Barker v. Stacy*, 25 Miss. 471; *Davis v. Williams*, 73 Miss. 708, 19 So. 352; *Lafayette County Bank v. Metcalf*, 29 Mo. St. App. 384; *Smith v. Hutchings*, 30 Mo. 380; *Feurt v. Rowell*, 62 Mo. 524; *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 87; *Cushman v. Luther*, 53 N. H. 562; *Parr v. Brady*, 37 N. J. L. 201; *Nichols v. Mase*, 94 N. Y. 160; *Hornthall v. Burwell*, 109 N. C. 10, 13 L.R.A. 740, 26 Am. St. Rep. 556, 13 S. E. 721; *Wilson v. Rustad*, 7 N. D. 330, 66 Am. St. Rep. 649, 75 N. W. 260; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla. 363, 60 Pac. 249; *Bank of Louisville v. Hill*, 99 Tenn. 42, 41 S. W. 349; *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296; *Craig v. Williams*, 90 Va. 500, 44 Am. St. Rep. 934, 18 S. E. 899.

Letton, J., delivered the opinion of the court:

This is an action in replevin to recover possession of a horse. Plaintiff had judgment, and defendant appeals.

The case was tried on an agreed statement of facts, which shows that on the 11th day of October, 1909, M. M. O'Leary and I. E. Reed executed and delivered to the plaintiff at its bank in Greenleaf, Kansas, a mortgage note for the sum of \$375, due in one year from that date, and pledged as security for the debt: "One span of bay geldings, 7 and 8 years of age, weight about 2,500 lbs., named 'Charlie and John.' One

1½ work harness, one 3½ lumber wagon, all property this day bought of Guy Scott." The mortgage was filed for record on the 12th day of October, 1909, in the office of the register of deeds of Washington county, Kansas, and duly recorded in Book 31 of Chattel Mortgage Records of said county, as required by the laws of Kansas. The mortgage was never at any time filed or recorded in Gage county, nor in any other county in Nebraska. About May 1, 1910, O'Leary being then in Wymore, Nebraska, and having one of the horses in his possession, sold the same to the defendant, John Sutherlin. Sutherlin had no actual notice of the fact that the horse was mortgaged, and acted in good faith. It is admitted that the debt secured by the note had not been paid at the time this suit was commenced, and that the horse was taken from Washington county, Kansas, without the consent of the mortgagee.

Appellant contends: First, that the mortgage is void for uncertainty in the description; second, that the filing or recording of a chattel mortgage in Kansas is not constructive notice to a subsequent purchaser in good faith in Nebraska.

1. The rule adopted in Kansas as to the sufficiency of a description in a chattel mortgage is that "a description which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient." *Mills v. Kansas Lumber Co.* 26 Kan. 574; *Griffiths v. Wheeler*, 31 Kan. 17, 2 Pac. 842; *Inter-State Galloway Cattle Co. v. McLain*, 42 Kan. 680, 22 Pac. 728. The mortgage, therefore, was not void as indefinite in that state. The rule in Nebraska is identical *Rawlins v. Kennard*, 26 Neb. 181, 41 N. W. 1004; *Union State Bank v. Hutton*, 61 Neb. 571, 85 N. W. 535. We conclude, therefore, that the description is sufficiently definite.

2. The most important point is whether the mortgage is valid in this state against an innocent purchaser of the property from the mortgagor, the mortgage not having been filed in the office of the county clerk in any county in this state. This seems to be a new question in this court. The general rule as stated in *Jones, Chattel Mortgages*, 5th ed. § 299, is as follows: "The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction, and effect of a mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirement of the law of the latter state." In support of this general principle cases are cited from Alabama, Arkansas, Connecticut, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mis-

Mississippi, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Utah, and Wyoming.

A different rule prevails in those states which have not substituted the filing or recording of chattel mortgages for the delivery of possession of the property pledged, as is required at common law, and also in such states as require by statute the refileing or recording of mortgages on property brought from other states. *Jones, Chat. Mortg.* § 300.

In *Corbett v. Littlefield*, 84 Mich. 30, 11 L.R.A. 95, 22 Am. St. Rep. 681, 47 N. W. 581, the supreme court of Michigan refused to enforce a chattel mortgage, given in Nebraska and duly filed in this state, from one citizen of this state to another, on property within the state which was taken to Michigan without the consent of the mortgagee. This holding is an exception to the general rules of comity prevailing between the states, and is in conflict with that of the majority of courts in this country.

This court has heretofore held, on the authority of *Snyder v. Yates*, 112 Tenn. 309, 64 L.R.A. 353, 105 Am. St. Rep. 941, 79 S. W. 796, that a chattel mortgage duly recorded in one state will not, under the doctrine of comity, be given priority by the courts of another state to which the chattels are removed with the consent of the mortgagee over local attaching creditors who had no actual notice of the mortgage. *Pennington County Bank v. Bauman*, 87 Neb. 25, 126 N. W. 654. The decision in the latter case seems to have been mainly based upon another ground. In any event, it would seem that there is a distinction between a case where a mortgagee voluntarily permits the mortgagor to remove the same into another state, there to become subject to the laws of that state, and a case where the property is moved without his consent, and regardless of the rights secured to him by mortgage. In the one case he is willing to place his security in a position where his rights may come in conflict with those of the citizens of the state to which the property is removed, and he has no right to complain if the courts of that state hold that he has waived his right of priority by failing to take possession, and that his claims are subsequent to that of its own citizens. In the other case his property has been taken away in despite of him and without his consent, and he must rely upon the comity of the state to which it has been taken to enforce the validity of the contract and protect his rights.

The states of Kansas and Nebraska are divided by an imaginary line over 300 miles

long. So far as commercial transactions of the border counties are concerned, they practically constitute one commonwealth. We believe that considerations of comity and of the value of active commercial intercourse require the enforcement of the rights of the mortgagee, even as we would enforce the rights of a citizen of this state holding a duly filed chattel mortgage against a purchaser of property living in a county of this state hundreds of miles removed from the place of contract, and without actual notice of the existence of the mortgage.

In *Handley v. Harris*, 48 Kan. 606, 17 L.R.A. 703, 30 Am. St. Rep. 322, 29 Pac. 1145, the facts were that certain personal property was mortgaged in Nebraska, the mortgage duly filed and recorded here, and the property taken to Kansas by the mortgagor, and there sold and delivered by him to a purchaser without notice. The mortgagee brought replevin and prevailed, the court holding that "where a mortgagor removes property from another state into this state, which has been encumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property. The constructive notice imparted by the recording of such mortgage, by the law of comity between the different states, is not confined to the county or state where the mortgage was executed and the property then was, but covers the property wherever it is removed." This case was followed in *Ord Nat. Bank v. Massey*, 48 Kan. 702, 17 L.R.A. 127, 30 Pac. 124, in which another Nebraska mortgage was held to be valid in Kansas without refileing.

The principles of comity should apply equally well both north and south of the Kansas-Nebraska line, and since our sister commonwealth has accorded to our citizens the right to follow property upon which they hold a lien, it would be but a poor return if we failed to accord the same right to the citizens of Kansas. We prefer not to adopt the views expressed by the Michigan court, and to hold that the buyer only obtained the rights of the seller subject to the mortgage lien.

The judgment of the District Court is affirmed.

Reese, Ch. J. and Fawcett and Rose, JJ., concur. Hamer, Sedgwick, and Barnes, JJ. not sitting.

IOWA SUPREME COURT.

MRS. HELEN BEACH

v.

ROSA BEACH, Appt.

(— Iowa, —, 141 N. W. 921.)

Fraud — inducing marriage — representations as to property.

1. A person who, to induce a marriage

Note. — Liability for fraud in inducing one to marry a third person.

An action lies for fraudulent misrepresentations inducing marriage the amount of damages recoverable depending on the circumstances of the particular case.

Thus, a man who induces another to marry a girl by false representations that she is virtuous when, in fact, she has been seduced by himself, and has become pregnant, is liable for damages, including exemplary damages, in an action by the husband for fraud; and irrespective of any pecuniary damages, an action for such a wrong may be founded upon the broad ground of loss of consortium. *Kujek v. Goldman*, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773, affirming 5 Misc. 360, 25 N. Y. Supp. 753, affirmed in 9 Misc. 34, 31 Abb. N. C. 314, 29 N. Y. Supp. 294.

The following cases rest upon the principle that fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto, in order to promote the marriage, are actionable, and authorize the recovery of such damages as may be proved, and the guilty person was held responsible for his representations:

—that a party was free from debt. *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Bro. Ch. 543;

—that a party was good financially, by giving note without consideration (*Montefiori v. Montefiori*, 1 W. Bl. 363; or making loan and secretly taking bond (*Gale v. Lindo*, 1 Vern. 475; or releasing jointure that son might make settlement the son privately agreeing to assign leasehold (*Lamlee v. Hanman*, 2 Vern. 466);

—that party was the absolute and sole owner of real estate. *Scott v. Scott*, 1 Cox, Ch. Cas. 386; *Webber v. Farmer*, 4 Bro. P. C. 170.

So, where defendant, after acquiring a devisee's interest in real estate, which was subject to be defeated by the latter's death without issue, induced a woman to marry the devisee by falsely and fraudulently representing to her that he had a fine property so left to him that if he married and had an heir, the land would go to the heir, it was held in *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626, that defendant must be considered as holding the property as trustee *ex maleficio* and was bound to make good his representations to the heir and only child subsequently born 46 L.R.A. (N.S.)

with her son, falsely represents that the son is the owner of certain specified real estate, is liable in damages to a woman who enters into a marriage with the son in reliance on the representations.

Damages — representation as to title to property — inducing marriage.

2. One third of the present value of the property is not the proper measure of damages in case a parent induces a woman to marry her son by fraudulently representing

of the marriage who would have been entitled to the property had his representations been true. The court said: "It is true the plaintiff was not born when the fraudulent representations were made. Still they were made by defendant to plaintiff's mother for the purpose of inducing a marriage between the parents, and if they had been true the plaintiff would have been the owner of this particular property. In this way she is the very person injured by the fraud, and, although not individually in the mind of defendant when he perpetrated that fraud, yet, as filling the position of heir to her father, she belongs to the class which defendant had in contemplation when he represented to the mother that the heir of Frederick would have the farm." The court further remarked: "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment."

But in *Brennen v. Brennen*, 19 Ont. Rep. 327, an action by the wife against the husband's relatives for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract, was held not maintainable as being without precedent and contrary to public policy.

In *Kujek v. Goldman*, supra, however, the court said that the question was not whether there was any precedent for the action but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages, and quoted in this connection the passage above quoted from *Piper v. Hoard*.

It was held in *Roberts v. Roberts*, 3 P. Wms. 66, that where a father, to further the marriage of his son, paid him £1,000, and the son, in order to promote the father's second marriage, released the thousand pounds, but took a private bond from the father for its payment, equity would not set aside the bond, because it would be injurious to the first marriage which, being prior in time, was to be preferred.

As to fraudulent inducement by one party to void marriage as ground for civil action in favor of the other, see *Sears v. Wegner*, 14 L.R.A. (N.S.) 819, and note to *Morrill v. Palmer*, 33 L.R.A. 411.

J. D. C.

that the son is the owner of a specified parcel of real estate.

Fraud — elements of action for deceit.

3. To render one liable in damages for deceit, he must have knowingly made a false representation with intent to deceive, and it must have been acted upon by another to his injury, without notice of the falsity.

Evidence — intent — action for fraud.

4. One charged with deceit in making false representations for another to act upon may testify as to the intent with which they were made.

(June 5, 1913.)

APPPEAL by defendant from a judgment of the District Court for Lee County in plaintiff's favor in an action brought to recover damages for fraudulent representations made by defendant to induce marriage between plaintiff and her son. Reversed.

Statement by Deemer, J.:

Action for deceit, brought by plaintiff against defendant, who is her mother-in-law, in which she claimed that she was induced to enter into a marriage with defendant's son by reason of certain false and fraudulent representations regarding the ownership of certain land. Defendant pleaded a general denial, and, on the issues so joined, the case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$1,600, and defendant appeals.

Mr. E. C. Weber for appellant.

Messrs. **Herminghausen & Herminghausen**, for appellee:

False and fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto in order to promote the marriage, are actionable, and authorize the recovery of such damages as may be proved.

Piper v. Hoard, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626; *Kujek v. Goldman*, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Atherly, Marriage Settlements*, 484; *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Bro. Ch. 543; *Scott v. Scott*, 1 Cox, Ch. Cas. 378; *Roberts v. Roberts*, 3 P. Wms. 66; *Mandel v. McClave*, 46 Ohio St. 207, 5 L.R.A. 519, 15 Am. St. Rep. 627, 42 N. E. 290; *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829; *Sears v. Wegner*, 150 Mich. 388, 14 L.R.A. (N.S.) 819, 114 N. W. 224.

The law considers marriage in no other light than as a marriage contract.

Kujek v. Goldman, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773.
46 L.R.A. (N.S.)

Because the case is novel is no reason why relief shall not be granted.

Piper v. Hoard, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626; *Kujek v. Goldman*, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 757, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1.

Every invasion of a right by fraudulent acts entitles the injured party to some damages.

1 Addison, Torts, 4th Eng. ed. 10.

Injuries by false representations create as valid a cause of action as any direct injury from force or trespass.

1 Addison, Torts, 4th Eng. ed. 12.

When the plaintiff entered into the marriage, she was entitled to all the rights and benefits that marriage would give.

Kujek v. Goldman, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773.

Defendant, having represented her son to be the owner of an 80-acre farm, is estopped from claiming a different state of facts.

Sewell v. Norris, 128 Ga. 824, 13 L.R.A. (N.S.) 1121, 58 S. E. 637; *Laub v. Trowbridge*, 71 Iowa, 396, 32 N. W. 394.

Where there is a proposal of marriage, and a third party misrepresents an existing fact, even though by collusion with the husband, he is bound to make good to the extent of the representation.

Piper v. Hoard, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Kujek v. Goldman*, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773.

Recovery may be by way of damages.

Risser v. Rathburn, 71 Iowa, 118, 32 N. W. 198; 8 Am. & Eng. Enc. Law, 479; *Wright v. Mack*, 95 Ind. 332.

Evidence that the defendant intended no fraud will not be received, irrespective of corrupt motives of gain for himself, or by a malicious motive of injury to the plaintiff.

Boddy v. Henry, 126 Iowa, 37, 101 N. W. 447; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Johnson v. Wallower*, 18 Minn. 288, Gil. 262; *Newlove v. Callaghan*, 86 Mich. 301, 49 N. W. 214; *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40; *Flower v. Brumbach*, 131 Ill. 646, 23 N. E. 335; *Baldwin v. Marsh*, 6 Ind. App. 533, 33 N. E. 973; *Ley v. Metropolitan L. Ins. Co.* 120 Iowa, 211, 94 N. W. 568; *Mitchell v. Moore*, 24 Iowa, 394; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *Foster v. Charles*, 7 Bing. 105, 8 L. J. C. P. 118, 31 Revised Rep. 446.

Fraud is not required to be shown by

direct evidence. It may be proved by facts and circumstances.

Kane v. Independent School Dist. 82 Iowa, 5, 47 N. W. 1076; Hall v. Carter, 74 Iowa, 364, 37 N. W. 956.

Where the petition contains specific allegations of specific ownership, all evidence to establish such allegations is competent.

Kuh, N. & F. Co. v. Glucklick, 120 Iowa, 506, 94 N. W. 1105.

The defendant in fact knew the condition of the title, and it was her duty truthfully to represent the same, if she essayed to speak at all upon the subject.

Riley v. Bell, 120 Iowa, 626, 95 N. W. 170; Mandel v. McClave, 46 Ohio St. 407; 5 L.R.A. 519, 15 Am. St. Rep. 627, 22 N. E. 290.

As soon as the plaintiff married August Beach, the defendant was a trustee under an implied trust, of the farm.

Beere v. Beere, 79 Iowa, 555, 44 N. W. 809; Piper v. Hoard, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626; Atherly, Marriage Settlements, 484; Gainor v. Gainor, 26 Iowa, 337; Beechley v. Beechley, 134 Iowa, 76, 9 L.R.A.(N.S.) 955, 120 Am. St. Rep. 412, 108 N. W. 762, 13 Ann. Cas. 101; Hamilton v. Smith, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276; Higgins v. Higgins, 219 Ill. 146, 109 Am. St. Rep. 316, 67 N. E. 86; Chandler v. Hollingsworth, 3 Del. Ch. 99; Collins v. Collins, 98 Md. 473, 103 Am. St. Rep. 408, 57 Atl. 597, 1 Ann. Cas. 856; 2 Addison, Torts, 1045, 1046; 27 Am. & Eng. Enc. Law, 248, 261, 262.

The representations were made by Rosa Beach. They were false, and known by her to be false, and the intent to deceive is implied or presumed.

Boddy v. Henry, 126 Iowa, 37, 101 N. W. 447.

The misrepresentation need not have formed the sole inducement for entering into the contract.

2 Pom. Eq. Jur. § 890; 2 Parsona, Contr. 5th ed. 773; Safford v. Grout, 120 Mass. 20; People v. Haynes, 1 Wend. 557; Winter v. Bandel, 30 Ark. 363; Fishback v. Miller, 15 Nev. 428; 20 Cyc. 40.

Deemer, J., delivered the opinion of the court:

This is a novel and unusual action, and the petition upon which it was tried contains so succinct a statement of plaintiff's claim that we here quote from it as follows: "That she is the wife of August Beach, and was married to him about . . . 1907; that August Beach, her husband, had lived with defendant, Rosa Beach, and her husband, now deceased, before their marriage, and was living with his mother on the farm at the time of the marriage 46 L.R.A.(N.S.)

between plaintiff and August Beach; that the defendant, Rosa Beach, was solicitous to have her son, August Beach, marry, and in the name of her son, without his knowledge or consent, sought correspondence with the plaintiff, signing and using her son's name, and leading the plaintiff to believe that August Beach was the owner in fee simple of the farm on which he and the defendant, Rosa Beach, were at the time residing, viz., the N. $\frac{1}{4}$, S. W. $\frac{1}{4}$, section 25, township 69 north, range 5 west, in Lee county, Iowa, which is of the reasonable value of \$8,000; that the representations made in the said correspondence induced the plaintiff to accept said August Beach in marriage; that the said misrepresentations made by the said defendant Rosa Beach, were false and fraudulent, and tended to deceive, and did deceive, the plaintiff; that not until long after their marriage did she (the plaintiff) learn that her husband, August Beach, was not the owner of the farm that the said defendant, Rosa Beach, led her to believe belonged to him, but the same belonged to the said defendant, Rosa Beach, and that her husband had no interest therein; that the plaintiff, by said false and fraudulent misrepresentations of the defendant, Rosa Beach, has been damaged in the sum of \$5,000." The defendant did not challenge the sufficiency of the pleading by demurrer, but answered, denying generally the allegations thereof, and further pleaded that plaintiff suffered no damages whatever by reason of the alleged representations. After the verdict was rendered, the defendant filed a motion in arrest for the reason that the petition did not state a cause of action. She also filed a motion for a new trial based upon many grounds, to some of which we shall refer during the course of the opinion.

Testimony was adduced in support of every allegation of the petition, and the first question to be considered is, Does the petition state a cause of action?

1. In law, marriage is a civil contract, requiring the consent of parties capable of entering into other contracts, except as otherwise declared. Code, § 3139; Brisbin v. Huntington, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931. With its religious aspect or its sanctity, courts have nothing to do. The law of marriage, in so far as property interests are concerned, is founded on business principles, in which the utmost good faith is required from all the parties, and the least fraud in connection therewith is the subject of judicial cognizance.

In Piper v. Hoard, 107 N. Y. 77, 1 Am. St. Rep. 789, 13 N. E. 629, the court of appeals of New York said: "To say of plaintiff's mother, therefore, that she was

too ready to marry a man because of the money he had, or would necessarily leave a child of the marriage, or that she was an adventuress, induced to marry solely by fraudulent representations as to the pecuniary condition of her husband, does not, as I have said, furnish the least reason for refusing relief to plaintiff, if she be otherwise entitled to it. If her mother had not been induced to marry by any such pecuniary considerations, clearly no cause of action would exist. It is because such considerations were the moving ones, and were induced by the fraud of defendant, that the plaintiff bases her right of action. There are some anomalies in the law relative to contracts or negotiations having marriage for their consideration, and such contracts are based upon considerations which obtain in no other contract. The family relations and their regulations are so much a matter of public policy that the law in relation to them is based on principles not applicable in other cases; and all business negotiations have marriage for their end are regarded in much the same light by our courts. Thus, a *particeps criminis* in the fraud has been permitted to recover in his own name against one who was no more guilty than he, when the marriage had taken place by reason of such fraud."

Even though it be said that the parties take each other for better or for worse, it has quite frequently been held that a woman who is deceived into entering into a void marriage with a man already married may maintain an action against him for deceit. *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829, and cases cited; *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702; *Sears v. Wegner*, 150 Mich. 388, 14 L.R.A.(N.S.) 819, 114 N. W. 224. So, too, it has been held that a man who induced another to marry a girl by false representations that she is virtuous, when, in fact, she has been seduced by himself and has become pregnant, is liable for damages in an action by the husband for fraud. *Kujek v. Goldman*, 150 N. Y. 176, 34 L.R.A. 156, 55 Am. St. Rep. 670, 44 N. E. 773.

In the instant case the charge is that, by false and fraudulent representations as to her son's ownership of land, defendant deceived the plaintiff and induced her to marry her son, to her damage, etc.

"In *Neville v. Wilkinson*, 1 Bro. Ch. 543 (decided in 1782), the plaintiff was the individual who desired to marry his coplaintiff's daughter, and he and the defendant, who was an attorney to whom he owed a large amount of money, agreed that defendant should represent to the father that the debt was much less than in truth it was. 46 L.R.A.(N.S.)

He did so, and after marriage he brought an action on a bond which would have made the debt in excess of the amount represented, and the plaintiff, the *particeps criminis*, was permitted to succeed in an action brought by him and his father-in-law to compel the surrender of the bond. . . . The English courts have held that a person who, by acts or speech, represents property as belonging to the proposed husband, when the possession thereof forms an inducement to the marriage, shall be bound to make good the thing in the manner represented. Such is the case of *Montefiori v. Montefiori*, 1 W. Bl. 363 (Easter term 1762, Mansfield, Ch. J.). The facts of the case were these: Montefiori being engaged in a marriage treaty, his brother Moses, to assist him in his designs and represent him as a man of fortune, gave him a note for a large amount of money as the balance of accounts between him and his brother Joseph, which balance he acknowledged to have in his hands, though in truth none existed. This note was shown by Joseph to the parents of the intended wife, and was an inducement to the marriage. After the marriage, Moses desired to reclaim the note so given without consideration, and the matter was referred to arbitration, and the arbitrators awarded the note to be given up, which Joseph refused to do, and the case then came up on motion for an attachment against Joseph for nonperformance of the award, and Joseph made a cross motion to set aside the award. Chief Justice Mansfield held that where there were proposals of marriage, and third persons represented anything in a light different from the truth, even though by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be, and the husband alone shall be entitled to relief, as well as when the fortune has been specifically settled on the wife. Atherly, in his work on *Marriage Settlements* (27 Law Lib. chap. 34, *484), after citing the above case, says that the principle upon which the court proceeds in such cases, when the thing is not actually made the subject of the settlement, must be this, as he conceives, that, as the wife must be presumed to agree to the marriage as well in expectation of the present support which she and her children will receive from her husband, as of the provision which he may have made for them after his death, that a person who has been at all concerned in raising such expectation shall not be suffered in any wise to disappoint it." See also *Piper v. Hoard*, 107 N. Y. 76, 1 Am. St. Rep. 789, 13 N. E. 629, in which Peckham, J., said, among other things: ". . . Such fraud

is not in the least mitigated in its character by the statement that it consisted of fraudulent representations made to a woman to induce her to consent to a marriage in which the mercenary motive was the strong, if not the only, one. The fact that she was ready and desirous of bettering her condition, even though it was by a mercenary marriage, does not alter the other fact that the defendant enjoys property which he has acquired by successful perpetration of a fraud, and which, if the fraudulent representations by which he acquired it had been true, the plaintiff herein would be herself entitled to enjoy as owner." Again, in *Kujek v. Goldman*, supra, the same court said: "It is difficult to see why a fraud which, if practised with reference to a contract relating to property merely, would support an action, should not be given the same effect when it involves a contract affecting not only property rights, but also the most sacred relation of life. Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, are held to constitute an actionable wrong, and the usual remedy is to require the person guilty of the fraud to make his representations good. *Piper v. Hard*, supra; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Atherly, Marriage Settlements*, 484. In such cases the injury is more tangible, and the measure of damages more readily applied, than in the case before us, but both rest upon the principle that he who, by falsehood and fraud, induces a man to marry a woman, is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered depending upon the circumstances of the particular case."

Indeed, the writer of the article on Fraud in 20 Cyc. says, at page 79, that instances where the guilty person has, in some way, been compelled to make good his representations, are frequent, citing, among other cases, *Neville v. Wilkinson*, 1 Bro. Ch. 543; *Scott v. Scott*, 1 Cox. Ch. Cas. 366. The only case which has been cited as holding to the contrary is *Brennen v. Brennen*, 19 Ont. Rep. 327. That was an action brought by a wife against her husband and his mother and father, in which it was claimed that the father and mother commenced negotiations with plaintiff for the purpose of bringing about a marriage with their son, and in which plaintiff claimed that they "represented . . . that the said Joseph Scott Brennen [their son] was a sober man and never drank any intoxicating liquor. That he, the said Joseph Brennen, was and always had been a man of unblemished mor-

al character and reputation. That he, the said Joseph Scott Brennen, was a member of the very large and prosperous firm of M. Brennen & Sons, then and still doing business in the said city of Hamilton. That he, the said Joseph Scott Brennen, had an income of \$3,000 per annum. That he, the said Joseph Scott Brennen, had an income of \$3,000 per annum over and above the income which he had as a partner in the said firm of M. Brennen & Sons." She further alleged that these representations were false and fraudulent, and made with intent to deceive. The defendants demurred, and Falconbridge, J., said: "The law, it has been observed, makes no provision for the relief of a blind credulity, however it may have been produced; per Lord Stowell in *Wakefield v. Mackay*, 1 Phillim, Eccl. Rep. at p. 137: 'Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament cannot vitiate the contract. *Schouler*, Dom. Rel. § 23; *Ewing v. Wheatley*, 2 Haag. Consist. Rep. 175. Nor even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage, for public policy is said to 'open marriage as the gateway to repentance and virtue.' The maxim *caveat emptor* seems as brutally and necessarily applicable to the case of marrying and taking in marriage as it is to the purchase of a rood of land or of a horse. *A fortiori* the present action cannot be maintained. There has been a change of the position of the parties which can never be revoked. They can never be replaced in their original status; and it would be against public policy, against public morals, and fraught with the greatest damage to the most sacred of the domestic relations, if the plaintiff should be entitled to succeed. That such an action should lie is doubly against public policy in this; that, if maintained at all, I see no reason why it should not be equally maintainable whether the husband and wife are or are not living together amicably, so that, if it be a wrong sounding in damages for a woman to be linked for life to a man of evil moral character, the astounding spectacle could be presented of a wife launching from the shelter of her husband's house an action against that husband's relatives for misrepresenting his character and conduct before his marriage. . . . She took her chances and must now, as far as this court is concerned, read into her contract the words 'for better, for worse, for richer, for poorer.' The praise of the father, the brother, and particularly of the mother is *simplex commendatio quæ non obligat*. I was impressed by the difficulty of giving any proper direction to the jury as to the mea-

sure of damages on the different branches of the case. Other objections to plaintiff's right to recover were urged, both by way of demurrer and on the facts. I rest my judgment on the want of precedent for such an action, and on its being clearly, in my opinion, against public policy. The action will be dismissed, with costs." As will be observed, the judge writing the opinion was not advised as to the nature of the authorities either in England or in this country. Doubtless, the representations in that case as to the character of the son were not actionable, and so also representations as to his earning capacity would not support an action. But it does not follow that representations as to the ownership of specific land, in which the wife immediately upon the marriage, would have a dowerable interest which could not be devised save by her own act, particularly if it were homestead in character, would not be actionable. Indeed, all the cases which have spoken on the subject seem to hold that an action for deceit will lie. The chief difficulty in such cases lies in stating any rule for the admeasurement of damages; and this brings us to the second vital proposition relied upon for a reversal.

2. The trial court instructed as follows upon the measure of damages: "(22) If, from the evidence under the law as defined in the instructions given you by the court, the jury finds a verdict in favor of the plaintiff, then you will allow the plaintiff as damages one third of the present market value of the 80-acre farm in question, as shown by the evidence introduced on this trial bearing upon that subject." Manifestly this instruction was erroneous. Whether or not, in a proper action in equity, plaintiff might have had a trust declared in the land for her use and benefit, should she have survived her husband, is not now before us. The sole question is, How much is she entitled to by way of damages for the deceit, if any, practised upon her? Had the son owned the land, as represented, plaintiff, upon her marriage to him, would have had nothing more than an inchoate right of dower therein, which might never have become consummate because of her death before her husband, and was subject to be defeated by judicial sale during her life. At most, she might, perhaps, have had a homestead right of which she could not have been deprived during life, but which ceased, so far as she was concerned, during her life. Doubtless the value of the land might be considered as bearing upon the support which she might reasonably have expected during life, and the society in which she might have moved, and the station in life which she might have occupied. 46 L.R.A. (N.S.)

But it is manifestly erroneous to give her presently the full one third of the market value of the land, as if she were entitled to dower consummate therein, as damages due to defendant's deceit. That she was not entitled to, nor would she ever have received, it in person, unless her husband died before she did. In no case has it ever been held that a married woman is entitled to recover the value of her one-third interest in her husband's estate, while such third remains inchoate. Such inchoate right will, of course, be protected in a court of equity, but action for the value thereof will not lie until the husband's death. The plain reason for this is that dower is inchoate and may never vest. Unless she survives her husband, it does not vest, and she is not entitled to convert this inchoate right into cash, even as against a wrongdoer. No cases are cited holding to a contrary doctrine, and, if any such were to be found, we should not be inclined to follow them.

The damages in such cases are to be found by a jury, and of necessity are somewhat speculative in character. We have already indicated the matters which may be considered, and these are all subject to be defeated by plaintiff's death. The trial court should, in its instructions upon this subject, indicate what might be considered as a present loss to the plaintiff by reason of the fact, that her husband did not own the land, and such as the evidence shows she was reasonably certain to lose in the future, depending somewhat upon her expectancy of life and the expectancy of life of her husband, and leave it to the jury to find what amount will make good her loss, present and prospective.

3. The eighth instruction given by the court reads as follows: "(8) If the jury finds from a preponderance of the evidence that the defendant, Rosa Beach, represented to the plaintiff that August Beach was the owner of the 80 acres of land in question, then such representations were false, and, if the jury finds that plaintiff relied thereon in becoming the wife of August Beach, then your verdict must be for the plaintiff." This and other instructions of like import were erroneous in that they failed to include knowledge of the falsity of the statements and intent on the part of the defendant to deceive. Of course, if one makes a false representation knowing it to be false, the law infers that he did it to deceive (*Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447); but the general rule in actions at law for deceit is that plaintiff must show a false representation of fact, with knowledge of its falsity and with intent to deceive, and that the person to whom made acted upon it and thereby suffered an injury. *Ley v. Metro-*

politan L. Ins. Co. 120 Iowa, 203, 94 N. W. 568; Avery v. Chapman, 62 Iowa, 144, 17 N. W. 454; Allison v. Jack, 76 Iowa, 205, 40 N. W. 811; Clement v. Swanson, 110 Iowa, 106, 81 N. W. 233; Sylvester v. Henrich, 93 Iowa, 489, 61 N. W. 942; Gee v. Moss, 68 Iowa, 318, 27 N. W. 268; Scroggin v. Wood, 87 Iowa, 497, 54 N. W. 437.

4. The intent of the defendant being a material element of the charge, defendant should have been permitted to testify thereto. An examination of the record also convinces us that the cross-examination of plaintiff was too narrowly limited by the trial court. Some other errors appear which are not likely to arise upon a retrial, and we do not stop to consider them at this time.

For the errors pointed out, the judgment must be, and it is, reversed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES W. CHRISTOPHER
v.

THOMAS B. AKIN.

(214 Mass. 332, 101 N. E. 971.)

Slander — charging employee with larceny — privilege.

A statement by an employer who has

Note. — Libel and slander: privilege as to communications made in response to inquiries by person defamed.

As to qualified privilege as to communications to employer with respect to employee, see note to Trimble v. Morrish, 16 L.R.A. (N.S.) 1017.

As to liability growing out of the giving or refusing of information affecting the character or reputation of servant, see note to Wabash R. Co. v. Young, 4 L.R.A. (N.S.) 1098.

The present note includes only civil cases where the statement complained of was made at the request of the one defamed, or his authorized agent, and a claim of privilege was raised. The note does not include cases passing upon the privilege of communications made at the request of prospective employers.

It may be laid down as a general rule that where defamatory matter is published in response to inquiries made by the one defamed, or his authorized agent, it is qualifiedly privileged, if it does not go beyond the scope of the inquiries. 25 Cyc. 392.

In the following cases statements made at the request of the one defamed were held privileged: Billings v. Fairbanks, 136 Mass. 177 (charging larceny, where plain-

been compelled to pay for property taken from a house where he was doing work, to an employee whom he discharges because he suspects him of having taken the property, and from whose pay he has deducted its value, in response to a question as to the cause of the deduction, that it was for property which the employee stole on the specified job, is privileged, although made in the presence of other employees.

(May 19, 1913.)

EXCEPTIONS by defendant to rulings of the Superior Court for Bristol County made during the trial of an action brought to recover damages for an alleged slander, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Mr. Mayhew R. Hitch, for defendant:

Where defamatory matter is published in the form of an answer made to inquiries by the plaintiff, the answer is privileged.

Brow v. Hathaway, 13 Allen, 239; Billings v. Fairbanks, 136 Mass. 177; Billings v. Fairbanks, 139 Mass. 66, 29 N. E. 544; Remington v. Congdon, 12 Pick. 310. 13 Am. Dec. 431; Howland v. George F. Blake Mfg. Co. 156 Mass. 543, 31 N. E. 656; Howland v. Flood, 160 Mass. 509, 36 N. E. 482; 25 Cyc. 392; 18 Am. & Eng. Enc. Law, 2d. ed. 1032.

Some jurisdictions have taken the view that there is no publication for which an action will lie if it is solicited or induced by

tiff introduced subject for discussion); Palmer v. Hummerston, Cab. & El. 36 (statement imputing larceny, made in answer to plaintiff's question); Newskey v. Mundt, 4 Legal Gaz. 230 (statement by manager of park in response to inquiry why admission was refused); Laughlin v. Schnitzer, — Tex. Civ. App. —, 106 S. W. 908 (landlord's answer to tenant's question as to why she was requested to move); Warr v. Jolly, 6 Car. & P. 497 (statement imputing intemperance to minister, made in response to his questions); Haynes v. Leland, 29 Me. 233 (statements before church committee and plaintiff's attorney, at his request); Remington v. Congdon, 2 Pick. 310, 13 Am. Dec. 431 (bona fide charges by nonmember of church, where plaintiff consented that church might investigate written charges against him); Patterson v. Frazer, — Tex. Civ. App. —, 79 S. W. 1077 (where, at plaintiff's solicitation, language was used which, in connection with plaintiff's statements, imputed want of chastity); Louisville Times Co. v. Lancaster, 142 Ky. 122, 133 S. W. 1155 (publication of retraction of newspaper article, at request of one claiming to have been libeled); Beeler v. Jackson, 64 Md. 589, 2 Atl. 916 (bona fide statement by station agent, made in reply to plaintiff's inquiry as to cause of discharge); Middleby

inquiry on the part of the plaintiff, although others are present.

25 Cyc. 370; *Brow v. Hathaway*, 13 Allen, 242; *Toogood v. Spyryng*, 1 Crompt. M. & R. 181, 4 Tyrw. 582, 3 L. J. Exch. N. S. 347, 9 Eng. Rul. Cas. 55; *Billings v. Fairbanks*, 136 Mass. 178.

The plaintiff in this case probably complains of the word "stole," but any form of words which imputed a theft, no matter how guarded, would have been just as actionable.

Pond v. Hartwell, 17 Pick. 269.

Morton, J., delivered the opinion of the court:

The plaintiff was a journeyman painter in the employ of the defendant, and was at

v. Effer, 55 C. C. A. 355, 118 Fed. 261 (statements made by husband in response to question to wife).

And it has been held that an answer alleging that the plaintiff consented to and authorized the publication of the defamatory matter complained of states a perfect defense. *Connors v. Collier*, 65 Misc. 169, 119 N. Y. Supp. 513.

And that evidence is admissible on behalf of the defendant in a libel suit, to show that a statement complained of was issued with the consent and by the authority of the plaintiff. *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502, reversing 25 App. Div. 438, 49 N. Y. Supp. 627.

In some cases it has been held that the maxim *non fit injuria* applies in case of defamatory statements which are made at the request of the one to whom they relate. *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887 (where plaintiff solicited statement and sent for an officer to be present to hear it); *Heller v. Howard*, 11 Ill. App. 554 (repetition of former statement at plaintiff's request, in presence of third person).

And where the one defamed procures a communication to be made for the purpose of founding a suit thereon, it is clear that he cannot sustain his action.

Thus, no action can be maintained an account of a communication made to one who acted as plaintiff's agent, and who procured it with view to bringing a suit. *Howland v. George F. Blake Mfg. Co.* 156 Mass. 543, 31 N. E. 656. The court said: "If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it."

And to the same effect are *Miller v. Donovan*, 16 Misc. 453, 39 N. Y. Supp. 820; and *Stevenson v. Ward*, 48 App. Div. 291, 62 N. Y. Supp. 717.

It is also held that defamatory statements made at the request of the authorized

work on the house of one Tillinghast. Tillinghast complained to the defendant that some of his men had stolen a putty knife and other property belonging to him. The defendant recompensed Tillinghast for the property, and testified that he was told by one of his men that the plaintiff had admitted to him that he took the putty knife. The men were paid off by the defendant at his shop Saturday night,—their time being made up to Wednesday. Their pay was handed to them in envelopes. When a man was discharged his envelop contained his pay up to Saturday night. The plaintiff's envelop contained his pay in full, less what the defendant had paid Tillinghast for the property, with a bill for it. There were four or five men in the shop waiting to be paid off.

agent of the one defamed are privileged. *Wells v. Lindop*, 13 Ont. Rep. 434 (statement charging larceny, made in response to wife's authorized demand for husband's pay); *Irish-American Bank v. Bader*, 59 Minn. 329, 61 N. W. 328 (statement concerning standing of bank, made at cashier's request); *Hopwood v. Thorn*, 8 C. B. 293, 19 L. J. C. P. N. S. 94, 14 Jur. 87 (statement concerning minister, made in answer to authorized communication from plaintiff's friend).

And in *White v. Newcomb*, 25 App. Div. 397, 49 N. Y. Supp. 704, it was held that if the defendant was induced to make the statements complained of by reason of the false representations of detectives sent by the plaintiff to obtain the statements, to the effect that they sought the information for their own protection, no recovery could be had.

And in *Schultz v. Guldenstein*, 144 Mich. 636, 108 N. W. 96, where the evidence was to the authority of the plaintiff's husband to interview the defendant on her behalf was conflicting, the case was held properly submitted to the jury, with instructions that if they found the interviews to have taken place by direction of, or through an understanding with, the plaintiff, and the defendant made honest answers, the communications were privileged.

And the court in *Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181, remarked that alleged defamatory statements invited or procured by a plaintiff, or a person acting for him, will not support an action for libel, and it was held that, unless satisfactorily explained, the jury might have determined that one who approached another and requested him to write a letter to the defendant concerning the standing of the plaintiffs was acting for the latter in so doing, where it appeared that the writer had no interest in the plaintiffs' standing or in their line of business, that he wrote the letter at the request of a person who could not be found at the time of the trial, and forwarded the answer to such person as directed, and the plaintiffs testified that they received the let-

when it came the plaintiff's turn to be paid. The plaintiff opened his envelop and counted the money and found the bill. The plaintiff testified that he asked the defendant what that meant, and that the defendant said in response, "Do you want to know in front of all these men?" and he said, "Yes," whereupon the plaintiff testified that the defendant said: "That is the stuff you stole from the Tillinghast job." What was testified to by the plaintiff as having been said by the defendant was contradicted by the defendant and three other witnesses who were present. What the defendant testified that he said was that "Tillinghast had complained to me that certain stuff had been taken, and I thought he took it and the bill was for that." The other witnesses stated in substance that the defendant said that the bill was for things taken from the Tillinghast job. The verdict of the jury must be taken to have settled, however, that the

plaintiff's account of what took place was the correct version.

The defendant asked the presiding judge in substance to instruct the jury that any statements by the defendant imputing theft would be privileged if made in explanation of and in answer to a request by the plaintiff to know what the bill for the putty knife and other articles in his envelop meant, and if made after the defendant had asked him if he wanted him to tell him before the people in the shop and he had answered that he did. The judge declined to instruct as thus requested, but instructed the jury in substance, amongst other things, that if the defendant had said to the plaintiff that Tillinghast had missed the articles and claimed that they had been taken by the defendant's men, and the defendant had recognized the claim and had paid Tillinghast, and that he believed that they had been taken by the plaintiff, and felt that he had a right to charge them to him, he would

ter through the mail, but did not know who sent it.

But statements made by one when approached by detectives employed by another who had learned that statements injuriously affecting him were in circulation are actionable, if untrue or made recklessly, not caring whether they are true or false. *Rudd v. Cameron*, 26 Ont. L. Rep. 154, Ann. Cas. 1913 A; 618.

And the demand of a candidate for public office, that a newspaper which had stated that there were numerous reasons why he was unfit for office should name those reasons does not give the newspaper the right to publish malicious falsehoods concerning him. *Luzenberg v. O'Malley*, 116 La. 699, 41 So. 41.

The rule that defamatory statements made at the instance and request of the one defamed are privileged was limited in *Wharton v. Chunn*, 53 Tex. Civ. App. 124, 115 S. W. 887, the court holding that it did not inure to the benefit of one who was himself the author of a defamatory statement which the plaintiff, at the time the communication complained of was made, was seeking to have retracted.

And in *Richardson v. Gunby*, 88 Kan. 47, 42 L.R.A.(N.S.) 520, 127 Pac. 533, it was held that an instruction that if the communication alleged to be defamatory was written as a result of a decoy letter sent to the defendant by a third person at the instance of the plaintiff, no recovery could be had, should be qualified to the extent that if the plaintiff set the inquiry on foot for the purpose of ascertaining whether the defendant was disseminating evil reports in order that they might be counteracted, or for any other purpose than that of laying a foundation for a suit, he would not be estopped from maintaining an action. The court said: "The reason why a person cannot recover in such a case, where

he instigates or invites the libel, is that he does it, as charged in the reply, for the purpose of predicating an action for damages upon it. He may not thus assist in building up a cause of action for the purpose of gathering the fruitage to himself. If, however, the plaintiff instigated or set on foot the inquiry for the purpose of ascertaining whether the defendant, or the bank of which he was president, was disseminating evil reports concerning the cement company or its officers, in order that such influences might be counteracted, or for any other proper purpose, and not for the purpose of predicating an action for damages in his own behalf, he was not estopped from maintaining an action." And to the same effect is *Nott v. Stoddard*, 38 Vt. 25, 88 Am. Dec. 633.

So, in *Griffiths v. Lewis*, 7 Q. B. 61, 14 L. J. Q. B. N. S. 197, 9 Jur. 370, where the plaintiff, because of a rumor of a former defamatory statement charging the use of false weights, inquired of the defendant if he had made such statements, it was held that the defendant's reply that he had, and that the plaintiff had used such weights for many years, was not privileged. Lord Denman said: "The words originally spoken were extremely injurious to the plaintiff, and she was bound to inquire about them. Then the defendant, in answer to her inquiry, not only says that he made the statement, but makes it again. The question raised by the present argument is, in reality, whether the having uttered a slander once gives a privilege to repeat it. It has been the constant course of persons complaining of slander to ask the author whether he abides by the imputation; it has been considered unsafe to bring an action without doing so. No case goes the length of laying down that repetition of a calumny in answer to such a question is privileged."

J. T. W.

have had a right to say it, and there would have been no slander. But he did not have a right to say to the plaintiff, even in reply to his request for information and after he had agreed that he might tell him in the presence of the other men, that he (the plaintiff) stole them.

We do not think that the law of privileged communications is to be interpreted so narrowly. Whether a communication is or is not privileged does not depend so much on the manner or form in which crime is imputed, where the alleged slander consists as here of a charge of crime, as on the occasion and circumstances under which the charge is made. If made in good faith in reference to a matter in which the person making it is immediately interested, and for the purpose of protecting his interest, and in the belief that it is true, and without any malicious motive, the communication is what is termed privilege; that is, the occasion and the circumstances under which it is made are held to be such as, if nothing more appears, to excuse or justify the statements that are made. But "if," as said in *Brow v. Hathaway*, 13 Allen, 239, 242, "unnecessary publicity be given to the statements, or if they go beyond what is reasonable in imputing crime, these circumstances may tend to show malice in fact; as well as evidence that the defendant knew them to be false, or had no sufficient reason to believe them to be true, or that he improperly sought or used the occasion to utter the defamatory words. But however strong the evidence from these sources may be, and however irresistible the conclusion of malice to be drawn therefrom, it is a conclusion of fact, and it is to be drawn by the jury, and not by the court."

Applying the principles thus laid down, we think that the jury should have been instructed in substance as requested. There was evidence tending to show that the charge was made in good faith, without unnecessary publicity, and under circumstances which the plaintiff himself invited; that the defendant believed it to be true; and that it related to a matter in which he was immediately interested, and was made for the purpose of protecting his interest. This evidence, if believed, would warrant the jury in finding, we think, that a case of privileged communication was made out. See *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431.

In addition to the instructions that were requested and refused, exceptions were also taken to portions of the charge, on the ground that they assumed a state of the evidence which did not exist. But inasmuch as the exceptions to the refusal to give the instructions requested in regard to the mat-

ter of privileged communications must be sustained, we do not deem it necessary to consider those taken to the portions of the charge thus referred to.

Exceptions sustained.

NEBRASKA SUPREME COURT.

WILLIAM R. STOCKING et al.

v.

CITY OF LINCOLN, Appt.

(93 Neb. 798, 142 N. W. 104.)

Highway — change of grade — injury — liability.

1. Where the record contains no competent evidence to show that the grade of a street had been established prior to the time a city grades a street from its natural to a lower grade, the city will be liable to an abutting lot owner for any damages inflicted upon him by such change of grade.

Same — destruction of trees.

2. And in such a case the removal or destruction of, or damage to, trees planted by the lot owner or his grantors and growing upon that part of the street contiguous to his lot, is a proper element of damages so far as it may effect the difference in the value of the property before and after its change of grade.

Appeal — instructions — error.

3. No prejudicial error is found in the instructions given or in the denial of requests for instructions made by counsel for the defendant, and the evidence is examined and found to support the verdict and judgment.

(May 17, 1913.)

APPEAL by defendant from a judgment of the District Court for Lancaster County in plaintiff's favor in an action brought to recover damages for injuries caused by a street improvement. Affirmed.

The facts are stated in the opinion.

Messrs. F. C. Foster and D. H. McClenahan, for appellant:

No damage could be allowed for improve-

Headnotes by HAMER, J.

Note. — As to liability of a municipality for injury to abutting property from change of grade of street under constitutional provision against "damaging" private property for public use without compensation, see note to *Dickerson v. Okolona*, 36 L.R.A. (N.S.) 1194. As stated in that note the earlier cases relating to the initial establishment of a grade are discussed in the notes in 23 L.R.A. 658 and 7 L.R.A. (N.S.) 108.

As to duty of property owner to minimize damage from change of grade, see note to *Lexington v. Chenault*, 44 L.R.A. (N.S.) 301.

ments or trees for the grading of Vine street or the lowering of the sidewalk space.

Gafney v. San Francisco, 72 Cal. 146, 13 Pac. 467; *Conklin v. Keokuk*, 73 Iowa, 343, 35 N. W. 444; *Elliott, Roads & Streets*, 3d ed. § 879; *Baker v. Normal*, 81 Ill. 108; *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 39 N. E. 584; *Chicago v. Noonan*, 121 Ill. App. 185; *Castleberry v. Atlanta*, 74 Ga. 164; *Chase v. Oshkosh*, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; *Murray v. Norfolk County*, 149 Mass. 328, 21 N. E. 757; *Scott v. Marshall*, 110 Mo. App. 178, 85 S. W. 98; *Gallaher v. Jefferson*, 125 Iowa, 324, 101 N. W. 124; *Rosenthal v. Goldsboro*, 149 N. C. 128, 20 L.R.A.(N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639.

Messrs. C. C. Flansburg and L. A. Flansburg also for appellant.

Messrs. George W. Berge and C. J. Campbell, for appellees:

Plaintiffs can recover where improvements are made after grade is established.

Groff v. Philadelphia, 150 Pa. 594, 24 Atl. 1048; *Davis v. Missouri P. R. Co.* 119 Mo. 180, 41 Am. St. Rep. 649, 24 S. W. 777; *O'Brien v. Philadelphia*, 30 Am. St. Rep. 844, note; *Omaha v. Williams*, 52 Neb. 43, 71 N. W. 970; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

The city is liable for negligent execution of legal right.

Perry v. Worcester, 66 Am. Dec. 438, note; *Sheehy v. Kansas City Cable R. Co.* 4 Am. St. Rep. 401, note; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 422, 23 N. W. 503; *West Covington v. Schultz*, 16 Ky. L. Rep. 831, 30 S. W. 410, 660; *Denver v. Vernia*, 8 Colo. 399, 8 Pac. 656; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379; *Slabaugh v. Omaha Electric Light & P. Co.* 87 Neb. 805, 30 L.R.A.(N.S.) 1084, 128 N. W. 505.

Hamer, J., delivered the opinion of the court:

This is an action by the owners of lot 20, in block 5, in Vine street addition to the city of Lincoln, for damages to their property caused by the grading of Vine and Twenty-third streets in said city. The lot in question is on the northwest corner of the intersection of said streets, and the property faces south. Vine street runs east and west along the south end of the property, and Twenty-third street runs north and south on the east side of the plaintiff's lot. The plaintiffs became the owners of the property on or about the 11th day of September, 1907. The grading in question was done by the city in 1910. The record shows that plaintiffs' trees growing

between the curb and the lot line on Vine and Twenty-third streets were dug up and removed, the sidewalk space was lowered from the 3 to 5 feet below the surface of the lot, and the plaintiffs sustained other damages by reason of the grading in question. There was a trial to a jury and a verdict against the city on which judgment was rendered for the plaintiffs for \$425. The city appeals.

It is contended that the evidence is insufficient to sustain the verdict. Ida Leinberge testified that after the excavation was made the lot at the intersection of Twenty-third and Vine streets was about 5 feet higher than the street. Her evidence is sustained by the testimony of William R. Stocking and T. J. Hensley, the street commissioner, the latter fixing the distance at 4½ feet. The testimony concerning the damage done is in direct conflict. An examination of the record fails to disclose any negligence on the part of the city in the manner of doing the work. The grading done seems to have been necessary. It was also necessary to lower the sidewalk. The witness Ida Leinberge testified that in order to lower the sidewalk it was necessary to remove the trees. The assistant engineer, Bates testified on behalf of the city that the grade as made is the proper grade; that the sidewalks were left in good condition after the city completed its work. His testimony as to the grading and cutting down of the sidewalk space does not vary in substance from that given by the witnesses for the plaintiffs.

It is claimed by counsel for the appellant that there was error at the trial because the court admitted evidence which allowed the jury to consider damages to improvements by reason of the grading of Vine street, and Twenty-third street and the lowering of the sidewalk space and digging up and removing the trees. It is the defendant's contention that "no damage can be allowed, as the city was the owner of the street in fee, and that the trees were the property of the city." As we understand the matter, it is this: When the grading and lowering of the sidewalk space has been done, what is the damage, if any, to the plaintiffs? Section 21, art. 1, of the Constitution reads: "The property of no person shall be taken or damaged for public use without just compensation therefor."

In *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379, it was held that, where property fronting on a public street is damaged by the method or manner adopted by the authorities of a municipal corporation in permanently grading such street, the corporation is liable to the owner of such property

for such damages. In such case the owner's measure of damages is the depreciation in value of his property caused by the construction and permanent maintenance of the grade.

In *Bronson v. Albion Teleph. Co.* 67 Neb. 111, 60 L.R.A. 426, 93 N. W. 201, 2 Ann. Cas. 639, it was held that where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company which removes, destroys, or injures such trees in erecting poles and wires under its franchise is liable for the resulting damage, even though no unnecessary injury is inflicted. In the body of the opinion in that case it is said: "The right of an abutting owner to maintain shade trees upon or overhanging the sidewalk is general and well recognized."

In *Slabaugh v. Omaha Electric Light & P. Co.* 87 Neb. 805, 30 L.R.A.(N.S.) 1084, 128 N. W. 505, this court held that the electric light company was liable to the abutting lot owner who plants trees in that part of the street contiguous to his lot, for all damages accruing to the lot by reason of trimming and injuring the trees. Chief Justice Reese in concurring said: "The trees were rightfully growing on and in connection with plaintiff's property at the time the alleged franchise was granted. According to the usual course of nature, those trees would grow up. As well might defendant have chopped them down in anticipation of their natural upward growth as to wait until they had become more valuable, and then, without consent or payment, and by the force and authority of might, practically ruin them. The rights of persons ought to be held just as sacred as the rights of property, and of the single individual as sacred as those of the multitude." Letton J., in concurring in the conclusion, said, among other things: "I am further of opinion, to quote the language of the opinion in *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1, that, 'if the city or other corporation invested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury.'"

In *Hammond v. Harvard City*, 31 Neb. 635, 48 N. W. 462, this court said: "It was formerly held, in accordance with some part of the instructions given in the case, that, 46 L.R.A.(N.S.)

'when a city, in the reasonable exercise of an authority, under its charter, establishes a grade for its streets, and works them accordingly. there being no provision of law for the payment of damages, no action will lie.' This was the law in 1873, and was so held in the case of *Nebraska City v. Lampkin*, 6 Neb. 27. But the Constitution of 1875, now in force, provided a different rule. The text of § 21 of the Bill of Rights now is that 'the private property of no person shall be taken or damaged for public use without just compensation therefor.'"

It is proper to remark that not all the states contain that clause of the Nebraska Constitution relating to the liability incurred because property is "damaged" by the act complained of.

In *O'Brien v. Philadelphia*, 150 Pa. 589, 30 Am. St. Rep. 832, 24 Atl. 1047, the question of law reserved was "whether a plaintiff who has built a house upon his lot in conformity with the existing physical grade of an old and open public highway can recover damages from the city of Philadelphia for depreciation in the value of the property occasioned by changing the *de facto* physical elevation of the highway in front of the lot to conform to a plan regulation legally confirmed after the building of the house; said plan being the first regulation of grade and differing from the *de facto* physical elevation of the old highway in front of the lot." There was judgment for the plaintiff on the verdict. The court said: "If any regard is to be had for the constitutional mandate that 'municipal and other corporations . . . shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements,' we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did. Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, *inter alia*, for the class of cases of which *O'Connor v. Pittsburgh*, 18 Pa. 187, is a conspicuous example. It has uniformly been so regarded from the date of its adoption until the present time. It is a fact, conclusively established by the verdict, that, as a direct consequence of the elevation of grade immediately in front of plaintiff's property, its market value was lessened at least to the extent of \$240; but it is gravely suggested that 'such a *damnum* is not necessarily an *injuria*,' and hence plaintiff is remediless. That principle has no application to the class of cases to which this belongs. To hold that it has would defeat one of the objects of the constitutional mandate in question, and virtually overrule several well-considered cases. We

do not propose to do either. . . . Again, in *New Brighton v. Peirsol*, 107 Pa. 280, the claim was by a lot owner for a second change of grade after he purchased the lot. This court, holding that he was entitled to recover, said: 'The claim now is for change of grade made since defendant in error purchased, and for damages sustained by work done since the adoption of the Constitution.' In *Ogden v. Philadelphia*, 143 Pa. 430, 22 Atl. 694, the claim was for damages caused by grading North street. After stating the undisputed facts were 'that the first grade . . . was established on the city plan in 1871, but nothing was done on the ground until 1887,' our Brother Mitchell says: 'For the establishment of the grade of 1871 there was no right of action. . . . Philadelphia v. Wright, 100 Pa. 235. Therefore the statute of limitations could not begin to run from that date. But the Constitution of 1874, art. 16, § 8, gave a right to owners to have compensation for property injured, as well as for property taken by municipal and other corporations in the construction or enlargement of their works. The right of action which this section gives is clearly for the actual establishment of the grade on the land. The general rule is that the cause of action arises when the injury is complete, and this has been uniformly applied to the taking of property for public use, from the case of *Schuykill Nav. Co. v. Thoburn*, 7 Serg. & R. 411, down to the present day.'

When the property of an abutting owner is damaged by the establishment of a grade of a street for the first time, changing it from the natural grade, such property is "damaged" within the meaning of the Constitution, as much as it is by reason of lowering the grade of the street as previously established. *Werth v. Springfield*, 78 Mo. 107; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574, 4 Am. St. Rep. 396, 7 S. W. 579; *New Brighton v. United Presby. Church*, 96 Pa. 331; *Hendrick's Appeal*, 103 Pa. 358.

Defendant further contends that plaintiffs acquired title to the lot in question since the grade of Vine street was established, and therefore that they cannot recover for damages to their improvements, and in support of that contention *Omaha v. Williams*, 52 Neb. 40, 71 N. W. 970, is cited. 'As we view the record, the city failed to show by any competent evidence that a grade had been legally established on that portion of Vine street abutting on the plaintiff's lot at any time prior to the time the grading in question was done. It follows that the rule contended for has no application to the facts of this case.'

We have examined the instructions given, 46 L.R.A. (N.S.)

as also the requests for instructions which were denied, and the other errors alleged. We are unable to find any alleged error which seems to us to be prejudicial to the rights of the defendant. We are unable to say that the verdict of the jury is wrong. It was upon a conflict of evidence, and apparently the evidence fully sustains it.

The judgment of the District Court is affirmed.

Sedgwick and Letton, JJ., concur in conclusion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MATTHEW J. MCGILLVRAY, by Next Friend,
v.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

(214 Mass. 484, 102 N. E. 77.)

Judgment — res judicata — third person.

1. A judgment entered in favor of a minor employee against his employer in a suit by his next friend, who was fraudulently induced by the employer's insurer to bring an action for a nominal amount, is not a bar to an action by the minor to hold the insurer liable for the fraud.

Fraud — inducing entry of judgment — liability.

2. An insurer of an employer who fraudulently induces the guardian of a minor employee injured by the employer's negligence, to bring an action for the injuries for a nominal sum, and secures entry of the judgment therein, is liable to the minor for the full amount of the actual damages caused by the injury.

(May 22, 1913.)

REPORT by the Superior Court for Essex County for the opinion of the Supreme Judicial Court after finding in defendant's favor in an action brought to recover damages for fraud in securing a release of a right of action for personal injuries. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. William A. Pew, for plaintiff:

The judgment in the inferior court is no

Note. — Right of action against third person for fraud inducing one to submit to a judgment less favorable to him than he was entitled to.

While no other case directly in point has been found, aside from *MCGILLVRAY v. EMPLOYERS' LIABILITY ASSUR. CORP.*, it is well settled that "strangers to a record, neither

bar to the present suit, because there is neither identity of parties, subject-matter, or cause of action.

Whittier v. Collins, 15 R. I. 90, 2 Am. St. Rep. 879, 23 Atl. 47.

Messrs. Henry C. Sawyer and William Harold Hitchcock for defendant.

Sheldon, J., delivered the opinion of the court:

The plaintiff is a minor sixteen years old. While in the employ of the Cape Ann Tool Company he suffered a serious personal injury, for which, as we must now take it, he had a right to recover damages from that company to the amount of \$3,500. The defendant had insured that company against such a liability. By means of a gross fraud practised by the defendant's authorized agent, the plaintiff's father was induced to consent to the bringing of an action in the plaintiff's name by his father as next friend, against the tool company, with an *ad damnum* of \$300. Such an action was brought by one member of a firm of attorneys, of which the other member was general counsel for the defendant, this defendant paying therefor. The other member of that firm appeared for the tool company. In pursuance of the same fraud, the defendant, through its agent, secured the signature of the plaintiff's father to a power of attorney authorizing the bringing of the action that has been mentioned, to an agreement for the entry of judgment and satisfaction of judgment for \$200, and to a paper purporting to be a release of all the minor's rights against the tool company on account of the injury. Then, in that action, an entry was made of judgment for the plaintiff for \$200 without costs, and judgment satisfied. No money has been paid to

parties thereto nor in privity with the parties, are not estopped by the judgment, nor can they take advantage of it as a bar." 23 Cyc. 1207.

In *Morris v. Travelers' Ins. Co.* 189 Fed. 211, however, which was an action by an employee against a company which had insured his employer against liability for injuries to employees, and against the employer,—the latter (a corporation) having been dissolved and gone out of business,—to recover damages for personal injuries caused by the negligence of the employer, in which action it was alleged that the plaintiff, by the fraud and deceit of the defendants had been deprived of his day in court, and his right to recover adequate damages for his injuries, in that the defendants had fraudulently and deceitfully caused an action to be brought in the name of the plaintiff and of another as his next friend, without their knowledge, consent, or direction, and by fraudulent representa-

46 L.R.A. (N.S.)

the plaintiff, and, of course, none ever can be collected, on that judgment.

The questions are whether that judgment is a bar to the present action, and, if not, whether the plaintiff has a right to prove his actual damages.

There is no doubt that a judgment rendered by a court of competent jurisdiction is conclusive between the parties and all who are in privity with them. But the defendant was neither a party nor a privy to the action in which the judgment was entered. It is not binding against this defendant nor in its favor. Until reversed or set aside, although procured without the knowledge of the plaintiff, and by means of a mere fraud practised upon his father while acting as his next friend, it is binding upon the parties to it. *Wallace v. Boston Elev. R. Co.* 194 Mass. 328, 80 N. E. 461; *Finneran v. Leonard*, 7 Allen, 54, 83 Am. Dec. 665; *White v. Merritt*, 7 N. Y. 352, 57 Am. Dec. 527; *Clark v. Southern Can Co.* 116 Md. 85, 36 L.R.A. (N.S.) 980, 81 Atl. 271. But it works no estoppel upon the plaintiff in favor of the present defendant. This was declared by the court in one of the cases relied on by the defendant. *Dunlap v. Glidden*, 31 Me. 435, 437, 52 Am. Dec. 625. And see *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, 206, 40 L.R.A. (N.S.) 314, et seq., 89 N. E. 193, and the cases collected in 23 Cyc. 120 et seq.

The plaintiff has not, by his declaration or in the subsequent proceedings in this action, set up the former judgment as having any binding effect, except as between himself and the tool company. He admits its validity as between himself and the tool company; but he rightly contends that, as between himself and this defendant, it constitutes no estoppel. That differentiates

tions had obtained from them a stipulation from the entry of judgment for a sum which was only one fiftieth of the amount of the damages to which the plaintiff was entitled, etc.,—it was held, on demurrer, that this was not a proper proceeding to attack the judgment referred to, and that the allegations were too indefinite to require the defendant insurance company to plead further. The court said: "The serious question presented is whether or no this is a collateral proceeding. The gist of this declaration is the defendant's alleged negligence and the plaintiff's damages. This old judgment seems to stand in the plaintiff's way of obtaining a new judgment for a larger sum, so he asks that in some form the facts relating to that old judgment be tried out, and, if found to be fraudulent, that he may then proceed with the trial of the main issue. This seems to me a collateral attack upon the old judgment."

A. C. W.

this case from those relied on by the defendant. *Engstrom v. Sherburne*, 137 Mass. 153; *Smith v. Abbott*, 40 Me. 442; *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625. In those cases, the plaintiff was obliged to contend that the judgment of the procuring of which he complained was so far invalid between the parties to it that the levy upon his property for its satisfaction was a legal wrong to him; and the contrary was held, because, as stated by Colburn, J., in *Engstrom v. Sherburne*, 137 Mass. 153, 155, it is no legal injury to one to take his property, pursuant to law, "to satisfy judgments in full force against him." In the case at bar, no such difficulty is presented.

This case resembles in principle an action by a client against his attorney for malfeasance, such as was disclosed in *Kelly v. Allin*, 212 Mass. 327, 99 N. E. 273. In that case, the defendant wrongfully caused a judgment to be entered in the plaintiff's case, of which he had the management as attorney. In the present case, the defendant by fraud obtained control of the plaintiff's original action and then consummated its fraud by wrongfully causing a judgment to be entered therein. In neither case could the defendant set up as a defense the judgment to which he was neither party nor privy, but which he had caused to be entered for his own ends and in fraud of the rights of the plaintiff. To hold otherwise would be to allow a gross injustice to be perpetrated under the forms of law, and to say that the law was powerless to prevent its own prostitution. We do not need here to go so far as the court went in *Verplanck v. Van Buren*, 76 N. Y. 247.

Nor is the plaintiff barred from showing the amount of his actual damages. The former judgment creates no estoppel upon him in favor of the defendant in any particular.

According to the terms of the report, judgment must be entered in favor of the plaintiff as of January 6, 1913, in the sum of \$3,500.

So ordered.

OKLAHOMA SUPREME COURT.

KANSAS CITY SOUTHERN RAILWAY
COMPANY, Plff. in Err.,

v.

JOHN WALLACE et al.

(— Okla. —, 132 Pac. 908.)

Mechanics' lien — waiver — evidence.

1. The provisions of mutual contracts be-

Headnotes by DUNN, J.
46 L.R.A. (N.S.)

tween the plaintiff in error, its principal contractor and subcontractors examined, and held, that, under their terms, the right to a lien upon the railway company and its properties was not waived by a subcontractor where action was brought therefor after the award of the resident engineer had been published.

Same — on railroad — statute.

2. Under § 6166, Comp. Laws 1909, any person other than the specific classes enumerated therein, who performed any work or labor upon or furnished any materials to facilitate the operation of any railroad, is entitled to a lien therefor upon the road-bed, buildings, equipments, income, franchises, and all other appurtenances.

Statute — construction — ejusdem generis.

3. The rule of *ejusdem generis* is resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent the legislature intended the general words to go beyond the class specifically designated, the rule does not apply. Moreover, where the particular words exhaust the class, then the general words must be given a meaning beyond the class.

Mechanics' lien — contractor.

4. Under the provisions of § 6166, Comp. Laws 1909, providing that "every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor upon . . . any railroad," under the general language used, is intended to and does include contractors and subcontractors who bring themselves otherwise within the terms of the act.

(June 3, 1913.)

ERROR to the District Court for Sequoyah County in plaintiff's favor in an action to recover the balance of the contract price for labor performed in the construction of defendant's railway and to enforce a mechanics' lien therefor. Affirmed.

The facts are stated in the opinion.

Messrs. Read & McDonough, for plaintiff in error:

The contract is a guaranty on the part of the defendants in error that no lien will be enforced by them against the property of the plaintiff in error. Even if the statute gives a right of lien, that is a right that may be waived.

Note.—The question whether contractors or subcontractors are within the protection of statutes giving liens to "laborers," "mechanics," "workmen," and the like is treated in the note to *Indianapolis Northern Traction Co. v. Brennan*, 30 L.R.A. (N.S.) 85; and see also later case, *Moore-Mansfield Constr. Co. v. Indianapolis, N. & T. Electric R. Co.* 44 L.R.A. (N.S.) 816.

Cost v. Newport Builders' Supply & Hardware Co. 85 Ark. 407, 108 S. W. 509, 14 Ann. Cas. 142; 27 Cyc. 84; *Nixon v. Cydon Lodge No. 5*, K. P. 56 Kan. 298, 43 Pac. 237.

The only persons who are given a lien under the above law are those who furnish things towards the equipment of a railroad.

Equipment does not mean the roadbed of a railroad.

People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; *Chicago, M. & St. P. R. Co. v. Hoyt*, 89 Wis. 314, 62 N. W. 189; *St. Louis, A. & T. R. Co. v. Sandal*, 3 Tex. App. Civ. Cas. (Willson) 453; *Detroit Trust Co. v. Detroit, F. & S. R. Co.* 159 Mich. 442, 124 N. W. 45; *Wallace v. Swepston*, 74 Ark. 525, 109 Am. St. Rep. 94, 86 S. W. 398; *Tucker v. St. Louis, I. M. & S. R. Co.* 59 Ark. 82, 26 S. W. 375; *Buckley v. Taylor*, 51 Ark. 302, 11 S. W. 281; *Van Etten v. Cook*, 54 Ark. 522, 16 S. W. 477; *Flournoy v. Shelton*, 43 Ark. 168; 27 Cyc. 20; *Wells v. Mehl*, 25 Kan. 205; *Missouri, K. & T. R. Co. v. Baker*, 14 Kan. 563.

Contractors are not entitled to a lien under the statute.

Tucker v. St. Louis, I. M. & S. R. Co. 59 Ark. 81, 26 S. W. 375; *Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 250, 11 L.R.A. 740, 26 N. E. 784; *Kirby v. McGarry*, 16 Wis. 68; *Harlan v. Rand*, 27 Pa. 515; *Dukes v. Love*, 97 Ind. 344; *Missouri, K. & T. R. Co. v. Baker*, 14 Kan. 563; *Peck v. Miller*, 39 Mich. 598; *Jacobs v. Knapp*, 50 N. H. 82; *Howard v. Moore*, 20 Fla. 167; *Nixon v. Cydon Lodge, No. 5*, K. P. 56 Kan. 298, 43 Pac. 237; *Pike Bros. Lumber Co. v. Mitchell*, 132 Ga. 675, 26 L.R.A.(N.S.) 409, 64 S. E. 998.

The provision of the mechanics' lien law do not extend to persons so remote as subcontractors of a subcontractor.

Nixon v. Cydon Lodge, K. P. 56 Kan. 298, 43 Pac. 236; *Kirby v. McGarry*, 16 Wis. 70; *Harbeck v. Southwell*, 18 Wis. 419; *Rothgerber v. Dupuy*, 64 Ill. 454; *Smith Bridge Co. v. Louisville, N. A. & St. L. Air Line R. Co.* 72 Ill. 506; *Schaar v. Knickerbocker Ice Co.* 149 Ill. 441, 37 N. E. 54; *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 54 Fed. 723; *Stone Co. v. Board of Publication*, 91 Tenn. 200, 18 S. W. 406; *Lowenstein v. Reynolds*, 92 Tenn. 543, 22 S. W. 210; *Monroe v. Hannan*, 7 Mackey, 197, 3 L.R.A. 549; *Phillips, Mechanics' Liens*, 49.

Messrs. Kimpel & Daily, for defendants in error:

In interpreting a statute the intention of the legislature must be ascertained by a construction of the whole act or enactment. 46 L.R.A.(N.S.)

Territory ex rel. Sampson v. Clark, 2 Okla. 82, 35 Pac. 882; *De Graffenreid v. Iowa Land & Trust Co.* 20 Okla. 687, 95 Pac. 624; *Bohart v. Anderson*, 24 Okla. 82, 103 Pac. 743, 20 Ann. Cas. 142.

Contractors are within the statute.

'King v. Greenway, 71 N. Y. 413; *Blakey v. Blakey*, 27 Mo. 39; *Merrigan v. English*, 9 Mont. 113, 5 L.R.A. 837, 22 Pac. 454; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 291; *Boisot, Mechanics' Liens*, 225; *Merrigan v. English*, 9 Mont. 113, 5 L.R.A. 837, 22 Pac. 454; *Hunter v. Truckee Lodge, No. 14*, I. O. O. F. 14 Nev. 33; 27 Cyc. 89; *Ehlers v. Elder*, 51 Miss. 498; *Davis v. Alvord*, 94 U. S. 549, 24 L. ed. 283, 9 Mor. Min. Rep. 384; *Hunter v. Truckee Lodge, No. 14*, I. O. O. F. 14 Nev. 33; *Treusch v. Shryock*, 51 Md. 173.

Dunn, J., delivered the opinion of the court:

This case presents error from the district court of Sequoyah county, and is an action brought by defendants in error against the plaintiff in error and the Ferguson Contracting Company to recover a judgment for a balance due on work and labor performed under a certain contract by plaintiffs, as subcontractors under the said Ferguson Contracting Company, and to enforce a lien for the amount thereof against the Kansas City Southern Railway Company, on whose line of railroad the work was performed. The answer denied the amount claimed and the right of plaintiffs to a lien. On a trial had on the issues made, the court found in favor of plaintiffs for the amount sued for, and rendered a judgment decreeing the same a lien upon the roadbed, buildings, and equipments, etc., of the said railroad company, from which the case has been brought to this court for review.

But two propositions are urged by counsel for plaintiff in error, which are: First, that, under the contract existing between it and the Ferguson Contracting Company and between the latter and the plaintiffs, a right to a lien was, by the plaintiffs, waived; and, second, that the statute under which the action is brought gives no lien to contractors.

The contract between the Ferguson Contracting Company and the railway company contains, among other things, the following section: "The contractor further agrees to pay in full for all materials by him furnished for the construction of the work aforesaid and for all labor by him employed upon said work, or any part thereof, and to so contract for said labor as to retain from the money due therefor the amount of the board bills, if any, con-

tracted during the performance of such labor, and to pay the board bills with the money so retained, and to save the railway company free and harmless from any lien for work or labor performed or material or supplies furnished in the performance of the work under this agreement, and from every claim, demand, or lien arising from or growing out of any act or thing done or suffered by the contractor or his agents or servants and his or their employees, in connection with the work aforesaid."

And the contract of the plaintiffs with the said contracting company provides as follows: "It is understood and agreed by both parties hereto that this agreement is and shall be subordinate to the said contract heretofore made between the party of the second part herein and the railway company, in all its provisions as to the times, manner, and conditions in and under which the whole and every part of said construction work is to be done and performed and in all essential respects, and that all the rights, powers, and privileges that are given and reserved to said railway company in their said contract with the party of the second part herein, are hereby expressly given, reserved, and conceded to the party of the second part in and under this agreement, as between the parties hereto."

From the proof it is made to appear that some time prior to the 1st of December, 1910, the plaintiffs received from the resident engineer of the railway company statements showing the amount due under the contract of plaintiffs with the Ferguson Contracting Company. On these statements the action seems to have been based, and under such circumstances the contract of the plaintiffs contained the following provision with reference to the filing and enforcement of a lien: "As it is the express intention of the parties hereto to avoid litigation, and it is further expressly understood and agreed between the parties hereto that there shall be no liens filed or suits brought until after the resident engineer has published his award, and then only for the purpose of enforcing said award."

As we view the terms of both contracts taken together, it was the intention of the parties to avoid any litigation over unliquidated accounts. In other words, no suits were to be brought nor liens filed until after the resident engineer had published his award, and the agreement then seems to contemplate that suits might be brought, if only for the purpose of enforcing such award. This action was for that purpose, and hence the contention of counsel for the company that plaintiffs had waived their right to a lien, under the terms of the contract, is untenable; the rule being that

there is no implication in favor of a waiver, but to exist it must be made to clearly appear. 27 Cyc. 262.

The second proposition presented is one of more difficulty, and is in fact the one upon which counsel chiefly rely. It is divided into two parts and arises on the question of the proper construction of § 6166, Comp. Laws 1909, which provides as follows: "Every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures, or other thing towards the equipment, or to facilitate the operation, of any railroad, shall have a lien therefor upon the roadbed, buildings, equipments, income, franchises, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, and beneficiaries under trusts or owners."

The work of plaintiffs in this case was the construction of concrete abutments, piers, and furnishing material for the roadbed of the railway, and it is the contention of counsel that the only persons who are given a lien under the foregoing act are those who furnish labor and materials toward the equipment of the railroad or to facilitate the operation of the same; that equipment means cars, locomotives, and things of that class; and, as none of the work performed by plaintiffs falls therein, the statute gives them no lien therefor. This particular branch of the case is dealt with in *Kansas City Southern R. Co. v. Rosier*, — Okla. —, 132 Pac. 908, an opinion delivered at this term of court, and the discussion therein contained is pertinent and conclusive, and we will not reiterate it. Suffice to say that therein we held that under this section laborers who performed work on a roadbed, right of way, and tracks of a railway company were, under this statute entitled to the lien here objected to.

The question of whether the plaintiffs, who were subcontractors, would be entitled to such a lien, even if the same was provided for by the statute, for the character of their work, is the second proposition presented by counsel. Counsel for the defendant company insist that contractors or subcontractors, not being mentioned in the act and not being of the same class of persons as those mentioned in the act, were not included therein, and that it was not the intention of the legislature that the protection and remedy provided for should be extended to them. They rely upon the cases of *Tucker v. St. Louis, I. M. & S.*

R. Co. 59 Ark. 81, 26 S. W. 375, and Little Rock, H. S. & T. R. Co. v. Spencer, 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196, to support the position that the word "builder" does not include contractors or subcontractors, while counsel for plaintiffs present a number of authorities, along with the definitions of a number of lexicographers, to support the proposition that the word "builder" is synonymous with "contractor," and that it was the intention of the legislature to embrace people of the class of their clients within it. The writer of this opinion, from an examination of the authorities, is much inclined to the view that the word "builder" is sufficiently broad to embrace within it a contractor, whether he be a principal contractor or a subcontractor; and, while not passing thereon, the majority of the court is of the view that the intention of the legislature to include parties within the class of plaintiffs in this action is more clearly manifested from another phase which the act contains, for all agree that they are provided for under one or the other.

It is a fundamental rule that courts favor a construction which will render every word operative, rather than one which makes some words idle and nugatory. *Bohart v. Anderson*, 24 Okla. 82, 103 Pac. 742, 20 Ann. Cas. 142. So that, accepting the contention of counsel for the railway company as sound, and for the purposes of this discussion concurring therein, it would leave, so far as the specifically enumerated classes are concerned, contractors and subcontractors, who might have performed work and labor upon the roadbed or furnished material towards facilitating the operation of the railroad, unprovided for. Taking this to be true, then, a critical examination of the act and due consideration for the scope of the duties to be performed by those who are enumerated discloses that every department of service demanded for the construction of a railroad is provided for by the services rendered and labor performed by the classes of servants and agents which are enumerated, except contractors and subcontractors.

For instance, the mechanic is the one who works and performs services with machinery or mechanics. The builder, if not a contractor, is the one who constructs and puts into permanent form the structure then in hand, whether it be the roadbed, bridges, buildings, or equipment. Within the term "artisan" is embraced the architect, the one who plans, sketches, and presents the complete details for the use of the contractor and builder. A workman upon a railroad might be any one or all of the classes below the architect, and in some instances might

include those who assisted and worked with him, while laborer would embrace everyone who with his hands, his crude implements, or his teams contributed his necessary and essential part toward the construction, either of the roadbed or of any other parts of the railway equipment demanding that character of service. This *résumé* of the classes specifically enumerated discloses under our postulate that contractors and subcontractors are the only persons unprovided for in the list; and unless they are held to be included within the phrase, "or other person who shall do or perform any work or labor upon . . . any railroad," this language is totally without force or effect, for assuredly those who furnish material cannot be held to be unprovided for.

It is true that, under the doctrine of *ejusdem generis*, general words, such as those just referred to, for the purpose of ascertaining the intent of the legislature, are generally restricted in their scope to the specific class of objects named. But, as is said by the supreme court of Missouri in the case of *State v. Smith*, 233 Mo. 242, 33 L.R.A.(N.S.) 179, 135 S. W. 465: "The rule of *ejusdem generis* is resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the legislature intended the general words to go beyond the class specifically designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class, or be discarded altogether." Other authorities supporting these general propositions and instructive on this phase of the case may be noted as follows: 2 Lewis's *Sutherland*, Stat. Constr. 2d ed. §§ 436, 437, 438; 36 Cyc. 1119-1122; *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69; *Weiss v. Swift & Co.* 36 Pa. Super. Ct. 376; *Strange v. Grant County*, 173 Ind. 640, 91 N. E. 242; *State v. Brown*, 163 Mo. App. 30, 145 S. W. 1180; *Mears Min. Co. v. Maryland Casualty Co.* 162 Mo. App. 178, 144 S. W. 883; *State v. Pabst Brewing Co.* 128 La. 770, 55 So. 349.

The supreme court of Indiana in the case of *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69, speaking to this subject, says: "In the construction of statutes or written contracts the doctrine of *ejusdem generis* is applicable, not in all, but in a certain class of, cases when general words are not accorded their usual and ordinary meaning, but restricted to things of the same kind, or genus, as those designated by the particular words. 2 Lewis's *Sutherland*, Stat. Constr. 2d ed. § 437; *Foster v. Blount*, 18 Ala. 687-689. The office

of the rule, however, like that of all other canons of construction, is to afford aid to the court in developing the true meaning of the statute, and cannot be employed to restrict the operation of an act within narrower limits than was intended by the lawmakers. *Woodworth v. State*, 26 Ohio St. 196; *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*) 48 Minn. 140-156, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; 2 *Lewis's Sutherland*, Stat. Constr. 2d ed. § 437. It is never used in an arbitrary sense, but operates as a sort of suggestion to the judicial mind that, when specific words of definite and certain meaning in a statute are deemed advisable by the framers, it may be that they intended the general words to extend only to persons or objects of the same kind or class as those embraced within the particular words, or they might not have gone to the pains of any specific enumeration. Whether the doctrine should be applied in any case depends largely upon the character and contents of the act as a whole, having due regard for that primary rule of construction that the object of a law must be sought from the entire act, including the title, and from a consideration of the evil to be remedied, the state of public sentiment existing at the time of the passage of the law, and the general purpose of the act, as derived from a consideration of every section. If the general purpose of the legislation clearly appears from a study of all the parts, that purpose cannot be defeated or limited by the doctrine we are considering. *Webber v. Chicago*, 148 Ill. 313-318, 36 N. E. 70; *Gillock v. People*, 171 Ill. 307, 49 N. E. 712; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *Woodworth v. State*, 26 Ohio St. 196; 2 *Lewis's Sutherland*, Stat. Constr. 2d ed. § 437; *State v. Villines* (1904) 107 Mo. App. 593-598, 81 S. W. 212; *State ex rel. Sedalia School Dist. v. Harter* (1905) 188 Mo. 516, 87 S. W. 941-944. Another potential rule of construction has peculiar application to the facts of this case, namely, that when the particular words embrace all the persons or objects of the class mentioned, and thereby exhaust the class, in such case there can be nothing *ejusdem generis* left for the rule to operate upon, and we must give the general words a meaning different from that indicated by the specific words, or ascribe to them no meaning at all. *National Bank v. Ripley*, 161 Mo. 126-132, 61 S. W. 587; *Ruckert v. Grand Ave. R. Co.* (1901) 163 Mo. 260-276, 63 S. W. 814; *Gage v. Cameron*, 212 Ill. 146-161, 72 N. E. 204; *Gillock v. People*, 171 Ill. 307, 49 N. E. 712; *Ellis v. Murray*, 28 Miss. 129-46 L.R.A.(N.S.)

142; *Fenwick v. Schmalz*, L. R. 3 C. P. 313, 37 L. J. C. P. N. S. 78, 18 L. T. N. S. 27, 16 Week. Rep. 481; 2 *Lewis's Sutherland*, Stat. Constr. 2d ed. § 437; *Maxwell*, Interpretation of Statutes 3d ed. p. 478; *Endlich*, Interpretation of Statutes § 409. This result must be avoided, if possible, at the behest of another canon of construction, that a statute must be construed so as to give effect to all its words."

The case of *Weiss v. Swift & Co.* 36 Pa. Super. Ct. 276, was one wherein the act in question read as follows: "In every sale of green, salted, pickled, or smoked meats, lard, and other articles of merchandise, used wholly or in part for food," etc. The question before the court was whether "eggs" were included within the act. In holding that they were, in its discussion the court said: "If the words were 'every sale of green, salted, pickled, or smoked meats, lard, and other articles of merchandise,' without more to indicate the subjects of sale intended to be covered, there would be propriety in applying the general principle of construction that when certain things are enumerated, and then a phrase is used which might be construed to include other things, it is generally confined to things *ejusdem generis*. . . . But in applying this principle of construction, and in determining what things are *ejusdem generis*, regard must be had to the general subject to which the act relates. Things which plainly belong to the same class when one subject is being considered might belong to an entirely different class when considered with reference to another subject. The rule would be absurd if under the head 'other' nothing can be included in the construction of the act which is not exactly the same in every particular as the thing specified. . . . Moreover, it has been held upon sound reason that, when the particular word or words exhaust a whole genus, the general term will not be regarded as surplusage, but will be construed to refer to a larger class. This must be so, if regard be had to the rule, which is more imperative than the rule *ejusdem generis*, that a statute is to be considered as a whole, so that, if possible, effect will be given to every part of it. Here the subject to which the act relates, as shown by the body of it, as well as by its title, is the sale of provisions by description; and, considering the specific words 'meats' and 'lard' as furnishing a sample of the kind of provisions referred to, the words 'other articles of merchandise,' upon the proper application of the rule *ejusdem generis*, would be confined to such provisions as are 'used wholly or in part for food,' and this would include eggs.

We take it, therefore, that if the last-quoted words had not been added in the statute, the words 'other articles of merchandise' would have included eggs, because, having regard to the subject of legislation, they are of the same kind of things that are specifically mentioned. At any rate, by adding the words, 'used wholly or in part for food,' the legislature set up the standard of similarity to the things specifically mentioned to which the other articles of merchandise must conform; and no principle of construction requires us to impose any other test, except that the articles of merchandise come up to this standard, and, in addition, be such as are comprehended within the term 'provisions,' as that term is commonly understood when used in such connection as this."

We can conceive of no reason nor logic which would support a conclusion that the legislature intended to and did give every other person who made the construction and operation of a railroad possible, a right to a lien, and left out the one who built the bridges and abutments, or who built the very roadbed of the railway itself. As is said by Judge Wood in his dissenting opinion in the case of *Little Rock, H. S. & T. R. v. Spencer*, 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196: "The contractor who furnishes the various appointments incident to the building of roadbeds for railroads, such as teams, wagons, barrows, shovels, scrapers, axes, picks, etc., and the men to use them, is no less deserving of protection, and no more able to protect himself, than the 'iron barons,' 'steel kings,' and 'rolling-stock magnates,' who are given a lien under this law. The legislature that would make a discrimination at once so unjust and unreasonable would, in the very act, lay at its door an impeachment for besotted ignorance or gross partiality."

And while the learned justice concludes that the term "builder" is sufficiently broad to embrace "contractor," his remarks are clearly as pertinent when "contractor" or "subcontractor" is held to fall within the larger scope of the general words used.

Finding, therefore, that the primary intention of the legislature was that those should be entitled to a lien who performed any work or labor or furnished anything toward the equipment, facilitating the operation of any railroad, and that contractors and subcontractors who had done these things were entitled to the benefit of this statute, and that, if not properly included within the term "builder," they were intended to be embraced by the general language used. 46 L.R.A. (N.S.)

guage used, the judgment of the trial court, being without error is affirmed.

Hayes, Ch. J., and Williams, Turner, and Kane, JJ., concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY

v.

ERIE RAILROAD COMPANY, Plff. in Err.

(— N. J. —, 87 Atl. 141.)

Trial — soft coal — negligence — question for court.

1. On the trial of an indictment against a railroad company for nuisance in negligently emitting dense smoke from its locomotive engines, the court, after properly

Headnotes by GARRISON, J.

Note. — The general subject of the effect of legislative authority upon liability for a private nuisance is discussed at length in the note to *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A. (N.S.) 49. As there shown, the weight of authority, at least of the better-considered cases, is that legislative authority is not a defense against liability for a private nuisance, but, as incidentally pointed out in that note, will ordinarily constitute a defense against liability for a public nuisance. Later cases in this series on the question in relation to public nuisances are: *Sopher v. State*, 14 L.R.A. (N.S.) 173; *State v. Concordia*, 20 L.R.A. (N.S.) 1050; *Zimmerman v. Gritzmacher*, 21 L.R.A. (N.S.) 299; *Campbell v. Jackman*, 27 L.R.A. (N.S.) 288; and later cases dealing with the question in relation to private nuisances are: *King v. Vicksberg R. & Light Co.* 6 L.R.A. (N.S.) 1036; *New York Continental Jewell Filtration Co. v. Wynkoop*, 11 L.R.A. (N.S.) 542; *Alabama & V. R. Co. v. King*, 22 L.R.A. (N.S.) 603; *Winona v. Botzet*, 23 L.R.A. (N.S.) 205; *Pickens v. Coal River Boom & Timber Co.* 24 L.R.A. (N.S.) 354; *Choctaw, O. & G. R. Co. v. Drew*, 44 L.R.A. (N.S.) 38.

The general subject of the liability of railroads for creating nuisances is treated in the notes to *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 579; *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A. (N.S.) 49; *Terrell v. Chesapeake & O. R. Co.* 32 L.R.A. (N.S.) 371.

As to the right under constitutional provision against "damaging" private property for public use without compensation, to compensation for consequential damages to property no part of which is taken, for smoke, noise, dust, etc., incident to the ordinary operation of a railroad, see notes to *Tidewater R. Co. v. Shartzler*, 17 L.R.A. (N.S.) 1054, and *Hyde v. Minnesota, D. & P. R. Co.* 40 L.R.A. (N.S.) 48.

charging that the defendant had the right to burn soft coal in the operation of its road, and could be convicted of nuisance only upon proof of negligence, left it to the jury to say whether or not the use of soft coal was in itself negligence. Held, error. Nuisance — legislative authority — effect.

2. Where the doing of a thing that would otherwise be a public nuisance is authorized by the legislature, the doing of that thing by the person so authorized, in the manner and for the purpose authorized cannot constitute a public nuisance in the absence of negligence, and such negligence must consist of something more than the mere doing of the authorized act.

Trial — erroneous instruction — cure.

3. An erroneous instruction is not cured or rendered harmless by reason of the fact that a correct instruction upon the same point was also given.

(Kalisch and White, JJ., dissent.)

(June 18, 1913.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Hudson County Quarter Sessions convicting defendant of maintaining a nuisance. Reversed.

The facts are stated in the opinion.

Messrs. Gilbert Collins and George S. Hobart, with Messrs. Collins & Corbin, for plaintiff in error:

The liability of the defendant depends on the existence or nonexistence of negligence.

State v. Young, — N. J. L. —, 56 Atl. 471; Morris & E. R. Co. v. State, 36 N. J. L. 553; State v. Terry, 72 N. J. L. 375, 61 Atl. 148; Hoff v. West Jersey R. Co. 45 N. J. L. 201; West Jersey R. Co. v. Abbott, 60 N. J. L. 150, 37 Atl. 1104, 3 Am. Neg. Rep. 574; Vallaster v. Atlantic City R. Co. 72 N. J. L. 334, 62 Atl. 993; Goodman v. Lehigh Valley R. Co. 75 N. J. L. 277, 68 Atl. 63; Kingsley v. Delaware, L. & W. R. Co. 81 N. J. L. 536, 35 L.R.A.(N.S.) 338, 80 Atl. 327; Traphagen v. Erie R. Co. 73 N. J. L. 759, 64 Atl. 1072, 67 Atl. 753, 9 Ann. Cas. 964; Erie R. Co. v. Jersey City, 83 N. J. L. 92, 84 Atl. 697; Hummer v. Lehigh Valley R. Co. 75 N. J. L. 703, 67 Atl. 1061.

The use of soft coal is not unlawful unless it is prohibited by statute.

Brooklyn v. Nassau Electric R. Co. 44 App. Div. 462, 61 N. Y. Supp. 33; Sigler v. Cleveland, 4 Ohio S. & C. P. Dec. 166, 3 Ohio N. P. 119.

It is not negligence for the railroad company to follow a customary practice in the operation of its railroad.

Traphagen v. Erie R. Co. 73 N. J. L. 759, 64 Atl. 1072, 67 Atl. 753, 9 Ann. Cas. 964; Feil v. West Jersey & S. R. Co. 77 N. 46 L.R.A.(N.S.)

J. L. 502, 72 Atl. 362; Kingsley v. Delaware, L. & W. R. Co. 81 N. J. L. 536, 35 L.R.A.(N.S.) 338, 80 Atl. 329; State v. Young, — N. J. L. —, 56 Atl. 471; Rex v. Pease, 4 Barn. & Ad. 40, 1 Nev. & M. 690, 2 L. J. Mag. Cas. N. S. 26, 22 Eng. Rul. Cas. 71; Joyce, Nuisances, § 68; Wood, Nuisances, § 306; Jersey City v. Abercrombie, — N. J. L. —, 58 Atl. 73.

Mere negligence on the part of employees is not sufficient to charge the defendant with criminal liability by reason of the consequences resulting solely from such negligence.

State v. Passaic County Agri. Soc. 54 N. J. L. 260, 24 Atl. 680; Reg. v. Great North of England R. Co. 9 Q. B. 316, 16 L. J. Mag. Cas. N. S. 16, 10 Jur. 755, 2 Cox, C. C. 70, 7 Eng. Rul. Cas. 466; Louisville & N. R. Co. v. Com. 10 Ky. L. Rep. 872; Com. v. Nichols, 10 Met. 259, 43 Am. Dec. 432; Barnes v. State, 19 Conn. 398; State v. Baltimore & O. R. Co. 65 W. Va. 603, 64 S. E. 735; Hall v. Norfolk & W. R. Co. 44 W. Va. 36, 41 L.R.A. 669, 67 Am. St. Rep. 757, 28 S. E. 754.

There is no remedy for incidental damage and inconvenience that naturally accompanies the operation of a railroad.

Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164, affirmed in 52 N. J. L. 221, 20 Atl. 169; State ex rel. Bd. of Health v. Bergen County, 46 N. J. Eq. 173, 18 Atl. 465.

Messrs. Robert S. Hudspeth and Pierre P. Garven for the State.

Garrison, J., delivered the opinion of the court:

This writ of error brings up the judgment of the supreme court affirming the judgment of the Hudson quarter sessions convicting the plaintiff in error of maintaining a common nuisance by the emission of dense smoke from its locomotive engines.

The facts charged in the indictment and the evidence produced at the trial, together with the trial errors complained of, especially with respect to the charge of the court, sufficiently appear in the opinion of the supreme court. That opinion, after stating that the defendant under its charter had the right to use any sort of coal necessary for the efficient operation of its road, laid down the general proposition that for a nuisance resulting as an incident of such use, independently of negligence, the railway company was not responsible. In laying down this proposition the court below followed the case of Morris & E. R. Co. v. State, 36 N. J. L. 553, in which this court followed the case of Vaughan v. Taff Vale R. Co. 5 Hurlst. & N. 679, 1 Eng. Rul. Cas. 296, in which Chief Justice Cockburn

stated the general principle to be that "when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence that if damage results from the use of such thing, independently of negligence, the party using it is not responsible." The court of exchequer chamber, thus speaking through Chief Justice Cockburn, followed the decision of the court of King's bench in *Rex v. Pease*, 4 Barn. & Ad. 30, 1 Nev. & M. 690, 2 L. J. Mag. Cas. N. S. 26, 22 Eng. Rul. Cas. 71, which was an indictment against a railway company for a smoke nuisance not distinguishable in principle or on its facts from the case now before us. In that case the judgment delivered by Baron Parke was that such incidental interferences with the rights of the public must be taken to have been contemplated and authorized by the legislature in return for the public benefits derived from the railway, and hence did not and could not constitute a nuisance at common law.

The principle which has thus been adopted and followed by the courts of this state, notably in the case of *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, justified the supreme court in saying that "wherever the question has been raised in this jurisdiction, negligent operation alone presents the *ratio decidendi*, whether it be upon an application for equitable relief against a conceded private nuisance, or in a prosecution under the criminal law upon an indictment for creating and maintaining a public nuisance; for the law is well settled that for mere incidental damage accruing by reason of the authorized and proper operation of the railroad, the company is exempt from liability upon the principle of *damnum absque injuria*," and "in suits for such injuries negligence is the gist of the action." [83 N. J. L. 231, 84 Atl. 698.]

A necessary corollary of this proposition and an essential part of the doctrine as applied to public nuisances is that the negligence that will thus transform the doing of a legislatively authorized act into a common-law nuisance must be something more than the mere doing of such authorized act; i. e., there must be evidence of negligence *dehors* the mere doing of the act which by force of the legislative sanction is not in itself a nuisance.

Unless this be so, the doctrine in question is an empty formula under which the authority granted by the central legislative body may be nullified by judicial action

confined to particular subdivisions of the state.

In the case of a railway it is not perceived how such legislative grant can be rendered effective, or the road operated under it, if each county through which it passes may prescribe the use or one or another of the various methods of operation in actual use upon no other evidence of negligence than that the doing of the act authorized by law creates a condition which but for such law would be a public nuisance.

I am not intimating that, with the advance of knowledge, improvements in railroad methods and equipment may not become so generally employed, and their practical utility so conclusively demonstrated, that the failure of a given company to know of them or to adopt them would not be evidence of negligence, as is suggested by the opinion recently delivered in *State v. New York C. & H. R. R. Co.* — N. J. L. —, 86 Atl. 48.

We are not now dealing with that question, but with the particular doctrine that the mere doing of an authorized act is not of itself evidence of negligence.

Briefly stated, the doctrine of our cases is that, where the doing of a thing that would otherwise be a public nuisance is authorized by the legislature, the doing of that thing by the person so authorized, in the manner and for the purpose authorized, cannot constitute a public nuisance in the absence of negligence, and such negligence must consist of something more than the mere doing of the authorized act.

Under this doctrine, the defendant below was wrongly convicted if the jury was permitted under the charge of the court to find that the defendant was guilty of maintaining a public nuisance merely because it did an act authorized by the legislature, — i. e., used soft coal, — or, to put it in another way, if the jury was permitted by the charge to find that the use of soft coal was in itself the negligent act that would render the doing of the act thus authorized a public nuisance. Such an instruction would be at once self-contradictory and a complete frustration of the established doctrine; for plainly what it amounts to is this, *viz.*: That, although the authorized use of a thing is not a nuisance unless made so by the negligent act of the user, yet the mere use of such thing may constitute the negligent act by which such authorized use becomes a nuisance. Clearly this is neither a logical nor a legal application of the principle by which the present case is controlled.

We do not understand that the supreme court sanctioned any such instruction, or

that its opinion gives countenance to any such impairment or misapplication of the doctrine it had laid down; on the contrary, we understand that it was precisely because the supreme court thought that such an instruction, if given, was cured by other parts of the charge that it affirmed the judgment of the quarter sessions. We are unable to reach this conclusion; and upon the contrary find that such erroneous instruction was given, and that it was not cured or attempted to be cured by anything in the charge.

In the main charge of the court this language is used:

"There has been testimony to the effect that this condition of things is due partially to the use by this company of soft coal as fuel. There has been further testimony—you will recollect it—to the effect that these engines and this property can be maintained without the use of soft coal. There has been testimony produced here to the effect that, by the expenditure of certain sums of money, the use of the fuel that is contended causes some of this inconvenience can be done away with altogether in that particular community. You are to take all that evidence into consideration in determining whether or not this defendant has exercised ordinary care in the operation of its property,—whether or not this defendant has been negligent in the performance of its duty to the public. If in the exercise of ordinary care this company could have operated this road so as to prevent the destruction of comfort and property to the people of this community, and the company failed in that duty, then the liability of the company would be clear."

Inasmuch as the jury had been correctly charged that the defendant was authorized by its charter to use soft coal in the operation of its road, and was liable only for a nuisance resulting from its own negligent acts, the language quoted, which made the defendant's use of soft coal the test of its negligence in using it, was erroneous for the reason that such act of negligence consisted of nothing more than the mere doing of such authorized act. The idea thus sought to be conveyed to the jury was again stated in response to a specific request to charge.

The request was that the court should charge that "under its franchises as a railroad company, the defendant, during the period alleged in the indictment, had a legal right to burn soft coal." Instead of charging this, the court instructed the jury thus: "I will charge you that this company had the legal right to burn soft coal or any other kind of fuel that they might determine to be essential to be used by the company in its business, provided always that

it uses ordinary care to satisfy its legal obligation to operate its property without negligence; and witnesses have testified—one of the witnesses for the defense—that other kind of fuel could be used under certain circumstances in the operation of this road, and that the use of that other kind of fuel might have prevented some of the conditions complained of here. You have the right to take that evidence into consideration, in connection with all the evidence in the case, in determining whether or not under such circumstances, having in view all the conditions, the burning of soft coal under such circumstances was negligence on the part of the defendant company."

If this instruction left any doubt that the burning of soft coal might be found by the jury to be "in itself" negligence, such doubt is removed by the statement that follows, viz.: "The company has no right, no legal right, to arbitrarily maintain a nuisance under any circumstances of the case; and if the use of a particular kind of fuel was in itself negligence, and worked an injury to the public at large, why that conduct in itself might be sufficient for you to say that this company was responsible in law for the maintenance of a nuisance."

Such an instruction was clearly erroneous, in that it left it open to the jury to find that the mere doing of an act authorized by the legislature was of itself proof of negligence in the doing of such act. For this error by which the defendant below was deprived of the benefit of the established doctrine of this court, the judgment of the supreme court should be reversed, unless, as that court thought, the error that we have pointed out was cured or rendered harmless by other parts of the charge. We fail to find that this was done, and do not see how it could be deemed to have been done, in view of the fact that the error in question occurred at the close of the charge and after the statements of the law that are said to be curative had been made. If a judge makes a mistake in charging the jury, he may undoubtedly cure it by calling attention to it as a mistake, and directing the jury to disregard it or to substitute for it a later statement of the law. Nothing of that sort was done in the present case, where the most that can be said is that two statements of the law were made to the jury, one of which was erroneous. Unless we conceive of our trial system as one in which the jury is clothed with the capacity to decide between two judicial statements of the law, and unerringly to select the correct statement and to disregard the incorrect, the error of the charge in the present case

was not cured or rendered noninjurious to the defendant, who excepted to it.

The judgment of the Supreme Court is reversed, to the end that a *venire de novo* may be awarded.

Kalisch and White, JJ., dissent.

MISSOURI SUPREME COURT.
(Division No. 1.)

LAURA BENDER, Resp't.,
v.
GEORGE WEBER et al., Appts.
(250 Mo. 551, 157 S. W. 570.)

Landlord and tenant—openings from
common passage—liability for in-
juries.

A property owner who maintains along the rear of several tenements a common passage for the use of tenants and their guests, from which access may be had to doors into the tenements and stairways leading to the basement, which are leased to, and pass into the control of, the tenants, is not liable for injury to one who, in going to the tenant's door on business, falls down the unguarded stairway to the basement, if there is a barrier between the passageway and the stairway so that, in order to gain access to the latter a passer-by would have to turn out of the passage-way onto the leased property.

(May 31, 1913.)

CERTIFICATION by the St. Louis Court of Appeals for the opinion of the Supreme Court of questions arising upon appeal by defendants from a judgment of the Circuit Court for the City of St. Louis in plaintiff's favor in an action brought to recover damages for personal injuries for which defendants are alleged to have been responsible. Reversed.

The facts are stated in the opinion.

Mr. Claud D. Hall, for appellants:

The court erred in refusing instructions in the nature of a demurrer to the evidence.

Buesching v. St. Louis Gaslight Co. 6 Mo. App. 85; Larkin v. O'Neill, 119 N. Y. 221, 23 N. E. 563; Kean v. Schoening, 103 Mo. App. 77, 77 S. W. 335.

There was no evidence that the defendants exercised exclusive control over the paved alleyway, or of the ingress or egress to these buildings, or that the public were authorized

to use the alleyway or the rear door of the grocery.

Shearm. & Redf. Neg. § 503; Leonard v. Storer, 115 Mass. 89, 15 Am. Rep. 76; Mellen v. Morrill, 126 Mass. 545, 30 Am. Rep. 695.

The petition does not show any relation of any character, existing at the time of the accident, between the plaintiff and defendants, which imposed any duty or obligation upon the defendants toward plaintiff.

Southcote v. Stanley, 1 Hurlst. & N. 247, 25 L. J. Exch. N. S. 339, 19 Eng. Rul. Cas. 60; Gautret v. Egerton, L. R. 2 C. P. 371, 36 L. J. C. P. N. S. 191, 16 L. T. N. S. 17, 15 Week. Rep. 638; Bolch v. Smith, 7 Hurlst. & N. 738, 31 L. J. Exch. N. S. 201, 8 Jur. N. S. 197, 6 L. T. N. S. 158, 10 Week. Rep. 387; Hounsell v. Smyth, 7 C. B. N. S. 731, 29 L. J. C. P. N. S. 203, 6 Jur. N. S. 807, 1 L. T. N. S. 440, 8 Week. Rep. 277; Glaser v. Rothchild, 106 Mo. App. 418, 80 S. W. 332; Sweeny v. Old Colony & N. R. Co. 10 Allen, 372, 87 Am. Dec. 644; Barry v. Calvary Cemetery Assn. 106 Mo. App. 358, 80 S. W. 709; Stevens v. Nichols, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150; Sterger v. Van Sicklen, 132 N. Y. 499, 16 L.R.A. 640, 28 Am. St. Rep. 594, 30 N. E. 987; Wencker v. Missouri, K. & T. R. Co. 169 Mo. 592, 70 S. W. 145; Davis v. Central Cong. Soc. 129 Mass. 370, 37 Am. Rep. 368; Nicholson v. Erie R. Co. 41 N. Y. 529.

The petition does not allege that, at the time of the accident, plaintiff was without fault in her conduct, or was exercising ordinary care to avoid the accident.

Laffin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599, 5 Am. Neg. Cas. 268; Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 94, 47 N. E. 971, 3 Am. Neg. Rep. 711; Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464, 15 Am. Neg. Cas. 686; Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; Buesching v. St. Louis Gaslight Co. 6 Mo. App. 85; Gilman v. Deerfield, 15 Gray, 580.

The petition does not allege that the rear door of the grocery was used by the public entering and leaving the store, with the knowledge of the defendants.

McCarthy v. Foster, 156 Mass. 511, 31 N. E. 385; Whiteley v. McLaughlin, 183 Mo. 160, 66 L.R.A. 484, 81 S. W. 1094, 16 Am. Neg. Rep. 458.

Note.—As to liability of owner for injuries to tenant's guests or employees by defect in premises, see notes to McConnell v. Lemley, 34 L.R.A. 609, and Cristodoro v. Von Behren, 17 L.R.A. (N.S.) 1161.

Generally, as to the liability of landlord 46 L.R.A. (N.S.)

for injury to tenants from defects in premises, see notes to Hines v. Willcox, 34 L.R.A. 824, and Walsh v. Schmidt, 34 L.R.A. (N.S.) 798; and later case Clark v. Sharpe, 41 L.R.A. (N.S.) 47.

Plaintiff was guilty of contributory negligence.

Diamond v. Kansas City, 120 Mo. App. 185, 96 S. W. 492; *Schaub v. Kansas City Southern R. Co.* 133 Mo. App. 444, 113 S. W. 1163; *Van Dyke v. Missouri P. R. Co.* 230 Mo. 259, 130 S. W. 1; *Ries v. St. Louis Transit Co.* 179 Mo. 1, 77 S. W. 734; *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532; *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 560, 985; *Reynolds v. Los Angeles Gas & Electric Co.* 162 Cal. 327, 39 L.R.A.(N.S.) 896, 122 Pac. 962; *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520; *Davis v. California Street Cable R. Co.* 105 Cal. 131, 38 Pac. 647; *McGraw v. Friend & T. Lumber Co.* 120 Cal. 574, 52 Pac. 1004, 4 Am. Neg. Rep. 6; *Tetwiler v. St. Louis, I. M. & S. R. Co.* 242 Mo. 178, 145 S. W. 780.

Messrs. John A. Talty and E. V. Selleck for respondent.

Lamm, J., delivered the opinion of the court:

Negligence. Personal injuries. Verdict and judgment for plaintiff for \$1,250. Appeal to the St. Louis court of appeals. Affirmed there by a divided court. Certified here under § 6 of the 1884 amendment of the Constitution. The pleadings fill no office for present purposes.

The case on the facts is this: There are two streets in St. Louis (Cardinal and Laclede) cutting each other at right angles. In one of such angles there are a group of buildings owned by defendants, husband and wife. The ground floors and basements of some are leased for business purposes, while the upper floors of those and the whole of the other buildings are flats or dwellings occupied by tenants for living purposes. There is a paved private courtyard or passageway for footmen only (somewhat like a *patio*) for access to the rear of all. For convenience of expression, we will call it the "courtyard," *passim*. To fill its office suitably (which office was that of giving access by way of common use of tenants and those other persons having a right to go to the rears of the group of buildings,—*e. g.*, grocers, meat market men, milkmen, breadmen, on their delivery rounds), said courtyard runs east and west and then turns north, taking the form of an "L." As said, this courtyard is private property, belongs to defendants, being cut off by lattice screens from both Cardinal and Laclede, with latched doors in the screens for ingress to and egress from the courtyard. It is not connected with any public alley. As said, defendants' tenants made common use of this courtyard when occasion called; this in addition to the use mentioned above. A 46 L.R.A.(N.S.)

minor or sporadic use also grew up, incident to the Wood tenement, which will be recurred to further on. At a certain place in this courtyard, the *locus in quo*, it is 8 feet 6 inches wide from wall to wall; *i. e.*, from north to south. The width is less at some other places. Ranged along the sides of this courtyard are bread boxes, gasoline tanks, ash bins (the latter possibly permanent), for the convenience of tenants (we suppose put there by them). There are also some cellar ways running east and west lengthwise with the courtyard, and hard by the rear building walls, which cellar ways lead to the basement cellars of those buildings having such cellars. These cellar ways make opening, say, 8 feet long and 2 feet 3 inches wide, severally. They have no trapdoors on top, but are cut off and guarded from the courtyard by wooden railings or banisters at one end and along one side (the other side being protected by the building wall), and one end was left open at the head of the cellar stairway; the latter leading down, say, 8 feet, to the outside cellar door to the basement proper. The upper step of each of these cellar stairs is flush with the paved courtyard; and these stairways were built and arranged, as above described, some years gone, to wit, at the time the group of buildings was constructed by their former owner in accordance with an architect's design.

At the times in hand the ground floor of one of these buildings was in the possession of two brothers named Wood, as tenants of defendants; the Woods running a grocery there. The cellar under that ground floor was leased with the ground floor itself to them for that purpose, including the right to the use of a stairway leading thereto. In this cellar the Woods stored and kept goods, boxes, etc., and their necessary outside access to this cellar was, as suggested above, by one of the described cellar stairs, opening into the courtyard, and subjected to this private and exclusive use everyday about their business.

There was a rear door to Woods' grocery opening on the courtyard. The upper step of the cellar stairway in question (said step being at a right angle to the building) began 9 inches or so west of the west jamb of this rear door, and the door sill of that door was about 2 inches above the level of the courtyard pavement. We take it from the record, including photographs in evidence, that the ordinary line of travel east and west in this courtyard (that is, the customary use) was on about 6 feet of clear space of pavement, to wit, the whole courtyard, saving and except the space taken up next to the rear building walls by ash bins, bread boxes, oil tanks, cellar ways, etc. It will

thus be seen that to fall into this cellar way anyone leaving this rear door would have to turn to the west, directly on stepping out, and in the line of the obstructions on that side, instead of taking pains to go north far enough to get outside the line of said obstructions and into the clear space or line of travel of the courtyard east and west.

In this condition of things, and not otherwise, on a Sunday evening, October 28, 1905, plaintiff (an intelligent housemaid thirty-three years of age, with good eyes) entered this courtyard from Cardinal on an errand for her mistress, a Mrs. Conley, to get from Woods' grocery some oysters and milk for lunch. Mrs. Conley was one of defendants' tenants, and the rear of her tenement, with windows therein, was on this courtyard, and but a few feet away from Woods' rear door and in plain view of said door and cellar way from said windows. Lying right under her eye, plaintiff could see and did see this cellar way from the Conley tenement windows, as said. Moreover, she had been in and out the grocery through this rear door. She admits she knew all the time she lived with Mrs. Conley that this cellar way was open at one end, the end next to Woods' rear door, but she says she did not know how close on the west its upper step was from the door s.l. of this rear door. All the testimony is to the effect that it was not dark, but it was "just getting dusk." We take it the light was such that plaintiff could have seen everything there was to see if she had looked at the immediate time. She says she saw at the very time the banisters of the cellar way, and saw the opening at one end where the steps begin, "but did not know it was so close." Her story is that, coming with a bucket in one hand to the rear door, she took hold of the door knob, turned it, and walked in; that she found there the proprietors and some others and "started" to buy what she went for. At that instant, and before trying to buy anything, she remembered "something" and wanted to speak to her mistress about it. So, after saying "good-evening" to the persons in the store, she faced about and stepped, face to the front, straight north and out of the door "just stepped in and stepped out," and as soon as she got out, when her hand was yet on the door knob, she fell (evidently having stepped to the west or westwardly along the building wall) through the open end of the cellar way headlong down to the foot of the cellar stairs, and thereby badly hurt herself. That she did injure herself is conceded; indeed, no question is made over the extent of her severe injuries.

Defendants introduced testimony from
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several witnesses, of great probative force, to the effect that plaintiff near dusk came with a bucket to the locked rear door of the grocery; that on knocking the door was opened; that several parties in the rear room of the grocery were smoking and drinking beer "socially;" that plaintiff, herself intoxicated, stood in the doorway and asked for beer; that she said nothing about buying groceries; that, being refused beer, she, with her face to the south (i. e., away from the courtyard), backed out of the door laughing and talking, and in so doing backed northwest into the cellar way.

The grocery had the usual front door and it was open at the time. There was no testimony that the rear door was intended by the owners of the building as a means of access to the storeroom by customers of the tenant occupying the ground floor, or was built for any purpose outside of the ordinary use such a rear door is put to for the backdoor convenience of the tenant. Neither is there any evidence showing, or tending to show, that defendants, the landlords, knew that their tenants, the Woods, permitted or solicited the use of this rear door by their customers in coming in or going out of the store. It stands conceded that no other rear door leading into this courtyard from any of defendants' other tenements was so used. Defendants did not live on the premises, but some distance away, and collected their rents through an agent. It seems the Woods kept their grocery store open during part of each Sunday for the sale of groceries, and, as said, the front door was open at the time. Furthermore, it appears that Mrs. Conley was a customer of the Woods, and that she and her housemaid used the courtyard as a near way or short cut to the grocery through this rear door. Plaintiff had worked for Mrs. Conley for about two weeks, though she had been familiar with the courtyard for a much longer time, and testified that she saw "people going in and getting groceries" through this rear door. There was testimony that other tenants of defendants at times made the same use of it, and sometimes outsiders, but the extent of this latter use is not disclosed. It was also shown that at times "people" were seen going through this courtyard, and that children sometimes played there. It was testified to by Mrs. Conley on behalf of plaintiff, and denied by Mr. Weber, that prior to the accident she had notified him to close up the open end of the Wood's cellar way, and gave as a reason that it was dangerous to her children. There was uncontradicted testimony on behalf of defendants that the customary way of building in St. Louis is to leave cellar ways intended for uses such as

this, in the rear of premises on private grounds, like this, open at one end. That "the general practice is to inclose all but one side; that is, where you go down the steps." As already pointed out, there was no testimony that anyone besides the Woods had any right to use the cellarway, or that its use was common to other tenants of defendants or to any part of the public at large.

Questions on the admissibility of testimony were ruled against appellants. So a ruling was made on objections to an alleged improper argument by one of respondent's counsel to the jury. Error is assigned in both particulars. Others relate to giving and refusing instructions; one a demurrer to the evidence hinging, in part, on the question whether respondent was not guilty of contributory negligence as a matter of law, and in part on another question presently stated. So, while the sufficiency of the petition was not challenged below, it is argued here it does not state facts sufficient to constitute a cause of action.

The record relating to the enumerated list of assignments needs no attention until such time as a main question raised by appellants (and hinted at above) is settled, to wit: Did they, as landlords, breach any duty they owed plaintiff by not fencing off the entrance of their tenants' courtyard cellar way, and hence should not the demurrer to the evidence have been given? If that question be ruled against appellants, other assignments will be reached in due order, and, in that event, any record pertinent thereto, if not already set forth, will appear in connection with a determination of those points. But, *contra*, if that question be ruled for appellants, then the case fatally breaks at that point, and the other assignments will be reserved as not necessary for decision, and to be ruled in some other case turning on them.

1. In determining that question it is better to clear the way by first defining it by eliminating or canceling out certain propositions and factors discussed in briefs and in authorities cited on both sides, and finally, as in paragraph "e," *infra*, differentiating and distinguishing our case from another closely allied to it.

(a) In the first place, and obviously, the question up is baldly disconnected in nature and principle from another looming large on this record, to wit, that of plaintiff's alleged contributory negligence. Hence the knowledge of plaintiff of the existence of the open stairway and its location, her possession of good eyes, the state of the light at the time of the accident, and whether she was intoxicated, or whether she went face forward (as she says) or walked backward (as de-

fendants say) into the cellar way, not being elements of any deciding value, are put away from us and laid on the shelf.

(b) In the next place, a good rule of everyday service is that judgments of appellate courts on one state of facts may not be applied automatically to another state of facts, but, *contra*, the general language in decisions must be read in the dry light of the very case held in judgment, and not otherwise. *State ex rel. Bixby v. St. Louis*, 241 Mo. loc. cit. 238 et seq. 145 S. W. 801. Therefore it will not do to indiscriminately invoke the principles and doctrines announced in cases where traps are laid or dangerous openings are left so close to the line of travel in a public highway that travelers thereon are likely to stumble into them, whether in daytime or nighttime, or where, under circumstances of danger and surprise, they suffer injuries from the proximity of such unguarded excavations or pits to public highways. This because the courtyard was in no just sense a public highway, but was private inclosed ground devoted to the convenience of defendants' tenants and tenements, and no express or implied invitation was extended to the general public to use it as a highway. The doctrine and reasoning of such cases, then, as *Smith v. St. Joseph*, 45 Mo. 449; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503; *Fehlhauser v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *Benton v. St. Louis*, 248 Mo. 98, 154 S. W. 473; *Delay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841; *Babbage v. Powers*, 130 N. Y. 281, 14 L.R.A. 398, 29 N. E. 132 (some of which are cited and relied on by counsel),—furnish little or no aid in this case. In so far as those cases, or any of them, discuss and announce the joint duty of owners and tenants, or the separate duty of either of them or of municipalities, to persons traveling on public highways, they are not at first blush, or at bottom, applicable to the instant case on the question up.

(c) In the next place there is a doctrine of the law hinging on the express terms of leases, whereby the duty to make repair or keep tenements fit is taken from the shoulders of the tenant or occupier (where it generally belongs [*Ward v. Fagin*, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738]) and is put upon those of the landlord, and wherein the breach of that duty has been sometimes (but not always) allowed some significance as *lex privata* in determining the liability of the landlord to the tenant or his guests or customers for injuries. This is so because in this case the terms of the lease between defendants and the Woods are not before us. Nor does

the petition count on a breach of any contractual duty springing from the verbiage or provisions of the lease itself. Therefore that doctrine and cases discussing it are affield.

(d) So, there are other doctrines of the law regulating rights and duties between landlords and tenants or between them (or either of them) and other persons, arising where tenements are let for an expressed purpose set forth in the lease, or are warranted as fit for such purpose, or where the landlord conceals from the tenant dangerous defects or noxious hidden conditions known to him, but unknown to the tenant, or where premises are let with an existing and present nuisance thereon, affecting the public. Cases dealing with one or another phase of those doctrines (*e. g.*, *Riley v. Pettis County*, 96 Mo. 318, 9 S. W. 906; *Whiteley v. McLaughlin*, 183 Mo. 160, 66 L.R.A. 484, 81 S. W. 1094, 16 Am. Neg. Rep. 458; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *State use of Bache v. Boyce*, 73 Md. 469, 21 Atl. 322; *Buesching v. St. Louis Gaslight Co.* 73 Mo. loc. cit. 227, 39 Am. Rep. 503) are not in point on this record.

(e) So, there is a well-established general doctrine that may be guardedly stated after this fashion: It is the tenant, not landlord, who has surrendered domination and control, who is liable for the negligent maintenance of the premises. But where the owner of premises lets them to different tenants, and there is a stairway, hall, roof, way, or the like, intended for and devoted to the common use of all of them and their guests or customers, which stairway, hall, way, or roof, is reserved from or not included in the demises, but is kept in the control of the owner, then a liability of the owner may spring (based on his negligent maintenance of the way, hall, stairway, or roof) to the tenant, his domestic, guest, or customer, lawfully and with due care using the way, hall, stairway, or roof for its intended purposes. That doctrine is quite universally announced in cases and textbooks, as will presently appear. If, now, plaintiff was hurt in that part of the courtyard designed for and appropriated to the common use described above, and which was not under lease, but was reserved and kept under the control of defendants as owners (and such part surely existed under this record), we would have one case here for determination. If, on the other hand (as appears to be the case), she was not, then we have another and different case here for determination. It is in the light of the 46 L.R.A. (N.S.)

premises, and not otherwise, that the question in hand must be ruled.

2. Coming to our question as thus narrowed, we are of opinion it should be ruled for appellants. This because (a) The record shows beyond all question that the outside stairway at the rear of the grocery passed to the Woods by their lease. The owners reserved no control whatever over it. So the exclusive control of the access to this stairway from the courtyard or from the rear door of the grocery passed to them with their demise, together with the preclusive right to use that rear door and way of access. These defendants had no right to intermeddle or interfere with that use or access, and were not charged with any duty under the law to make that use safe to their tenants or such customers as were invited or permitted by them to make use of it in entering or leaving the store. The lessees took it as they found it, for better or worse. As to the invitees of the tenants, they stood in the shoes of the tenants, and had no greater rights against the owner. "In such a case the guest can have no greater claim against the lessor than the lessee himself and the members of his family have." *McKenzie v. Cheetham*, 83 Me loc. cit. 550, 22 Atl. 470. The doctrine of *caveat emptor* applied in such cases, and if any third persons are injured in the use of it on their invitation or permission, the tenants in control, and not owners out of control, are liable. Such injured parties must look to those who invited them, not to those who had no hand in doing so.

May A not rent to B a tenement in a known tumble-down condition without being liable to B's invitees? Withal if A is liable, as, for example, for the absence of a gate or bar where the upper tread of the cellar stairway began, how could he ever discharge or acquit himself of that liability? Must he keep the gate shut or the bar up from day to day? If he provide one and B is remiss in using it, what then? It is plain that to rule as respondent wishes us to would be to let in a flood of strange and deep water for the landlord to struggle with. Fortunately it is not so written in the law.

As pointed out heretofore, we are not dealing here with a condition dangerous to the general public, which condition appertained to a use by the owner intended to be public (or which was necessary to the public), nor are we dealing with a public nuisance *per se*. Subject to limits suggested in this and the former paragraph, the proposition announced seems good and acceptable doctrine. 2 *Shearm. & Redf. Neg.* 5th ed. §§ 709, 709a, and especially 710; 1 *Taylor, Landl. & T.* 9th ed. p. 221.

The doctrine is exemplified in the cases.

Take one to illustrate: In *Sawyer v. McGillicuddy*, 81 Me. loc. cit. 320, 321, 3 L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl. 125, it is held as follows: "The tenant for the time being is in the place of the owner, taking the property as he finds it. These circumstances are so connected with the repairs that the law deems it reasonable and proper that in this respect, as well as in others, the tenant should take the place of the owner, and authorizes the inference that such was the intention of the parties in the absence of controlling facts. This would also be true of all appurtenances connected with, or ways to, the premises, when such appurtenances and ways were included in the lease, with the same right of possession in the tenant as in the premises. This rule is now beyond controversy."

Take another case, *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695: "It appears that the plaintiff was injured by falling down an embankment adjoining a walk leading from the street to the door of a building owned by the defendant, but leased to a tenant. The accident happened in the nighttime. There was no defect in the walk itself. It was rendered dangerous, if at all, by the want of a railing or by the absence of a light or some other warning. The plaintiff can hold the defendant liable only upon the ground that he was guilty of negligence towards her. The occupier of a building, who negligently permits the building or the access to it to be in an unsafe condition, is liable for an injury occasioned thereby to a person whom he by an invitation, express or implied, induces to enter upon it. He is liable because it is negligence in him to invite a person to enter upon a dangerous place without proper warning. *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216. But the defendant was not the occupier of the land, and did not, expressly or impliedly, invite the plaintiff to enter upon it. He had leased it to a tenant, and there is nothing to show that he retained any control over the walk, or any right to direct the purposes for which the premises should be used."

In short, the reason of the sting is that, as to customers and inviters generally, the tenant, standing in the shoes of the owner, *pro hac vice*, is the owner. The student yearning to follow principles of law up to their ultimate sources and reasons in the exposition of philosophical jurists may on this score profitably consult *Sheridan v. Krupp*, 141 Pa. 564, 21 Atl. 670; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; *Leonard v. Storer*, 115 Mass. 86, 15 46 L.R.A. (N.S.)

Am. Rep. 76; *McCarthy v. Foster*, 156 Mass. 511, 31 N. E. 385; *Marwede v. Cook*, 154 Mass. 235, 28 N. E. 140; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424. We will not swell this opinion by excerpts from those cases, but content ourselves with saying they, some in one and some in another phase, support the conclusions reached by us.

In so far as the question ruled has been before the appellate courts of this state in related or analogous features, we think nothing can be found militating against pronouncements herein made. *St. Louis v. Kaime*, 2 Mo. App. 66; *Vai v. Weld*, 17 Mo. 232; *Whiteley v. McLaughlin*, 183 Mo. 160, 66 L.R.A. 484, 81 S. W. 1094, 16 Am. Neg. Rep. 458; *Ploen v. Staff*, 9 Mo. App. 309; *Little v. Macadaras*, 29 Mo. App. 332; *Carson v. Quinn*, 127 Mo. App. 525, 105 S. W. 1088; *Kean v. Schoening*, 103 Mo. App. 77, 77 S. W. 335; *O'Donnell v. Patton*, 117 Mo. 13, 22 S. W. 903.

(b) Again, respondent, putting her very best foot foremost, an invitee as to the Woods, was a mere licensee as to appellants. In such case, absent some form of active mischief on appellants' part, as here, they are not liable for her injuries. *Kelly v. Benas*, 217 Mo. loc. cit. 9, 20 L.R.A. (N.S.) 903, 116 S. W. 557; *Glaser v. Rothschild*, 221 Mo. loc. cit. 185, 22 L.R.A. (N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576. We hold that, on the reasoning employed and conclusions set forth, appellants are not liable, and the demurrer to the evidence should have been given. Whether there are other grounds for reversal we do not determine. As there is nothing to indicate that respondent's case was not fully developed, another trial will serve no purpose of justice.

Let the judgment be reversed. It is so ordered.

All concur.

MAINE SUPREME JUDICIAL COURT.

ALBERT F. MANNING

v.

WILLIAM H. SHERMAN.

(— Me. —, 86 Atl. 245.)

Landlord and tenant — unsafe premises — injury to stranger — intervening negligence.

One who, in constructing an office building, postpones the construction of stairs intended to lead from the ground floor to the

Note. — See references under note to *Bender v. Weber*, ante, 121.

basement, but securely locks the door and keeps the key in his own possession, is not answerable for injury to one entering the building on business with a tenant, who falls into the basement through the door, which had been temporarily unfastened by a plumber who procured the key from the owner's clerk without the owner's knowledge or consent, to do some work in the basement for one of the tenants.

(March 31, 1913.)

R EPORT by the Supreme Judicial Court for Hancock County for the opinion of the full bench of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Judgment for defendant.

The facts are stated in the opinion.

Mr. E. S. Clark, for plaintiff:

Defendant is liable.

Stratton v. Staples, 59 Me. 94; Foren v. Rodick, 90 Me. 276, 38 Atl. 175; Gordon v. Cummings, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978; Hayward v. Merrill, 94 Ill. 349, 34 Am. Rep. 229; Lindsay v. Wilson, 2 L.R.A. (N.S.) 444, note; Hayes v. Pitts-Kimball Co. 183 Mass. 262, 67 N. E. 249, 14 Am. Neg. Rep. 69; Dalay v. Savage, 145 Mass. 40, 1 Am. St. Rep. 429, 12 N. E. 841; Lindsey v. Leighton, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Readman v. Conway, 126 Mass. 374; Looney v. McLean, 129 Mass. 35, 37 Am. Rep. 295; Watkins v. Goodall, 138 Mass. 533; Leydecker v. Brintnall, 158 Mass. 298, 33 N. E. 399; Shackford v. Coffin, 95 Me. 69, 49 Atl. 57; Whitmore v. Orono Pulp & Paper Co. 91 Me. 297, 40 L.R.A. 377, 64 Am. St. Rep. 229, 39 Atl. 1032; Sears v. Merrick, 175 Mass. 25, 55 N. E. 476, 7 Am. Neg. Rep. 58; Elliott v. Pray, 10 Allen, 378, 87 Am. Dec. 653; 16 Am. & Eng. Enc. Law, 473; Allen v. Smith, 76 Me. 340; Taylor, Land. & T. 7th ed. § 175; Handyside v. Powers, 145 Mass. 123, 13 N. E. 462.

Plaintiff was rightfully upon the premises.

Foren v. Rodick, 90 Me. 276, 38 Atl. 175; Stratton v. Staples, 59 Me. 94; Gordon v. Cummings, 152 Mass. 514, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978.

Defendant was in control of the cellar way.

Foren v. Rodick, and Stratton v. Staples, *supra*.

Defendant would be liable as owner.

Sawyer v. McGillicuddy, 81 Me. 320, 3 L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl. 124.

The theory of an independent contractor cannot be invoked in this case, 46 L.R.A. (N.S.)

Sciolaro v. Asch, 198 N. Y. 77, 32 L.R.A. (N.S.) 945, 91 N. E. 263; Blake v. Fox, 43 N. Y. S. R. 527, 17 N. Y. Supp. 508.

Messrs. Peters & Knowlton, for defendant:

Plaintiff must show that his own negligence was not an active contributing cause to the accident.

Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; McCarvell v. Sawyer, 173 Mass. 540, 73 Am. St. Rep. 318, 54 N. E. 259; Hutchins v. Priestly, Exp. Wagon & Sleigh Co. 61 Mich. 252, 28 N. W. 85; Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; McLane v. Perkins, 92 Me. 46, 43 L.R.A. 487, 42 Atl. 255.

One entering the premises of another, whether by invitation or as a mere licensee, is himself bound to exercise ordinary care and diligence, and failing in this and suffering injury he cannot recover.

Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262.

The law will not hold the owner liable for the unauthorized acts of third persons who stand in no relation of agency with him.

Clapp v. LaGrill, 103 Tenn. 164, 52 S. W. 134, 6 Am. Neg. Rep. 709; Herlihy v. Smith, 116 Mass. 265; Leavitt v. Bangor & A. R. Co. 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, 1 Am. Neg. Rep. 605; Currier v. McKee, 99 Me. 364, 59 Atl. 442, 3 Ann. Cas. 57; Mahoney v. Libbey, 123 Mass. 22, 25 Am. Rep. 6.

Defendant was not negligent.

Handyside v. Powers, 145 Mass. 123, 13 N. E. 462; Allen v. Smith, 76 Me. 335.

Mr. H. L. Graham also for defendant.

Cornish, J., delivered the opinion of the court:

On November 13, 1911, the plaintiff was injured while in the Rodick Block, so called, in Bar Harbor, of which the defendant was lessee under a fifteen year lease, dated March 1, 1907. It is conceded, that, as lessee, the defendant had full charge and control of the premises and stood in the place of the lessor, the owner.

The plaintiff on the day in question had stepped from the sidewalk on Cottage street into the open recess in the building, from which, on the right, was an entrance into the store occupied by Walls & Brewer, and on the left an entrance into the fire insurance agency of Frank E. Walls & Company. This recess or hall way was 5½ feet wide at the street, 7 feet 4 inches long, and a little over 3 feet wide at the inner end. At this narrow, inner end was a door opening into a cellar way 8 feet deep, without stairs, an open area. This door was equipped with a Yale lock, and was intended and supposed

to be kept locked at all times, but was unlocked at the time of the accident. The building had been reconstructed by the defendant during the season of 1911, and the recess, as well as the doors leading therefrom, had been changed.

On the day in question the plaintiff entered the building for the purpose of transacting some business in the fire insurance office. Instead of opening the door at the left, as he should, he pushed the unlocked door at the end, and, stepping into the floorless area, fell into the cellar beneath and sustained serious injuries, to recover for which this action was brought.

It is not seriously contended that the leaving of this cellar door unlocked was not a negligent act. That was the proximate cause of the accident; and the single question that needs to be considered is whether, under the evidence in this case, the defendant was legally liable therefor. It is the opinion of the court that he was not.

The facts connected with the unlocked cellar door are these: When the defendant reconstructed the Rodick building, he left the cellar way incomplete and nonusable until such time as he might put in a cement floor and a heating plant. He therefore had a door constructed without any latch or knob on the outside, but with a Yale lock, which, on the completion of the work, was securely locked, and remained so until about the time of the plaintiff's accident. The defendant did not himself occupy any portion of the Rodick Block, but had a store in an adjoining building. This Yale lock had two keys, and the defendant, when the work was finished, about June 15, 1911, took them and placed them in the drawer of the cash register in his own store, where they remained until within a week of this accident.

About a week previous to this accident Mr. Brewer, of the firm of Walls & Brewer, one of the tenants of the Rodick Block, having occasion to have some plumbing done in the cellar, went to Miss Paine, a clerk in the defendant's store, and asked for the key to the cellar door. She took it from the cash register and gave it to him. He carried it to Mr. Carter, the plumber who had charge of the work and whose two employees actually did the work. One of the three plumbers unlocked the door, put down some sort of a ladder, and a portion of the work was done within a day or two. Then, on the day of the accident, one of the plumbers returned to complete the job and opened the door again, the key having in the meantime remained in the possession of the plumbers, went down into the cellar, neglecting to lock the door behind him, al-

though he says he thought he had fastened it, and while there for a short time this accident happened.

Under these facts we fail to see in what respect the defendant was negligent.

He was responsible only for neglect of duty, and that duty was to use reasonable and ordinary care in keeping the premises safe for the access of all persons who might have occasion to come upon them by his invitation, either express or implied, in providing a safe and suitable entrance to the stores and offices, and in having the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors and deceptive landings. *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175.

This measure of duty the defendant fully met. He had constructed a proper door to this open area, had securely locked it, and had taken the key into his own possession and deposited it in a place of safe-keeping. Up to this point, surely, no negligence could be attributed to him. He had done all that reason or the law could require of him, and at this point the defendant's connection with the transaction ceased. Of the subsequent steps he had no knowledge whatever. Nor had he any reason to anticipate them. The work to be done was not for him, and he had no knowledge that Brewer contemplated doing it. He did not know that the key had been taken away and given to Brewer or to the plumbers until after the accident. He continued to believe, and had reason to believe, that the door remained as he had left it, securely fastened. He had given to Miss Paine no authority or permission to deliver the key to Brewer, or to anyone else, and no such authority could be implied from the nature of her employment. She was simply a sales clerk in the defendant's store. She did not even have charge of the books. She had no more to do with the key to the Rodick Block than to the key to her employer's house or garage. In delivering the key to Brewer without authority from the defendant, she was entirely outside the scope of her employment or agency. Her act was not the defendant's act; and the law does not hold one responsible for the unauthorized acts of third persons who stand in no relation of agency to him.

This principle is well stated in these words: "Where the injury is the result solely of the negligent act of a third person who does not stand in such a relation to defendant as to render the doctrine of *respondet superior* applicable, no liability attaches to defendant. The fact that the negligent act which caused the injury was

done on a person's land or property will not render him liable, where he had no control over the persons committing such act, and the act was not committed on his account, nor where the third person whose negligence caused the injury assumes control of the owner's property without authority. An owner or occupant of premises not in a defective or dangerous condition is not liable for injuries caused by acts of third persons which were unauthorized, or which he had no reason to anticipate, and of which he had no knowledge." 29 Cyc. pp. 477, 478.

See also *Clapp v. LaGrill*, 103 Tenn. 164, 52 S. W. 134, 6 Am. Neg. Rep. 709; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6.

In *Handyside v. Powers*, 145 Mass. 123, 13 N. E. 462, the plaintiff was injured by falling down an elevator well. The door to the well had been provided with a lock, had been locked, and the key deposited in the defendant's office. There was evidence that a key had been obtained by the plaintiff's employer and used, but without the knowledge or consent of the defendant or his agent. In sustaining a verdict which had been ordered for the defendant by the presiding justice, the court say: "The door to the elevator had been provided with a lock, had been locked, and the key deposited in the defendant's office. This was the only key known by the defendant or his agent to exist, and it was found in its place in the defendant's office after the accident. There was evidence that a key had been procured by King and used, but without the consent or knowledge of the defendant or his agent, and that the neglect of King in unlocking the door and in leaving it unlocked had been the cause of the injury. But the act of King in obtaining a key without the knowledge of the defendant, and his subsequent carelessness, cannot be attributed to the defendant."

This case is directly in point, because in principle the defendant was no more liable for the use of the key procured from Miss Paine than for the use of one procured from any other third party.

The chain of causal connection was broken, the act of one or more third parties intervened (*Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336), and, without considering the question of contributory negligence, which was argued by counsel, it is sufficient for the purposes of this case to hold, as we must, that no liability attached to the defendant.

Judgment for defendant.

46 L.R.A. (N.S.)

OKLAHOMA SUPREME COURT. (Division No. 1.)

J. W. GILLILAND, Plff. in Err.,
v.

JOHN T. JAYNES.

(— Okla. —, 129 Pac. 8.)

Broker — agreement for resale — right to commission.

1. When a real estate agent has property listed with him for sale, and finds a purchaser ready, willing, and able to buy on the terms on which the property is listed, the fact that he has an agreement with the purchaser that, after the purchase is completed, he may subdivide the property and sell it as town lots for a contingent commission, will not defeat his right to recover a commission against his original client, which has been earned.

Same — commission — when earned.

2. In order for a real estate agent to recover his commission for making a sale which has not been completed, it is necessary for him to find a purchaser who is ready, willing, and able to buy, and to procure a written agreement to buy from the purchaser, which will be enforceable against him, if accepted and signed by the seller, provided the seller and purchaser have not come together, and an oral agreement to buy accepted by the seller.

(October 15, 1912.)

Headnotes by AMES, C.

Note. — Brokers: necessity of securing written contract from purchaser to entitle real estate broker to commissions.

The earlier cases on this subject will be found in a note attached to *Lunney v. Healey*, 44 L.R.A. 605.

As to the necessity that agent's authority to purchase or sell real property be in writing, to enable him to recover compensation for his services, see note in 9 L.R.A. (N.S.) 933.

Cases holding merely that, a valid binding contract having been entered into with the intended purchaser, the broker is entitled to his commissions, are expressly excluded.

And as to broker's right to compensation where the contract with the intended purchaser is a mere option to purchase which has never been exercised, see note attached to *Warnekros v. Bowman*, 43 L.R.A. (N.S.) 91.

The general rule is that a broker to be entitled to recover his commissions must produce one who is ready, willing, and able to purchase upon the terms which the broker was authorized to offer. It seems clear that, to comply with this condition, the broker must either himself procure a binding contract from the prospective purchaser, or he must find one who is willing

ERROR to the District Court of Muskegee County to review a judgment in plaintiff's favor in an action brought to recover commissions alleged to have been earned in selling real estate. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. N. A. Gibson and H. C. Thurman, for plaintiff in error:

When one is acting as the agent of the purchasers, he cannot act as the agent for the seller, and enforce the payment of a commission from the latter, because the law requires of an agent the strictest fidelity, and he cannot serve two parties whose interests are conflicting.

Berlin v. Farwell, — Cal. —, 31 Pac. 527; Kronenberger v. Fricke, 22 Ill. App.

550; Barnes v. Lynch, 9 Okla. 11, 59 Pac. 995; McKinley v. Williams, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94; Plotner v. Chillson, 21 Okla. 224, 129 Am. St. Rep. 776, 95 Pac. 775; Choctaw, O. & G. R. Co. v. Sittel, 21 Okla. 695, 97 Pac. 363; Michoud v. Girod, 4 How. 504, 11 L. ed. 1077; Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; Pom. Eq. Jur. § 959; Hoyt v. Latham, 143 U. S. 556, 35 L. ed. 260, 12 Sup. Ct. Rep. 572; Aberdeen R. Co. v. Blakie Bros. 1 Macq. H. L. Cas. 461, 2 Eq. Rep. 1281; Webb v. Marks, 10 Colo. App. 429, 51 Pac. 518, Fry v. Platt, 32 Kan. 52, 3 Pac. 781; Porter v. Woodruff, 36 N. J. Eq. 179; Ruckman v. Bergholz, 37 N. J. L. 440; Jansen v. Williams, 36 Neb. 869, 20 L.R.A.

to take the property at once, or enter into a binding contract, and present him to the owner so as to afford the latter an opportunity to procure such a contract from him. If the prospective purchaser whom the broker has discovered, without any fault on the part of the owner, refuses either to take the property at once or to enter into a binding contract, the broker can hardly be said to have complied with the condition of finding one who is willing to purchase. Upon the other hand, where the broker's right to commissions does not depend upon conditions other than those ordinarily implied, it would seem that he is entitled to his commissions if he procured one of requisite ability who in fact was willing to enter into a binding contract, and presented him to the owner, although, because of the latter's fault, no contract was procured.

The rule seems to be accurately stated in *Watters v. Dancey*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, holding that, to entitle a broker to recover compensation for finding a purchaser for real estate, he must prove that he has found and produced and brought to the owner a purchaser who is ready, willing, and able to enter into a contract to purchase on the terms prescribed by the owner, or, in lieu of producing and presenting such a purchaser, he must show that he has obtained from him a valid, binding contract in favor of the owner,—a contract that might be enforced by the owner himself in case of a breach or default in the terms thereof; and that a contract by the purchaser to buy the land from the agent or broker is not sufficient.

And in the following cases, the rule is stated in the alternative to the effect that, before a broker employed to find and procure a purchaser for real estate can recover his commissions, he must furnish his principal a binding contract executed by an intending purchaser who is able to buy, and upon whom, if there is a failure to buy, the principal may have recourse; or he must by some means bring the buyer and seller together or in communication with

each other, so they may themselves make the contract and conclude the sale: *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622; *Cone v. Kiel*, 18 Cal. App. 675, 124 Pac. 548; *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103; *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326; *McDonald v. Smith*, 99 Minn. 42, 108 N. W. 291; *McCray v. Pfost*, 118 Mo. App. 672, 94 S. W. 998; *Henry v. Harker*, 61 Or. 276, 118 Pac. 205, affirmed on rehearing in 61 Or. 287, 122 Pac. 298; *York v. Nash*, 42 Or. 321, 71 Pac. 59; *Hardy v. Sheedy*, 58 Or. 195, 113 Pac. 1133; *Grindstaff v. Merchants' Invest. & Trust Co.* 61 Or. 310, 122 Pac. 46.

GILLILAND v. JAYNES seems to be in accord with this rule, for it appears that the prospective purchaser had never been actually presented to the owner, so that the parties never met or had any communication on the subject, and under the rule it was therefore incumbent for the broker to produce a binding contract with the purchaser before he could recover the commissions. The holding in *Reynolds v. Anderson*, post, 144, on the facts, is also in accord with this rule, although the second headnote, which is by the court, seems to imply that the broker must at all events procure the contract.

So, in the following cases, where it appeared that the broker had produced a purchaser who was able, willing, and ready to buy the property upon the terms authorized, but was prevented from doing so by the owner's refusal, or inability to carry out the contract, it was held that the owner could not avoid paying the commissions, upon the ground that the broker had not procured a binding written contract from the purchaser: *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; *Pope v. Caddell*, 125 Ky. 837, 102 S. W. 327; *Holden v. Starks*, 159 Mass. 503, 38 Am. St. Rep. 451, 34 N. E. 1069; *Watkins v. Thomas*, 141 Mo. App. 263, 124 S. W. 1063; *Brydges v. Clement*, 14 Manitoba L. Rep. 588.

So a broker employed to sell real estate, who obtains and produces to the owner a

207, 55 N. W. 279; Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236; Tillyen v. Wolverton, 46 Minn. 256, 48 N. W. 908.

The alleged contract between the parties bound the agent to negotiate a sale of the defendant's land, as distinguished from merely finding a purchaser.

Slayback v. Wetsel, 146 Mo. App. 171, 123 S. W. 982; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724; Bolton v. Coburn, 78 Neb. 731, 111 N. W. 780; Munroe v. Taylor, 191 Mass. 483, 78 N. E. 106; Burnett v. Edling, 19 Tex. Civ. App. 711, 48 S. W. 775; Burnett v. Potts, 236 Ill. 499, 86 N. E. 258; Yoder v. Randol, 16 Okla. 308, 3 L.R.A.(N.S.) 576, 83 Pac. 537; Birch v. McNaught, 23 Okla. 634, 101 Pac.

1049; Sharpley v. Moody, 152 Ala. 549, 44 So. 650; Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; Northwestern Packing Co. v. Whitney, 5 Cal. App. 108, 89 Pac. 981; Wolverton v. Tuttle, 51 Or. 501, 94 Pac. 961; Hayden v. Grillo, 35 Mo. App. 647; Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Bingham v. Davidson, 141 Ala. 551, 37 So. 738; Fox v. Ryan, 240 Ill. 391, 88 N. E. 974; Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106.

Messrs. DeRoos Bailey, J. E. Wyand, and Charles A. Moon, for defendant in error:

The broker is entitled to his commission for the sale of real estate, though the purchaser never enters into any enforceable

purchaser ready, able, and willing to buy, is entitled to his commission when the owner chooses to deal with the purchaser on other terms, although the broker has no formal contract with the purchaser which may be specifically enforced. Barnes v. German Sav. & L. Soc. 21 Wash. 448, 58 Pac. 569; Beougher v. Clark, 81 Kan. 250, 27 L.R.A.(N.S.) 198, 106 Pac. 39.

A real estate broker was held not entitled to his commission in *Kronenberger v. Bierling*, 37 Misc. 817, 76 N. Y. Supp. 895, where he brought an intending purchaser to the owner's agent, and a complete understanding was reached as to price and terms,—the purchaser even making a deposit,—but no memorandum or receipt was given by either of the parties, it being contemplated that a formal contract would be drawn up in two or three days, the purchaser subsequently refusing to enter into any contract with the owner, who stood ready to execute an agreement of sale upon the agreed terms.

In *Pfanz v. Humburg*, 82 Ohio St. 1, 29 L.R.A.(N.S.) 533, 91 N. E. 863, where, by the special terms of the broker's contract with the owner, the former's right to commissions was dependent upon a completed sale, there are expressions that seem to impose upon the broker the duty of procuring a contract from the prospective purchaser; but even in this case it is not clear that such duty rested upon the broker except as an alternative to presenting to the owner one ready and willing to enter into a contract.

In *Harvil v. Wilson Bros.* 11 Ga. App. 156, 74 S. E. 845, where it does not appear just what the broker was employed to sell, it is held that if, during the agency, the broker enters into a contract in behalf of his principal, which is mutually binding and enforceable, the broker has fully complied with his obligation, and is entitled to his commission, but that, for the broker to recover his commissions on this theory, he must allege and prove either that the owner or the purchaser refused to comply without legal cause, and that, when the purchaser refused to comply, he was sol-

vent, or that the question of his solvency had been waived by the owner.

A signed contract of sale is essential to a real estate broker's right to compensation, where his contract of employment expressly provides that no commissions are to be paid until the contract of sale is signed. *Reichard v. Wallach*, 91 N. Y. Supp. 347; *Schlansky v. Hillman*, 111 N. Y. Supp. 696.

And that the broker secured a parol offer in such case, which was accepted by the principal, is not enough. *Schlansky v. Hillman*, supra.

So, where a broker's contract of employment required him to draw the papers necessary to a sale, and authorized the retention of his commissions from the cash payment, it was held in *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724, that, to entitle the broker to his commissions, there must have been a sale so far consummated as to be valid, binding, and mutually obligatory upon the vendor and vendee, and that a contract which a court of equity would not specifically enforce in behalf of the vendee was not enough.

And where a contract for the sale of real estate provided that if the purchaser failed to execute and deliver certain notes and make a cash payment provided for, the vendor should retain the cash payments made as liquidated damages, and the contract should be terminated, it was held in *Rankin v. Grist*, — Tex. Civ. App. —, 129 S. W. 1147, that there was no completed or absolute contract to purchase, and therefore the agent was not entitled to commissions for making a sale.

Where the broker, instead of presenting the prospective purchaser to the owner and leaving it to them to make the contract, has himself entered into an unenforceable arrangement with the purchaser, it seems that he is not entitled to his commission if the sale fails, unless the purchaser is willing to carry out the contract on his part.

Thus, a broker employed to find a purchaser for real estate does not earn his commission unless the contract procured by him is capable of specific enforcement in

contract of sale, if, as a matter of fact, he is willing to comply with the oral contract and the owner declines to do so; and the agent's duty is ended when he produces a purchaser ready, willing, and able to buy.

Fisk v. Henarie, 13 Or. 156, 9 Pac. 322; *Hancock v. Stacy*, — Tex. Civ. App. —, 116 S. W. 177; *Montgomery v. Amsler*, 57 Tex. Civ. App. 216, 122 S. W. 307; *Dockery v. Maple*, — Tex. Civ. App. —, 125 S. W. 631; *Poston v. Hall*, 97 Ark. 23, 132 S. W. 1001; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Coburn v. Seymour*, 32 Colo. 430, 76 Pac. 1058, 2 Ann. Cas. 182; *Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710; *McDermott v. Mahoney*, — Iowa, —, 106 N. W. 925; *Stanton v. Barnes*, 72 Kan. 541, 84 Pac. 116; *Johnson v. Huber*, 80 Kan. 591, 103 Pac. 99; *Neiderlander v. Starr*, 50 Kan. 770, 33 Pac. 592; *Davis v. Lawrence*, 52 Kan. 383, 34 Pac. 1051; *Hartford v. McGillicuddy*, 103 Me. 224, 16 L.R.A. (N.S.) 431, 68 Atl. 860, 12 Ann. Cas. 1083; *Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301; *Warren Commission & Invest. Co. v. Hull Real Estate Co.* 120 Mo. App. 432, 96 S. W. 1038; *Ryer v. Turkel*, 75 N. J. L. 677, 70 Atl. 68; *Feist v. Jerolamon*, 81 N. J. L. 437, 75 Atl. 751; *Ryer v. Minningham*, 78 N. J. L. 742, 75 Atl. 890; *Owen v. Riddle*, 81 N. J. L. 546, 79 Atl. 886, Ann. Cas. 1912 D, 45; *Potvin v. Curran*, 13

Neb. 302, 14 N. W. 400; *Martin v. Wer-*
mann, 107 App. Div. 482, 95 N. Y. Supp. 284; *Milne v. Ingersoll-Sergeant Drill Co.* 120 App. Div. 465, 104 N. Y. Supp. 1053; *Michaelis v. Roffmann*, 37 Misc. 830, 76 N. Y. Supp. 973; *Getzelsohn v. Donnelly*, 50 Misc. 164, 98 N. Y. Supp. 213; *McGill v. Gargoula*, 103 N. Y. Supp. 113; *Arnold v. Schmeidler*, 144 App. Div. 420, 129 N. Y. Supp. 409; *Frank v. Connor*, 107 N. Y. Supp. 132; *Young v. Metcalf Land Co.* 18 N. D. 441, 122 N. W. 1101; *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922; *O'Connor v. Semple*, 57 Wis. 243, 15 N. W. 136; *Hunter v. Wenatchee Land Co.* 50 Wash. 438, 97 Pac. 494; *Barnes v. German Sav. & L. Soc.* 21 Wash. 448, 58 Pac. 569; *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884; *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; *Barnard v. Monnot*, 33 How. Pr. 440; *Carlin v. Lifur*, 2 Cal. App. 590, 84 Pac. 292; *Lewis v. Simpson*, 122 Iowa, 663, 98 N. W. 508; *Mooney v. Elder*, 56 N. Y. 238.

Where the sale is not consummated on account of the fraud, bad faith, or fault of the owner, the agent cannot be defeated of his compensation.

Lockwood v. Rose, 125 Ind. 588, 25 N. E.

a court of equity; it being insufficient that the vendor is entitled to damages only for the breach of the contract by the purchaser. *Webb v. Durrett*, — Tex. Civ. App. —, 136 S. W. 1189, and *Moss v. Wren*, 102 Tex. 567, 113 S. W. 847, 120 S. W. 847.

Likewise, a receipt executed by the broker only, acknowledging payment of a specific amount as earnest of the purchaser's intention to purchase the described property at a named price, and stating the terms of payment of the balance, and stipulating certain expenditures to be made by the owner in connection with the property, is not an enforceable contract of sale, entitling the broker to his commissions. *Henry v. Harker*, 61 Or. 276, 118 Pac. 205, 122 Pac. 298.

But, in *Barber v. Heade*, 30 Ohio C. C. 127, it is held that when an owner contracts in writing with a broker to sell a parcel of land, and the broker secures a purchaser who offers to take the land in accordance with such contract, and duly tenders the money to, and demands a deed from the owner, such broker is entitled to his commission, although no memorandum in writing of the contract between the broker and purchaser is signed by the purchaser.

So, where the purchaser was ready, willing, and able to buy, as evidenced by his tender of the purchase money and demand for a deed, the broker was entitled to his commissions, although the contract secured

from the purchaser was not enforceable by specific performance. *Goodmanson v. Rosenstein*, 144 Ill. App. 243.

Where a real estate agent makes a verbal contract for the sale of land, unenforceable under the statute of frauds, which his principal refuses to carry out, the agent is nevertheless entitled to his commissions, upon showing that the prospective purchaser was able, ready, and willing to comply with the mere verbal contract. *Fox v. Starr*, 106 Ill. App. 273.

To practically the same effect are *Scott v. Stuart*, 115 Ill. App. 335; *Carter v. Simpson*, 130 Ill. App. 328; *Caruthers v. Reeser*, 134 Ill. App. 370; *Watkins v. Thomas*, 141 Mo. App. 263, 124 S. W. 1063, which, however, do not represent an exhaustive search for this particular class of cases.

A broker is not obliged to have a binding written agreement with the would-be purchaser to be entitled to compensation where, by statute, sales of real estate are permitted by oral contract. *Bird v. Phillips*, 115 Iowa, 703, 87 N. W. 414.

Accordingly, it is held in *Lewis v. Simpson*, 122 Iowa, 663, 98 N. W. 508, that a broker employed to find a purchaser for and sell a farm is entitled to his commission when he finds one ready, willing, and able to buy, although the owner subsequently refuses to enter into a written contract, and revokes the agency. A. L. R.

710; *Barnard v. Monnot*, 33 How. Pr. 440; *O'Connor v. Semple*, 57 Wis. 243, 15 N. W. 136; *Potvin v. Curran*, 13 Neb. 302, 14 N. W. 400; *Lewis v. Simpson*, 122 Iowa, 663, 98 N. W. 508; *York v. Nash*, 42 Or. 321, 71 Pac. 59.

Ames, C., filed the following opinion.

The first error assigned and discussed is the action of the court in refusing a peremptory instruction; and the position of the plaintiff in error, hereinafter referred to as defendant, is thus stated in his brief: "We maintain, first, that a binding contract whereby the plaintiff was to sell property of the defendant as the defendant's agent was not proven at the trial; second, that, if the plaintiff was acting as the agent of the defendant in the sale of defendant's property, the interest which he would have acquired in the purchased property was antagonistic to the interest of his principal, and he is not entitled to any commission; third, that, if the plaintiff was in fact acting as the defendant's agent, he did not so consummate a sale of defendant's property to earn any commission, because he never brought together the owner and a purchaser who was ready, willing, and able to buy on the terms named by the owner." Of these in their order.

Upon the first proposition, it is sufficient to say that there was testimony reasonably tending to support the plaintiff's averment of employment, and this was submitted to the jury for determination under proper instructions, and their verdict will not therefore be disturbed.

Upon the second proposition, the testimony tended to show that the plaintiff was the agent of the defendant for the sale of land; that he was authorized to sell it for a net price to the defendant of \$6,500; that he was making no commission on the Muskogee; that the plaintiff negotiated a sale to certain purchasers for \$7,500; that he told the purchaser that this was the net price at which he had the land listed, and that he was making no commission on the sale; that he had an understanding with the purchasers that, after they bought, the land should be platted and sold as an addition to the city of Muskogee; that out of the proceeds of the sale the first \$9,000 was to be paid to the purchasers, and the excess to be divided between the plaintiff and the purchasers, provided he sold it out within a certain time. It is contended by the defendant that this is such a relation to the purchasers as to make the agent's interest antagonistic to that of the principal, and therefore to defeat his right to recover a commission. The law does not permit the agent of a vendor to become interested

as the purchaser, or as the agent of the purchaser, in the subject-matter of the agency, but requires of the agent the exercise of good faith toward the principal. *Plotner v. Chillson*, 21 Okla. 224, 129 Am. St. Rep. 776, 95 Pac. 775. In the case at bar, however, the property involved was listed for sale with the plaintiff at a fixed price, and he was permitted to retain as his commission all that he might receive in excess of that price, and we do not think under the facts of this case there was any such relation between the parties as to defeat a right which the plaintiff would otherwise have to recover his commission. The plaintiff was not the purchaser; he was not investing his money in the land, or in any way becoming liable for it. His only relation to the purchase was an understanding with the purchasers that he would put it on the market for them for a contingent commission, to be taken out of the proceeds after they had been reimbursed in full and allowed an agreed profit.

The next question presented is one which presents difficulty. Under the facts in this case, is the plaintiff entitled to recover? The verdict of the jury resolves all the disputed questions in favor of the plaintiff, and under this rule the facts are as follows: The defendant listed his land for sale with the plaintiffs at \$6,500 net, the plaintiff to have as his commission all that the land might sell for in excess of \$6,500. The plaintiff resided in Muskogee and the defendant in Holdenville. Once or twice prior to this transaction the plaintiff requested the defendant to come to Muskogee to close a sale which he had made. The defendant came, and the purchasers failed to buy. The plaintiff then negotiated this deal with the purchasers, and the testimony tended to show that they were ready, willing, and able to buy the land on the terms by which it was listed with the plaintiff. No written agreement was made and signed by the proposed purchasers, nor did they pay any part of the purchase money to the plaintiff or defendant. The plaintiff telephoned the defendant at Holdenville that he had purchasers, and for him to come to Muskogee, bringing the necessary papers to close the deal. The defendant said he was busy at the time, but would come over in a day or two. The next day he wrote the plaintiff that he had concluded not to sell for less than \$7,000 net. The plaintiff again tried to reach him on the telephone, but, when the defendant discovered that the calling party was Muskogee, he declined to talk. Nothing further was done until several months afterwards, when the defendant was in Muskogee and this suit was filed against

him. Upon this exact point there is a sharp conflict in the authorities, and the question is not settled in this state. Some of the cases hold that the broker is entitled to his commission for the sale of real estate, though the purchaser never enters into any enforceable contract of sale, if, as a matter of fact, he is willing to comply with the oral contract and the owner declines to do so, and that the agent's duty is ended when he produces a purchaser ready, willing, and able to buy. *Holden v. Starks*, 159 Mass. 503, 38 Am. St. Rep. 451, 34 N. E. 1069; *Carlin v. Lifur*, 2 Cal. App. 590, 84 Pac. 292. Other cases cited as supporting this position are *Staufer v. Linenthal*, 29 Ind. App. 305, 64 N. E. 643; *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; *Ford v. Easley*, 88 Iowa, 603, 55 N. W. 336. But a close examination discloses that these cases are not exactly in point. In the first one the owner and the purchaser entered into a written contract. In the second one the owner and the purchaser met in person, and the owner accepted him as a purchaser without requiring a written contract; while in the third the exact facts on this proposition are not disclosed by the opinion.

On the other hand, there is likewise eminent authority holding that it is necessary for the broker either to effectuate a sale, or, where the seller declines to proceed, to present him with a written agreement signed by the purchasers, which would become enforceable when signed by the seller, and take the negotiations for sale out of the statute of frauds. *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724; *Grindstaff v. Merchants' Invest. & Trust Co.* 61 Or. 310, 122 Pac. 46; *Bolton v. Coburn*, 78 Neb. 731, 111 N. W. 780. Other cases tending to support this rule, but not exactly in point, are *Hammond v. Crawford*, 14 C. C. A. 109, 35 U. S. App. 1, 66 Fed. 425; *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105; *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572. In *Wilson v. Mason*, 158 Ill. 310, 49 Am. St. Rep. 162, 42 N. E. 134, it is said: "Some of the cases go so far as to hold that the broker is not entitled to his commissions, unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee, and the payment of the purchase money by the latter; or unless it is proven that the sale is prevented by the fault of the vendor. Other cases seem to hold that the broker is entitled to his commissions when the minds of the vendor and purchaser meet on a verbal agreement for the sale by the one and the purchase by the other of the land. We are not inclined

to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding, and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale, and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and, in binding form, offers, to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of the sale, or purchase. *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Coleman v. Meade*, 13 Bush, 358; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Veazie v. Parker*, 72 Me. 443; *Willes v. Smith*, 77 Wis. 81, 45 N. W. 666; *Rice v. Mayo*, 107 Mass. 550; *Christensen v. Woolley*, 41 Mo. App. 53; *Love v. Owens*, 31 Mo. App. 501; *Greene v. Hollingshead*, 40 Ill. App. 195; *Short v. Millard*, 68 Ill. 292; *Kerfoot v. Steele*, 113 Ill. 610; *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174." The question is of great practical importance, and, there being eminent authority supporting both rules, we find some difficulty in reaching a conclusion. Our own cases only go to the extent of holding that "a real estate agent authorized to sell the land of another for a certain price for a certain compensation, or send the seller a buyer, has not earned his commission until he produces a purchaser ready, willing, and financially able to purchase the land upon the terms agreed upon." *Crutchfield v. Webster*, 31 Okla. 142, 120 Pac. 615; *Birch v. McNaught*, 23 Okla. 634, 101 Pac. 1049. But this question was not involved in either of those cases. We are inclined to believe that the weight of authority, as well as the better reason, supports the rule that, in order to recover his commission, the real estate agent must produce a purchaser who is ready, willing, and able to buy, and that the evidence of this fact must be such as would be recognized in a court of justice. The sale of real estate is an important

step, which the law requires to be taken in writing, and it is explicitly provided that no contract or agreement for the sale of real estate shall be valid unless it is in writing. These safeguards are designed to prevent fraud, and we are inclined to believe that the rule we adopt will have a tendency to prevent fraud, and will not work any hardship in a just case. If the real estate agent has a purchaser who is ready, willing, and able to buy, it will not be difficult for him to have such purchaser sign an agreement to buy, which will become a valid, binding, and enforceable contract as against the purchaser. On the other hand, if the real estate agent merely procures a man who says he is willing to buy, his statement does not bind him, and within legal contemplation he has done nothing which the law recognizes. The best evidence of his being willing to buy is his written agreement to do so. In fact, his written agreement is the only thing which can be enforced against him, and his mere word of mouth that he is willing to buy would not be recognized in an action against him to compel specific performance. It would not even be competent evidence as tending to show that he had agreed to buy. In the case at bar the defendant had made one or two trips to Muskogee on previous occasions upon the plaintiff's advice that he had a purchaser for his property, and, when he got there, the purchaser refused to proceed further, and the defendant was helpless, whereas, if the plaintiff had required of the proposed purchaser his signature to an agreement which would be binding upon him, the purchaser would either have refused to sign, and thereby saved the defendant the expense of the trip, or he would have taken the property when the defendant appeared. In the case at bar the plaintiff testified that the defendant was still willing to sell, but wanted to raise his price from \$6,500 to \$7,000, and that the purchaser had agreed to buy for \$7,500, and that he had an agreement with them by which he was to plat the land as a townsite addition and sell it off on a basis by which he expected to realize further profit. He therefore, on the defendant's new offer, had a commission of \$500 for making the sale, and the prospect of profit by platting the land as an addition, and yet he did not secure from the purchasers any part payment of the purchase price, or any written agreement to buy the land, nor did he seek out the defendant for the purpose of urging the sale, but let the whole matter drop, and waited some months until he saw the defendant in Muskogee, at which time he sued him.

We believe the rule which we adopt will
46 L.R.A. (N.S.)

have a tendency to require greater care and system in the transaction of the real estate business, will have a tendency to prevent frauds, and will not often prevent the recovery of a commission which is really earned.

The case should be reversed and remanded, with instructions to proceed further in accordance with this opinion.

Per Curiam:

Adopted in whole.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

VILLAGE OF CHARLOTTE, Appt.,

v.

JOHN M. KEON, Respnt.

(207 N. Y. 346, 100 N. E. 1116.)

Set-off — action to enforce tax — applicability.

A statute permitting taxes to be collected by suit, as upon contract, does not change the quality of the tax so as to make applicable a statute permitting set-off in actions upon contract.

(February 11, 1913.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Monroe County Court which affirmed a judgment of a Justice of the Peace allowing a set-off in an action brought to recover taxes alleged to be due and unpaid. Reversed.

The facts are stated in the opinion.

Mr. Fred H. Baker, for appellant:

The subject-matter of plaintiff's complaint, for which the action was brought to recover, is a tax, which is not a debt nor a contract, but is an impost, not founded on contract or collectable by action, except where there is express statutory authority.

Rochester v. Gleichauf, 40 Misc. 446, 82 N. Y. Supp. 750; Cooley, Taxn. 2d ed. 16; New York v. McLean, 57 App. Div. 604, 68 N. Y. Supp. 606; Camden v. Allen, 26 N. J. L. 398; Augusta v. North, 57 Me. 392, 2 Am. Rep. 55; Hibbard v. Clark, 56 N. H. 155, 22 Am. Rep. 432.

Mr. Joseph M. Feely, for respondent:

A tax is the social debt, resting in implied contract.

Note. — As to right of set-off in action for taxes, see cases cited at pages 382 et seq. of the note to State v. Arkansas Brick & Mfg. Co. 33 L.R.A. (N.S.) 376.

Edes v. Boardman, 58 N. H. 585; *Mason v. Belfast Hotel Co.* 89 Me. 384, 36 Atl. 624; *Mariner v. Milwaukee*, 146 Wis. 605, 131 N. W. 442; *Lexington v. Wilson*, 118 Ky. 221, 80 S. W. 811.

Where a statute allows an action to recover a tax, "there is no distinction between the claim for taxes and a debt which could be recovered in a personal action." *Re Babcock*, 52 Hun, 142, 4 N. Y. Supp. 903, affirmed in 115 N. Y. 450, 22 N. E. 263; *Seabury v. Bowen*, 3 Bradf. 207; *Hone v. Lockman*, 4 Redf. 64; *Litchfield v. Vernon*, 41 N. Y. 123; *Bowe v. Jenkins*, 69 Hun, 458, 23 N. Y. Supp. 548; *Torrey v. Willard*, 55 Hun, 78, 8 N. Y. Supp. 392.

The tax was made a contract by statute.

Davis v. State, 119 Ind. 555, 22 N. E. 9.

By limiting the action to the known form of one upon contract, the intention of the legislature was to limit the procedure therein to the contractual forms, and to subject the village to all the incidents of actions upon contract,—among which are counterclaims.

United States v. Lee, 106 U. S. 213, 27 L. ed. 179, 1 Sup. Ct. Rep. 240; *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482; *Wolcott v. Sullivan*, 1 Edw. Ch. 403; *Wickham v. Weil*, 43 N. Y. S. R. 155, 17 N. Y. Supp. 518; *Bien v. Freund*, 26 App. Div. 203, 49 N. Y. Supp. 971.

Actionable taxes are subject to counterclaim.

Taylor v. New York, 82 N. Y. 25; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432; *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432; *Louisville & N. R. Co. v. Com.* 17 Ky. L. Rep. 136, 30 S. W. 624.

Cuddeback, J., delivered the opinion of the court:

The plaintiff is a municipal corporation organized under the village law of the state. The defendant owns land within the village, for which he has been assessed and taxed in the annual tax levy. This action was brought in justice's court to recover the tax. The defendant by his answer alleged that the tax was illegal. The answer also contained two counterclaims based upon contract. The justice rendered judgment, dismissing the complaint as to the tax and awarding judgment in favor of the defendant upon counterclaims. The judgment of the justice has been affirmed by the county court and by the appellate division of the supreme court. The appellate division has certified that in its opinion a question of law is involved in the action which ought to be reviewed by the court of appeals.

The question to be considered is whether a counterclaim against a village can be sus-

tained in an action brought to recover a tax. The village law (Consol. Laws, chap. 64) provides the usual remedies of levy and sale for the collection of a tax, and in § 126 further provides as follows: "After the lapse of thirty days from the return of the collector, an action may be maintained, as upon contract, by the village, to recover the amount of an unpaid tax. . . ." But for this statutory authority the village could not maintain an action at law to collect the tax. *Rochester v. Bloss*, 185 N. Y. 42, 6 L.R.A.(N.S.) 696, 77 N. E. 794, 7 Ann. Cas. 15. It is argued on behalf of the defendant that the statute also opens the door to the counterclaims pleaded.

The court has reached the opposite conclusion. The obligation of the tax does not rest on contract. It is a statutory liability imposed upon all the inhabitants of the state defined as taxable, to the end that they may contribute their just share to the expenses of government. *Rochester v. Bloss*, supra. The legislature did not change the nature of the obligation by providing that the village might collect the tax in an action "as upon contract." The intention was to provide an additional and convenient remedy for enforcing the tax. In some municipal charters it has been provided that taxes upon land may be collected by foreclosure of the tax lien and a sale of the land through an action in equity, as the lien of a mortgage is foreclosed; but with regard to village taxes the legislature gave an action at law in which the judgment may be enforced by execution. If the quality of the tax was not changed by § 126 of the village law, then the defendant's counterclaim cannot be allowed. Section 501 of the Code of Civil Procedure provides that in an action upon contract the defendant may set up in his answer as a counterclaim any other cause of action on contract. This is not such a case. It is the substance of the plaintiff's cause of action, and not the form of the action, which determines the right of set-off, and the plaintiff's cause of action is not upon contract.

But, passing all questions which rest merely upon a strict or liberal construction of the statutes, the reason why a counterclaim cannot be set up against a tax will be found to lie much deeper. The reason will be found in the village law itself. The amount of the annual tax levy in villages, and the various purposes for which taxes are imposed, are fixed and defined in advance of the levy, and the money raised must be expended for the purposes so defined. If the taxpayer can properly refuse to pay his tax when called upon by the collector, because he has a claim for services against the village which is not included in

the tax levy, it is plain that some legitimate and necessary village expenditure must be curtailed. If the taxpayer's claim is disputed, the collection of the tax must await and abide the result of a lawsuit, and meanwhile the financial affairs of the village will be thrown into great confusion.

Therefore, public policy requires that taxes be paid, and that claims against the village be collected in independent proceedings. If such claims are admitted by the village trustees, they may be included in the tax levy. If disputed, the claims must be reduced to judgment and so collected.

The general rule prevailing throughout the United States is that taxes are not subject to counterclaim or set-off on the part of the taxpayer. See cases cited in note, 34 Cyc. 656. A much plainer declaration by the legislature than is found in § 126 of the village law should be required before it is held that a different rule exists in this state with regard to any tax whatsoever.

The judgment below should be reversed, and judgment ordered dismissing the plaintiff's complaint and the defendant's counterclaim, but with costs to the plaintiff appellant in the Appellate Division and in this court.

Cullen, Ch. J., and Gray, Werner, Chase, Collin, and Miller, JJ., concur.

Motion for reargument denied.

SOUTH CAROLINA SUPREME COURT.

H. R. BLACK et al., Respts.,

v.

ARTHUR O. SIMPSON, Appt.

(— S. C. —, 77 S. E. 1023.)

Tender — necessity — fraudulent purchase of stock — price.

1. Tender of the amount received is not

Note. — *Joinder of stockholders in suit against officer or director based upon transactions inter se.*

It is not intended to include herein cases involving the right of stockholders to join in an action with regard to dealings between the corporation and an officer or officers, or with regard to any rights which the corporation may have against an officer because of his misfeasance or nonfeasance in office, or any other claim of the stockholders arising through the corporation, but, as indicated by the title, only cases are included which involve dealings between stockholders and an officer or officers of the corporation.

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a condition precedent to the recovery by a stockholder of a corporation, from a director who fraudulently procures the stock for less than it is worth, of the balance of its true value.

Corporation — directors — trustee for stockholder.

2. A director and manager of a corporation is a trustee for stockholders.

Parties — joinders — stockholders — breach of trust by director.

3. Stockholders of a corporation who have been induced by fraud to part with their stock to a director at less than its value may join in a suit to compel him to account for the profit made by him in the transaction, where the statute provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs.

(Fraser, J., dissents in part.)

(April 14, 1913.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Spartanburg County overruling his demurrer to a complaint filed to hold defendant liable for profits in a transaction by which he purchased corporate stock from plaintiffs. Affirmed.

The facts are stated in the opinion.

Messrs. Bomar & Osborne, for appellant:

If, after the discovery of the fraud, one party still avails himself of the benefit of the contract, or permits the other to proceed with the execution of it, he will thereby be held to have waived the tort and affirmed the contract.

M'Corkle v. Doby, 1 Strobb. L. 396, 47 Am. Dec. 560; Whittle v. Jones, 79 S. C. 208, 60 S. E. 522; 20 Cyc. 87; 14 Am. & Eng. Enc. Law, 2d ed. 162.

If there is any cause of action stated, the complaint sets forth a cause of action separate and distinct in favor of each of the plaintiffs, and they cannot be united in one action.

The holding of BLACK v. SIMPSON, that a joinder of plaintiffs (individual stockholders) is proper in an action for damages for fraud based upon false representations as to the condition of the corporation, by means of which the individual stock of the several plaintiffs is secured at a price much below its real value, finds support, in part at least, in the holding of Bradley v. Bradley, 165 N. Y. 183, 58 N. E. 887. In this case it is conceded that if a complaint by several stockholders against officers of the corporation for fraud in inducing a sale of the stock of the plaintiffs to such officers at a price much below its real value was at common law for the recovery of money, the demurrer to the complaint on the ground

Hellams v. Switzer, 24 S. C. 40; Edwards v. Sartor, 1 S. C. 269; Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 247; Schulenberg-Boeckeler Lumber Co. v. Hayward, 20 Fed. 425; Walker v. Powers, 104 U. S. 248, 26 L. ed. 731; Bouton v. Brooklyn, 15 Barb. 375; Hill v. Kensington, 1 Pars. Sel. Eq. Cas. 501; Chester v. Halliard, 36 N. J. Eq. 313, 34 N. J. Eq. 341; State use of District No. 11 v. Ellis, 10 Ohio, 456; Tate v. Ohio & M. R. Co. 10 Ind. 174, 71 Am. Dec. 309; Newcomb v. Horton, 18 Wis. 566; Woodbury v. Delosa, 65 Barb. 501; Gray v. Rothchilds, 112 N. Y. 668, 19 N. E. 847; Frear v. Bryan, 12 Ind. 343; American Plate Glass Co. v. Nicoson, 34 Ind. App. 643; 73 N. E. 625; Brunner v. Bay City, 46 Mich. 236, 9 N. W. 263; Durfee v. Abbott, 50 Mich. 479, 15 N. W. 559; Barber v. Vernon Twp. 63 Mich. 516, 30 N. W. 175; Winslow v. Jenness, 64 Mich. 84, 30 N. W. 905; Governor use of Moore v. Hicks, 12 Ga. 189; Shoemaker v. Grant County, 36 Ind. 175; Bort v. Yaw, 46 Iowa, 323; Independent School Dist. v. Independent School Dist. 50 Iowa, 322; Pelly v. Bowyer, 7 Bush, 513; Berkshire v. Shultz, 25 Ind. 523; Boshier v. Richmond & H. Land Co. 89 Va. 455, 37

Am. St. Rep. 882, 16 S. E. 360; Rader v. Bristol Land Co. 94 Va. 766, 27 S. E. 591.

It was necessary to allege a tender by the plaintiffs to the defendant of the amounts paid them upon the sale of stock.

Levister v. Southern R. Co. 56 S. C. 513, 35 S. E. 207; Riggs v. Home Mut. Fire Protective Asso. 61 S. C. 455, 39 S. E. 614; Kennerty v. Etiwan Phosphate Co. 17 S. C. 411, 43 Am. Rep. 607; White v. Hewitt, 86 S. C. 584, 68 S. E. 820; DuPont v. DuBos, 52 S. C. 252, 29 S. E. 665.

The trust relationship does not extend to the director's dealings with the individual stockholders, and he is at liberty to deal with the stockholders as freely as he might with a stranger in regard to purchasing stock.

2 Thomp. Corp. § 2721; Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; Tippecanoe County v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Deaderick v. Wilson, 8 Baxt. 108; Carpenter v. Danforth, 52 Barb. 581; Gillett v. Bowen, 23 Fed. 625; Hooker v. Midland Steel Co. 215 Ill. 444, 106 Am. St. Rep. 175, 74 N. E. 445; Trisconi v. Winship, 43 La. Ann. 45, 26 Am. St. Rep. 175, 9 So. 29; 10 Cyc. 796; 21 Am. & Eng. Enc. Law, 898; Crowell

of misjoinder of plaintiffs would be well taken, since neither plaintiff has any pecuniary interest in the stock of the other, nor any interest in the damages sustained by the other. It is, however, pointed out that the action is in equity to rescind the contract of sale which the defendant induced plaintiffs to make of all the shares of capital stock held separately by each, by a fraud ingeniously contrived with the design and to the end that both should be misled, and hence is joint in operation and effect. And it is held that a joinder of parties plaintiff under such circumstances is proper where the complaint shows that, although the plaintiffs severally owned their quota of shares, they nevertheless acted in concert respecting them and the interests represented by them, and were, by the same fraud of the defendant, induced to act in concert in selling their stock to him. The court reasoned that the defendant baited and set one trap for both, and caught both in it. The wrong of the defendant destroyed their unity of action as owners of the stock, and it is agreeable to equity that the plaintiffs should be extricated together, and be permitted to act together in rescinding the sale and in reinstating themselves in their former position, since the fraud alleged is of that single character and bifold or manifold effect that, in order to present its full scope, both causes of action should be united; and also, in order to avoid two actions, equity should take cognizance of the fraud in one action and dispose of it once for all, to the relief of both 46 L.R.A. (N.S.)

parties to the action, whose like interests have been in like manner injured by it.

Without discussing this point, Austin v. Murdock, 127 N. C. 454, 37 S. E. 478, sustains a joint action by several stockholders of a corporation for damages for fraud and deceit in inducing them to subscribe for the stock.

But see Deaderick v. Wilson, 8 Baxt. 108, holding that several stockholders cannot join in an action against officers and directors of a corporation to recover damages severally sustained by them through a sale to such officers and directors of their stock, although it is alleged that such sales were procured through a conspiracy of such officers and directors to speculate in the stock owned by the complainants to their damage, and that, in carrying out such conspiracy, such officers and directors availed themselves of their superior knowledge, information, and power, and other advantages incident to their position as such officers and directors, and as trustees of the stockholders, to carry such scheme into execution and procure such stockholders to transfer to them their shares of stock at prices far below their par value, and far below the prices their superior information enabled them to foresee such shares would command. While the question of misjoinder of parties plaintiff was raised, the court did not pass upon it, but disposed of the case on the ground that the action was not maintainable on the theory of any trust or fiduciary relation existing between the officers of a corporation and the stockholders

v. Jackson, 53 N. J. L. 656, 23 Atl. 427; O'Neill v. Ternes, 32 Wash. 528, 73 Pac. 696.

Messrs. Johnson, Nash, & Daniel and Sanders & DePass, for respondents:

All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs.

Code § 138; Stallings v. Barrett, 26 S. C. 478, 2 S. E. 483; Tucker v. Tucker, 13 S. C. 318, note; McCorkle v. Williams, 43 S. C. 66, 20 S. E. 744; Wagner v. Sanders, 49 S. C. 192, 27 S. E. 68; Bliss, Code Pl. § 73; 15 Enc. Pl. & Pr. 707; 30 Cyc. 44.

When one is induced by fraud or misrepresentation to convey away his property, he is not required to return the property received as a condition precedent to bringing an action to set aside the fraudulent deed.

Dupont v. DuBos, 52 S. C. 244, 29 S. E. 665; White v. Hewitt, 86 S. C. 576, 68 S. E. 820.

Directors and managing officers of the corporation are quasi trustees for the stockholders.

Stewart v. Harris, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873; 2 Pom. Eq. Jur. 2d ed. § 1090; Pearson v. Concord R. Corp. 62

thereof, in so far as concerned dealings between the two with reference to their stock. On this point it is asserted that the officers and directors of a corporation are not trustees for the stockholders or individual owners of the stock in such a sense as to forbid their purchasing shares of stock owned by individual stockholders, except under the stringent rules that govern as between trustee and beneficiary, or as between principal and agent, or attorney and client.

The foregoing case also presented a question of substantive law as to the duties and liabilities of officers of a corporation in dealing with stockholders with reference to the stock of the latter. This question is not covered by this note. In general, however it may be said that there is a conflict among the cases upon this question of duty as affording a ground for charging the directors of a corporation with a constructive fraud in purchasing shares of stock from stockholders without disclosing facts peculiarly within their knowledge enhancing the value of the stock. As to this point, see note appended to Strong v. Repide, 213 U. S. 419, 53 L. ed. 853, 29 Sup. Ct. Rep. 521.

While, in the following cases, the complaint was not based upon a transaction between officers and directors of an association and the stockholders, it is believed the cases themselves are of sufficient value upon this question to justify a reference to them. Thus, in Loewenstein v. Diamond Soda Water Mfg. Co. 94 App. Div. 383, 88 N. Y. Supp. 313, although not necessary to the opinion, it is asserted that stockhold-

N. H. 537, 13 Am. St. Rep. 590; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; 10 Cyc. 787.

Woods, J., delivered the opinion of the court:

The appeal is from an order of the circuit judge overruling defendant's demurrer to the complaint.

For the purposes of this discussion, the material facts set out in the complaint may be stated in few words. The defendant, Arthur O. Simpson, was a director and general manager of the Farmers' Fertilizer Company, in which the plaintiffs were shareholders. The defendant, while occupying this trust relation to the plaintiffs, conceived and entered upon a scheme of acquiring the entire corporate assets at much less than their actual value, by representing to each of the plaintiffs that the corporation was not prosperous, but financially embarrassed, and thus having assigned to him the shares of each of the plaintiffs at much less than their real value. The defendant successfully carried out his scheme by means of the false representations to the plaintiffs as to the condition of the corporation and the value of its property; and thus, in breach

ers owning stock in severalty cannot join in an action to recover damages they may have sustained individually through the depreciation in the value of their stock caused by wrongful acts of the defendant officers of the corporation.

And in Cazeaux v. Mali, 25 Barb. 578, in holding that an injury to shares of stock in a corporation caused by a fraudulent overissue of stock by the directors renders the latter liable to the stockholders, and any stockholder may maintain an action against the directors to recover damages for the injury without joining other stockholders. It is said that fraudulent acts by the defendants which have made the stock to the plaintiff valueless to him constitute an injury which is peculiar to the plaintiff as regards the stock owned by him, hence he cannot join the other stockholders with him, because they do not own the shares of their stock jointly, but separately, each owning his own shares separately and each sustaining his separate loss on his own stock. To the same effect, see Mead v. Mali, 15 How. Pr. 347.

However, in Wells v. Jewett, 11 How. Pr. 242, an action based apparently upon the same state of facts, it is said that the stockholders have a common interest and are all affected in the same proportionate degree according to their respective shares of stock, and hence it is proper that they join in an action for fraud in inducing the purchase of the stock by the plaintiff, and also for a fraudulent overissue of the stock.

A. G. S.

of his trust, induced the plaintiffs and other shareholders to sell him their stock. After thus acquiring all, or nearly all, the shares of stock, he sold "the stock, franchises, real estate, buildings, and machinery" at much more than he had paid the shareholders, to his great profit, and to the great loss of the plaintiffs.

The grounds of demurrer to the complaint are as follows:

"First. Upon the ground that the same does not state facts sufficient to constitute a cause of action, in that it fails to state facts which, if true, constitute a joint cause of action in behalf of the plaintiffs against the defendant, and, if it states any cause of action at all, states a separate and distinct cause of action in favor of each of the plaintiffs against the defendant, it being submitted that such separate and distinct causes of action do not constitute a joint cause of action, and cannot be joined in one cause of action.

"Second. Upon the further ground that the complaint fails to allege any facts showing that the plaintiffs, or any of them, have ever rescinded, or offered to rescind, the several contracts whereby the defendant purchased from several parties all stock in the Farmers' Fertilizer Company, and fails to allege any tender by the plaintiffs, or any of them, to the defendant of the amounts paid to the several plaintiffs by the defendant for the shares of stock purchased from each of them, it being submitted that such allegations are necessary and prerequisite to the maintenance of this action."

Considering the second and less important ground first, it is perfectly clear that tender by each plaintiff of the amount received for his stock was not a necessary condition of bringing an action of this character. The action is not for rescission. Indeed, the complaint alleges that the property has passed from the ownership and control of the defendant.

But, even if the property were still in the hands of the defendant, it is elementary that the plaintiffs could either tender back the price paid and demand a rescission, or they could elect to let their transfer to the defendant stand, and bring their action to require him to account for the true value of the property acquired at less than its true value by false representation in breach of his trust. Examination of their complaint shows that this last is the course the plaintiffs have elected to pursue, and that the action is one to require the defendant, as their trustee, to account to them for profit obtained by the acquisition and resale of property through a breach of his trust. *Whittle v. Jones*, 79 S. C. 46 L.R.A. (N.S.)

205, 60 S. E. 522; 20 Cyc. 87, and cases cited.

The second question, whether the plaintiffs can sue jointly to require an accounting from the defendant, is one of greater difficulty. The argument in support of the demurrer on this point has been strongly presented, but it is plausible rather than sound. If the transactions alleged in the complaint amounted to nothing more than sales whereby a stranger had obtained from each of the plaintiffs separately a transfer of his stock by false representations, it would be true that each stockholder should maintain a separate suit in his own behalf for the difference between the real value of the stock and the price paid. But this case is much more than separate transactions of that sort between strangers. The defendant, as director and manager, was trustee, not only of the corporation, but for all the stockholders. 10 Cyc. 787; 2 Pom. Eq. Jur. § 1090. His duty was to manage the corporate property for the benefit of the stockholders; and in the performance of that duty he was chargeable with the utmost good faith. It was a breach of his trust to all of the stockholders to use any means to acquire for himself the corporate property, except in the open after giving to the stockholders, fully and candidly, all material information he possessed as to its condition and value. Yet, according to the complaint, he entered upon a scheme to control the corporation and acquire the corporate property for his own advantage, by positive concealment as to the real condition of the corporation and the value of its property. Each separate purchase of the shares of a stockholder was but one step in the general scheme to defraud the stockholders, as a class, consummated by the acquisition of all, or nearly all, of the stock and the subsequent sale of the corporate property at a great profit.

Looking at the complaint in this its full scope, it seems to me clear, both on reason and authority, that the plaintiffs as *cestuis que trust* may maintain a joint action against the common trustee for an accounting for the profits made by him in breach of his trust at their expense, each being charged in the accounting with the amount received by him from the trustee in the course of the execution of the fraudulent scheme. The subject of the action is the consummated scheme to defraud the stockholders, the *cestuis que trust* of the defendant; and all the plaintiffs are interested in the relief of an accounting. Hence the joinder is allowed by § 106 of the Code of Procedure, which provides that "all persons having an interest in the subject of the ac-

tion, and in obtaining the relief demanded, may be joined as plaintiffs."

Turning to the authorities the test in determining when there may be a joinder of plaintiffs seems to be whether there is a wrong common to all, or, stated differently, whether all are interested in the matter or thing concerning which the action is brought. *Hellams v. Switzer*, 24 S. C. 40; *Bliss*, Code Pl. § 76. That the consummation of the defendant's scheme to acquire the property in breach of his trust was a wrong common to all the stockholders, and a matter or thing in which they were all interested, seems evident. In this the case is distinguished from the *Hellams* Case, just cited; for that was an action by persons who owned separate tracts of land for damages, and an injunction against the defendant who had dammed up a stream. There was no common interest, no trust relation common to all the plaintiffs, no wrong common to all; and therefore the court held the joint action could not be maintained. It is well settled that several distributees entitled to unequal portions of an estate, after receiving unequal payments, may unite in an action against an administrator to require him to account for breaches of his trust, and pay over to each his share, though the shares be unequal. *Stallings v. Barrett*, 26 S. C. 478, 2 S. E. 483; *McCorkle v. Williams*, 43 S. C. 66, 20 S. E. 744; *Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68. The present case falls under the same principle.

The examination of the authorities leads to the conclusion that no inflexible rule on the subject of joinder of parties can be laid down, and that the provisions of the Code of Procedure on the subject must be allowed considerable flexibility to meet the requirements of justice and convenience in the cases as they arise. *Pom. Remedies*, §§ 257, 266; 16 Cyc. 198. This was so even under the strict rules of the old practice. "It is a favorite object of this court to prevent multiplicity of suits and variety of litigation. Furthermore, 'if the nature of the transaction' (says an approved author, *Adams's Eq.* 310) 'makes a single suit convenient, the objection of multifariousness in such cases will not be sustained.' In *Oliver v. Piatt*, 3 How. 333, 411, 11 L. ed. 622, 657, the court say: 'Where the interests of different parties are so complicated in different transactions that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious.' And again: 'There is no general rule by which to determine whether a bill, in such cases, is multifarious or not; but it must be left to the discretion of the court, under the circumstances of the case.' 46 L.R.A. (N.S.)

See also *Williams v. Neel*, 10 Rich. Eq. 338, 73 Am. Dec. 94." *Barkley v. Barkley*, 14 Rich. Eq. 12. In a case like this, where, according to the complaint, an officer of a corporation conceives and consummates a scheme to defraud the stockholders by deceiving them as to the value of the corporate property, and purchases the stock of each as a step in his scheme of fraudulent acquisition, it seems to us not only illogical, but most inconvenient and unjust, to require each stockholder to allege and prove the fraudulent scheme and the breach of trust in a separate action. In many corporations there are hundreds, and in some thousands, of stockholders, many of them having small holdings and residing at a distance from the corporate enterprise. To establish a rule which would deny to stockholders in such cases the right to unite in attacking such a breach of trust as is here alleged, and demanding an accounting by the trustee, would be a practical denial of justice.

For these reasons, judgment of the Circuit Court is affirmed.

Gary, Ch. J., and Watts, J., concur.

Fraser, J., dissenting:

I cannot concur in the opinion of the majority. The complaint in this action alleges that the plaintiffs were stockholders in the Farmers' Fertilizer Company, a corporation which owned valuable property. That the defendant was the general manager of the corporation, and as such had charge, control, and direction of its affairs, and knew the value of the stock. That the defendant conceived the idea of selling the property, and making a large profit for himself. That, in pursuance of this plan, he entered into negotiations with others for the sale of the franchises and property, but kept the knowledge to himself. That after ascertaining the true value of the property, and the price for which it could be sold, the defendant did not call the stockholders together, but went from individual to individual, and, concealing the value of the stock and the condition of the corporate affairs, and leading them to believe that the affairs of said corporation were in embarrassing condition, thereby induced the plaintiffs and other stockholders to sell their stock to him for much less than he knew it to be worth. That, after purchasing all or nearly all the stock, the defendant sold the property and franchise for a large sum, and at a much larger than the sum at which it was estimated in the purchase of said stock, and made large gains for himself, contrary to the obligation which he owed to the plaintiffs. The gains were the loss of the plain-

tiffs, and not an increase in market value. That the plaintiffs, in selling said stock to the defendant, relied upon his representations and good faith and defendant's knowledge arising from the position which he held as general manager of said corporation.

The plaintiffs brought suit on behalf of themselves and all others who would come in under these proceedings, and asked for an accounting, and a judgment for the difference between the value at which the stock was sold and the true value.

The defendant made a motion to make the complaint more definite and certain as to (a) unnamed plaintiffs; (b) unnamed purchasers; (c) separation of causes of action.

The defendant also demurred because they claimed (1) that there was no allegation of a joint cause of action; (2) that plaintiffs had not rescinded or offered to rescind the contract. The motion was heard before his Honor, Judge Gage, who overruled both motions, but ordered stricken from the complaint the words, "and those who were acting for or in conjunction with him." From this order the defendant appealed.

Exception 1: "Upon the ground that the same does not state facts sufficient to constitute a cause of action, in that it fails to state facts which, if true, constitute a joint cause of action in behalf of the plaintiffs against the defendant, and, if it states any cause of action at all, states a separate and distinct cause of action in favor of each of the plaintiffs against the defendant, it being submitted that such separate and distinct causes of action do not constitute a joint cause of action, and cannot be sued upon as a joint cause of action, and cannot be joined in one cause of action." In my opinion this exception ought to be sustained. There must be some joint interest. Here there is none. The sales were made by each individual for himself. Separate contracts of sale, and so far as the complaint shows may have been at different prices. They claimed no interest in the corporate property. This was a suit on twenty-two contracts, made with twenty-two different people, at different times, and each demanding, it may be, and depending on different evidence, a different money judgment. The plaintiffs are not associated in any way, and each ought to bring his separate action. In *Hellams v. Switzer*, 24 S. C. 40, there was an injury that rose from one cause, and yet this court required all the plaintiffs to be withdrawn except one. 15 Enc. Pl. & Pr. pp. 541, 542. "Where two or more persons have a separate interest and sustain a separate damage, they may and must sue separately, and cannot join, even though their several injuries were caused by the same 46 L.R.A. (N.S.)

act." The injury here was to the holding of stock, and the holding of stock is several. If two or more owned jointly a certain block of stock, of course, the joint owners must sue together. There is no allegation of joint ownership in the complaint.

It will be observed that the evils that rise from a multiplicity of suits are in no way avoided by the consolidation of suits here. A is not entitled to recover because there was fraud in the purchase from B. A may have been in urgent need of money, and willing to take less than the value in order to provide for his immediate necessities, and a misstatement was not required. It would be manifestly unfair to allow A to recover because of the fraud in the contract with B. The fraud in each of the twenty-two contracts must be proven, or he who fails to prove fraud ought to fail. This is not a case in which there was a fraudulent sale of the property of the corporation where the same act necessarily affected all. The same testimony that proved fraud as to B would prove the fraud as to the others. The small and distant stockholder has the same burden in the consolidated as in the separate suit in theory. In practice it will be found that proof in one case will inure to the benefit of all, and the wholesome protection provided by the exclusion of *res inter alios acta* will be denied the defendant. I do not see a single bond of union. The complaint does not even allege that the defendant now has the proceeds of sale and the plaintiffs are entitled to the share in the fund.

For these reasons I dissent. I agree with the majority as to the other exceptions.

Hydrick, J., concurs.

TENNESSEE SUPREME COURT.

MEMPHIS STREET RAILWAY COMPANY, Plff. in Err.,

v.

W. N. CAVINESS.

(— Tenn. —, 157 S. W. 63.)

Carriers — passenger — negligent injury — liability.

A city fireman carried free on a street

Note. — Degree of care owed to free passengers in absence of a stipulation upon the subject.

Earlier cases covering this question will be found in a note to *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A. (N.S.) 721. As was the case in that note, this note covers cases only where the injured passenger was rightfully on a common carrier's conveyance designed for the

car by way of courtesy may hold the company liable for injury inflicted upon him by the negligent operation of the car.

(May 31, 1913.)

ERROR to the Circuit Court for Shelby County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Roane Waring, for plaintiff in error:

One riding on a pass cannot recover except for negligence that can be called gross, wilful, reckless, or wanton.

Marshall v. Nashville R. Light Co. 118 Tenn. 254, 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 2 Ann. Cas. 675; Kirtland v. Montgomery, 1 Swan, 452; Coward v. East Tennessee, V. & G. R. Co. 16 Lea, 225, 57 Am. Rep. 226; Boering v. Chesapeake Beach R.

transportation of passengers under a valid pass, or authorized invitation or permission to ride, and does not extend to cases where he was on the conveyance without any invitation, or under an unauthorized invitation, or was fraudulently riding on a pass issued to another.

Nor does it include the liability of a carrier to passengers traveling on passes or contracts contrary to provisions of statute or Constitution. For such cases, see note to Bradburn v. Whatcom County R. & Light Co. 14 L.R.A.(N.S.) 526, and Southern P. Co. v. Schuyler, 43 L.R.A.(N.S.) 901.

Nor does it include cases involving care owed to one riding gratuitously upon a conveyance of a private carrier, such as logging roads. For such cases, see note to Harvey v. Deep River Logging Co. 12 L.R.A.(N.S.) 131.

Nor does it include cases where the transportation was because of some contract with the carrier, such as drovers accompanying shipment of cattle, express messengers, or postal mail clerks. For liability of railroad company for injuries received by postal clerks, see note to Cleveland, C. C. & St. L. R. Co. v. Ketcham, 19 L.R.A. 339.

For note as to rights of person riding on pass or contract for free passage, see note to Muldoon v. Seattle City R. Co. 22 L.R.A. 794.

The few reported cases found since the earlier note are in harmony with the rule laid down in the cases there collected.

Thus, in Southern R. Co. v. Decker, 5 Ga. App. 21, 82 S. E. 678, it was held that a railway company and its servants must use ordinary care to protect one who is riding upon a train by permission of the conductor, though it be gratuitously.

And in Wood v. Valdes, 4 Porto Rico Fed. Rep. 166, that a carrier owes a duty to 46 L.R.A.(N.S.)

Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515.

Messrs. Anderson & Crabtree, for defendant in error:

If the conduct of the defendant indicates or evinces a reckless disregard of the rights of others, then that conduct is grossly negligent.

Watermelen v. Fox River Electric R. & Power Co. 110 Wis. 153, 85 N. W. 663; Alabama G. S. R. Co. v. Hall, 105 Ala. 599, 17 So. 176; Trauerman v. Lippincott, 39 Mo. App. 478; Highland Ave. & Belt R. Co. v. Robinson, 125 Ala. 483, 28 So. 28; Memphis Street R. Co. v. Roe, 118 Tenn. 613, 102 S. W. 343; Marshall v. Nashville R. & Light Co. 118 Tenn. 260, 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675.

Negligence, whether ordinary or gross, is for the jury to determine.

Marshall v. Nashville R. & Light Co. 118 Tenn. 262, 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675; Illinois C. R. Co. v.

take reasonable care of one riding on a free pass. And to the same effect is Ryckman v. Hamilton G. & B. Electric R. Co. 10 Ont. L. Rep. 419, 4 Ann. Cas. 1126.

In Indianapolis Traction & Terminal Co. v. Klentschy, 167 Ind. 598, 79 N. E. 908, it was held that a carrier owes the same duty to a person carried gratuitously by its invitation as it does to a person who pays full fare. This was an action arising out of the same accident as that in the Lawson Case, to which the former note was attached.

But where a city fireman rides on the left-hand running board of an open car in direct violation of a rule of the company prohibiting anyone from riding in such place, and also in violation of the rule which required, as a condition of his free transportation, that he ride on the rear platform, the company owes him no duty, except to refrain from intentional wrongdoing toward him.

In Philadelphia & R. R. Co. v. Derby, 14 How. 486, 14 L. ed. 509, it was asserted that when a carrier undertakes to convey persons by the agency of steam, public policy and safety would require that it should be held to the greatest possible care and diligence, whether the consideration for the transportation be pecuniary or otherwise. And this principle was expressly reaffirmed in The New World v. King, 16 How. 469, 14 L. ed. 1019. These two cases were both actions involving injuries to gratuitous passengers,—the Derby Case being that of an injury to a stockholder riding at the invitation of the president of the railroad free and in the president's private car, and in the King Case, the passenger was a former employee of the boat, who was being carried free by permission of the captain, in accordance with the usual custom to grant free passage to such persons.

J. H. B.

Leiner, 202 Ill. 624, 95 Am. St. Rep. 270, 67 N. E. 398.

Regardless of the status of the plaintiff on the car, he was entitled to a recovery on the ground that the defendant was guilty of such gross negligence as indicated a conscious indifference to the rights of others.

Williams, J., delivered the opinion of the court:

The plaintiff below, W. N. Caviness, brought suit for personal injuries received while riding on a street car that collided with a wagon under circumstances showing, it is conceded by defendant company, negligence on the part of the motorman less in degree than gross and wilful negligence. Plaintiff was a member of the city fire department, and, under customary grant of that courtesy by the company, was riding free, without a pass, "on his uniform."

The company's defense is based upon certain language used by Judge Wilkes in the opinion in *Marshall v. Nashville R. & Light Co.* 118 Tenn. 254, 9 L.R.A.(N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675, which it is insisted holds or tends to hold that where, as here, no fare was paid for the passage, the relationship of common carrier and passenger is not to be deemed to have attached, and that the company would be liable only in event its gross or wilful negligence was established.

While, in the argument and reasoning of the opinion, language is used (in reference to cases quoted from, which relate to carriage of goods, rather than to carriage of passengers, and therefore not analogous) which may be confusing, yet that opinion is not to be construed as laying down the doctrine contended for by the counsel of the company. The decision in favor of the company sued in that case was based upon a provision of waiver in a pass held by Marshall, to the effect that he rode upon the cars of the company entirely at his own risk of injury.

As early as 1859 this court held against the contention of defendant company in the present case, in *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784; and nothing said in the Marshall Case was meant to indicate a departure from the rule there laid down.

In that earlier case it appeared that an engineer of the defendant company, on a private errand of his own while off duty, without previous grant of permission, got on a passenger train, and was injured in a collision while sitting in the baggage car. After stating that he was not to have applied to him the rules applicable as between master and servant, but was substantially 46 L.R.A.(N.S.)

in the attitude of a stranger, and that he had been received on the train without objection on the part of the conductor, the court said that the case was not affected by the fact that the plaintiff, at the time of the injury, was riding free, citing *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502.

The rule that payment of fare is not requisite to the establishment of the relation of passenger to a carrier, and that such a one, who is fairly accepted for transportation, may recover for want of ordinary care like a paying passenger, is buttressed by abundant authority. *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 87, 88, 48 N. E. 294, 4 Am. Neg. Rep. 48; *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A.(N.S.) 721, 143 Fed. 834, 74 C. C. A. 630, 6 Ann. Cas. 666, and notes; *Indianapolis Traction & Terminal Co. v. Klentschy*, 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869; 5 Am. & Eng. Enc. Law 2d ed. 507; 6 Cyc. 544.

Negligence on the part of the carrier being admitted, as indicated, the judgment of the Court of Civil Appeals is affirmed.

OKLAHOMA SUPREME COURT. (Division No. 1.)

H. C. REYNOLDS, Plff. in Err.,
v.
S. C. ANDERSON.

(— Okla. —, 132 Pac. 322.)

Broker — commissions — when earned.

1. A real estate agent, in order to recover commission for the sale of real estate, must produce a purchaser who is ready, willing, and able to buy, upon the terms and conditions agreed upon.

Same — written contract to purchase.

2. The only legal evidence of his intent to comply with those conditions is his written agreement to do so. Hence a real estate agent is not entitled to recover a commission for the sale of real estate, unless he has also (in addition to the foregoing requirements) procured and presented to the seller, from the purchaser, who is ready, willing, and able to buy, an enforceable contract in writing, binding him to take the land according to the terms and conditions agreed upon.

(May 6, 1913.)

Headnotes by ROBERTSON, C.

Note. — As to necessity of securing written contract from purchaser to entitle real estate broker to commissions, see note to *Gilliland v. Jaynes*, ante, 129.

ERROR to the District Court for Oklahoma County to review a judgment in favor of defendant in an action brought to recover commissions for the sale of real estate. Reversed.

The facts are stated in the commissioner's opinion.

Mr. S. A. Horton, with Messrs. Harry White and Phillip E. Mann, for plaintiff in error:

To entitle him to a commission where no sale is actually consummated, a broker employed to find a purchaser, must either produce to the owner a customer who is able, ready and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase.

19 Cyc. 255; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415.

There never was a binding written contract with purchaser.

19 Cyc. 242; *Greusel v. Dean*, 98 Iowa, 405, 67 N. W. 275; *O'Neil v. Crain*, 67 Mo. 250; *Fougue v. Burgess*, 71 Mo. 389; *Hugbins v. Hearne*, 74 Mo. App. 86; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724; *Parmly v. Head*, 33 Ill. App. 134; *Kimberly v. Henderson*, 29 Md. 512; *Blankenship v. Ryerson*, 50 Ala. 426; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Lindsey v. Fay*, 119 Cal. 231, 51 Pac. 333; *Power v. Kane*, 5 Wis. 265; *Hoyt v. Shipherd*, 70 Ill. 309; *Gilliland v. Jaynes*, — Okla. —, ante, 129, 129 Pac. 8.

Defendant in error was an unsuccessful broker and is not entitled to a commission on the success of another broker.

19 Cyc. 261; *Goin v. Hess*, 102 Iowa, 140, 71 N. W. 218; *Latshaw v. Moore*, 53 Kan. 234, 36 Pac. 342; *Ward v. Fletcher*, 124 Mass. 224; *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299.

Mr. H. M. Carr for defendant in error.

Robertson, C., filed the following opinion:

This is an action by C. S. Anderson against H. C. Reynolds to recover commission alleged to be due for the sale of real estate. The petition charges that Anderson was a real estate agent living at Stratford, Oklahoma; that Reynolds owned a farm in Garvin county that he wanted to sell; that he listed the same with Anderson at \$85 per acre, or a total of \$12,350, and was to pay Anderson 5 per cent of the amount realized from the sale of the land when a sale had been made. Anderson charges that, immediately upon the listing of the farm with him, he proceeded to advertise the same in newspapers and by circulars; that in a few months he secured a buyer

for the land at the agreed price, drew a deed for the same, which was signed by defendant, but not by his wife, she refusing to sign it; that the prospective purchaser waited for two months for the wife to sign the deed, but that defendant failed and refused to deliver the deed with his wife's signature, but that he (Reynolds) subsequently sold the farm to another person; that by reason of his failure to complete the sale he became liable to plaintiff in the sum of \$617.50 as commission. To this petition defendant filed a general denial. The case was tried to a jury and resulted in a verdict for the plaintiff for the full amount sued for. The evidence shows that the defendant listed his farm by oral contract with the plaintiff as alleged in the petition, and that the plaintiff advertised the same and endeavored to secure a purchaser; that during the early fall of 1909 a real estate firm in Oklahoma City, by the name of Witt & Grubb, wrote to Anderson, the plaintiff, that they had a buyer for the farm, and asked him to divide the commission with them in case they furnished a purchaser, to which he agreed; that he also received a letter from the defendant, about this time in which he stated that he could sell the farm if Anderson would divide the commission with Witt & Grubb; that the purchase was to be made by a man named W. C. Kandt, who was negotiating for the farm through the firm of Witt & Grubb; that the defendant was to take a house and lot in Oklahoma City in trade and \$6,500 in addition; \$5,000 of which was to be in cash secured by a first mortgage on the farm, and the balance of \$1,500 to be secured to Reynolds by second mortgage on the farm.

It also appears that while Reynolds was in Stratford, about this time, he called on Anderson and talked the matter over with him, and Anderson drew up a deed for the land, and Reynolds signed the same and put the deed in his pocket with the evident intention of taking it to his wife and securing her signature. Reynolds and his wife were living apart during this time. The wife refused to sign the deed, leastwise Reynolds never delivered it to Kandt, and Kandt, after waiting for two months or more, notified Reynolds that on account of his failure to deliver the deed with his wife's signature that the deal was off. The evidence further shows that Anderson had nothing whatever to do with the trade; that he never saw Kandt and never had any correspondence with him; that Witt & Grubb negotiated the deal. Anderson claims his commission solely by reason of his oral contract to sell the farm; he does not claim to have made the sale, or to have produced

the purchaser, although he insists that he had the exclusive agency for the sale of the farm. It is further shown that after this Reynolds sold the land himself to another party. There was no contract in writing of any kind or character between the prospective purchaser, Kandt, and the owner, Reynolds. The amended petition was not challenged by motion or demurrer; no objection was made to the introduction of testimony thereunder, nor was there any request for an instructed verdict. The petition is barren of any allegation with reference to a written contract of purchase from Kandt, nor is it anywhere claimed by plaintiff that any such contract was entered into between Kandt and Reynolds, or that Kandt ever offered such a contract to Reynolds for his signature, or that any act of his (Kandt's) would excuse him from the provisions or requirements of the statute of frauds, or give Reynolds an opportunity to compel specific performance from him in case a deed had been offered to him for the farm.

Many alleged errors are raised and urged by counsel in their petition in error and brief, and each specification has been given careful consideration, and aside from one assignment, which will be noted hereafter, we do not think it necessary to give them any consideration, inasmuch as the disposition of the one referred to will effectually dispose of the case. The alleged error to which reference has been made may be considered under the first, second, third, fourth, or eighth assignment of error, and relates to the insufficiency of the allegations of the petition to state a cause of action, and the total failure of proof on the question of the existence of a binding or enforceable contract of sale between Reynolds, the owner, and Kandt, the alleged prospective purchaser. In fairness to the lower court it may be said that while this question was not presented at the trial, except inferentially, yet it is urged here by plaintiff in error.

The law on this point in this state had not then been determined; but, since the trial of this cause in the district court, this question has been presented to, considered, and passed upon by this court, and the law on this question settled, as may be seen by reference to the case of *Gilliland v. Jaynes*, — Okla. —, ante, 129, 129 Pac. 8. In that case, the facts of which are not wholly dissimilar to those in this, the court says: "We are inclined to believe that the weight of authority, as well as the better reason, supports the rule that, in order to recover his commission, the real estate agent must produce a purchaser who is ready, willing, and able to buy, and that the evi-

dence of this fact must be such as would be recognized in a court of justice. The sale of real estate is an important step, which the law requires to be taken in writing, and it is explicitly provided that no contract or agreement for the sale of real estate shall be valid unless it is in writing. These safeguards are designed to prevent fraud, and we are inclined to believe that the rule we adopt will have a tendency to prevent fraud, and will not work any hardship in a just case. If the real estate agent has a purchaser who is ready, willing, and able to buy, it will not be difficult for him to have such purchaser sign an agreement to buy, which will become a valid, binding, and enforceable contract as against the purchaser. On the other hand, if the real estate agent merely procures a man who says he is willing to buy, his statement does not bind him, and within legal contemplation he has done nothing which the law recognizes. The best evidence of his being willing to buy is his written agreement to do so. In fact, his written agreement is the only thing which can be enforced against him, and his mere word of mouth that he is willing to buy would not be recognized in an action against him to compel specific performance. It would not even be competent evidence as tending to show that he had agreed to buy."

It must not be forgotten that the record in this case shows that Witt & Grubb procured Kandt to make the offer of purchase; Anderson never saw or talked to Kandt; the contract between Anderson and Reynolds was for the sale of the premises, while the prospective purchaser furnished by Witt & Grubb depended on a trade for the same. To be sure it seems as though Reynolds was willing to make the trade, and as an incident showing such intent may be cited the fact that Anderson drew a deed from him to Kandt, which Reynolds signed, put it in his pocket, and took it away from Anderson's office ostensibly to secure his wife's signature thereto; but the signing of the deed was not conclusive evidence as to Reynolds' intention at that time, inasmuch as the deed was never delivered, and Kandt refused to accept the same without the signature of Reynold's wife. Under the authority of *Gilliland v. Jaynes*, supra, and the cases therein cited, there never was a complete consummation of the proposed contract between Reynolds and Kandt, and, of course, Anderson had no cause of action at the time this suit was instituted, even conceding that it was through his efforts that the parties were brought together. Kandt did nothing that would take his proposed agreement out of the statute of frauds, or give to Reynolds

a cause of action for specific performance against him. Before a cause of action existed in Anderson's favor and against Reynolds, it was the duty of Anderson, under the terms of his contract, to have secured a binding and enforceable contract in writing from Kandt, and to have presented the same to Reynolds, when, if he refused to accept such offer, a cause of action would have accrued, and Reynolds would have been liable for the commission. We need but refer to the most excellent reasons, given by Judge Ames, in *Gilliland v. Jaynes*, supra, for the necessity of these requirements, and the present case is but an emphasis for the rule there announced. Under Anderson's claims in the present case he insists on a commission for the sale of the farm when he had, so far as we are able to see, absolutely nothing to do with procuring the prospective purchaser; his contract with Reynolds was oral, and its terms cannot be ascertained, for Anderson claimed it gave to him the exclusive right to sell the farm, while Reynolds claimed the very opposite. This question was not decided by the general verdict of the jury; it was not an issue in the case, was not alleged in the petition, or treated in any manner by the court's instructions. So, too, there is a diversity of opinion between Reynolds and the other parties as to the terms of the proposed trade with Kandt. Were it not for the law as announced in the case above, we might very properly leave all these collateral questions for the determination of the jury; but when it is the law that these contracts shall be in writing in order, among other things, that the intent of the parties may be ascertained without doubt or speculation for the very purpose of preventing misunderstandings and attendant lawsuits, and no compliance with such law has been attempted by the parties, it is, and should be, the policy of the courts to refuse to interfere in their quarrel, but to leave them where they were before this action was begun. It would impose no hardship on any one to comply with the requirements of the law as hereinabove announced, and, as is evidenced by the instant case, it would prevent unnecessary litigation and trouble.

It has been suggested that the rule in this state applicable to this question has been settled by the case of *Carson v. Vance*, — Okla. —, 130 Pac. 946, and that the doctrine announced in *Gilliland v. Jaynes*, supra, is in conflict with that holding and with the holding of this court in former decisions on the subject; but a careful reading of that case, together with the other Oklahoma cases referred to therein, shows that there is no conflict, either real or apparent. Thus in the *Carson v. Vance* Case, 46 L.R.A. (N.S.)

the question of a valid, binding, and enforceable contract between the seller and prospective purchaser was not raised, nor was it in any wise considered by the court. It is presumed that the contract therein referred to as having been made and entered into by the parties was a legal, binding, and enforceable contract, such as is required by the statute of frauds, in connection with the sale of real estate; there is nothing in the record to indicate the contrary; the court below must have found it to be such, and by the failure of counsel in that case to urge its invalidity, and the failure of the court to treat, or in any wise consider, the same, is conclusive evidence to our mind that there was no such question in that case, and, not being in the case, it was, of course, unnecessary to, and the court did not, consider or decide the same. In that case, the question considered was: "When has a real estate broker earned his commission?" The court said in answer: "A real estate agent authorized to sell land for another for a stated price for a certain compensation has earned his commission when he produces a purchaser ready, willing, and financially able to purchase the land upon the terms and conditions agreed upon." The law provides that one of these terms or conditions, which every contract for the sale of real estate must contain, is that the parties thereto shall express their intent in a binding, enforceable contract in writing. The reasons for this salutary provision of statute are so numerous that it is unnecessary to here set them out. There was no binding contract in the case at bar between the prospective purchaser and the seller, and therefore the agent was not entitled, under the pleadings and the evidence, to recover. This is a requirement of law that cannot be waived impliedly by either of the parties, although we do not attempt to say that a seller might not in any case be estopped by his actions from availing himself of the protection of the law in this regard. But of this we venture no opinion at this time, contenting ourselves with the observation that no such estoppel exists in this case. There are many other, but minor, questions raised in the petition in error, but their consideration is rendered unnecessary by the above conclusion. We feel that the rule announced in *Gilliland v. Jaynes*, supra, not only states the law as it is, but as it should be.

Entertaining these views, it follows that the judgment of the lower court should be reversed.

Per Curiam:
Adopted in whole,

UNITED STATES SUPREME COURT.

CHARLES C. BURLINGHAM et al., Trustees, etc., of Thomas A. McIntyre et al., Appts.,

v.

CHARLES M. CROUSE.

(228 U. S. 459, 57 L. ed. 920, 33 Sup. Ct. Rep. 564.)

Bankruptcy — assets — life insurance — cash surrender value.

1. Policies of life insurance on the life of the bankrupt which do not have a cash surrender value available to the bankrupt at the time of bankruptcy as a cash asset do not pass to the trustee in bankruptcy, under the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541), § 70a, subd. 5, which, though investing the trustee with the title to property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judi-

cial process against him, provides that a bankrupt, when the cash surrender value of insurance policies having such value has been ascertained, may pay or secure such sum to the trustee, and continue to hold and own them free from claims of creditors, and that otherwise the policies shall pass to the trustee as assets.

Same — assignment.

2. The absolute assignment by a bankrupt of policies of life insurance on his life does not exclude them from the operation of the proviso in the bankrupt act of July 1, 1898, § 70a, subd. 5, that a bankrupt, when the cash surrender value of policies having such a value has been ascertained, may pay or secure such sum to the trustee, and continue to hold and own them free from the claims of creditors, otherwise they shall pass to the trustee as assets; and such policies, therefore, if they have no cash surrender value, do not pass to the trustee in bankruptcy.

(April 28, 1913.)

Note. — Life insurance as assets of bankrupt.

The earlier notes on this question, appended to *Morris v. Dodd*, 50 L.R.A. 33; *Re White*, 26 L.R.A.(N.S.) 451; *Re Orear*, 30 L.R.A.(N.S.) 990, and *Re Andrews*, 41 L.R.A.(N.S.) 123, show that heretofore there has been considerable conflict of judicial opinion on the various phases of the question as to the status in bankruptcy of a policy of insurance on the life of the bankrupt, under § 70a of the bankruptcy act of 1898, 30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511, the language of which is set out in *BURLINGHAM v. CROUSE*.

As shown in the earlier notes, the United States Supreme Court sometime ago settled two phases of this question, holding in *Hiscock v. Mertens*, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488, that the term "cash surrender value," as used in the proviso to § 70a, embraced not only policies which by their terms had such value, but also those having it by the practice or concession of the company issuing them; and in *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656, 14 Am. Bankr. Rep. 94, that § 70a, providing that the trustee shall be vested with the title of the bankrupt, "except in so far as it is to property which is exempt," together with the proviso, did not limit § 6 of the bankruptcy act, providing that "this act shall not affect the allowance to bankrupt of the exemptions which are prescribed by state laws in force at the time of the filing of the petition," and that the meaning of such language in § 70a was that where a policy was exempt under state laws, the trustee had no right to it whatsoever, the proviso being intended as a benefit to the bankrupt, and to apply only to policies which were not exempt.

46 L.R.A.(N.S.)

BURLINGHAM v. CROUSE, and two other decisions of the United States Supreme Court handed down at the same time, establish the rule that the trustee has no rights under a policy which had no cash surrender value at the time of the filing of the petition. In one of such decisions, *Everett v. Judson*, 228 U. S. 474, 57 L. ed. 927, Adv. S. U. S. 1912, p. 568, post, 154, 33 Sup. Ct. Rep. 568, it is held that the time when the petition in bankruptcy is filed fixes the cash surrender value, and that hence the death of the bankrupt between the time of the filing of the petition and the date of the adjudication does not make the proceeds of the policies, over and above the cash surrender value, assets in the hands of the trustee, although § 70a also provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date of the adjudication. In the other decision, *Andrews v. Partridge*, 228 U. S. 479, 57 L. ed. 929, Adv. S. U. S. 1912, p. 570, 33 Sup. Ct. Rep. 570, reversing 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 325, the court, upon the authority of the two contemporaneous decisions, holds that the right of the bankrupt to pay the cash surrender value, and to hold and own the policies free from the claims of creditors, is not extinguished by his death after the filing of the petition, and that such right may be exercised by his executors.

About the time of the decision of the three recent cases by the United States Supreme Court, the South Carolina supreme court decided the case of *Sanders v. Aetna L. Ins. Co.* — S. C. —, 78 S. E. 532, in which two judges held that the trustee had no rights under a policy payable to the wife, which had no cash surrender value at the time of the adjudication, though the bankrupt died before the estate was set-

A PPEAL by the trustees from a judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York upholding the title of the assignee of a bankrupt to policies of life insurance on his life. Affirmed.

The facts are stated in the opinion.

Messrs. Dorr Raymond Cobb and Irving L. Ernst, for appellants:

The policies in question constituted property which the bankrupts could have transferred.

Re Slingsluff, 5 Am. Bankr. Rep. 82, 105 Fed. 502.

Policies are property irrespective of their value.

Re Roger Brown & Co. 28 Am. Bankr. Rep. 340, 116 C. C. A. 386, 196 Fed. 758.

The policies were valuable.

Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 27 Am. Bankr. Rep.

393, 191 Fed. 325; *Kinzie v. Winston*, 4 Am. Bankr. Rep. 21, 56 Ill. 56; *Wynehamer v. People*, 13 N. Y. 396; *Jackson ex dem. Pearson v. Housel*, 17 Johns. 281.

Prior to the present decision, it had been repeatedly held in the second circuit that the interest of the bankrupt in all policies of life insurance payable to his estate vested in the trustee, subject to redemption by the bankrupt when they had either technically, or as a matter of fact or custom, a cash surrender value, upon his paying such value to the trustee.

Re Coleman, 69 C. C. A. 496, 136 Fed. 818, 14 Am. Bankr. Rep. 461; *Re White*, 26 L.R.A.(N.S.) 451, 98 C. C. A. 205, 23 Am. Bankr. Rep. 90, 174 Fed. 333; *Re Hettling*, 23 Am. Bankr. Rep. 161, 99 C. C. A. 87, 175 Fed. 65; *Van Kirk v. Vermont Slate Co.* 15 Am. Bankr. Rep. 239, 140 Fed. 38; *Re Mertens*, 73 C. C. A. 561, 15 Am. Bankr. Rep. 701, 142 Fed. 445, 205 U. S.

112. These two judges also held that the right of the insured to change the beneficiary did not pass to the trustee as property which the bankrupt could have transferred, or which could have been levied upon against him, nor as a power which he could have exercised for his own benefit within the meaning of subdivision 3 of § 70a providing that the property which passed to the trustee should include powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person. One judge concurred upon the ground that such power was one which the bankrupt might have exercised by some other person, thus being excluded from the trustee by the express provision of the statute. One judge dissented, contending that the policy passed to the trustee.

In *Re Morse*, 206 Fed. 350, the court declares that the beneficial interest in a policy to the extent of the cash surrender value passes to the insured's trustee in bankruptcy, unless exempt under state laws; but holds in this case that a policy payable to the bankrupt's wife as beneficiary is exempt under the Kansas statute entitled, "An Act to Exempt from Legal Process to Beneficiaries the Proceeds of Life Insurance Policies and Beneficiary Certificates, and providing that all such policies and their reserves of the present value shall inure to the sole and separate use of the beneficiaries, and shall be free from the claims against the insured, and shall also be free from the claims of the person or persons effecting such insurance, their creditors, and representatives, and shall be free from all taxes and the claims and judgments of the creditors and representatives of the person or persons named in said policy or policies of insurance.

Some of the other phases of the question have been recently passed upon.

Thus, in *Kirkpatrick v. Johnson*, 28 Am. 46 L.R.A.(N.S.)

Bankr. Rep. 291, it is held that an insured's trustee in bankruptcy is entitled to claim and realize the cash surrender value of a policy payable to the insured's executors, administrators, or assigns, which the insured, while insolvent, and when the policy had a cash surrender value payable on demand, assigned to his wife without her knowledge, and upon which he thereafter unnecessarily paid two premiums in advance.

The South Carolina supreme court holds that a policy having no cash surrender value on the husband's life, payable to the wife, who was copartner in business, does not vest in the trustee in bankruptcy of the individuals and firm, where the husband had the right under the policy to change the beneficiary; and that the fact that the husband obtained a change of beneficiary after bankruptcy, by falsely stating that he was not insolvent gives the trustee no better right. *Sanders v. Aetna L. Ins. Co.* — S. C. —, 78 S. E. 532.

The Alabama supreme court holds that the exemption of a policy payable in favor of a person named by the state exemption act is not affected by the fact that the insured was authorized by the contract to change the beneficiary. *Young v. Thomason*, — Ala. —, 60 So. 272, citing *Holden v. Stratton*, supra, as settling the rule that a policy of insurance which is exempt under the laws of the state of the bankrupt is exempt under the bankruptcy act.

Re Loveland, 118 C. C. A. 310, 200 Fed. 136, reversing 192 Fed. 1005, holds only that a bankrupt will not, in summary proceedings, be required to surrender a policy of insurance on his life payable to his wife, to the trustee, but will be required only to assign all his rights thereunder, where it appears that the wife has had possession of the policy from the beginning, and has paid premiums out of money earned by her.

202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488; Remington, Bankr. § 1131, p. 644; Re Wright, 18 L.R.A.(N.S.) 193, 85 C. C. A. 206, 18 Am. Bankr. Rep. 198, 157 Fed. 544; Bump, Bankr. p. 368; Security Warehousing Co. v. Hand, 206 U. S. 425, 426, 51 L. ed. 1117, 1124, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 557, 54 L. ed. 610, 614, 30 Sup. Ct. Rep. 412; Stern v. Louisville Trust Co. 50 C. C. A. 367, 7 Am. Bankr. Rep. 305, 112 Fed. 501; Re Orear, 30 L.R.A.(N.S.) 990, 102 C. C. A. 78, 24 Am. Bankr. Rep. 343, 178 Fed. 632; Re Davison, 24 Am. Bankr. Rep. 460, 179 Fed. 750; Holden v. Stratton, 198 U. S. 214, 49 L. ed. 1022, 25 Sup. Ct. Rep. 656; Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 27 Am. Bankr. Rep. 388, 191 Fed. 325.

All the considerations of policy upon which § 70a is held to be based are absent in case of an assignment of the policies.

Holden v. Stratton, 198 U. S. 214, 49 L. ed. 1022, 25 Sup. Ct. Rep. 656; Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488.

The effect of the enforcement of the transfer in question is to enable defendant Crouse to obtain a greater percentage of his debt than other creditors of the same class.

Wilson Bros. v. Nelson, 7 Am. Bankr. Rep. 142, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74.

When defendant elected to proceed against Ryan and the firm of T. A. McIntyre & Company on his notes, he effectually barred himself from enforcing any collateral he had to secure a return of the stocks upon which he had borrowed the money to loan on the notes.

Thomas v. Sugerman, 15 L.R.A.(N.S.) 1267, 85 C. C. A. 337, 19 Am. Bankr. Rep. 509, 157 Fed. 669; Droege v. Aherns & O. Mfg. Co. 163 N. Y. 466, 57 N. E. 747; Le Marchant v. Moore, 150 N. Y. 209, 44 N. E. 770; Moller v. Tuska, 87 N. Y. 166; Deitz v. Field, 10 App. Div. 425, 41 N. Y. Supp. 1087.

Mr. Winfred T. Denison also for appellants.

Messrs. Levi S. Chapman, Harry E. Newell, and James E. Newell, for appellee:

To constitute a preference, actual value must have passed from the bankrupt to the creditor in some form.

National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633; Re Steam Vehicle Co. 121 Fed. 939; McDonald v. Clearwater Shortline R. Co. 164 Fed. 1007; Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; 46 L.R.A.(N.S.)

Mutual L. Ins. Co. v. Farmer's & M. Nat. Bank, 173 Fed. 390; Central Nat. Bank v. Hume, 128 U. S. 195, 204, 32 L. ed. 370, 375, 9 Sup. Ct. Rep. 41; Barbour v. Connecticut Mut. L. Ins. Co. 61 Conn. 240, 23 Atl. 154; Hoyt v. Godfrey, 88 N. Y. 669; Guy v. Graighead, 21 App. Div. 460, 47 N. Y. Supp. 576; Stacy v. Deshaw, 7 Hun, 449; Re Adams, 104 Fed. 72; Baldwin v. Rogers, 28 Minn. 549, 11 N. W. 77; Blake v. Baisjoli, 51 Minn. 296, 53 N. W. 637; Johnson v. Riley, 41 W. Va. 140, 23 S. E. 698; Mittelburg v. Harrison, 11 Mo. App. 136, 90 Mo. 444, 3 S. W. 203; French v. Holmes, 67 Me. 186; Jones v. Brandt, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310; Williams v. Robbins, 15 Gray, 590; Credle v. Carrawan, 64 N. C. 422; Rice v. Perry, 61 Me. 145; Bump, Fraud, Conv. 2d ed. 19.

The policies, having no actual cash surrender value, and no value of any kind which could be realized by the bankrupt or the trustees, were merely executory contracts, and were not property or a property right which the trustees in bankruptcy were entitled to take.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Re McKinney, 15 Fed. 535; Central Nat. Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; Re Coleman, 69 C. C. A. 496, 136 Fed. 818; Re Newland, 6 Ben. 342, 7 Nat. Bankr. Reg. 477, Fed. Cas. No. 10,170; Leonard v. Clinton, 26 Hun, 288; Barbour v. Larue, 106 Ky. 546, 51 S. W. 5; Holt v. Everall, 34 L.T.N. S. 599, L. R. 2 Ch. Div. 266, 45 L. J. Ch. N. S. 433, 24 Week. Rep. 471; Re Buelow, 98 Fed. 86; Re Josephson, 121 Fed. 142, 59 C. C. A. 650, 124 Fed. 734; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; Re Steele, 98 Fed. 78; Re Lange, 91 Fed. 361; Aetna Nat. Bank v. United States L. Ins. Co. 24 Fed. 770; Gould v. New York L. Ins. Co. 132 Fed. 927; Re Judson, 113 C. C. A. 158, 192 Fed. 834; Re Slingluff, 106 Fed. 154; Collier, Bankr. 7th ed. 1909, p. 822; People v. Security L. Ins. & Annuity Co. 78 N. Y. 114, 34 Am. Rep. 522.

The policies are within the proviso of § 70a, subd. 5, of the bankruptcy law.

The bankrupt's right under § 70a to retain any insurance policy held by him, by paying or securing to the trustee the cash surrender value thereof after the same has been stated by the company to the trustee, is an assignable right.

Van Kirk v. Vermont Slate Co. 140 Fed. 38; Re Judson, 113 C. C. A. 158, 192 Fed. 834; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; Re Wolff, 165 Fed. 984.

Mr. Justice Day delivered the opinion of the court:

The action was brought in the United States district court for the southern district of New York by the trustees of the firm of T. A. McIntyre & Company, and of the individual members of that firm, bankrupts, against Charles M. Crouse and the Equitable Life Assurance Society of the United States, to recover the sum of \$90,698.32, the net proceeds of certain policies of insurance issued by the Equitable Life Assurance Society upon the life of Thomas A. McIntyre, one of the bankrupts, deceased. The proceeds of the policies were paid into court by the society. The judgment of the district court in favor of Crouse was affirmed by the circuit court of appeals (104 C. C. A. 227, 181 Fed. 479), and the case has been appealed to this court.

It appears that on the 10th of April, 1902, Thomas A. McIntyre obtained two policies of life insurance in the Equitable Society. They were known as "guaranteed cash-value, limited payment, life policies," each providing that upon the death of the insured the company would pay to his executors, administrators, or assigns the sum of \$100,000 in fifty annual instalments, or the sum of \$53,000 in cash, a total of \$108,000 for the two policies. On April 14, 1906, the policies were assigned absolutely to the firm of T. A. McIntyre & Company, and on April 24, 1907, they were by that firm assigned to the Equitable Society as collateral security for a loan of \$15,370. On February 25, 1908, two months prior to the filing of the petition in bankruptcy, the policies were assigned by McIntyre & Company to the defendant, Charles M. Crouse, subject, however, to the prior assignment to the Equitable Society. A petition in involuntary bankruptcy was filed against McIntyre & Company and its individual members on April 25, 1908, and on May 9, 1908, the defendant Crouse paid the premiums on the policies, in the sum of \$6,078.38. McIntyre & Company and the individual members thereof were adjudged involuntary bankrupts on May 21, 1908, and the trustees were elected on the 24th of July, 1908. On the 29th of July, 1908, Thomas A. McIntyre died, and the policies became payable.

It appears that the policies had a cash surrender value, which, at the time when the trustees qualified, was \$15,370, or the amount of the loans of the Equitable Society upon the policies. It is therefore apparent that on the day when the petition was filed, as well as the day of the adjudication in bankruptcy, the cash surrender value would not have exceeded the loan and lien of the society upon the policies. The circuit court of appeals for the second circuit held that.

under the circumstances, the policies did not pass to the trustees as assets, and therefore the action which had been begun to set aside the transfer to Crouse, as a preference within the bankruptcy act, could not be maintained.

The correctness of this decision depends primarily upon the construction of § 70a of the bankruptcy act, which reads:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1511.]

The part of the section particularly to be considered is subdiv. 5 and its proviso. Subdivision 5 undertakes to vest in the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon or sold under judicial process against him. Then follows the proviso with reference to insurance policies which have a cash surrender value, permitting a bankrupt, when the cash surrender value has been ascertained and stated, to pay or secure such sum to the trustee, and to continue to hold, own, and carry the policies free from the claims of creditors;

otherwise the policies to pass to the trustee as assets.

Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors.[†] The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of § 70a immediately preceding the proviso, which reads: "Property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."[‡]

To determine the congressional intent in this respect requires a brief consideration of the nature of the rights dealt with. Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policy holder, and which forms a consequent basis for the surrender of the policy by the insured, with advantage to the company upon the payment of a part of this accumulated reserve. This feature of surrender value was discussed by Judge Brown of the southern district of New York, in *Re McKinney*, 15 Fed. 535, 537:

"The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy,—an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with

the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured, and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund.

"Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made."

This case has been cited with approval in this court. *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; *Hiscock v. Mertens*, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488.

Under the bankruptcy act of 1867 [14 Stat. at L. 522, chap. 176, § 14] no special provision was made for insurance policies. The section providing for the passing of the assets of the bankrupt to the trustee contained the broad language of "all the estate, real and personal." Under this statute it was held in *Re McKinney*, *supra*, that the insurance upon the life of the bankrupt vested in the bankrupt estate only to the extent of its cash surrender value at the time of the filing of the petition.

In *Holden v. Stratton*, *supra*, this court held that the law of the state of Washington, exempting the proceeds of life insurance policies, was applicable, and under the bankruptcy act of 1898, § 6, the bankrupt might retain such policies. The circuit court of appeals for the ninth circuit, from which *Holden v. Stratton*, came by certiorari to this court, had held that § 70a was not controlled by the exemption provided in § 6 of the bankruptcy act, and had adhered to its former decision in *Re Scheld*, 52 L.R.A. 188, 44 C. C. A. 233, 104 Fed. 870, in which § 70a had been construed to pass insurance policies having a cash surrender value to the trustee, unless the bankrupt paid or secured the surrender value, as pointed out in the section. While this court held that the exempting under the state law applied under the bankruptcy act to the policy in question,

[†]*Re Buelow*, 98 Fed. 86; *Re Josephson*, 121 Fed. 142; *Gould v. New York L. Ins. Co.* 132 Fed. 927; *Morris v. Dodd*, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83.

[‡]*Re Becker*, 106 Fed. 54; *Re Slingluff*, 106 Fed. 154; *Re Welling*, 51 C. C. A. 151, 113 Fed. 189; *Re Coleman*, 69 C. C. A. 496, 136 Fed. 818; *Re Hettling*, 99 C. C. A. 87, 175 Fed. 65; *Re Orear*, 30 L.R.A. (N.S.) 990, 102 C. C. A. 78, 178 Fed. 632, 46 L.R.A. (N.S.)

coming to deal with the construction of § 70a, this court said (198 U. S. p. 213):

"As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve."

The section came again before this court in *Hiscock v. Mertens*, supra, and it was held that the insured was entitled to retain the policies upon the payment to the trustee of a sum equivalent to the amount the company was willing to pay according to its custom, although there was no stipulation in the policies as to a cash surrender value, and upon this subject the court said (p. 212):

"What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies? In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to 'continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings.'"

And in that case it appeared that this sum was less than \$6,000, whereas in a short time, some six months later, the maturity of one of the policies would give it a value of over \$11,000. But this court held that this circumstance made no difference in the right of the insured to pay the surrender value and hold the policy.

True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdiv. 5, § 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. It is also true that a proviso may

sometimes mean simply additional legislation, and not be intended to have the usual and primary office of a proviso, which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.

This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, and policies payable in a period of years, so as to become investments and means of money saving, are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay, and which brings the policy within the terms of the proviso (*Hiscock v. Mertens*, supra), and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the states have provided that policies of insurance shall be exempt from liability for debt, and in many states provision is made for the protection from such liability of policies in favor of those dependent upon the insured. See *Holden v. Stratton*, supra.

Congress undoubtedly had the nature of insurance contracts in mind in passing § 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate, the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was

the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance.

It should be observed, in this connection, that in the present case the company had advanced upon the policies their full surrender value, as stipulated in the policies, and that the only interest that could have passed to the trustees would have been the speculative right to the net proceeds of the policies, contingent upon the death of the bankrupt, and possibly dependent upon the payment of large annual premiums for thirteen years.

It is urged, however, that under § 70a, the cash surrender value was to be paid by the *bankrupt* when ascertained, and the policies kept alive for his benefit; and as these policies had been assigned by the beneficiary to McIntyre & Company, not as collateral, but absolutely, they would not come within the terms of the proviso, and therefore the proceeds of the policies vested in the bankrupt estate; but we find nothing in the act by which the right of the assignee of a policy to the benefits which would have accrued to the bankrupt is limited. As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors, and not otherwise to limit the bankrupt in dealing with his policy.

As to the reimbursement of Crouse for the premiums advanced by him, and the application by him of the proceeds of the policies to particular items of indebtedness of the bankrupt estate in his favor,—upon the facts found we have no occasion to disturb the decree of the circuit court of appeals.

It results that the judgment of the Circuit Court of Appeals must be affirmed.

UNITED STATES SUPREME COURT.

A. LEO EVERETT, Trustee, etc., of Alfred M. Judson,
v.

WILLIAM D. JUDSON, Exr., etc., of Alfred M. Judson, Deceased.

(228 U. S. 474, 57 L. ed. 927, 33 Sup. Ct. Rep. 568.)

Bankruptcy — assets — life insurance — cash surrender value — death of bankrupt.

The time when the petition in bankrupt-

Note.—As to life insurance as assets of bankrupt, see the note appended to *Burlingham v. Crouse*, ante, 148. 46 L.R.A. (N.S.)

cy is filed fixes the cash surrender value of the insurance policies mentioned in the proviso in the bankrupt act of July 1, 1898 (30 Stat. at L. 565, chap. 541), § 70a, subd. 5, that a bankrupt, when the cash surrender value of insurance policies having such value has been ascertained, may pay or secure such sum to the trustee and continue to hold and own them free from the claims of creditors, otherwise the policies shall pass to the trustee as assets, and hence the death of the bankrupt between the time of the filing of the petition and the date of the adjudication does not make the proceeds of the policies, over and above the cash surrender value, assets in the hands of the trustee, although that section also provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date of adjudication.

(April 28, 1913.)

CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed an order of the District Court for the Southern District of New York directing payment of the proceeds of policies of insurance upon the life of Alfred M. Judson, deceased, less their cash surrender value, to his executor. Affirmed.

The facts are stated in the opinion.

Mr. Charles K. Beekman, for petitioner:

Life insurance policies of a bankrupt, payable to himself, his executors, administrators, or assigns, but having no actual surrender value payable at the time of the filing of an involuntary petition in bankruptcy against him, either by their terms or the concession of the company issuing the same, are property within the meaning of the bankruptcy act, and pass to a trustee as assets of his estate.

Re *Coleman*, 69 C. C. A. 496, 136 Fed. 818; *Grigsby v. Russell*, 222 U. S. 149, 156, 56 L. ed. 133, 137, 36 L.R.A. (N.S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913 B, 863; *Sessions v. Romadka*, 145 U. S. 29, 30, 36 L. ed. 609, 610, 12 Sup. Ct. Rep. 799; *Re Orear*, 30 L.R.A. (N.S.) 990, 102 C. C. A. 78, 178 Fed. 632; *Re Welling*, 51 C. C. A. 151, 113 Fed. 189; *Meyers v. Josephson*, 10 Am. Bankr. Rep. 687.

They are also property which the bankrupt, prior to the filing of the petition in bankruptcy, could have transferred.

1 *Remington*, Bankr. p. 556, § 1002; *Re Barrow*, 98 Fed. 583, 3 Am. Bankr. Rep. 416; *Partridge v. Andrews*, 41 L.R.A. (N.S.) 123, 112 C. C. A. 69, 191 Fed. 329, 27 Am. Bankr. Rep. 397.

If policies of life insurance payable to a bankrupt, his executors, administrators, or

assigns have a surrender value at the time the petition was filed, and the bankrupt dies before adjudication, his legal representatives cannot obtain the proceeds thereof by paying or securing to the trustee this surrender value only.

Partridge v. Andrews, *supra*.

The trustee takes title to the proceeds of property which was owned by the bankrupt at the time the petition was filed, as well as to the actual property which then belonged to the bankrupt.

Ibid.; 1 Remington, Bankr. p. 647, § 1135; Re McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 94; Re Ghazal, 98 C. C. A. 517, 174 Fed. 809, 23 Am. Bankr. Rep. 178; Re Laplume Condensed Milk Co. 145 Fed. 1013, 16 Am. Bankr. Rep. 729; Re Pease, 4 Am. Bankr. Rep. 582.

The cash surrender value referred to in the proviso of § 70a, subdiv. 5, is the surrender value as of the date upon which the same is stated to the trustee by the company issuing the same, to wit, after adjudication, upon the date of the trustee's qualification or thereafter, and not the surrender value when the petition was filed.

Re McKinney, 15 Fed. 537; Holden v. Stratton, 198 U. S. 214, 49 L. ed. 1022, 25 Sup. Ct. Rep. 656; Hiscock v. Mertens, 205 U. S. 202, 209, 51 L. ed. 771, 774, 27 Sup. Ct. Rep. 488.

The trustee takes title to rights of action arising upon contracts which existed at the date of adjudication, but which had not matured at the time the petition was filed, where the bankrupt has died between those dates, and the contracts were owned by him prior to the filing of the petition.

Matthews v. American Cent. Ins. Co. 154 N. Y. 460, 39 L.R.A. 433, 61 Am. St. Rep. 627, 48 N. E. 751; Partridge v. Andrews, 41 L.R.A.(N.S.) 123, 112 C. C. A. 69, 191 Fed. 325, 27 Am. Bankr. Rep. 397.

Messrs. George S. Ludlow and Wilbur L. Ball, for respondent:

The only property value of these policies that could at any time pass to the trustee was their cash surrender value.

Hiscock v. Mertens, 205 U. S. 202, 212, 51 L. ed. 771, 775, 27 Sup. Ct. Rep. 488.

The trustee is entitled only to the property owned by the bankrupt at the date of the filing of the petition, and not to property acquired by him or his estate between that date and the date of adjudication.

Re Harris, 2 Am. Bankr. Rep. 359; Re Pease, 4 Am. Bankr. Rep. 578; Re Elmira Steel Co. 5 Am. Bankr. Rep. 487; State Bank v. Cox, 16 Am. Bankr. Rep. 35; Sibley v. Nason, 22 Am. Bankr. Rep. 712; Smith v. Berman, 24 Am. Bankr. Rep. 855; Re Schermerhorn, 16 Am. Bankr. Rep. 507. 46 L.R.A.(N.S.)

Mr. Justice Day delivered the opinion of the court:

This case involves the title to the proceeds of certain insurance policies upon the life of Alfred M. Judson, bankrupt, deceased, collected by the trustee in bankruptcy. The executor of Judson's estate brought suit against the trustee in the United States district court for the southern district of New York, asserting title to such funds. The district court ordered that the proceeds of the policies, less their cash surrender value, be paid to the executor (188 Fed. 702); the circuit court of appeals for the second circuit, upon petition to revise, affirmed that order (113 C. C. A. 158, 192 Fed. 834), and the case comes here on certiorari.

A petition in involuntary bankruptcy was filed against the firm of Judson & Judson and its members, Alfred M. Judson being one, on December 17, 1910, and on December 23, 1910; Judson entered a notice of his appearance in the proceedings. On January 9, 1911, the firm and its members were adjudged bankrupts, and on February 9, 1911, Everett qualified as trustee. Judson owned certain life insurance policies at the time of the institution of the bankrupt proceedings, and thereafter and until his death, payable to his executors, administrators, or assigns. So far as this case is concerned, at the time of the filing of the petition in bankruptcy, these policies, with cash surrender values and subject to loans, were as follows: One policy for \$5,000, having a cash surrender value of \$2,291.49, and subject to a loan of \$2,238; another for \$1,000, having a cash surrender value of \$332.31, and subject to a loan of \$322; and another for \$10,000, having a cash surrender value of \$5,030, and subject to a loan of \$5,240. It therefore appears that the cash surrender value of the policies on December 17, 1910, was \$63.80.

On January 4, 1911, Judson committed suicide. Notice was served on the trustee that the executor claimed the right, under § 70a of the bankruptcy act, to pay to the trustee the cash surrender value of the policies when ascertained, but the trustee denied such right and also the right of the executor to the balance of the proceeds of the policies. Under agreement, the insurance companies paid to the trustee \$8,675.14 upon the policies. The executor asserted title to the difference between the sum realized on the policies and the cash surrender value; namely, \$8,611.34. The district court, upon the authority of *Burlingham v. Crouse*, 104 C. C. A. 227, 181 Fed. 479, held that the proceeds of the policies, over and above the cash surrender value as of the date of the filing of the petition,

passed to the executor. The circuit court of appeals affirmed the order of the district court, holding that the time when the interest of the bankrupt estate in the policies passed to the trustee was the date of the filing of the petition, and further, also upon the authority of *Burlingham v. Crouse*, supra, that the interest of the trustee in the policies extended only to their cash surrender value.

The present case was argued at the same time as the case of *Burlingham v. Crouse*, 228 U. S. 459, 57 L. ed. 920, ante, 148, 33 Sup. Ct. Rep. 564, and in so far as it is like that case the principles therein laid down are controlling. The present case has, however, a feature not directly involved in the case of *Burlingham v. Crouse*, because Judson, the insured, committed suicide before the adjudication in bankruptcy, although after the filing of the petition, and it is the contention of the petitioner that the bankruptcy act vested the title to the property in the trustee as of the time of the adjudication, and that the death of the bankrupt between the filing of the petition and the date of the adjudication made the proceeds of the policies assets in the hands of the trustee.

While it is true that § 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in *Acme Harvester Co. v. Beekman Lumber Co.* 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96, wherein it was held that, pending the bankruptcy proceedings, and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. *Zavelo v. Reeves*, 227 U. S. 625, 630, 631, 57 L. ed. 676, 678, 33 Sup. Ct. Rep. 365. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition.

We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of 46 L.R.A. (N.S.)

the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. And it is as of that date that the surrender value of the insurance policies mentioned in § 70a should be ascertained. The subsequent suicide of the bankrupt before the adjudication was an unlooked-for circumstance which does not change the result in the light of the construction which we give the statute.

It follows that the judgment should be affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

G. E. CROTTY, Appt.,
v.

NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY.

(— W. Va. —, 78 S. E. 233.)

Easement — way of necessity — physical obstructions.

1. A way of necessity over the lands of a grantor is implied in a deed, if, by reason of a physical obstruction to access to the granted land, the grantee cannot construct a road from a considerable portion thereof over the residue without an expenditure wholly disproportionate to the value of the land.

Same — when passes with land.

2. Such a way is appurtenant to the granted land, and passes to subsequent grantees thereof, and a subsequent grantee of land not used at the time of the severance of the larger tract by the common owner may, when the use of such way becomes necessary to the enjoyment of the land, claim it under the remote deed of severance.

(*Robinson and Lynch, JJ., dissent.*)

(February 18, 1913.)

Headnotes by *POFFENBARGER, P.*

Note. — Right of remote grantee to claim easement by way of necessity not opened by immediate grantee.

The question raised by the subject of this note is dependent upon several broader principles which have already been covered in previous notes, and there are not many cases falling entirely within the scope of this note as to all of the facts. But sufficient cases have been found to justify the conclusion that the principle underlying the decision in *CROTTY v. NEW RIVER & P. CONSOL. COAL Co.* is correct. The applicability of the principle to the facts of a particular case is, however, a different question.

APPEAL by complainant from a decree of the Circuit Court for Fayette County dismissing a bill filed to establish a right of way. Reversed.

The facts are stated in the opinion.

Messrs. C. R. Summerfield and Hubbard & Lee, for appellant:

The record in this cause discloses the actual right of plaintiff to the pass way in controversy as a way of necessity.

2 Bl. Com. Shareswood's ed. cl. 4, § 35; Jones, Easements, § 298; Goddard, Easements, Bennett's ed. 25; 14 Cyc. 1174; Rogerson v. Shepherd, 33 W. Va. 317, 10 S. E. 632; Hoffman v. Shoemaker, 69 W. Va. 233, 34 L.R.A.(N.S.) 632, 71 S. E. 198; Proudfoot v. Saffle, 62 W. Va. 51, 12 L.R.A.(N.S.) 482, 57 S. E. 256.

This applies with equal force to conveyances made simultaneously, and to partition deeds, whether executed by the several heirs to one another, or by a special commissioner acting under a decree of court.

Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Johnson v. Gould, 60 W. Va. 93, 33 S. E. 798; Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Proudfoot v. Saffle, 62 W. Va. 51, 12 L.R.A.(N.S.) 482, 57 S. E. 256; Palmer v. Palmer, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966; Collins v. Prentice, 13 Conn. 43, 38 Am. Dec. 61; Smyles v. Hastings, 22 N. Y. 222; Rollo v. Nelson, 34 Utah, 116, 26 L.R.A.(N.S.) 315, 96 Pac. 263.

Only reasonable necessity is required.

Morris v. Edgington, 3 Taunt. 31; God-

Although it appears that in some of the cases the servient as well as the dominant tenement had passed into the hands of a remote grantee, this note does not purport to deal with the question whether a grantee of the servient tenement is chargeable with notice of the potential right of way.

Generally, as to easements created by severance of tract of land with appurtenant benefits existing, see note to Rollo v. Nelson, 26 L.R.A.(N.S.) 315.

That the owner of land may grant a right of way over the same either by an express or implied grant is, of course, elementary law. Necessity on the part of a grantee is not the basis of his right to a way over the land of the grantor, but it is the basis for a presumption that the grantor actually granted the right of way when he sold the landlocked property. On the general question of ways by necessity, see note to Logan v. Stogdale, 8 L.R.A. 58. And as to what necessity will give rise to such presumption, see note to Corea v. Higuera, 17 L.R.A.(N.S.) 1019, and supplementary note thereto in 32 L.R.A.(N.S.) 1075.

And it seems to be the prevailing rule that the presumption of a reservation may be based upon the grantor's necessity where he has disposed of the *locus in quo*. See notes in 13 L.R.A. 657, and 26 L.R.A.(N.S.) 355, although the latter note has reference more especially to cases where the need for the way was apparent at the time of the grant.

From this it would seem that, where the contest is between two grantees tracing their titles to a common grantor, the relative time when the common grantor was divested of title to the respective properties would be immaterial, and it has been so held. See Collins v. Prentice, 15 Conn. 43, 38 Am. Dec. 61. But this principle does not apply to visible easements. See note in 26 L.R.A.(N.S.) 337.

Since an easement runs with the land, the proposition that a remote grantee is entitled to all that was contained in the original grant is deducible from the above stated principles. The particular subject 46 L.R.A.(N.S.)

here under annotation is, Does the remote grantee's necessity (assuming the existence of sufficient necessity) for a way over the *locus in quo* establish the presumption that a right of way sufficient to supply his needs was included in the original grant, where such way was never opened, nor the right asserted, by the intermediate grantee? CROTTY v. NEW RIVER & P. CONSOL. COAL Co. answers the question in the affirmative, and the holding is supported by Myers v. Dunn, 49 Conn. 71, where the whole tract was between two roads; the part sold touched neither road, but the deed contained a specific grant of a way limited in terms and by physical conditions to the single use of carting wood, which way seems to have supplied all the needs of the immediate grantee, who, after building a house, sold the property; the grantor sold the part of the property over which the limited way had been granted, and this grantee restrained the remote grantee, who was then living upon the property, from using the specific way for any other purpose than that of carting wood, even though physical conditions made any other use almost impossible; it was held that the remote grantee had a way by necessity sufficient to meet all his needs, over another portion of the original tract, which portion was then owned by the heirs of the original grantor. The court said: "The owner of land has a right to the most profitable use, the most beneficial enjoyment thereof, subject to limitations not necessary here to be mentioned. He may erect buildings and raise grain upon, and dig ores beneath, it; and when, by their conveyance to the defendant's grantor, the administrators imposed, in favor of the land granted, a way of necessity over the *locus in quo*, they are to be presumed to have intentionally done it for any or all of these purposes, and the law will declare that it may be used for all, for it desires and encourages proprietors to increase the value of their land by building houses upon and cultivating it."

The same principle was sustained in Pearne v. Coal Creek Min. & Mfg. Co. 90 Tenn. 619, 18 S. W. 402, where the in-

dard, Easements, Bennett's ed. 26; Paine v. Chandler, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; 14 Cyc. 1171; Pettingill v. Porter, 8 Allen, 1, 85 Am. Dec. 671; Washb. Real Prop. § 1236; Jones, Easements, § 316.

The right of way passes to successive grantees.

Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778; Proudfoot v. Saffle, 62 W. Va. 54, 12 L.R.A. (N.S.) 482, 57 S. E. 256; 14 Cyc. 1184; Burke v. Wall, 29 La. Ann. 38, 29 Am. Rep. 316; 2 Washb. Real Prop. § 1240; Logan v. Stogsdale, 123 Ind. 372, 8 L.R.A. 58, 24 N. E. 135; Thomas v. Bertram, 4 Bush, 317; Winston v. Johnson, 42 Minn. 398, 45 N. W. 958; Borst v. Empie, 5 N. Y. 33; Brown v. Thissell, 6 Cush. 254.

intermediate grantees had opened the way as to all their necessities, but had never done so for the purpose of developing the minerals, and the implied grant was held to be inclusive of a right of way sufficient for that purpose. The court said that if there had been a specific grant that did not include the right sufficient for the development, it could not be enlarged, but since no terms were stated, but wholly implied, the presumption was that the grant was sufficiently broad to cover a right of way for all reasonable uses of the property.

Although there was another and independent ground for the holding in *Smyles v. Hastings*, 22 N. Y. 217, the decision is also based upon the doctrine here under annotation, and the court said that since there was no occasion for the intermediate grantees to assert their claim to a right of way by necessity, because the land was wild and unimproved until it was acquired by the remote grantee, the right had never been lost.

In *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302, where the remote grantee claimed a second way by necessity, in addition to the one to which the intermediate grantee had been entitled, on the ground that the additional way was necessary to reach a part of the property which was claimed to be inaccessible by the other way, the court approved the theory of the claim, but refused to grant it for the reason that not sufficient necessity had been shown.

In *Moore v. White*, 159 Mich. 460, 134 Am. St. Rep. 735, 124 N. W. 62, the court apparently approves this doctrine; probably not to its full extent, however, for there were some distinguishing features in the case, in that the "remote grantee" obtained title by inheritance from the only intermediate grantee, and it appeared that the intermediate grantee, while never claiming the exact way that was here claimed, had made some use of the *locus in quo* in getting in and out, and even this right had been denied to the complainant.

There are some cases in harmony with this doctrine, in which the reports are silent as to whether or not the intermediate grant-

It is appurtenant to every part of the tenement.

Henrie v. Johnson, 28 W. Va. 190; Linkenhoker v. Graybill, 80 Va. 835; Brossart v. Corlett, 27 Iowa, 288; Underwood v. Carney, 1 Cush. 285; Dawson v. St. Paul F. & M. Ins. Co. 15 Minn. 136, Gil. 102, 2 Am. Rep. 109; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Sachs v. Cordes, 11 Ohio C. C. 145, 5 Ohio C. D. 67; Re Private Road, 1 Ashm. (Pa.) 417; Walker v. Gerhard, 9 Phila. 116; McMakin v. Magee, 13 Phila. 105.

Messrs. Dillon & Nuckolls, for appellee:

To establish a right of way, it must appear that it has been exercised for the statutory period, with the acquiescence of

tee had ever opened or claimed the right of way, and the omission of this fact somewhat weakens their force as authority on the proposition. *Thomas v. McCoy*, 48 Ind. App. 403, 96 N. E. 14; *Taylor v. Warnaky*, 55 Cal. 350; *Kimball v. Cochecho R. Co.* 27 N. H. 448, 59 Am. Dec. 387.

In *Morse v. Benson*, 151 Mass. 440, 24 N. E. 675, the owner of two lots with a public road across one of them sold the landlocked one, thus creating a way by necessity over a portion of the one retained; subsequently both lots passed into the hands of different persons, and the public road was relocated upon the *locus in quo* in such manner that the original way of necessity did not reach it, and it was held that the remote grantee had no right of way by necessity over that portion necessary to enable him to reach the road as newly located, but that his way extended only to the old location of the road. This decision, however, rests upon the ground that the intermediate grantee could not have extended the way, being limited by the terms of the implied grant, and precludes the supposition that the intermediate grantee had never exercised all the rights contained in his grant. Therefore the holding is not authority against the proposition.

But the government or state in disposing of public domains cannot be taken as the common grantor. *Bully Hill Copper Min. & Smelting Co. v. Bruson*, 4 Cal. App. 180, 87 Pac. 237; *Pearne v. Coal Creek Min. & Mfg. Co.* 90 Tenn. 619, 185 S. W. 402.

The doctrine that the extent of the right of way by necessity is limited by the necessity which creates it, and cannot be extended to suit the convenience of the owner beyond what is actually necessary (see 14 Cyc. 1202), is not necessarily inconsistent with the principle here considered, since that doctrine, like the holding in *Morse v. Benson*, supra, is a limitation upon the extent of the implied grant at its inception, and does not prevent a remote grantee from obtaining all the rights that can be presumed to have passed by the implied grant.

J. W. M.

the owner over whose land the way is claimed.

Woolridge v. Caughlin, 46 W. Va. 348; 10 Am. & Eng. Enc. Law, 409; *Kelly v. Dunning*, 43 N. J. Eq. 63, 10 Atl. 276; *Washb. Easements*, § 586; *Shaver v. Edgell*, 48 W. Va. 509, 37 S. E. 664; *Patton v. Quarrier*, 18 W. Va. 447; *Scott v. Beutel*, 23 Gratt. 1; *Hardy v. McCullough*, 23 Gratt. 251; *Kuhlman v. Hecht*, 77 Ill. 570.

There is no presumption of grant where other outlet is possible.

Kingsley v. Gouldsborough Land Improv. Co. 86 Me. 279, 25 L.R.A. 502, 29 Atl. 1074.

Necessity does not create a way, but merely furnishes evidence of the real intention of the parties through whose agency the alienation is effected. The facts and conditions surrounding the original division of the Banks estate do not warrant the presumption that an implied grant was made.

Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. 1020.

At the time of severance, necessity for way must exist.

Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Central R. Co. v. Valentine*, 29 N. J. L. 561; *De Luze v. Bradbury*, 25 N. J. Eq. 70; *Cannon v. Boyd*, 73 Pa. 179.

The uses for which the land was used at the time govern.

London v. Riggs, L. R. 13 Ch. Div. 798, 49 L. J. Ch. N. S. 297, 42 L. T. N. S. 580, 28 Week. Rep. 610, 44 J. P. 345; *Washb. Easements*, 163; *McDonald v. Lindall*, 3 Rawle, 492; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Cooper v. Maupin*, 6 Mo. 625, 35 Am. Dec. 456; *Lankin v. Terwilliger*, 22 Or. 97, 29 Pac. 268; *Schmidt v. Quinn*, 136 Mass. 575; *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Myers v. Dunn*, 49 Conn. 71; *Mead v. Anderson*, 40 Kan. 203, 19 Pac. 708; *Voessen v. Dautel*, 116 Mo. 379, 22 S. W. 734; *Palmer v. Palmer*, 71 Hun, 30, 24 N. Y. Supp. 613; *Bayley v. Great Western R. Co.* L. R. 26 Ch. Div. 452, 51 L. T. N. S. 337; *Dee v. King*, 73 Vt. 375, 50 Atl. 1109; *Elliott v. Rhett*, 5 Rich. L. 405, 57 Am. Dec. 750; *Kelly v. Dunning*, 43 N. J. Eq. 63, 10 Atl. 276; *Shaver v. Edgell*, 48 W. Va. 509, 37 S. E. 664; *Buss v. Dyer*, 125 Mass. 287; *Randall v. McLaughlin*, 10 Allen, 366; *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Murray v. Ealy*, — Tenn. —, 57 S. W. 412; *Patton v. Quarrier*, 18 W. Va. 447; *Scott v. Beutel*, 23 Gratt. 1.

In case of doubt as to whether the grant would be enforced by implication, the construction by the original parties to the grant should determine the matter.

Glenn v. Augusta Perpetual Bldg. & L. 46 L.R.A. (N.S.)

Co. 99 Va. 695, 40 S. E. 25; *Bank of Old Dominion v. McVeigh*, 32 Gratt. 530; *Knick v. Knick*, 75 Va. 12; *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4; *King v. Norfolk & W. R. Co.* 99 Va. 625, 39 S. E. 701; *Titchenell v. Jackson*, 26 W. Va. 460; *Heatherly v. Farmers' Bank*, 31 W. Va. 70, 5 S. E. 754.

Poffenbarger, P., delivered the opinion of the court:

This bill, filed to vindicate the plaintiff's alleged right to a way over the land of the defendant, claimed as a public one, a private one by prescription, and a private one by necessity, must be sustained, if at all, upon the last theory, since the evidence wholly fails to sustain either of the other two. The appeal is from a decree dismissing the bill.

The way in question is a short one, only 322 feet in length, leading from the plaintiff's 4.5-acre lot through the land of the defendant to a public road. This lot and the road are on two separate tracts of land which at one time constituted a portion of a still larger tract owned, prior to the year 1831, by Henry Banks under a patent issued by the state of Virginia December 6, 1794. This large tract, containing 12,300 acres, was divided into lots, and sold in 1831 and 1832, John Bowyer becoming the purchaser of lot No. 15, and Samuel Blake of lot No. 21, containing, respectively, 150 acres and 497 acres. The plaintiff's 4.5-acre lot is a portion of the former. At the time of this division a public road ran through lot No. 15, but there was none through lot No. 21. The portion of lot No. 15 out of which plaintiff's small lot was taken was cut off from the public thoroughfare by a cliff so high and steep as to render it impossible to go over it without very great expense. This portion containing about 30 acres lies about 400 or 500 feet lower than the table land on which the residue of the tract, through which the road ran, is situated. Above and below the cliff the mountain side is very steep, and the cliff itself is nearly perpendicular, and 100 feet high. The plaintiff's title goes back regularly to the deed to John Bowyer, and that of the defendant to the deed to Samuel Blake. The portion of lot No. 15 lying below the cliffs, excluding the plaintiff's 4.5 acres, is owned in small lots by the heirs of one Wood, and is unimproved. The plaintiff obtained his lot in 1905, and erected a butcher shop thereon. Later he put up a substantial building for residence and mercantile purposes. Until that time he had been permitted to use the way claimed by him out to the county road constructed on the adjacent land, lot No. 21, long after the di-

vision of the Banks land. About the time of the completion of the building, the defendants obstructed the road, and denied him the right of use thereof.

When Effie and Frank Roach, the heirs of Woods, conveyed this 4.5-acre lot to the plaintiff, more than sixty years had elapsed from the date of the division of the Banks survey and conveyances of its several parts. They conveyed, not a small lot out of a larger one, but all that had been assigned to them in the partition of the Woods estate. Hence, it cannot be said that at the date of this grant there was a grant by implication, on the ground of necessity, of a right of way through their remaining lands. They had none. If, however, there was a way of necessity included in the partition among the Woods heirs, which became appurtenant to this 4.5-acre lot, the deed to that lot to the plaintiff may have carried it. But, as the partitioned land did not extend to the public road in question, that way would avail plaintiff nothing. To sustain his claim, it becomes necessary to go back to the division of the Banks land in the years 1831 and 1832.

Whether an owner of land can go back beyond the deed of the immediate grantee, to the common source of title, however remote it may be, and claim a way by necessity as appurtenant to the land, is a vital and far-reaching question in the case. The authorities uniformly hold there must have been at some time privity of title. There cannot be a way of necessity over the land of a stranger to the title. *Linkenhoker v. Graybill*, 80 Va. 835; *Kimball v. Cochecho R. Co.* 27 N. H. 448, 59 Am. Dec. 387; *Pomfret v. Ricroft*, 1 Wms. Saund. 323, 10 Eng. Rul. Cas. 16; 23 Am. & Eng. Enc. Law, 17. Mr. Sergeant Williams's note 6 to *Pomfret v. Ricroft* asserts the right to go back to unity of possession and title, however remote. It says: "If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way, either by grant or prescription, according to the circumstances of the case. Where the fact is that there existed at one period an unity of possession, it must then be claimed as a way by grant." The principle and conclusion intimated in this note have been embodied in actual decisions. In *Logan v. Stogsdale*, 123 Ind. 372, 8 L.R.A. 58, 24 N. E. 135, the court, after very thorough consideration of the authorities, upheld the claim to a right of way asserted on the ground of necessity, by going back to a remote common grantor, citing *Taylor v. Warnaky*, 55 Cal. 350. The following is taken from the opinion: "The decision in the 46 L.R.A. (N.S.)

case referred to is sustained by the doctrine maintained by the ancient and modern authorities, that the original grantor grants, as appurtenant to the parcel expressly conveyed, a way which will enable his grantee to obtain access to the corporeal property expressly conveyed to him. Both the corporeal property and the incorporeal right pass from the grantor at the same time,—one as the inseparable incident of the other,—and a subsequent grantee must necessarily take the land conveyed to him subject to the burden created by the implied grant." The character and weight of the considerations upon which this implication rests argue strongly the correctness of the theory of the decisions here referred to. Land without means of access is practically valueless. No reasonable use can be made of it, and it has no market value. The presumption of intent on the part of the parties to the conveyance, to provide a means of access, is so strong for this reason, that the contrary thereof can hardly be supposed. This brings the implied grant within a well-settled principle of construction and interpretation of contracts.

That the land was in a state of nature at the date of the division of the Banks land, and there was no road on lot No. 21, nor any occasion for an outlet in that direction for a number of years thereafter, are asserted and relied upon as inconsistent with a presumption of intent to grant the way in question. These circumstances are not broad enough in their scope to preclude it. The parties may well be presumed to have contemplated such conditions as the future was likely to bring forth. This principle is asserted in *Uhl v. Ohio River R. Co.* 47 W. Va. 59, 34 S. E. 934, 20 Mor. Min. Rep. 263, in which the following is quoted from Jones on Easements, § 323: "The prevailing view in this country is that a way of necessity is not limited to such use of the land as was actually made or contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time." In that case Judge Brannon said: "Though such a use of that crossing may not have been dreamed of at the date of the deed, yet the crossing was for use for any purpose which might thereafter be called for in the conveyance from the land of its products,—whether a wagon carrying wheat or coal, or a pipe or other appropriate means of carrying gas,—so it did not practically impair the use of the right of the railroad to use its track." The principle thus applied necessarily includes, or accords with, what has been said in the preceding para-

graph. A way of necessity springs out of the deed at the date of the grant, and becomes appurtenant to the granted estate. If it includes such a way as is necessary for any purpose to which the land may thereafter be adapted, and becomes appurtenant and attaches to the subsequent grant, when the occasion for a broader use of the adjacent land or a heavier burden thereon arises, the right to it is found in the remote conveyance. In the case just referred to, there was an express grant of a right of way, but not such a way as afterwards became necessary to the full enjoyment of the land, and the court held such larger grant had been made by implication. If a remote grant by implication can be invoked to enlarge a way expressly granted, no reason is perceived why recourse cannot be had to one for a way of necessity by implication for property which at the time, owing to its position and the surrounding circumstances, was unoccupied, and in connection with which no road was actually used. According to the legal theory, a way of necessity is granted for any and all purposes for which the land is adapted, and, if the grantee has at the time of the grant occasion for an outlet and demands it, he can enforce the right. It is therefore a right appurtenant to the land, and, having become fixed, it goes to subsequent grantees.

As to whether physical obstruction to access to land, such as the insurmountable cliff standing between the plaintiff's lot and the public road on the table land within the boundary of lot No. 15, will sustain an implication of a grant of a way of necessity, the authorities are in conflict, some saying the grantee cannot have a right of way out over the adjacent land of the grantor, if, by any means, no matter at what cost, he can get out over his own land; while others say necessity within the meaning of the terms as it is used in the law of contracts suffices. The latter class of cases seems to accord with reason and the considerations upon which the rule rests. If the cost of the construction of a right of way or road out over a man's own land would exceed the value of the land itself, or be greatly disproportionate thereto, it may well be supposed such means of access was not within the contemplation of the parties, and that a way out over the land of the grantor was contemplated. That a road over the adjacent land of the grantor is more convenient, and could be constructed at a lighter cost than one over the grantee's own land, will not sustain a grant of such right on the theory of necessity, of course, but, if it is practically impossible to get out over the

grantee's own land, there is as clear a case of necessity, within the reasonable meaning of the term, as if it were surrounded by adjacent land of strangers; for, in the latter case, a right of way can generally be secured if a sufficient amount of money is offered for it, just as a road can be made up such a cliff as is described here by the expenditure of an amount of money wholly disproportionate to the value of the land, and so great the grantee cannot be supposed ever to have intended to burden himself with it. Logically, it is the necessity that gives rise to a grant by implication, not the character or form or occasion thereof. Very few, if any, of the cases in which it has been held that a way of necessity does not exist when a man can get to his own property through his own land, and that steepness or narrowness of the way does not prevent it, presented such as the situation we have here. In practically all of them the grantees had sought ways out over the grantors' lands on the ground of convenience and economy only. Such was the case of *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664. Of the evidence in that case Judge Brannon said: "It shows that his land runs a long distance along the public highway, and there is no obstruction of access to it, save some tolerably steep ground, and that a very usable road can be made to the highway at small expense, ranging from \$5 up to \$60, according to different witnesses, the most reliable putting the cost at \$15 or \$20." In cases like this the courts have said there need not be an absolute physical obstruction. The following text from *Jones on Easements*, § 316, is well sustained by authority: "The word is to have a reasonable and liberal interpretation. The way must be reasonably necessary. If it were limited to an absolute physical necessity, a way could not be implied if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but \$1,000, it would follow from this construction that the purchaser would not have a right of way over the intervening piece as appurtenant to the land, provided he could make another way at an expense of \$100,000." See *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671; *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905; *Oliver v. Pitman*, 98 Mass. 46; *Schmidt v. Quinn*, 136 Mass. 575; *Paine v. Chandler*, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440.

Applying the foregoing principles and authorities, we think the plaintiff is enti-

tled to a way of necessity. The practicability of a way by a different course is relied upon, but, as it too would pass over a portion of lot No. 21, and be very inconvenient as compared with the road plaintiff now uses, the fact constitutes no defense.

The decree complained of will be reversed, and the injunction reinstated and perpetuated.

Robinson and Lynch, JJ., dissent.

Petition for rehearing denied May 29, 1913.

OREGON SUPREME COURT.

C. H. NOBLE, Respt.,
v.

BEEMAN-SPAULDING-WOODWARD
COMPANY et al.,
and

MILTON G. SMITH, Appt.

(— Or. —, 131 Pac. 1006.)

Bills and notes — guarantor — rights against accommodation makers.

1. One who, after the note of a corporation has been signed by stockholders as accommodation makers, places his guaranty on the back, may, under the negotiable instrument act, recover from such accommodation makers in case he is compelled to pay the note.

Trial — ignoring issue.

2. An issue raised by an answer, which is contrary to the other pleadings and the testimony, may be ignored in the findings.

Bills and notes — guarantor — assent to assignment for creditors — effect as to accommodation maker.

3. A guarantor of a corporation note cannot, before he pays anything on his guaranty, agree to an assignment by the corporation for creditors which will release the obligation to him of an accommodation maker.

Pleading — supplemental answer — judgment against codefendant.

4. One of several accommodation makers of a note who wishes to take advantage of the entry of a judgment by default against a comaker after the joining of issue in a proceeding against himself, must file a plea setting up such fact under a statute permitting a defendant to make a supplemental answer or reply alleging facts material to the cause occurring after the former answer or reply.

Note. — For rights *inter se* of accommodation parties to commercial paper, see note to Porter v. Huie, 28 L.R.A.(N.S.) 1039.
46 L.R.A.(N.S.)

Bills and notes — comaker — joint liability — effect of judgment against comaker.

5. An accommodation maker of a note containing a joint promise to pay cannot defeat an action against himself by a guarantor, because a judgment has been taken against a comaker.

Same — suit by guarantor — attorneys' fees.

6. A guarantor of a note which he is compelled to pay is not entitled to the benefit of a provision in the note for payment of attorneys' fees in an action against an accommodation maker, although the statute provides that when the instrument is paid by a person secondarily liable, it is not discharged, but the party by paying is remitted to his former rights as regards all prior parties.

Interest — note — payment by guarantor.

7. A guarantor who pays the note is entitled to interest at the statutory rate only, regardless of the rate provided for in the note.

(Bean, J., dissents.)

(April 29, 1913.)

APPEAL by defendant Smith from a judgment of the Circuit Court for Multnomah County in plaintiff's favor in an action brought to recover the amount of a note which plaintiff was compelled to pay for defendants. Modified.

Statement by Burnett, J.:

About March 30, 1908, the Beeman-Spauldning-Woodward Company, hereinafter called the corporation, applied to the Hibernia Savings Bank, to be called the bank, for a loan of \$2,500. The bank officers drew up a note of that date, of which here follows a copy:

\$2,500. Portland, Or., March 30, 1908.

On demand, after date, without grace, I promise to pay to the order of Hibernia Savings Bank at the Hibernia Savings Bank, of Portland, Oregon, twenty-five hundred dollars in gold coin of the United States of America, with interest at the rate of 8 per cent per annum from date until paid; value received. Interest payable quarterly, and if not so paid the whole sum, both principal and interest, to become immediately due and collectible at the option of the holder of this note; and I further agree to pay all taxes and assessments which may be levied or assessed to the holder of this note on account thereof; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable, as attorneys' fees in said suit or action.

This note was signed by the corporation and forwarded by the bank to its correspondent at Seattle, Washington, with this writing on the back, to be presented to the plaintiff there for his signature: "For value received, I hereby guarantee the payment of the within note at maturity, or any time thereafter, with interest at 8 per cent per annum until paid, and hereby waive demand, protest, and notice of nonpayment, and consent that the payment of this note may be extended from time to time without affecting my liability thereon." Noble refused to sign the writing last above quoted unless the defendants Julius Beeman, Lewis V. Woodward, and M. G. Smith, who were members of the corporation, would sign the note as makers, and it was returned to the bank. The three individual defendants then signed the note, which was again sent to Seattle, where Noble signed the writing on the back, and, after again receiving it, the bank paid to the corporation \$2,500, the principal of the note. It is admitted by all parties that this money was borrowed by the corporation for its own use, and that neither the plaintiff nor any of the individual defendants received any of it, though the latter were members of the corporation. The interest was paid to March 30, 1909.

The complaint sets out the note and the writing on the back thereof in full, alleges the payment of the interest, and that, the defendants having failed to pay the note, the bank compelled the plaintiff to pay the same, and he did pay it to the bank on April 14, 1910. It was agreed that he paid \$2,700 on that date to take up the note, and he alleges that he has been and now is the owner and holder thereof. It is charged also that, by the terms of the note, the defendants promised and agreed to pay the bank the sum of \$2,500 on demand, but that, although demand was made upon them by the bank, they had refused to pay the same or any part thereof; that the plaintiff never received any of the proceeds of the note, but indorsed the same as stated for the accommodation of the defendants and to enable them to procure a loan of \$2,500 from the bank. It is also averred that the plaintiff was compelled to employ a firm of attorneys to bring an action upon the note, and agreed to pay them a reasonable attorneys' fee therefor, which the plaintiff alleges is \$500. The plaintiff demands the amount paid by him on the note, together with interest at the rate of 8 per cent per annum from April 14, 1910, and for \$500 attorneys' fees. The summons was served on the corporation and the defendant Woodward respectively May 5, 1910, and May 10, 1910, but neither of them answered. It was served upon the defend-

ant Smith May 20, 1910, and he is the only person who answered in the action. The first answer was filed May 28, 1910. On October 13th of that year, summons having been served upon the defendant Beeman by publication, his default was entered and judgment taken against him for the sum demanded in the original complaint. On December 23d Smith filed an amended answer, upon which the case was tried. He admitted the execution of the promissory note set out in the complaint, but says that he executed it only as surety for the corporation and without any consideration to himself whatever. The execution and indorsement of the plaintiff's written guaranty of payment of the note as inducement to the bank to loan money to the corporation is also admitted, but Smith denies that it was an inducement to the bank to loan money to anyone except the corporation. The answer concedes that the bank compelled the plaintiff to pay the note on April 14, 1910, but denies that he is the owner or holder of it, or as such is in possession thereof. The employment of the attorneys and the necessity therefor, the reasonableness of the fee of \$500, or any other sum, are all challenged by the answer. Further answering the complaint, Smith avers, in substance, that the \$2,500 included in the note of March 30, 1908, was loaned to and received by the corporation for its sole benefit, and no part of the same was ever received or used by Smith; that he signed the note as surety only for the accommodation of the corporation and without any consideration whatsoever; and that the plaintiff both before and at the time he executed said written guaranty of payment of the note, and at the time he paid the same on April 14, 1910, had full knowledge and notice and well knew that said \$2,500 was being loaned to the corporation alone for its sole and exclusive use, and that this defendant signed said promissory note as a surety only. As a second defense Smith avers substantially that the corporation borrowed said sum of \$2,500 from the plaintiff for its own use and benefit alone, and gave the note, signed by itself as principal and by the other defendants as sureties, to secure payment of the same, and that, knowing all this, the plaintiff did on or about August 2, 1909, duly enter into an agreement with the corporation and its other creditors that it should assign all its property to S. C. Spencer in trust for the benefit of all said creditors to dispose of and convert the same into money, and, after deducting his necessary expenses in that behalf, to divide and distribute the residue among said creditors *pro rata* in full payment of their claims against the corporation, and that said as-

signment of the assets of the corporation to Spencer should release the corporation from all liability on account of all claims of its said creditors against it. He further states that, in accordance with this agreement and with plaintiff's assent thereto, the corporation transferred all its property to Spencer, who has converted and is converting the same into money in execution of the agreement, and that by reason of the premises Smith is released and discharged from all obligations or liability on the note. The amended answer of Smith was traversed by the reply.

The cause was tried before the court without a jury, and the judge found facts substantially according to the allegations of the complaint, and in addition thereto found that Smith signed the note as surety only, receiving no part of the proceeds of the loan nor any consideration for signing it, and that he executed the same only as an accommodation maker for the corporation. The judge also made this finding: "That on or about August 2, 1909, the corporation turned all of its assets over to S. C. Spencer in trust for the benefit of the creditors of the corporation, and that said Spencer was to reduce the assets of said corporation to money and take out his reasonable charges and expenses therefor and in connection therewith, and pay the creditors of the corporation *pro rata* out of the net amount realized, so that the creditors of the corporation would receive said *pro rata* share in full of their claims against it, and that a large number of the creditors of the corporation signed this agreement with said Spencer, but that the plaintiff herein never did sign it; that said Spencer entered upon the duties of his trust and has reduced some of the assets to cash, but that he never paid said plaintiff anything for or on account of the note herein nor anything to the Hibernia Savings Bank." The answering defendant made various objections to the findings of the court, but the one principally relied upon is to the effect that it was not determined by the court whether the plaintiff assented to or became bound by the agreement between the corporation and its creditors and the transfer of its assets to Spencer as trustee in accordance therewith. The court disregarded all the objections to the findings and entered judgment against Smith for \$2,700, with interest at 8 per cent per annum from April 14, 1910, and \$275 attorneys' fees, with costs and disbursements. From this judgment the defendant Smith appeals.

Messrs. Watson & Beekman, with Mr. E. B. Watson for appellant.
46 L.R.A. (N.S.)

Messrs. Wilbur, Spencer & Dibble and S. C. Spencer for respondent.

Burnett, J., delivered the opinion of the court:

It may be conceded that as to the bank the plaintiff, who signed the writing on the back of the note, and the defendants in this action, all of whom signed the note as makers, were all directly liable. Such is the doctrine taught by all the cases cited in the defendant's brief. *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Hecht v. Acme Coal Co.* 19 Wyo. 10, 113 Pac. 786; *Walter A. Wood Mowing & Reaping Co. v. Farnham*, 1 Okla. 375, 33 Pac. 867; *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575, and other cases. The question, however, here to be determined is not between the bank and the parties to this suit, but it is for us to decide what is the relation existing between the plaintiff, who signed the instrument on the back of the note, on the one hand, and the defendants here, who signed as makers, on the other. In the first place it is laid down in the case of *Staver & Walter v. Locke*, 22 Or. 519, 524, 17 L.R.A. 652, 29 Am. St. Rep. 621, 30 Pac. 497, 498, that "in determining the liability of a surety or a guarantor, it must be remembered that he is a favorite of the law, and has the right to stand upon the strict terms of his obligation when such terms are ascertained."

It is manifest, upon the face of the writings involved, that at the outset the parties intended to be bound to the bank in different capacities for, as conceded by all parties, Noble refused to sign the contract of guaranty indorsed on the note, unless the individual members of the corporation, including the answering defendant here, should themselves sign the note; and it was only when the note was again presented to him with the signatures of the individual defendants as makers that he signed as he did. Our Negotiable Instrument Law (Laws 1899, p. 27, § 63) provides: "A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Under this section it is plain that Noble was not an indorser, because he indicated by the appropriate word "guaranty" his intention to be bound in that capacity, and not as an indorser. Section 5862 L. O. L., says: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on

the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." The Code has thus limited accommodation parties to the four classes of maker, drawer, acceptor, or indorser. True enough it has not made it unlawful for any person to enter into a contract of guaranty as to the debts of another party, but by the law, "the mention of one being the exclusion of the other," such a guarantor is not an accommodation party. Although, by placing his name only on the back of the note, Noble would have been an indorser, he clearly excluded himself from that category by the terms of the writing which he signed, indicating his intention to be bound in a different capacity. So far as anything is concerned in this case, the writing which Noble signed would have been equally efficacious if it had been inscribed on an entirely separate piece of paper, with appropriate words describing the instrument to be secured.

Taking Noble's agreement and the note together, nothing else being shown, his liability is not concurrent with that of those who signed the note as makers, but successive to theirs, and this would be true, in the absence of any other showing, even if Noble had merely written his name on the back of the note before it was delivered to the bank and the money advanced thereon. The law of this state says that "the person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same." L. O. L. § 6023. On the face of the note this is the liability of the defendant Smith. The same section says further: "All other parties are secondarily liable." Even if Noble had merely written his name on the back of the note and thus became an indorser under the terms of § 5896, L. O. L. he would still have been only secondarily liable, as respects the makers, and hence not in the same category with Smith. But if we should treat Noble as strictly an indorser, and not a guarantor, as far as appears from the note itself and its indorsements, "it is the established rule that the parties to ordinary commercial paper, negotiated for value in the regular course of business, are liable to each other in succession as their names appear upon the instrument; the acceptor of a bill or the maker of a note being the principal debtor and the indorsers being liable severally in the order in which their names are written. The same rule applies in the absence of special agreement to successive accommodation parties, and a subsequent accommodation indorser, who has been compelled to meet the obligation, may maintain an ac-

tion upon the instrument against any prior accommodation party and recover the whole amount paid, although he knew that the latter's signature was given for accommodation merely. . . . It follows that successive accommodation parties, acceptor and indorser, maker and indorser, or successive indorsers, are not to be considered as co-sureties, and therefore they are not entitled to contribution among themselves unless they specially agree that they are to be bound jointly, and not severally; but where such an agreement exists, contribution may be enforced, and the agreement may be proved by parol or may be evidenced by the circumstances of the case." 1 Am. & Eng. Enc. Law, 2d ed. p. 356. To the same effect is the doctrine taught by the case of *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689. There *Montgomery* had signed a note as maker which had already been signed by a partnership in its firm name and by the individual partners. *Montgomery* was in fact a surety, and at the same time, as part of the transaction, the defendant *Page* wrote on the back of the note and signed these words, "for value received I hereby guarantee the payment of the within note," and, having been compelled to pay the note, brought an action against *Page*, and alleged that, at the time of the making of the note and the indorsement by *Page*, it was agreed between them that, in case either should be compelled to pay the note, the other would contribute half of the amount required to be paid. Based upon such an allegation, this court, in an opinion by Mr. Justice Wolverton, held that the agreement could be proved by parol, and could be relied upon to take the case out of the natural operation of the law upon the writings embodied in the note and the indorsement thereof. The contract raised by operation of the law between the makers of a promissory note and the indorsers thereof is that the liability is successive. This contract may be overcome and the natural operation of the law be superseded only by a special contract between the parties thus bound to pay the note.

Turning to the answer of the defendant *Smith*, we find it to be utterly silent about any agreement between himself and Noble about the relation to be sustained between each other as to the note, independent of the effect of the note itself and the contract indorsed thereon by Noble. All that the answer alleges in that respect is that Noble, at the time he executed the written guaranty on the note, knew that *Smith* was a surety or an accommodation maker, and not a principal. Not having alleged any special agreement taking it out of the ordinary category, whereby Noble's liability

would be subsequent to that of Smith, the latter could not resist the action of Noble against him on that point. Moreover, if this were an open question on the pleadings, the trial court found in accordance with the allegations of the complaint in that respect, and this amounts to a verdict which we cannot disturb, unless we can affirmatively say there is no evidence to support it. Evidence of a nature tending to support the findings of the court in this particular is found in the circumstance that Noble was a stranger to the corporation, while Smith himself was a director and interested therein; that Smith signed as a maker, while at best Noble was only an indorser. The result is the same whether we consider the matter as one of pleadings or one of evidence.

It is next contended that the assignment of the corporation's assets to Spencer, as trustee under the agreement of August 2, 1909, constituted a payment of the debts and a release to the company and of the sureties as to all creditors of the company signing an agreement consenting thereto, and that the assent of Noble was a material issue upon which the court refused to find. This contention is fallacious in at least two features: First, the answer upon which this contention is based alleges that the corporation borrowed the money directly from the plaintiff, and that the plaintiff accepted the promissory note as security for the payment of the loan, thus placing the plaintiff in the position of an original principal creditor of the corporation. This is manifestly so contrary to the other pleadings of the parties, as well as the testimony in the case, that the court would have been justified in utterly disregarding the contention as sham. In short, there is no testimony whatever tending to show that the plaintiff originally loaned the money to the corporation. On the contrary, all agree that the money was advanced by the bank on the note, signed, as stated in the pleadings, by the defendants here, and the agreement of Noble indorsed thereon. Further, the court did substantially determine the issue in the fourteenth finding of fact, in substance, that a large number of the creditors of the corporation signed the agreement with Spencer to convert the assets of the corporation into cash, but the plaintiff never did sign the agreement, and that nothing has ever been paid by Spencer to the bank or to the plaintiff on account of the note. Secondly, whatever was done with Spencer about realizing upon the assets of the concern was agreed upon before the plaintiff had paid anything on the note and while he was still either guarantor or indorser, as the case might be. He did not, and could not, release anything

of value to the defendant Smith, for he had no control over the assets of the corporation, and was not in a position to exercise any control over them. He could not do anything either favorable or unfavorable to Smith in that connection at that time, and hence it is immaterial to consider whether he assented to the Spencer contract or not.

The defendant also maintains that the default judgment taken against Beeman operates to release Smith from any liability; in other words, that it is a bar to any judgment against Smith. Prior to the rendition of this default judgment against Beeman, the issues had been made up between the plaintiff and the defendant Smith. If he had intended to rely upon the Beeman judgment as a bar to a judgment against himself, Smith should have operated under § 108, L. O. L. reading thus: "The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply." This is a statutory rule analogous to the common-law plea of *puis darrein continuance*; and, if a party would rely upon anything occurring since the issues were joined, it was his duty to bring it to the attention of the court by a proper plea. 31 Cyc. 493; Trotter v. Stayton, 45 Or. 301, 77 Pac. 395.

Again, the obligation of the defendant, which Noble guaranteed, was a joint and several obligation, being a note on which the words were, "For value received, I promise to pay." Noble stands in the situation of saying to the defendants: "I guaranteed the performance of your joint and several obligation. Having performed that obligation for you and in your place, I now demand of you that you perform the same to me as you should have done to the bank." Under such circumstances, the obligation which they assumed to him who stood sponsor for them is not materially different from that which they assumed to the bank. In good reason, therefore, the obligation of the defendants to their guarantor, Noble, is joint and several. It presents a case within the meaning of *Sears v. McGrew*, 10 Or. 48, where it was held that, when the action was upon a contract joint and several, a several judgment would be proper, as the defendant might have been sued alone in said case; therefore judgment might be rendered against one or more without waiting for the final trial.

It is lastly contended that Noble was not entitled to recover from Smith any attorneys' fees, and this will be considered in determining what judgment should have been entered in the court below, as we are empowered to do under article 7 of the

Constitution. Without having taken an assignment of the note, Noble is not the owner or holder thereof in the true meaning and intent of the law. In legal effect he is not bringing an action upon the note. It is said in § 5954, L. O. L., that "where the instrument is paid by a party secondarily liable thereon it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument,"—with certain exceptions not here material. It is argued that the right of again negotiating the instrument includes the right to bring an action upon it, from which it would follow that the present proceeding is directly upon the note entailing the allowance of attorneys' fees. Manifestly this section refers only to indorsers for value, and not for mere accommodation. An indorser for value at some time prior to his indorsement owned the note with the right to sue upon it at maturity. With this right he parted when he discounted the paper by indorsement to a purchaser for value, who in turn by like process may transfer the title, becoming liable by his indorsement to the new indorsee, and so on without limit until the maturity of the instrument. Then, whichever of the successive indorsers is compelled to pay is restored to his former rights within the meaning of this section, upon striking out his own and subsequent indorsements.

The case is entirely different, in reason, concerning an accommodation indorser or a guarantor. Neither of them has any "former rights," or, indeed, any right whatever, until he pays the note or bill, and then it is the right of contribution or of reimbursement according to whether he is liable jointly with the others as among themselves, or liable after them. So it is with the plaintiff here. He has performed his contract as a guarantor, and is contending, not for the principal and interest and attorneys' fees provided for by the note, not for contribution from a cosurety, but for reimbursement, or, as some authorities term it, "exoneration" for the amount which he paid for the defendants in execution of his contract of guaranty. As against the apparent makers of the note, he has no cause of action, except that arising upon the contract which he carried out. This contract with them does not provide for an attorneys' fee. As we have seen, he is not an accommodation party, being neither a maker, a drawer, acceptor, nor indorser. By his contract he excludes himself from all those classes who alone, under § 5862, are accommodation parties. Strictly speak-

ing, he cannot enforce the terms of the note. He can only rely upon the contract which he himself made, and cannot extend its terms to matters not included therein. He is entitled to reimbursement, and no more.

The amount he paid became due to him from and after April 14, 1910, the date he paid it. Interest in such cases is reckoned at 6 per cent per annum. L. O. L. § 6028.

The judgment will be modified and one entered here in favor of the plaintiff and against the defendant for \$2,700, with interest thereon at the rate of 6 per cent per annum from April 14, 1910.

Moore, J., took no part in the consideration of this case.

Bean, J., reserves the right to dissent.

COLORADO SUPREME COURT. (In Banc.)

G. A. POWERS, Plff. in Err.,
v.
CITY OF BOULDER.

(— Colo. —, 131 Pac. 395.)

Pleading — ambiguity — waiver.

1. Ambiguity of a complaint is waived by failing to move to make it more certain, or to demur upon that ground.

Municipal corporation — negligent injury — notice — service on wrong officer — effect.

2. Service of notice of an injury through the negligence of a municipal corporation, upon the mayor, instead of the clerk, as the statute requires, will not defeat the action, if the mayor accepted the service on behalf of the city, and the clerk and council received full notice in their official capacity of the accident and the injury arising therefrom.

(Hill, Garrigues, and White, JJ., dissent.)

(April 7, 1913.)

Note. — Upon whom may notice of injury or claim against municipality be served.

Notice or presentment of a claim to a municipality for injuries is not necessary as a condition precedent to an action thereon, unless expressly required by statute; but the legislature has power to require it, and in most municipalities it is required either by the charter or the General Statutes (see 28 Cyc. 1447; and 20 Am. & Eng. Enc. Law, 1231). It is with one phase of the construction of such statutes that the present note is concerned; namely, upon whom may the notice be

ERROR to the District Court for Boulder County to review a judgment sustaining a demurrer to a complaint filed to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. F. T. Johnson and J. M. Eslington, for plaintiff in error:

Service of the notice directly upon the mayor, who is the chief executive officer of the city and the presiding officer of the council, brings home to the knowledge of the city all that the statute requires or could require.

Denver v. Saulcey, 5 Colo. App. 423, 38 Pac. 1098; McIntee v. Middletown, 80 App. Div. 434, 81 N. Y. Supp. 124; Dobson v.

served. The answer to this question depends, of course, largely upon the phraseology of the various statutes, the only real conflict being as to whether or not the terms of such statutes must be strictly complied with. Some of the courts expressly say that they are mandatory and must be strictly complied with, while others say that substantial compliance which fulfils the purpose of the statute is sufficient.

Of course, no notice need be served upon others than those named in the statutes. See Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908, 14 Am. Neg. Rep. 381, holding that no notice need be served upon the park board where such board is not enumerated among those which must be served.

And where the statutes merely require notice to be presented to the "city" or "municipal corporation," service of the required notice upon the mayor has been held sufficient. Pittsburgh, C. C. & St. L. R. Co. v. Chicago, 144 Ill. App. 293, affirmed without reference to this point in 242 Ill. 178, 44 L.R.A. (N.S.) 358, 134 Am. St. Rep. 316, 80 N. E. 1022 (in which the Illinois mobs and riots liability act of 1887 was under consideration); McCartney v. Washington, 124 Iowa, 382, 100 N. W. 80 (notice served upon and accepted by both the mayor and the city solicitor).

And under a statute which merely provides that the claim "must be presented for payment" it has been held that notice may be served upon the common council, that being the body which had power to pay the claim, and that notice need not be served upon the treasurer. Butler v. Rochester, 4 Hun, 321, 6 Thomp. & C. 572.

There is a divergence of conclusion as to what constitutes sufficient service upon a common council. Thus, where the statute provided that notice must be given to the city or town council, service of notice upon the mayor has been held insufficient (Doyle v. Duluth, 74 Minn. 157, 76 N. W. 1029); as has service upon one of two branches of the council (Whalen v. Bates, 19 R. I. 274, 33 Atl. 224; McKenna v. Bates, 19 R. I. 610, 35 Atl. 580, 36 Atl. 1133); upon the town treasurer (Seamons v. Fitts, 21

Oneida, 106 App. Div. 377, 94 N. Y. Supp. 958; Blount v. Troy, 110 App. Div. 609, 97 N. Y. Supp. 182; Walden v. Jamestown, 178 N. Y. 213, 70 N. E. 466, 16 Am. Neg. Rep. 171.

All the law requires of an ordinary layman, or should require of him, is that he live up to and comply with the law in a substantial manner, which we say has been done in this case, so far as giving the notice is concerned.

Grand Forks v. Allman, 83 C. C. A. 554, 153 Fed. 532; Pyke v. Jamestown, 15 N. D. 167, 107 N. W. 359; Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868.

Service upon the mayor, and acceptance, was a sufficient service on the city.

Coleman v. Fargo, 8 N. D. 69, 76 N. W.

R. I. 236, 42 Atl. 863); upon the city secretary (Ft. Worth v. Shero, 16 Tex. Civ. App. 487, 41 S. W. 704); upon the city clerk (Hiner v. Fond du Lac, 71 Wis. 74, 36 N. W. 632—overruled by later Wisconsin cases which are set out *infra*); and upon the individual members of the council when separate and apart (Seamons v. Fitts, 21 R. I. 236, 42 Atl. 863).

But in such case the service has been held sufficient where made upon the clerk or recorder having charge of the records and files of the council, he having presented and read it to the council (Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868, referred to in POWERS v. BOULDER; Roberts v. St. James, 76 Minn. 456, 79 N. W. 519, holding in such case that it is immaterial that the notice passed through the hands of the president of the common council before it reached the clerk; Peterson v. Cokato, 84 Minn. 205, 87 N. W. 615, 10 Am. Neg. Rep. 576; Seamons v. Fitts, 21 R. I. 236, 42 Atl. 863 [town clerk]), as it has where made upon the assistant clerk, he also having charge of the files and records of the council (Kelly v. Minneapolis, 77 Minn. 76, 79 N. W. 653). And under such a statute it has been held sufficient to file the notice with the city clerk. Tiggerman v. Butte, 44 Mont. 138, 119 Pac. 477 (notice was directed to the common council); Durham v. Spokane, 27 Wash. 615, 68 Pac. 383; Mason v. Ashland, 98 Wis. 540, 74 N. W. 357 (notice filed with the city clerk for action by the council); Bacon v. Antigo, 103 Wis. 10, 79 N. W. 31; Oshkosh Waterworks Co. v. Oshkosh, 106 Wis. 83, 81 N. W. 1040. Hiner v. Fond du Lac, 71 Wis. 74, 36 N. W. 632 (set out *supra*) must be considered as overruled by the above Wisconsin Cases, it being expressly so stated in Bacon v. Antigo.) And the common council has been held properly served, by service on the president thereof, where it was provided by statute that a board or body may be served by service on the clerk or chairman. McIntee v. Middletown, 80 App. Div. 434, 81 N. Y. Supp. 124, followed in O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. Supp. 555, reversed on

1051; *Wormwood v. Waltham*, 144 Mass. 184, 10 N. E. 800; *Denver v. Saulcey*, 5 Colo. App. 423, 38 Pac. 1098; *Pueblo v. Babbitt*, 47 Colo. 597, 108 Pac. 175; *Herman, Estoppel*, § 556; *Canfield v. Jackson*, 112 Mich. 120, 70 N. W. 444, 1 Am. Neg. Rep. 626; *Griswold v. Ludington*, 116 Mich. 401, 74 N. W. 663; *Wright v. Portland*, 118 Mich. 23, 76 N. W. 141; *McCarthy v. Dedham*, 188 Mass. 204, 74 N. E. 319; *Janse v. Boston*, 201 Mass. 348, 87 N. E. 633.

Mr. J. T. Atwood for defendant in error.

Scott, J., delivered the opinion of the court:

This is an action upon the part of the plaintiff on account of personal injuries

other grounds in 184 N. Y. 1, 3 L.R.A. (N.S.) 1053, 112 Am. St. Rep. 538, 76 N. E. 758, 6 Ann. Cas. 173, where service was made upon both the president and the clerk of the common council. So, service upon the president of the council has been held sufficient, where it was made when the council was not in session and the notice was received by the council at its first meeting after the service upon its president. *Blount v. Troy*, 110 App. Div. 609, 97 N. Y. Supp. 182.

And a requirement that a claim be presented to a town board of audit has been held sufficiently complied with by presentation of a claim to the town clerk who is the clerk of such board, with written directions to file same and to present it to the town board. *Parish v. Eden*, 62 Wis. 272, 22 N. W. 399.

But a statute requiring notice to be presented to the board of trustees has been held not to have been complied with by notice to the chamberlain and president of the village (*Mark v. West Troy*, 69 Hun, 442, 23 N. Y. Supp. 422), nor by notice to the treasurer of the city water board (*King v. Randolph*, 28 App. Div. 25, 50 N. Y. Supp. 902). But such a requirement has been held sufficiently complied with by the serving of notice upon the village clerk, where he was the clerk of the board and it was provided by statute that, when notice is required to be given to a board, service on the clerk thereof shall be sufficient. *Dobson v. Oneida*, 106 App. Div. 377, 94 N. Y. Supp. 958.

And a statute requiring presentation of claims to the board of county commissioners has been held not to have been complied with by the filing of claims with the county treasurer. *San Mihuel County v. Pierce*, 6 N. M. 324, 28 Pac. 512.

And under a charter requiring notice of injury to be served upon either the mayor or city council, it has been held that handing a notice to a single alderman was not sufficient. *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098, wherein the reason, as is shown by quotations in the dissenting opinions in *POWERS v. BOULDER*, was that 46 L.R.A. (N.S.)

alleged to have been sustained by him by reason of certain acts of negligence upon the part of the defendant city. A general demurrer to the amended complaint was sustained by the trial court. The plaintiff elected to stand upon his amended complaint, and the ruling of the court sustaining the demurrer is the only question presented, and this is confined to the allegations as to service of notice of the injury required by the statute. The allegation of the amended complaint in this particular is as follows: "That on or about August 24, 1911, plaintiff caused a written notice of said accident to be served upon the defendant by serving the same upon its mayor, respectively, setting forth the time, place, and cause of said injuries, and plain-

since the liability of the city is statutory, the provisions of the statute must be strictly complied with, and therefore that the notice must be served upon the party designated in the statute, such service being a condition precedent to the right of the injured to maintain his action. However, the vigor of the language used in this case seems to have been relaxed somewhat in *POWERS v. BOULDER*.

But under statutes requiring as a condition precedent to the maintaining of an action against a city for personal injuries the presentation of a verified claim therefor to the mayor and common council for audit, a claim was held in *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532, set out and quoted in *POWERS v. BOULDER*, to have been duly presented where it was presented to the city auditor, who filed it and advised the council thereof; the reason being that, since the purpose of the statute had been fulfilled, its requirement had. And construing the same statutes it was held in *Coleman v. Fargo*, 8 N. D. 69, 76 N. W. 1051, that filing of the claim with the city auditor, and its presentation to the mayor and council by the auditor within the statutory period, was a sufficient presentation of the claim under the statutes. And a similar conclusion was reached in *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359, set out in *POWERS v. BOULDER*, where notice was served upon both the mayor and the city auditor for presentation to the council.

And where the statute provides that the claim must be filed with the supervisor of the town against which recovery is sought, it has been held sufficient compliance that the claim was mailed to the town clerk or town board of which the supervisor was a member, and was actually received by the supervisor in question. *Soper v. Greenwich*, 48 App. Div. 354, 62 N. Y. Supp. 1111.

And under a statute which provides that notice may be given to the city clerk, the following parenthetically noted notices have been held sufficient: *Canon City v. Cox*, — Colo. —, 133 Pac. 1040 (notice delivered to the mayor and by him delivered to the clerk); *Wormwood v. Waltham*, 144 Mass.

tiff further alleges that at the time of said service plaintiff was informed by said mayor that he, the said mayor, would accept service of said notice for and in behalf of said defendant, and that plaintiff need not serve any other or further notice upon any other officer of said city, all of which plaintiff relied upon as being sufficient and valid in every way so far as serving any other or further notice was concerned; and plaintiff alleges upon information and belief that as a matter of fact the said city and its duly constituted authorities, consisting of its mayor, board of council, and clerk thereof, had full notice of said accident and plaintiff's injuries arising therefrom in their official capacity within ninety days from the

happening thereof, and duly acted thereon in their official capacity."

Revised Statutes of 1908, § 6661, provides: "No action for the recovery of compensation for personal injury or death against any city of the first or second class, or any town, on account of its negligence, shall be maintained unless written notice of the time and place and cause of injury is given to the clerk of the city or recorder of the town by the person injured, his agent or attorney, within ninety days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But the notice given under the provision of this act shall not be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place,

184, 10 N. E. 800, referred to in *POWERS v. BOULDER* (notice given to an alderman, who presented it to a board meeting, which referred it to the city solicitor, who handed it to the city clerk, it being said that the alderman to whom it was handed was the agent of the injured person); *Janse v. Boston*, 201 Mass. 348, 87 N. E. 633, set out in *POWERS v. BOULDER* (notice given to clerk, found in city clerk's office, the city clerk and the assistant city clerk both being absent); *Johnson v. St. Paul*, 52 Minn. 364, 54 N. W. 735 (notice addressed to mayor and common council, but delivered to city clerk); *Kelly v. Minneapolis*, 77 Minn. 76, 79 N. W. 653 (notice served upon assistant city clerk). But see *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58, wherein it was held that such a provision was mandatory, and that notice must be served upon the city clerk as provided by statute.

So, a statute requiring service of proper notice upon the "corporation council" or his "chief assistant" has been held complied with by serving the notice upon the chief clerk found in charge of the corporation council's office, provided the notice reached one of the proper officers. But otherwise if it did not reach him within the prescribed period. *Abbott v. Detroit*, 150 Mich. 245, 113 N. W. 1121. And in *McAuliff v. Detroit*, 150 Mich. 346, 113 N. W. 1112, construing the same statute, service upon a messenger in the corporation council's office was held insufficient where not brought to the attention of the proper officer. But the corporation council was held properly served in *McMahon v. New York*, 1 App. Div. 321, 37 N. Y. Supp. 289, by delivery of the notice to the chief assistant by one of the assistant corporation councils. So, the city solicitor was held properly served in *Rafferty v. Pittsburg*, 15 Pa. Super. Ct. 77, by delivery of notice to the assistant city solicitor. And a statute requiring a notice of claim to be filed "in the office of the city attorney" has been held to have been complied with by the filing of notice directed to the city attorney and acknowledgment thereof by the acting city attorney. *Fairfield v. Sechrest*, 136 Ill. App. 8. And see 46 L.R.A.(N.S.)

Donaldson v. Dieterich, 247 Ill. 522, 93 N. E. 366, reversing 157 Ill. App. 38, wherein it was held that where the statute requires notice of a claim for injuries to be filed "in the office of the city attorney (if there is a city attorney)" as a condition precedent to suit on the claim, no such notice need be given unless there is a city attorney who is a licensed attorney having an office where the notice can be filed, it not being sufficient that the municipality has a *de facto* attorney.

But under the rule of strict compliance it has been held that the mandatory provisions of a statute requiring service of notice upon "one of the municipal officers" were not complied with by serving the notice upon the city clerk, where by statute the mayor and aldermen constitute the "municipal officers" of the city. *Huntington v. Calais*, 105 Me. 144, 73 Atl. 829.

And where the provisions of a statute requiring service of notice to be made upon the clerk, mayor, or member of the board of trustees are regarded as mandatory and a strict compliance a condition precedent to suit, it has been held that service of notice upon the city attorney was not sufficient although he notified the proper officials. *Rushville v. Morrow*, — Ind. App. —, 101 N. E. 659.

So, presentation of a claim to the city council has been held not to be a sufficient compliance with a statute requiring service of notice upon the mayor or city clerk as a condition precedent to suit on the claim. *Dorsey v. Racine*, 60 Wis. 292, 18 N. W. 928.

And it has been held that where the requirement is that notice be served upon the street commissioner, or city sidewalk superintendent, or alderman of the ward where the injury occurred, service of notice upon the mayor and city clerk is not sufficient. *Harris v. Fond du Lac*, 104 Wis. 44, 80 N. W. 66. But, construing the same statute, it was held in *Zoellner v. Fond du Lac*, 147 Wis. 300, 133 N. W. 35, that it was sufficient to give notice to one who had been hired as sidewalk inspector, but whose duties were to construct, repair, and inspect

or cause of injury; Provided, it is shown that there was no intention to mislead and that the city council or board of trustees was in fact not misled thereby."

There is no objection that the notice was not in writing, nor that it was not in all respects sufficient, nor that it was not served within the time provided, but only that it was served on the mayor of the city rather than the city clerk, as provided by the statute. Did such allegation of service upon the mayor, when considered with the additional allegation as to official consideration by the constituted authorities, meet the substantial requirement of the statute? The complaint, in addition to service of the notice upon the mayor, alleged "that the mayor, clerk, and board of aldermen

all had full notice of the accident and plaintiff's injuries in their official capacity within ninety days thereafter, and that the mayor declared at the time of the service on him, that no further notice would be required." There is no claim that the city council did not have full or sufficient notice, or that they did not act on it. The defendant rests solely upon the technical contention that the service was not made upon the city clerk as designated by the statute, but who by the very nature of things could perform no other duty in the matter than to present it to the mayor and council, who were vested with authority to act in the premises.

It may be conceded that the part of the complaint wherein it is said that the may-

sidewalks, and who purported to be and was recognized by the city as sidewalk superintendent.

In *Baine v. Rochester*, 85 N. Y. 523, where the statute required the notice to be filed with the chief fiscal officer of the city, it was held that notice must be filed with the city treasurer, he being declared by statute to be the chief fiscal officer.

Where there are separate statutes, each requiring notice to be served upon different officials or bodies, notice must be served upon both where the purposes of such statutes are different. Thus, it has been held that where one statute requires service to be made upon the corporation counsel, the purpose being to enable him to prepare his defense, and another statute requires notice to the city comptroller, the purpose being to give him an opportunity to examine into the validity of the claim and by adjustment or payment thereof to avoid the expenses of action, notice must be given to both the comptroller and the corporation counsel. *Frankel v. New York*, 18 N. Y. S. R. 241, 2 N. Y. Supp. 294; *Babcock v. New York*, 56 Hun, 196, 9 N. Y. Supp. 368 (holding service upon the comptroller insufficient although he transmitted it to the corporation counsel for the special purpose of investigation); *Kennedy v. New York*, 34 App. Div. 311, 54 N. Y. Supp. 261, affirming 18 Misc. 303, 41 N. Y. Supp. 1077; *Smith v. New York*, 88 App. Div. 606, 85 N. Y. Supp. 150; *Watts v. New York*, 133 App. Div. 400, 117 N. Y. Supp. 612 (holding that notice upon the corporation counsel only was not sufficient, at least in the absence of proof that it was acted upon by the comptroller); *Bernreither v. New York*, 123 App. Div. 291, 107 N. Y. Supp. 1006, affirmed without opinion in 196 N. Y. 506, 89 N. E. 1096. And the same has been true where the statutes required notices to both the city council and the corporation counsel. *Higgins v. Albany*, 130 App. Div. 276, 114 N. Y. Supp. 516; *Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80, affirming 57 Hun, 25, 10 N. Y. Supp. 392. And under separate statutes requiring presentation of claims to the comptroller and to the deputy

commissioner in the department in which claimant was employed, the filing of such a claim with such a deputy commissioner, but not with the comptroller, has been held insufficient although the claim filed with the commissioner eventually reached the comptroller. *Ruprecht v. New York*, 102 App. Div. 309, 92 N. Y. Supp. 421. But see *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652, reversing 17 App. Div. 536, 4 N. Y. Anno. Cas. 186, 45 N. Y. Supp. 892, 3 Am. Neg. Rep. 586, wherein it was held that service upon the comptroller was sufficient where he sent it to the corporation counsel, who filed it and acted upon it.

But in *Clark v. Austin*, 38 Minn. 487, 38 N. W. 615, where one charter provision required all claims to be presented to the common council and another provision required notice of claims for personal injuries, etc., to be presented to the mayor or the city recorder, it was held that it could hardly be contemplated that a claim falling within the latter provision need be presented twice, and that notice to the mayor was sufficient. And see *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532, set out and quoted in *POWERS v. BOULDER*, wherein the statutes provided that notice of the claim must be presented to the mayor and the common council for audit and allowance; that the mayor and common council constitute the city board of audit; and that the city council consists of the mayor and aldermen, and it was held that it was not necessary that the claim should be presented to the mayor separately from the council, but was properly presented if presented to the mayor and council sitting together as a board of audit.

In the following cases in which it does not appear to whom the statute provided that notice should be given, it was held that the notice given was not sufficient: *Miles v. Lynn*, 130 Mass. 398 (notice given to police officer during friendly call upon injured person was held not sufficient, although the injured person understood that he was talking to the officer in an official capacity); *Mooney v. Salem*, 130 Mass. 402

or, board of council, and clerk all "had full notice of said accident and plaintiff's injuries arising therefrom, in their official capacity, within ninety days from the happening thereof, and duly acted thereon in their official capacity," was ambiguous, and that the court may have well sustained a motion to make the complaint more specific, definite, and certain in that particular, or have sustained a demurrer upon such specific ground; but no such motion or demurrer was presented, and therefore the right to attack the complaint on the ground of such ambiguity was waived. The complaint was not for this reason alone subject to general demurrer. Under these circumstances, the complaint may be construed to charge that the mayor, clerk, and council were in fact presented with the notice so served on the mayor, and that they acted officially thereon, and within the time required by law. If so, then every purpose of the notice was accomplished.

It is true that service of a sufficient notice on the clerk would have bound the city in that respect, even though he may not have presented it to the mayor and council at all. But the sole purpose of the statute is to give the mayor and council notice of the claim of damage for the specific injury within the designated time, so that they may have opportunity to take official action thereon, and to properly protect the interests of the city.

In the case of *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532, it was held by the United States circuit court of appeals, where such notice was required by the statute to be presented to the mayor and city council, that the presentation of such notice to the city auditor was a sufficient compliance with the statute, and the court there said: "A brief reference to the statutes and decisions of North Dakota will serve to show

that the filing of the claim with the auditor was a presentation of it to the mayor and council within the meaning of the law. The mayor and common council of each city is constituted a board of audit of such city. § 2171, Rev. Code 1899. The city council consists of the mayor and aldermen. § 2172, Rev. Code 1899. Only one writing signed by the plaintiff and properly verified is contemplated by § 2172, supra. When so executed and verified, it is to be presented to the mayor and council 'for audit and allowance.' § 2174. Giving due consideration to these provisions of the statutes considered collectively, we cannot agree with counsel for the city that the claim should have been presented to the mayor separately from the council. The claim manifestly should be so presented to the body authorized to audit it as to secure the attention of that body, and, when that is done, it would seem that the requirement of the statutes has been complied with."

To the same effect is *Pyke v. Jamestown*, by the supreme court of North Dakota, 15 N. D. 157, 107 N. W. 359, construing the same statute. The facts in that case were as follows: "He presented one copy to the mayor and one copy to the city auditor. The copy presented to the mayor was delivered at his office. The copy delivered to the auditor was delivered upon the street. Accosting that officer, he inquired whether he was the city auditor, and, receiving an affirmative answer, he gave him the copy, informed him what it was, and stated that he desired to have it presented at the next meeting of the city council. The claim was addressed: 'To the City Council of the City of Jamestown, N. D.' The mayor testified that he submitted the copy he received to Mr. Thorp, the city attorney. He also testified that 'the notice was not discussed or presented to the council at any time.' Two

(notice given to police officer who called in his official capacity); *Roach v. Somerville*, 131 Mass. 189 (notice given to police officer during casual conversation).

And in the following cases in which it does not appear upon whom the notice should have been served, notice was held served upon a proper person: *McCabe v. Cambridge*, 134 Mass. 484 (notice served upon the assistant city clerk, the city clerk being absent); *McCarthy v. Dedham*, 188 Mass. 204, 74 N. E. 319 (notice served upon selectman); *Burnette v. St. Joseph*, 112 Mo. App. 668, 87 S. W. 539 (notice served upon mayor).

As to validity of requirement of notice of injury as a condition of municipal liability, see 36 L.R.A.(N.S.) 1136.

As to validity of requirement of written notice of defect to render municipal corporation liable for injuries caused by defective highway, see 11 L.R.A.(N.S.) 391. 46 L.R.A.(N.S.)

As to notice of claim and cause of injury as condition of municipal liability for defect in highway generally, see 20 L.R.A.(N.S.) 757.

As to applicability in case of injury to municipal employee of rule requiring notice of defect or notice of injury as condition of municipal responsibility for personal injuries on street or highway, see 28 L.R.A.(N.S.) 533.

As to necessity of written notice as to defect as condition of liability of municipal corporation for injuries due to the positive act of its officers or servants, see 23 L.R.A.(N.S.) 282.

As to physical or mental incapacity as an excuse for failure to give notice of injury required as a condition of municipal liability, see 32 L.R.A.(N.S.) 350.

G. J. C.

aldermen testified to the same effect. The present city auditor testified that he could find no copy of the claim among the records and no entry in reference thereto. The auditor to whom the claim was presented died in the following December." Commenting upon this, the court said: "We are of opinion that the presentation was sufficient. The manifest purpose of the statute is to protect cities from the unnecessary expense and the annoyance of legal proceedings until claims against them can be investigated. The person injured must present his claim within sixty days from the date of the injury, during which period the facts are fresh and ascertainable. The city is given sixty days thereafter in which to inform itself as to the merits of the claim and determine whether it will audit and allow it. If not allowed at the end of that period, the party injured may pursue his remedy by action."

The Minnesota statute requires such notice to be given to the city council or other governing body. In *Lyons v. Red Wing*, 76 Minn. 20, 78 N. W. 868, the notice was left with the clerk, who read it to the council. This was held to be sufficient compliance with the statute.

In *Wormwood v. Waltham*, 144 Mass. 184, 10 N. E. 800, the law required the notice to be given to the mayor, clerk, or treasurer. The notice was given to an alderman, and was afterward read to the board, of aldermen. This was held sufficient.

In *Janse v. Boston*, 201 Mass. 348, 87 N. E. 633, construing the same statute, it appears that one acting for the plaintiff handed the notice to a person in the clerk's office, and asked that it be handed to the clerk; the person saying, "All right." This was held to be good. So, in this case if the notice was handed to the mayor, and if such notice was officially considered by the mayor, clerk, and council, what important difference can it make to the defendant? Every purpose of the law was thus accomplished, and to hold that the plaintiff must hand the notice to the clerk personally in order to substantially comply with the statute is to demand form and ignore substance.

If the allegations in the amended complaint, as herein construed, are sustained by the proof, then the notice in this case was sufficient.

The demurrer should have been overruled.

The judgment is reversed, and the case remanded for further proceedings in accord with this opinion.

Gabbert, J., concurring:

There is an additional reason why the judgment should be reversed. The plaintiff's cause of action is the alleged negligence of 46 L.R.A.(N.S.)

the city. In order to maintain his action, unless legally excused, he is required to give the statutory notice. The purpose of this notice is to afford the municipal authorities opportunity to investigate his claim and take steps to protect the city. It is therefore solely for the benefit of the city, and service upon the official designated in the statute may be waived. In my opinion the complaint alleges facts from which it appears that service of notice upon the clerk was waived.

White, J., dissenting:

I think the giving of the notice of injury in the form and in the manner prescribed by statute, and upon the person designated, is a condition precedent to the right of plaintiff to maintain his action, and, that the complaint having failed to allege such facts, the demurrer thereto was properly sustained. In *Denver v. Saulcey*, 5 Colo. App. 420, 422, 38 Pac. 1098, 1099, it is said: "The notice must not only contain all the things the statute requires, but it must be served on the persons which the law designates, and in the way specified, if the statute be specific in this particular. . . . The importance of making the service on the proper person has been a matter of judicial consideration; and it has accordingly been adjudged that, where the service must be upon a trustee or upon a mayor or upon a council, service upon the clerk, even though he be one of the principal officers of the corporation, is not such a compliance with the provision as to permit the maintenance of the suit,"—citing *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132; *Underhill v. Washington*, 46 Vt. 767; *Wade, Notice*, §§ 1312, 1313. And in 28 Cyc. 1459, it is said that "service of notice or presentation of the claim must be made in the manner prescribed by the statute; or, if not prescribed, then as provided by general law for the service of notice, and within the time prescribed. The notice or statement must be served upon or presented to the board or officers, designated in the statute to be notified, such as the corporation counsel or city council." It may be that if the city clerk and council were, in fact, presented with the notice within the time limited by the statute, it would be a sufficient service upon the clerk, though it had actually been brought before him by the mayor. But I am unable to find in the complaint any fact alleged that would warrant the conclusion, or even inference, that these things occurred. How it can be said that the allegation, "that the mayor, clerk, and board of aldermen, all had full notice of the accident and plaintiff's injuries in their official capacity within ninety days

thereafter," "may be construed to charge that the mayor, clerk, and council were in fact presented with the notice so served on the mayor," is beyond my comprehension. Neither can I conceive that there is anything ambiguous in the language quoted from the complaint. How can it be said that an allegation that certain persons "had full notice of the accident and plaintiff's injuries in their official capacity" is in any wise ambiguous? There is not the slightest intimation in such allegation that the notice of the injury required by the statute as a condition precedent to plaintiff's right to maintain the action had ever been brought before the clerk or the council, or that they had knowledge of its existence. It is said in the opinion that "there is no claim that the city council did not have full or sufficient notice, or that they did not act on it." The very fact that a demurrer was filed to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action in respect to the service of the notice is essentially a claim that the city did not have full and sufficient notice to make it liable under the statute. Moreover, that which the statute required the plaintiff should do, as a condition precedent to maintain his cause of action, cannot be legally excused by the courts, even though the latter should think the requirement harsh or unwise. To do so is to annul legislation and determine the rights of litigants, not in accordance with the law of the land, but as the court thinks the law should be.

I am authorized to state that Mr. Justice Hill and Mr. Justice Garrigues concur in the views I have herein expressed.

Garrigues, J., dissenting:

I cannot agree with the majority opinion. I think service of the notice required by statute to be made upon the clerk before bringing suit is a condition precedent to the right to bring the action. The legislature, having the power to deny the right to bring the suit, could prescribe the conditions under which it could be brought. In my opinion *Denver v. Saulkey*, 5 Colo. App. 420, 38 Pac. 1098, is decisive of this case. It is there said on page 422 of 5 Colo. App.: "The charters of nearly all cities contain a provision like that found in the charter of this city. In providing satisfactory plans for municipal government, it seems to have been found expedient to attach this requirement as a condition precedent to the general right which the injured person is given to recover damages for such alleged wrongs. Since the right to sue the city is a matter of statute, lawmakers have the undoubted right to require the observance of these 46 L.R.A.(N.S.)

reasonable conditions. Wherever similar provisions have come before the courts for construction, it has been almost, if not quite, universally held that the giving of the notice in the form and in the manner prescribed is a condition precedent, without which the plaintiff may not maintain his action."

I am authorized to state that Mr. Justice Hill and Mr. Justice White concur in this dissenting opinion.

KANSAS SUPREME COURT.

ETTA H. OSINCUP, Appt.,

v.

JENNIE HENTHORN et al., Admrs., etc.,
of Julia A. George, Deceased.

(89 Kan. 58, 130 Pac. 652.)

Descent — voluntary distribution — mistake — relief.

1. The mistake of the wife and mother of a decedent in regard to the law of descents and distributions of a state other than that of their residence, which led to the apportionment and transfer of land owned by the decedent at the time of his death to the mother, when, under the statute, the widow was entitled to all of it, is a mistake of fact against which equity will relieve, unless some principle of equity bars the granting of such relief.

Laches — relief from mistake — effect.

2. The general rule is that equity will not interpose to relieve from a mistake where there is inexcusable delay and negligence in asserting a right, or where the granting of the relief would operate inequitably; but laches is an equitable defense, and will not bar a recovery from mere lapse of time, nor where there is a reasonable excuse for nonaction of a party in making inquiry as to his rights or in asserting them.

Trial — laches — question for jury.

3. In view of the testimony herein, as to the delay of appellant in making inquiry or in asserting her right to land owned by her, but which was conveyed to the mother of decedent by mistake, the question whether she was guilty of laches was one of fact, and the ruling of the trial court sustaining a demurrer to her evidence was error.

(March 8, 1913.)

Headnotes by JOHNSTON, Ch. J.

Note. — Mistake as to law of another state or country as one of law or of fact.

The scope of this note includes cases where the parties were wholly ignorant of the law of another state, as well as cases where they were mistaken in regard thereto, both classes of cases standing on the

APPEAL by plaintiff from a judgment of the District Court for Trego County in defendants' favor in an action brought to set aside an agreement between plaintiff and Julia A. George, deceased, for the equal division of the estate of plaintiff's deceased husband, and the deed conveying the same. Reversed.

The facts are stated in the opinion.

Mr. Herman Long, for appellant:

A mistake as to the law of another state is regarded as a mistake of fact, and is on the same basis, so far as diligence is concerned, as any other matter of fact; there is no fiction of law which presumes that a resident of Iowa is familiar with the laws of Kansas, and which makes it negligence not to know the laws of another state.

same footing. It may also be stated that the "other state or country" meant is another from the standpoint of the party mistaken, and not merely from that of the court.

The parent case on this subject is *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353, decided in 1829, which involves a situation substantially identical with that in *OSINCUP v. HENTHORN*. There a citizen of Massachusetts had died intestate, leaving as his heirs a niece, the daughter of a deceased sister, and three nephews, the sons of another deceased sister. The nephews and niece united in a deed of lands of the intestate in the state of New York, and divided the proceeds among themselves *per capita*. By a statute of New York, the land in that state descended to the niece and nephews *per stirpes*, and not *per capita*, as in Massachusetts. Upon discovering this fact, an action was brought against a nephew for the amount of purchase money received by him over and above his share. The court, in holding that the mistake of the parties was one of fact against which equity would relieve, and not of law, said: "The mistake in the distribution of the consideration money for which the land was sold arose from the mutual ignorance of the law of descents in New York. Can this mistake be corrected and the plaintiff be restored to the rights which he had under this statute? It is, in the first place, objected that the plaintiff's ignorance was owing to his own negligence, that he shall not be allowed to take advantage of his own laches; that what a man may learn with proper diligence, he shall be presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve. In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. But this doctrine does not apply to the present case. It was not the duty of the plaintiff to know the laws of New York, nor does ignorance of them imply negli-

2 Pom. Eq. Jur. § 849; *Jeakins v. Frazier*, 64 Kan. 271, 67 Pac. 854; *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Bolinger v. Beacham*, 81 Kan. 747, 106 Pac. 1094; *Morgan v. Bell*, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925; *Nicholson v. Nicholson*, 83 Kan. 223, 109 Pac. 1086; *Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976.

And if it be not negligence to make such a mistake, neither is it negligence nor laches to fail to discover the mistake, even for years and years afterward.

First Nat. Bank v. Wentworth, 28 Kan. 183; *Duvall v. Simpson*, 53 Kan. 291, 36 Pac. 330; *Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976.

Mr. W. E. Saum for appellees.

gence. Knowledge cannot be imputed to the plaintiff, and it is expressly agreed that he, as well as the defendant, was entirely ignorant of the statute of New York. Besides, it was as much the duty of the defendant as of the plaintiff, to be acquainted with the laws of New York. And, if either is guilty of negligence, both are in this respect *in pari delicto*. . . . The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is that the payment to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed. It is alleged that to allow the plaintiff to recover in the present action would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim, *Ignorantia juris quod quisque tenetur scire, neminem excusat*. This objection has been strongly urged by the defendant's counsel, and learnedly and elaborately discussed by the counsel on both sides. It is believed that all the authorities applicable on the point, from the civil as well as the common law, have been brought before the court. Whether money paid through ignorance of the law can be recovered back is a question much vexed, and involved in no inconsiderable perplexity. We do not court the investigation of it, and, before attempting its solution, it may be well to ascertain whether it is necessary to the decision of the case before us. That a mistake in fact is a ground of repetition is too clear and too well settled to require argument or authority in its support. The misapprehension or ignorance of the parties to this suit related to a statute of the state of New York. Is this, in the present question, to be considered fact or law? The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. 2 Starkie, Fv. Metcalf's ed. 568; *Male v. Roberts*, 3 Esp. 163, 6 Revised Rep. 823. If a foreign law is unwritten, it may be proved by

Johnston, Ch. J., delivered the opinion of the court:

Manfred E. Hull and his wife, Etta H. Hull, now Etta H. Osincup, the appellant, were, in 1894, residents of the state of Iowa, and with them lived his mother, Julia A. George. Manfred E. Hull was possessed of certain property in the state of Iowa, and also of certain land in the state of Kansas. On October 24, 1894, Hull died intestate, leaving surviving his wife and mother, but no children. In order to settle up the estate, and acting upon the advice of an attorney, who, as it is alleged, informed appellant and Julia A. George that they were each entitled to one half of the Kansas land, appellant and Julia A. George entered into a contract

which recited that, "in consideration of the love and affection existing between the parties," the estate, including the Kansas land, should be equally divided between them, after the payment of debts and funeral expenses. To carry out this agreement, appellant made a quitclaim deed for the Kansas land to Julia A. George "in consideration of one dollar and other valuable considerations," and later received from Julia A. George a quitclaim deed for an undivided one half interest in the land for the same consideration. In each of the deeds it was recited that Julia A. George was the mother and only heir of Manfred E. Hull. In 1910, Julia A. George, while a resident of Illinois, died, leaving a will naming the appellees as devisees. At this

parol evidence; but if written, it must be proved by documentary evidence. *Kenny v. Clarkson*, 1 Johns. 385, 3 Am. Dec. 336; *Frith v. Sprague*, 14 Mass. 455; *Consequa v. Willings*, Pet. C. C. 229, Fed. Cas. No. 3,128. The laws of other states in the Union are in these respects foreign law. *Raynham v. Canton*, 3 Pick. 293. The courts of this state are not presumed to know the laws of other states or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules, and to have the same effect upon all subjects coming within their operation, as the laws of this state. That the *lex loci rei sitæ* must govern the descent of real estate is a principle of our law with which everyone is presumed to be acquainted. But what *lex loci* is the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the state of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other states. We are of opinion that, in relation to the question now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition."

Although the statement which is made in some of the cases, that the doctrine that ignorance of foreign law is to be deemed ignorance of fact proceeds upon the principle that foreign laws are matters of fact, to be proved like other facts, before even the courts can notice them (see *Ellison v.* 46 L.R.A. (N.S.)

Branstrator, 153 Ind. 146, 54 N. E. 433; *Bolinger v. Beacham*, 81 Kan. 746, 106 Pac. 1094; *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *King v. Doolittle*, 1 Head, 77), and which seems to have had its origin in the argument used by the court in *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353, may suggest a distinction between cases where the mistake is by a resident of the state of the forum as to the laws of another state or foreign country, and cases where the mistake is by a nonresident as to the law of the forum state, of which the court takes judicial notice, no such distinction has in fact been taken, as is indicated by the decisions hereinafter cited. And if, as seems to be the case, the true basis of the rule is that the duty of every person of sound and mature mind to know the law is limited to the law of one's residence, so that one is under no duty to know the law of another state or country, the suggested ground for distinction disappears. Compare *Haven v. Foster*, supra, and *Vinal v. Continental Constr. & Improv. Co.* 53 Hun, 247, 6 N. Y. Supp. 595, where it is said: "Foreign laws (including laws of other states) are facts. The presumption that everyone knows the laws of his own state is hard enough. He never is presumed to know the laws of all the other states in this country and the laws of all the nations of the world."

The rule that ignorance or mistake as to the law of another state or country is ignorance or mistake of fact is also supported by the following cases: *Bolinger v. Beacham*, 81 Kan. 746, 106 Pac. 1094; *Nicholson v. Nicholson*, 83 Kan. 223, 109 Pac. 1086; *Lyle v. Shinebarger*, 17 Mo. App. 66; *Rosenbaum v. United States Credit System Co.* 64 N. J. L. 34, 44 Atl. 966, reversed on other grounds in 65 N. J. L. 255, 53 L.R.A. 440, 48 Atl. 237, in which the ignorance or mistake was that of a resident of the forum as to the laws of another state; *Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976, in which the mistake was that of a nonresident of the forum as to the law of another state; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218;

time appellant was a resident of California, and, after Julia A. George's death, appellant alleges that, by consulting an attorney regarding her interest, if any, in the estate, she for the first time found herself to have been entitled to the whole of the Kansas land owned by Manfred E. Hull, and she thereupon brought this action to set aside the agreement entered into with Julia A. George, and the deed conveying the land. She gave testimony that she had not resided in the state of Kansas, and had therefore had no opportunity to become familiar with Kansas laws. In their answer to appellant's petition, appellees deny that, at the time of the making of the contract and deed, appellant was laboring under any mistake as to the legal rights

of the parties, and assert that the instruments were voluntarily given and entered into. As a further defense, appellees set up that appellant was guilty of laches in not familiarizing herself earlier as to her legal rights under the Kansas laws. On a trial of the cause, the appellant produced the evidence above outlined; but a demurrer to her evidence was sustained, and the case dismissed.

Accepting as true all of the testimony which tends to support the allegations of the appellant in her petition, and drawing every fair inference from it favorable to her, as must be done upon a demurrer to evidence, did she present a case for equitable relief? She alleged that, upon the death of her husband, she became the ab-

Marshall v. Coleman, 187 Ill. 556, 58 N. E. 628; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433; Curtis v. Leavitt, 15 N. Y. 9; Vinal v. Continental Constr. & Improv. Co. 53 Hun. 247, 6 N. Y. Supp. 595; Morgan v. Bell, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925, in all of which the ignorance or mistake was that of a nonresident as to the law of the forum; Moreland v. Atchison, 19 Tex. 303, where the ignorance was that of an immigrant as to the law of the forum; and by *dicta* in Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; and King v. Doolittle, 1 Head, 77.

And see also Leslie v. Baillie, 7 Jur. 77, 12 L. J. Ch. N. S. 153, 2 Younge & C. Ch. Cas. 91, holding payment of a legacy by the executors of an English will, to a married woman domiciled in Scotland, after her husband's death, a good payment in the absence of proof that they knew the Scotch law on the subject, though according to the Scotch law the payment should have been made to the husband's personal representatives; since the executors were not bound to know the law of Scotland.

So, also, where it is necessary to prove a person's knowledge of the law of a state or country other than that of his residence, such knowledge must be proved as a fact. Stedman v. Davis, 93 N. Y. 32; Bank of Chillicothe v. Dodge, 8 Barb. 233; Merchants' Bank v. Spalding, 12 Barb. 302, affirmed in 9 N. Y. 53.

There is, however, a class of cases (of which Cambioso v. Maffett, 2 Wash. C. C. 98, Fed. Cas. No. 2,330; Knower v. Haines, 31 Fed. 513; Wooten v. Miller, 7 Smedes & M. 380; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, and Tyson v. Passmore, 2 Pa. St. 122, 44 Am. Dec. 181, may be cited as examples) which hold that where the contract of a foreigner is to be completed in, or has reference to its execution in, a foreign country, he will be presumed to know the laws of that country. Now while this presumption is a proper one for the purpose of ascertaining the rights acquired by such a contract, or of determining whether the contract is one which the 46 L.R.A. (N.S.)

courts of the country in which it is to be performed will enforce, it would seem that it does not necessarily follow that a mistake in regard to the law of that country should, for the purpose of determining the right of the nonresident to equitable relief, be regarded as one of law.

Such, nevertheless, seems to be the position taken in Bentley v. Whittemore, 18 N. J. Eq. 366. There a resident of New York made to two persons, also residents of New York, an assignment for the benefit of creditors, valid under the laws of New York, which included real estate in New Jersey upon which one of the assignees held a mortgage. The assignees sold the New Jersey property to complainant, the one holding the mortgage giving it up at the time of the sale, although it does not appear that he received payment thereof, and the purchaser paying a cash consideration, and assuming another mortgage on the property, which he subsequently paid off. In this situation, certain judgment creditors of the assignor, claiming that the assignment for the benefit of creditors was invalid under the laws of New Jersey, caused executions to be issued and levied upon the New Jersey property, whereupon the complainant filed his bill for an injunction to restrain the sale of the property under the executions, and to have the mortgages, alleged to have been canceled by mistake, again set up and declared valid liens to protect his title. The assignee who had given up his mortgage on the property filed a cross bill to have the mortgage to him set up as having been canceled under misapprehension, as he supposed that the assignment was valid, and that the deed to the complainant conveyed the title. The court, holding the assignment to be void as to the lands in New Jersey, refused to reinstate the mortgages, and dismissed the bill and cross bill on the ground that the mistake of the parties was one of law, saying: "Although a mistake as to the law of a foreign state is considered a mistake of fact in most cases, yet when a nonresident enters into a contract to be performed in another state, or relating to lands in a

solute owner of the Kansas land, but that she and Julia A. George were advised by the attorney and led into the mistaken belief that the law of Kansas was the same as the law of Iowa, where they resided, giving the mother of decedent one half of the land in Kansas as well as in Iowa, and that transfers were made by each to the other of a one-half interest in the land, without any consideration, and that neither of them resided in Kansas, and neither discovered the mistake before the death of the mother, in 1910, and that after her death, and upon inquiry, appellant discovered the mistake, and that she promptly came to a court of equity in order to correct the mistake and obtain relief.

The testimony shows plainly enough that a mistake was made, and also that it was a mutual mistake. The oral evidence of appellant is supported by the recitals in the deeds that were executed. In the deed executed by appellant, it is recited: "The grantee is the mother and only heir at law of said Manfred E. Hull, deceased, who died intestate without living issue." In the deed from Julia A. George to appellant, there is a recital as follows: "The said Julia A. George is the mother and sole heir at law of Manfred E. Hull, and the grantee is the widow of said Manfred E. Hull, deceased, who died intestate without living issue."

The mistake was not an unnatural one. The deceased owned land in Iowa, where he lived with his wife and mother, and, under the law of that state, one half of the real estate which he had owned there descended to the mother and the remainder to the widow. They believed that the law of descents and distributions was the same in Kansas as in Iowa, and of this they

were reassured by the advice of a lawyer of that state.

It is contended that, if a mistake was made, it was one against which equity will not relieve. Passing the question as to whether equity ever gives relief for a mistake of a person as to his legal rights or as to the law, it must be held that the mistake claimed by appellant was one of fact. It was not a mistake as to the legal effect of the deeds executed, but it was a mistake as to the law of descents and distributions of a state other than the one in which the parties resided, and of the rights of the parties under that statute. It has been decided that a mistake as to the law of another state is one of fact against which relief may be had in the absence of countervailing equities. On this question it has been said: "The general rule that a mistake of law, pure and simple, is not adequate ground for relief, rests upon the fundamental assumption that persons of sound and mature mind are presumed to know the law; but this assumption does not apply to the laws of another state. 2 Pom. Eq. Jur. 3d ed. § 842. Ignorance of these laws is deemed to be ignorance of fact." *Bolinger v. Beacham*, 81 Kan. 746, 750, 106 Pac. 1094, 1095. Other cases of like import are *Alexandria A. & Ft. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976; *Loyal Mystic Legion v. Brewer*, 75 Kan. 729, 90 Pac. 247; *Morgan v. Bell*, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925.

Through this mistake of fact, based on erroneous advice from one on whom she would naturally rely, appellant conveyed property to which she had a clear and complete title to one who gave no consideration for it, and who had no interest in or

foreign state, he is held to know the law of such state, and in that case the mistake is one of law. Besides, Bentley, who seeks the relief, and paid the mortgages and canceled them by mistake, was a resident of this state." Upon appeal (19 N. J. Eq. 402, 97 Am. Dec. 671), the assignment was held valid; and it consequently became unnecessary for the appellate court to pass upon the question whether the mistake of the cross complainant as to the legal effect of the assignment was one of law or of fact.

It seems worthy of note that even if the mistakes in question in *OSINCUP v. HENTHORN*, and in some of the other cases which hold a mistake in regard to the law of another jurisdiction to be a mistake of fact against which equity will relieve, had been held to be mistakes of law, they would nevertheless have constituted grounds for equitable relief under the rule suggested by Mr. Pomeroy (Eq. Jur. vol. 2, 3d ed. § 849): "Wherever a person is ignorant 46 L.R.A. (N.S.) •

or mistaken with respect to his own antecedent and existing private legal rights, interest, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." And in the same section he states that whenever cases of this kind have arisen, relief has almost always been granted, although not always on this ground.

See note to *Page v. Higgins*, 5 L.R.A. 153, as to "Mistake: relief obtainable in equity."

See note to *German Ins. Co. v. Gueck*, 6 L.R.A. 835, defining mistake. E. S. O.

right to it. The preliminary contract between them referred to the consideration of love and affection, and in the deeds the consideration recited was "one dollar and other valuable considerations,"—an expression used to indicate a nominal consideration, and is ordinarily employed in cases where nothing is actually paid. It is not easy to infer that appellant intended to donate and convey land of which she had an absolute title to Mrs. George; but her testimony, which is uncontradicted, is that there was no consideration in fact paid, and no intention to make a gift to the grantee, but that, through the erroneous advice and the mistake as to their rights of inheritance under the statute, they apportioned the land between them in equal shares, and deeds were accordingly executed.

The next contention is that equity will not grant relief from the mistake in question, because of the laches or negligence of appellant in making inquiry and in asking for redress. The general rule is that equity will not interpose to relieve from mistake where there is inexcusable negligence, or where the granting of the relief asked would operate inequitably and do an injustice. On the other side, it is said that there were good reasons for the delay; that no circumstances arose to cause distrust of the advice given to appellant until about the time that the action was brought. It appears that neither of the parties ever lived in Kansas. For about six years after the transfers were made, appellant and Julia A. George lived together in Iowa. After that time Mrs. George removed to Illinois, while appellant went to California. When Julia A. George died, appellant consulted an attorney in California as to whether she had an interest in the estate of Julia A. George, when she was informed for the first time that, under the Kansas statute, she was entitled to all of the Kansas land which her husband owned at the time of his death. The advice given the parties, and the circumstances under which they acted, the exchange of deeds, which would naturally end inquiry and be accepted as the final division and settlement of their rights in the lands of the deceased, the absence of appellant from Kansas, and the fact that no circumstances arose to challenge the correctness of the advice or the legality of the apportionment of the land, are the excuses assigned for the long delay in discovering the mistake and in asking for relief; and, in view of these facts, it can hardly be said that the inaction of appellant was inexcusable. Laches is an equitable defense, and ought not to be applied

in a way that would do injustice or defeat the real owner of land from recovering it. Although about sixteen years elapsed between the execution of the deeds and the bringing of this action,—a fact which made it incumbent upon appellant to show some sufficient excuse for the delay,—it is well settled that the lapse of such a time will not necessarily defeat the granting of equitable relief. If a party has no knowledge of his rights, he can hardly be charged with negligence in failing to assert them; neither can he be regarded as having abandoned such rights as he may have.

In *Gallihier v. Cadwell*, 145 U. S. 368, 372, 38 L. ed. 738, 740, 12 Sup. Ct. Rep. 873, 874, the court said: "They [cases on laches] proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that, by reason of his delay, the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

If, as the testimony tends to show, appellant acted as soon as she learned of the mistake, and of the fact that her land was held by another, how can it be said that there was any abandonment of her rights or laches in asserting them? It would be inequitable to impute negligence to one who was ignorant of her rights. It has been said: "There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." *Halstead v. Grinnan*, 152 U. S. 412, 417, 38 L. ed. 495, 497, 14 Sup. Ct. Rep. 641, 643.

In *Nicholson v. Nicholson*, 83 Kan. 223, 109 Pac. 1086, a case similar to the one under consideration, it was said: "It is conceded that a mistake as to the law of another state is a mistake of fact; but it is urged that the plaintiff's petition discloses laches; that she has been negligent in not reading up on the law of Ohio. A woman eighty-four years of age, who has resided in Kansas for many years, and is ignorant of the laws of another state, and who relies upon the statements of her adopted son that such laws are thus and so, cannot, as a matter of law, be held guilty of laches in failing to discover the truth with respect thereto."

No one would have questioned the right of appellant to relief if it had been asked for within a short time after the mistake was made; and it should not be denied

now, unless there are other considerations than the mere lapse of time. If the rights of creditors were involved, or innocent purchasers affected, or if the granting of relief would operate unjustly as against anyone, other considerations would arise. There has been no change of conditions connected with the delay, so far as the testimony of appellant goes, which would necessarily make it inequitable to grant relief to her.

The appellees are claiming under Mrs. George, and have no better rights to the property than she had. The death of one of the parties, it is true, is a consideration for the court, as it may affect the production of evidence as to the circumstances of the transfer; but this, of itself, is not sufficient to prevent the granting of relief in this case. On all of the testimony of appellant, it cannot be held, as a matter of law, that she has been guilty of laches either in failing to discover the mistake or in failing to act with promptness after making the discovery. It is not determined, of course, that appellant is entitled to a judgment for the recovery of the property, as the testimony of appellees has not yet been produced, but only that the testimony of appellant appears to make out a prima facie case for relief, so that it became a question of fact whether there were laches or any circumstances which would make the granting of the relief asked inequitable or unjust.

There was error in sustaining the demurrer to the evidence of appellant, and for that reason the judgment will be reversed.

RHODE ISLAND SUPREME COURT.

M. M. STONE & COMPANY
v.
POSTAL TELEGRAPH CABLE COMPANY.

(— R. I. —, 87 Atl. 319.)

Telegraph — waiver of contract provision — requirement of written notice.

1. A telegraph company does not waive a

Note. — As to when a telegraph company is chargeable with notice of importance of a commercial message, see note to Western U. Tele. Co. v. True, 41 L.R.A.(N.S.) 1188. As to duty with respect to cipher and unintelligible telegrams, see note to Baily v. Western U. Tele. Co. 43 L.R.A.(N.S.) 503.

Generally as to the right of an addressee of a telegram to sue for delay in delivery, see note to Anniston Cordage Co. v. Western U. Tele. Co. 30 L.R.A.(N.S.) 1116, and as to the damages recoverable by him, see pages 1133 et seq. of that note.

For duty of a telegraph company to dis-

provision of its contract requiring notice in writing of a claim for damages for delay in transmitting a message, within sixty days after the delay occurred, by failing to object when verbal notice was given or when written notice was given after the expiration of the sixty-day period.

Same — misdelivery of message — gross negligence.

2. Gross negligence in the delivery of a telegram which will avoid a stipulation limiting liability in case of unrepeatable messages is not shown by the fact that, when receiving a message for a business man, the company consulted only the city directory and delivered the message at his house address, the only one appearing in such directory, although his business address appeared in the telephone directory and was on file in the telegraph office, and he had previously complained of failure to deliver messages at his business address.

Same — care required — time and place of delivery.

3. A telegraph company is not bound to exercise the highest degree of diligence and promptness in delivering a message, or to use the greatest care as to the place of delivery.

Damages — delay in delivering telegram — rule.

4. The damages to be recovered in an action in tort by the sendee of a telegram, against the telegraph company, for delay in delivery, are governed by the same rule which would govern in an action by the sender on the contract.

Same — telegram — notice of special loss.

5. A message to a commission merchant, stating "sell" two cars, and naming the price, or "packed" a certain quantity of apples, is not sufficient to notify the company of possible loss in case of failure to deliver, so as to charge it with the loss which he suffers because he loses a sale which he had negotiated, and to fill which he sent an order for the goods, which was accepted by the telegram, so that he was compelled to sell the property at a loss.

(July 7, 1913.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Providence and

cover unknown sendee, see note to Western U. Tele. Co. v. Elliot, 22 L.R.A.(N.S.) 761, and as to duty to deliver message by telephone, see note to Western U. Tele. Co. v. Price, 29 L.R.A.(N.S.) 836.

As to liability for failure properly to transmit or deliver a message pertaining to the negotiation for, or offer of, a contract, see note to Western U. Tele. Co. v. Sights, 42 L.R.A.(N.S.) 419.

For law governing liability of telegraph company, see notes in 63 L.R.A. 532; 5 L.R.A.(N.S.) 751; 23 L.R.A.(N.S.) 648; 28 L.R.A.(N.S.) 490; 20 L.R.A.(N.S.) 795; and 41 L.R.A.(N.S.) 223.

Bristol Counties made during the trial of an action brought to recover damages for alleged negligent failure promptly to deliver certain telegrams which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

Mr. William J. Brown, for plaintiff:

The mere fact that the telegram was a business telegram was sufficient notice to the company to render it liable for the natural and proximate loss or damage resulting from negligence on its part.

Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; Dixon v. Western U. Teleg. Co. 3 App. Div. 60, 38 N. Y. Supp. 1056; Western U. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Ferrero v. Western U. Teleg. Co. 9 App. D. C. 468, 35 L.R.A. 548; Western U. Teleg. Co. v. Merritt, 55 Fla. 462, 127 Am. St. Rep. 169, 46 So. 1024; Mowry v. Western U. Teleg. Co. 51 Hun, 126, 4 N. Y. Supp. 666; Hadley v. Western U. Teleg. Co. 115 Ind. 191, 15 N. E. 845; Western U. Teleg. Co. v. Lehman, 105 Md. 442, 66 Atl. 266; Jones, Teleg. & Teleph. Cos. §§ 535, 536; 37 Cyc. 1753.

The question as to whether or not the defendant company, by reason of the language of the telegram or otherwise, did have sufficient notice to render it liable for the actual damages sustained by the plaintiff, should have been submitted to the jury for their determination.

Fererro v. Western U. Teleg. Co. 9 App. D. C. 473, 35 L.R.A. 548; Western U. Teleg. Co. v. Merritt, 55 Fla. 462, 127 Am. St. Rep. 169, 46 So. 1024; Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; Jones, Teleg. & Teleph. Cos. § 537; 37 Cyc. 1742.

The defendant had waived its right to rely upon the sixty-day clause as a defense to the first count of the declaration.

Hill v. Western U. Teleg. Co. 85 Ga. 425, 21 Am. St. Rep. 166, 11 S. E. 874; Western U. Teleg. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Hayes v. Western U. Teleg. Co. 70 S. C. 16, 67 L.R.A. 481, 106 Am. St. Rep. 731, 48 S. E. 608, 3 Ann. Cas. 424; Jones, Teleg. & Teleph. Cos. § 394; Wheelock v. Postal Teleg. Cable Co. 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188.

There was sufficient evidence to go to the jury upon the question of gross negligence on the part of the company, in connection with the messages originating in New York.

37 Cyc. 1671; Jones, Teleg. & Teleph. Cos. § 511; Nicholas v. Peck, 21 R. I. 404, 43 Atl. 1038; Crandall v. Stafford Mfg. Co. 24 R. I. 555, 34 Atl. 52, 13 Am. Neg. Rep. 440.

Plaintiff was entitled to recover for the 46 L.R.A. (N.S.)

damages sustained by him by reason of the failure to deliver the two telegrams originating in Illinois.

M. M. Stone & Co. v. Postal-Teleg. Co. 31 R. I. 174, 29 L.R.A. (N.S.) 795, 76 Atl. 762; Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168, 24 Am. Rep. 279; Webbe v. Western U. Teleg. Co. 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

Messrs. Carver, Wardner, Cavanagh, & Walker, G. Philip Wardner, and Clifford H. Walker, for defendant:

The rule of damages for negligent delivery of a telegram is the same whether the form of the action be contract or tort, and whether the plaintiff be sender or addressee.

Wheelock v. Postal Teleg. Cable Co. 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; Swift River Co. v. Fitchburg R. Co. 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015; Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A. (N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, 19 Am. Neg. Rep. 306; Western U. Teleg. Co. v. Hall, 124 U. S. 444, 456, 31 L. ed. 479, 483, 8 Sup. Ct. Rep. 577; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 29, 38 L. ed. 883, 894, 14 Sup. Ct. Rep. 1098; 27 Am. & Eng. Enc. Law, 1059; M. M. Stone & Co. v. Postal-Teleg. Co. 31 R. I. 174, 29 L.R.A. (N.S.) 795, 76 Atl. 762.

In the absence of notice of special circumstances rendering negligence in delivery likely to produce extraordinary and extended damages, the company's liability does not exceed the amount paid for sending the message; and the liability is not extended by notice, unless the company is informed thereby of the nature of the transaction to which the message refers and the character and possible extent of the damages which might occur, and assumes liability for such damages.

Hadley v. Baxendale, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 C. L. R. 517, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Greene v. Creighton, 7 R. I. 1; Wheelock v. Postal Teleg. Cable Co. 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 Am. Rep. 165, 3 Mor. Min. Rep. 70; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Candee v. Western U. Teleg. Co. 34 Wis. 471, 17 Am. Rep. 452; Harvey v. Connecticut & P. River R. Co. 124 Mass. 421, 26 Am. Rep. 673; Western U. Teleg. Co. v. Coggin, 15 C. C. A. 231, 32 U. S. App. 245, 68 Fed. 137; Dorgan v. Western U. Teleg. Co. Fed. Cas. No. 4,004; Shields v. Washington Teleg. Co. 9 West. L. J. 283; United States Teleg. Co. v. Gildersleve, 29

Md. 232, 96 Am. Dec. 519; *Cahn v. Western U. Teleg. Co.* 1 C. C. A. 107, 2 U. S. App. 24, 48 Fed. 810; *McColl v. Western U. Teleg. Co.* 7 Abb. N. C. 151; *Stevenson v. Montreal Teleg. Co.* 16 U. C. Q. B. 530.

Mere notice is not sufficient to impose an extended liability unless the defendant has agreed to assume it.

Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754; *Howard v. Stilwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *E. W. Bliss Co. v. Buffalo Tin Can Co.* 65 C. C. A. 289, 131 Fed. 51; *Goddard v. Barnard*, 16 Gray, 205; *Harvey v. Connecticut & P. River R. Co.* 124 Mass. 421, 26 Am. Rep. 673; *Whitehead & A. Mach. Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736; *Loneragan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479; *Snell v. Cottingham*, 72 Ill. 161; *Clark v. Moore*, 3 Mich. 55; *Cuddy v. Major*, 12 Mich. 368; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828; *Bridges v. Stickney*, 38 Me. 361; *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250; *British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 37 L. J. C. P. N. S. 235, 18 L. T. N. S. 604, 16 Week. Rep. 1046; *Horne v. Midland R. Co.* L. R. 8 C. P. 131, 42 L. J. C. P. N. S. 59, 28 L. T. N. S. 312, 21 Week. Rep. 481, 5 Eng. Rul. Cas. 506; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, 43 L. J. Q. B. N. S. 211, 30 L. T. N. S. 871, 23 Week. Rep. 127; 1 *Pothier, Obligations*, 161; *Mayne, Damages*, 7th ed. 31; 1 *Sutherland, Damages*, 3d ed. 157.

There had been no waiver of the "sixty days" stipulation, and it was a bar to recovery on the first count of the declaration, no claim in writing admittedly having been presented within sixty days from the filing of the first message.

Metcalf v. Phenix Ins. Co. 21 R. I. 307, 43 Atl. 541; *Paul v. Fidelity & C. Co.* 186 Mass. 413, 104 Am. St. Rep. 594, 71 N. E. 801; *Cook v. North British & M. Ins. Co.* 181 Mass. 101, 62 N. E. 1049; *Bolan v. Fire Asso.* 58 Mo. App. 225; *Travellers' Ins. Co. v. Nax*, 73 C. C. A. 649, 142 Fed. 653; *Ætna L. Ins. Co. v. Fitzgerald*, 165 Ind. 317, 1 L.R.A.(N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 Ann. Cas. 551; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Albers v. Phoenix Ins. Co.* 68 Mo. App. 543.

There was no error in the direction of a verdict for the defendant upon all counts, because of the "unrepeated message" stipulation and the rule of damages.

Riley v. Western U. Teleg. Co. 6 Misc. 221, 26 N. Y. Supp. 532; *French v. Buffalo*, 46 L.R.A.(N.S.)

N. Y. & E. R. Co. 4 *Keyes*, 108; *Litchfield v. White*, 7 N. Y. 438, 57 Am. Dec. 534; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583; *Van Nostrand v. New York Guaranty & I. Co.* 7 Jones & S. 73; *Kiley v. Western U. Teleg. Co.* 109 N. Y. 231, 16 N. E. 75; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 504; *Clement v. Western U. Teleg. Co.* 137 Mass. 463; *Wheelock v. Postal Teleg. Cable Co.* 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *North Packing & Provision Co. v. Western U. Teleg. Co.* 70 Ill. App. 275, 89 Ill. App. 301, 188 Ill. 366, 52 L.R.A. 274, 58 N. E. 958; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Adams v. Robertson*, 37 Ill. 45; *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 885; *Walker v. Lovitt*, 250 Ill. 543, 95 N. E. 631; *Westlake, Private International Law*, 4th ed. 25-40; *Dacey, Conf. L.* 2d ed. 715, 716; *Collier v. Rivas*, 2 Curt. Eccl. Rep. 855; *Re Johnson* [1903] 1 Ch. 821, 72 L. J. Ch. N. S. 682, 51 Week. Rep. 444, 88 L. T. N. S. 161, 19 Times L. R. 309.

Messrs. Edwards & Angell also for defendant.

Sweetland, J., delivered the opinion of the court:

This is an action on the case for negligence brought against the defendant to recover for losses alleged to have been sustained by reason of the negligent failure of the defendant to deliver with promptness certain telegrams addressed to the plaintiff. The case was tried before a justice of the superior court sitting with a jury, and upon the conclusion of the testimony a verdict was rendered for the defendant by direction of the court. The case is now before this court upon the plaintiff's exceptions to the direction of a verdict, and to certain other rulings of said justice made during the progress of the trial.

The declaration alleges that the plaintiff was a broker and commission merchant in the city of Providence, doing business under the style of M. M. Stone & Company, engaged in buying and selling beans and similar commodities; that on the dates when each of said telegraphic messages was sent he had on hand orders for certain quantities of such commodities, subject to confirmation before the close of business hours on such dates; that previously he had sent by mail or telegraph to dealers in the state of New York and in Chicago orders for the quantities of said commodities needed to fill the orders of his customers, with the request to each of said dealers that if he should accept such order given by the plaintiff, to telegraph such acceptance to the plaintiff at once; that each of said dealers

delivered to the defendant in the state of New York or in Chicago, in season to be delivered to the plaintiff at his business address before the close of business hours on the same day, a telegram addressed to the plaintiff in his tradename of M. M. Stone & Company, at Providence, Rhode Island, accepting said order, and paid for the transmission of said message to the plaintiff; that the defendant, having notice of the location of the plaintiff's office, did not deliver said messages to the plaintiff at his business address, but negligently delivered them at his home, so that they were not received by him in season to confirm and fill his customers' orders, whereby he lost his commission and profit on said orders.

The declaration is in four counts. The message which is the subject of the first count was delivered by the plaintiff's correspondent to the defendant in New York city, directed to the plaintiff, and was in the following terms:

New York, Aug. 26.

M. M. Stone & Co.

Letter received accept your order beans although refused to sell to others below two dollars send check.

[Signed] Bennett Day & Co.

The message which is the subject of the second count was delivered to the defendant by the plaintiff's correspondent in Chicago for transmission to the plaintiff, and was in the following terms:

Chicago, Ill., Sep. 10/09.

M. M. Stone & Co., Providence, R. I.

Too low. Sell two cars two twenty-eight deld there.

[Signed] A. J. Thompson Co.

The message which is the subject of the third count was delivered to the defendant by the plaintiff's correspondent at Holley, in the state of New York, and was in the following terms:

Holley, N. Y., Oct. 6.

M. M. Stone & Co.

Letter received. Have booked Swift order two twenty prompt shipment.

[Signed] W. D. Hatch.

The message which is the subject of the fourth count was delivered by the plaintiff's correspondent at Chicago to the defendant for transmission to the plaintiff, and was in the following terms:

Chicago, Ill., Nov. 3.

M. M. Stone.

Packed fifty boxes crop apples.

[Signed] A. J. Thompson.

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The different dates upon these telegrams are all in the year 1909.

Among other defenses, the defendant set up in its plea to each of these counts that it undertook to transmit and deliver each of said messages subject to the terms and conditions printed upon the back of the blank upon which said message was written by the sender thereof. One of the terms and conditions so printed on the back of the blank and known as the "sixty days" stipulation provided in substance that the defendant would not be liable for damages in any case where the claim was not presented in writing within sixty days after the message was filed with the defendant for transmission. The defendant further alleged in its pleas that in the case of each of these messages, which the plaintiff claimed had been delayed in delivery, the plaintiff had failed to present to the defendant his claim of damages in writing within sixty days after said message had been filed for transmission. Another of the terms printed upon the back of said blank provided for repeating the message upon the payment by the sender of a toll greater than the regular rate charged; and also provided, by what is known as the "unrepeated message" stipulation, that the defendant would not be liable for damages in the case of an unrepeated message beyond the amount received by it for sending the same. All the messages referred to in the declaration were unrepeated messages.

Prior to said trial certain questions of law were certified to this court by the superior court, and the opinion of this court thereon appears in 31 R. I. 174, 29 L.R.A. (N.S.) 795, 76 Atl. 762. In said opinion it was held that the so-called "sixty days" and "unrepeated message" stipulations were valid conditions which the defendant might impose upon the contract with the sender of the message, and that any right of action which the plaintiff may have is based upon and limited by the terms of the contract for transmission. As the receiver of the telegram, he may come in and avail himself of the defendant's express and implied obligations arising under the contract; but the plaintiff's right can be no greater than those of the party to the contract. All the courts of last resort in the different states of the Union are not in accord upon the question of the validity of these stipulations; and it was further held in said opinion that the validity and effect of said stipulations, so far as concerns the addressee's right to recover for loss arising from negligent delay in delivery of the message, is governed by the law of the state where the message originated. It is admitted by the plaintiff that the courts of the state of

New York hold the stipulations in question to be reasonable and valid conditions which the defendant might impose upon its contract with the sender of the message, and that in the case at bar, under the New York decisions, the plaintiff would be entitled to recover upon the first and third counts of his declaration only in case the defendant was guilty of gross negligence, or in case the defendant had waived said condition. The validity and effect of these stipulations with reference to the telegrams which are the subject of the first and third counts of the declaration are determined by the law of the state of New York, where said messages were delivered to the defendant, and must be held to be valid and binding conditions.

The plaintiff did not file a written notice of his claim for damages for loss arising from negligent delay in the delivery of the four telegrams in question until November 5, 1909, more than sixty days after the telegram of August 26th was filed with the defendant for transmission, but within sixty days after the other telegrams were filed for transmission. The plaintiff contends that, although the said "sixty days" and "unrepeated message" stipulations are valid under the laws of the state of New York in ordinary circumstances, yet as to the telegram of August 26th, which originated in the city of New York, said "sixty days" regulation has been waived by the defendant, and that as to said message of August 26th and the message of October 6th, which originated at Holley, in the state of New York, the "unrepeated message" stipulation is inapplicable because of gross negligence on the part of the defendant.

In regard to the message of August 26, 1909, the plaintiff bases his contention that the defendant had waived the provision that it would not be liable for damages if the claim was not presented within sixty days after the message was filed for transmission upon the following facts: On August 27th he made a verbal complaint to an employee at the Providence office of the defendant because the message of August 26th had not been delivered at his office, and on September 11, 1909, he made another verbal complaint to the manager of the Providence office of the defendant with regard to the same matter; also, when the plaintiff presented to the defendant the written notice of his claim for damages for its failure to deliver the several telegrams in question at the plaintiff's office, the defendant made no objection to the claim of loss as to the telegram of August 26th, on the ground that the plaintiff had failed to give the defendant written notice of his 46 L.R.A. (N.S.)

claim within sixty days. These facts fall far short of establishing a relinquishment by the defendant of its right to insist upon the provision of said stipulation. The plaintiff cannot recover for any loss occasioned by negligence in the delivery of said telegram of August 26th.

The facts relied upon by the plaintiff to establish gross negligence on the defendant's part in the delivery of the message of October 6th are as follows: This telegram, as well as the others named in the declaration, was delivered at the home of the plaintiff rather than at his business office, whereby he failed to receive it until after the close of business hours on the day of delivery. The plaintiff's office was in the same building as the defendant's main office. The plaintiff commenced doing business as a commission merchant about June 1, 1909. Shortly thereafter he went to the defendant's office and arranged to have a cable address recorded with the defendant, and informed the defendant's servant where telegrams addressed to M. M. Stone & Company should be delivered. Between June 1, 1909, and October 6, 1909, the defendant delivered a number of telegrams transmitted over defendant's wires and addressed to M. M. Stone & Company to the plaintiff at his business office. On August 27th, and again on September 11th, he made complaint to the defendant's agent that the telegrams of August 26th and September 10th had been delivered at his home rather than at his office. At other times between June 1, 1909, and October 6, 1909, the plaintiff requested the agent of the defendant to deliver telegrams addressed to the plaintiff as M. M. Stone & Company at his business office. The plaintiff's business address appeared in the Providence telephone directory, but did not appear in the ordinary city directory. The plaintiff's business address was not placed in the messages by the senders thereof. When the messages in question arrived at Providence, the defendant's servant neglected to look in the telephone directory, or to consult its record of cable addresses, but consulted merely the Providence city directory and delivered said messages at the only address of the plaintiff appearing in said directory; namely, his home address. Without deciding whether, upon these facts, a jury might properly have found the defendant guilty of negligence with regard to the delivery of the message of October 6th, we think that the justice presiding properly ruled that this evidence was not sufficient to warrant a finding of gross negligence on the part of the defendant. The degree of negligence, which, under the New York decisions, will render the defendant liable, notwithstanding the provision restrict-

ing liability, is much greater than ordinary negligence or carelessness. It is very great negligence, amounting to a reckless disregard of consequences to the sender or addressee of the message. The facts relied upon by the plaintiff do not show such a condition. The plaintiff cannot recover for any loss arising from the manner of delivery of the message of October 6, 1905.

The courts of the state of Illinois hold the "unrepeated message" stipulation to be unjust, without consideration, contrary to public policy, and void. *Tyler v. Western U. Teleg. Co.* 60 Ill. 421, 14 Am. Rep. 38; *Western U. Teleg. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279. The defendant, however, contends that under the Illinois decisions it is the law of the place of performance which governs; and hence as the two telegrams, which are, respectively, the subject of the second and fourth counts of the declaration, although forwarded by the defendant in Illinois, were to be delivered in Rhode Island, the stipulation should be held as valid by this court although against public policy in Illinois, the place where the contract originated. The defendant bases this claim upon the case of *Western U. Teleg. Co. v. North Packing & Provision Co.* 188 Ill. 366, 52 L.R.A. 274, 58 N. E. 958. This view was adopted by the justice of the superior court. In our opinion this is not a correct interpretation of *Western U. Teleg. Co. v. North Packing & Provision Co.* supra. That case first came to the appellate court of Illinois, first district, on appeal from the circuit court of Cook county. By the opinion reported in 70 Ill. App. 275, the judgment rendered for the defendant was reversed, and the case was remanded to the circuit court for a new trial. The action was in assumpsit for failure to deliver promptly in Chicago a telegram originating in Boston. The message, when it was filed with the defendant, had the "unrepeated message" stipulation printed on its back. This stipulation is held to be valid in Massachusetts, but against public policy in Illinois. The appellate court held, contrary to the great weight of authority, that as the message was to be delivered in Chicago the contract should be construed in accordance with the law of Illinois. The case was retried in the circuit court, resulting in a decision for the plaintiff, and again came to the appellate court on appeal. 89 Ill. App. 301. In that opinion the appellate court said: "It is contended by counsel for appellant that the court should have held that the law of Massachusetts, in relation to liability for unrepeated messages, should control in this case. The question is disposed of by the decision of this court upon the former appeal. 70 46 L.R.A.(N.S.)

Ill. App. 275. But if it were not, no question of controlling importance could arise in that regard." The court then proceeded to a discussion of the other exceptions, and approved the judgment. The case then went to the supreme court, and the opinion of that court appears in 188 Ill. 366, 52 L.R.A. 274, 58 N. E. 958. Apparently no question of the conflict of law was before the supreme court. The court said: "The various errors assigned will all be considered together." Following which is an extended discussion of questions relating to the legal effect, upon the matter of damages, of certain conduct on the part of the plaintiff and its agent; but the opinion is silent as to whether the law of Massachusetts or that of Illinois governs as to the validity of the conditions printed on the back of the message blank. It is clear that no assignment of error carried that question to the supreme court. *Western U. Teleg. Co. v. North Packing & Provision Co.* supra, therefore, is not an authority for the proposition that, under the Illinois law, the law of the place where the message was delivered governs as to the validity of the "unrepeated message" stipulation. In that case the courts of Illinois might, with propriety, refuse to enforce such a provision, although it constituted a valid part of the contract in Massachusetts, in accordance with the well-recognized doctrine that a contract will not be upheld, though valid in the place where it was made, if regarded as against public policy of the state in which it is attempted to be enforced. We must hold the conclusion of the justice of the superior court as to the state of the Illinois law in this regard to be unwarranted. As we have previously held in this case (31 R. I. 174, 29 L.R.A.(N.S.) 795, 76 Atl. 762), the question as to the validity and effect of this regulation is governed by the law of the state where the message originated. In the messages which are the subject of the second and fourth count of the declaration, the stipulations printed upon the back, by which the defendant sought to restrict its liability, were of no effect when the contract was made. They were against the public policy of the state of Illinois, entirely void, and unenforceable. As they did not become a part of the contract when it was made, the courts of this state cannot place them therein.

We will now pass from this general consideration of the case to the specific exceptions before us. The plaintiff excepted to rulings by the justice presiding, excluding evidence offered by the plaintiff to show the actual damage sustained by him by reason of the manner in which the defendant delivered said messages. As to the messages

of August 26, 1909, and October 6, 1909, both of which originated in the state of New York, we have said above that no recovery can be had. The exceptions to the exclusion of such testimony in regard to those telegrams, therefore, are overruled. As to the messages of September 10th and November 3d, which were filed with the defendant in the state of Illinois, the legal liability of the defendant is such as results from the agreement to transmit the same for a reasonable compensation, unaccompanied by any limitation of its liability by express terms or conditions. Without special agreement, telegraph companies are not insurers of the correctness of the message delivered, nor are they bound to exercise the highest degree of diligence and promptness in its delivery, or to use the greatest care as to the place of delivery; but they must be held to the exercise of ordinary and reasonable care in the performance of their obligations.

As this plaintiff was not privy to the contract between the defendant and the sender of these messages, his action is properly in tort. We have held, however, that his action is founded upon and limited by that contract, and his rights thereunder can be no greater than those of the party to the contract. 31 R. I. 174, 29 L.R.A. (N.S.) 795, 76 Atl. 762. His action is governed by the same rule as to damages as would be that of the sender of the message in an action *ex contractu* founded upon the same alleged negligent act of the defendant.

The rule as to special damages for breach of contract, followed by the courts of England and the United States and approved by this court in *Greene v. Creighton*, 7 R. I. 1, was laid down by Baron Alderson in *Hadley v. Baxendale*, 9 Exch. 353, 5 Eng. Rul. Cas. 502, in the following terms: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach 46 L.R.A. (N.S.)

of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such breach of contract."

The testimony offered by the plaintiff, the exceptions to the exclusion of which is now under consideration, was that, by reason of the delay in the receipt by him of the messages in question, he was unable to accept the offer of his customers made for the commodities referred to in these telegrams, and that he was obliged to make sales of said goods to other persons at a loss, either actual or of profits. Can such loss be said to be one which naturally flowed from the alleged breach of the defendant's duty as to delivery of these messages; or can such loss be regarded as within the contemplation of the parties as a result of such breach of the defendant's duty? The only loss which would naturally flow from the failure to deliver this message would be the loss to the sender of what he paid to the defendant for its service. In the absence of knowledge on the part of the defendant as to the contents of the messages, the loss which the plaintiff now claims cannot have been in the contemplation of the defendant when it accepted the messages for transmission. The plaintiff contends, however, that under the authority of a number of cases in several of the states, enough appeared in the messages in question to show that they related to business transactions between the plaintiff and the senders, and that that is sufficient to charge the defendant with all the damages resulting from its negligence in transmission and delivery. *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583. The plaintiff claims that that circumstance would bring this case within the portion of the rule in *Hadley v. Baxendale*, which provides that if the special circumstances under which the contract was made were communicated to the defendant, it would be liable for the extraordinary damages which might arise from a breach of the contract under those special circumstances. The weight of authority, however, and it seems to us the better reason, is that the knowledge merely that the messages are important or that they relate to a business transaction, without information as to the exact nature and extent of that business transaction, does not constitute such a disclosure of special circumstances as would

render the defendant liable for damages arising from a breach of the contract. *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Whelock v. Postal Teleg. Cable Co.* 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165, 3 Mor. Min. Rep. 70; *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452; *United States Teleg. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519. In the case at bar the only notice which the defendant had of the transactions to which the messages of September 10, 1909, and November 3, 1909, related, was contained in the messages themselves, which were as follows: "Too low. Sell two cars two twenty-eight deld there," and "Packed fifty boxes crop apples." From the language of these telegrams the defendant might have conjectured that they related to some sort of business transaction, but they were insufficient to give it any information of the possible damages which might arise from the delivery of the telegram at the defendant's home, rather than at his business office. The testimony in question offered by the plaintiff was properly excluded, and the exceptions should be overruled.

The defendant excepted to the ruling of said justice directing the jury to return a verdict for the defendant. As to the first and third counts of the declaration, relating to the messages delivered to the defendant in the state of New York, we have said above that no cause of action arose to the plaintiff from the matters alleged in said counts. As to the second and fourth counts of the declaration, relating to messages delivered to the defendant in the state of Illinois, we have said above that the justice was in error in his conclusion that the plaintiff could not recover on said counts because of the validity of the "unrepeated message" stipulation, which the defendant sought to impose as a condition attached to the transmission of said messages. There is, however, no testimony upon which the jury could base a finding of damages for the plaintiff upon said counts if they should find the defendant was guilty of negligence in the manner of delivery of said messages. There was, therefore, no reversible error in the direction of a verdict by said justice.

All of the plaintiff's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment upon the verdict.

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MARYLAND COURT OF APPEALS.

MURRAY VANDIVER, State Treasurer,
et al., Appts.,
v.

EDWIN W. POE et al., Receivers of United
Surety Company.

(119 Md. 348, 87 Atl. 410.)

Guaranty fund — state treasurer — surender to receiver.

Funds deposited by a surety company with the state treasurer to secure its contracts, under a statute providing that they shall be held in trust by the treasurer for contract holders, subject to sale by him and application of the proceeds only on the order of a court of competent jurisdiction, will not be required to be turned over to a receiver appointed to liquidate the affairs of the company, which remains solvent.

(January 14, 1913.)

A PPEAL by the state treasurer and the United States from decrees of the Circuit Court of Baltimore City granting a petition, and reaffirming the same on petition to reopen the matter, directing the state treasurer to deliver a deposit of stock held by him to petitioners. Reversed.

The facts are stated in the opinion.

Note. — Right of receiver of insurance company to funds deposited with state official to secure performance of contracts.

The question raised by this note must of necessity depend to a great extent upon the wording and construction of the particular statute permitting or requiring the deposit. The decisions seem to indicate a disposition, if not a settled rule, on the part of the courts, to hold that the state official cannot be compelled to turn the deposit over to the receiver, unless the statute either, in plain words or by implication, so directs. The reason underlying such rule is that the state officer has been by law made trustee of the fund for a special use, and, in the absence of fraud on the part of the trustee the court has no power to hinder him from performing his trust.

In case the state officer held more funds than were required to fulfil the trust, the reason for the rule would be lacking as to the excess, and in such case the rule would probably to that extent not be applied. See *State ex rel. Cincinnati Life Asso. v. Matthews*, 64 Ohio St. 419, 60 N. E. 605; *Hayne v. Metropolitan Trust Co.* 67 Minn. 245, 69 N. W. 916; *Raymond v. Security Trust & L. Ins. Co.* 44 Misc. 31, 89 N. Y. Supp. 753.

The court in *VANDIVER v. POE* distinguished the *American Casualty Ins. Co.'s Case* (Boston & A. R. Co. v. *Mercantile Trust & D. Co.*) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778, from the case before the court: "There the insolvency of the company was

Messrs. Edgar Allan Poe, John Philip Hill, and Edward Duffy, for appellants:

The receiver of a solvent surety company should not be put in possession of the stock held by the treasurer in trust for policy holders.

People ex rel. Ruggles v. Chapman, 64 N. Y. 557; Ruggles v. Chapman, 59 N. Y. 163; State ex rel. Cincinnati Life Asso. v. Matthews, 64 Ohio St. 419, 60 N. E. 605; Re Guardian Mut. L. Ins. Co. 13 Hun, 115; Re Home Provident Safety Fund Asso. 129 N. Y. 288, 29 N. E. 323; Fullerton v. National Burglar & Theft Ins. Co. 63 How. Pr. 5.

Messrs. George R. Gaither and Ritchie & Janney, for appellees:

The court, having jurisdiction of the receivership, has jurisdiction on the petition of the receivers, and with the consent of the state treasurer to direct the delivery of the special deposit to the receivers of the court.

American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.) 82 Md. 536, 38 L.R.A. 97, 34 Atl. 778; Shipley v. Fink, 102 Md. 219, 2 L.R.A. (N.S.) 1002, 62 Atl. 360; Offutt v. Jones, 110 Md. 241, 73 Atl. 629; State ex rel. Cincinnati Life Asso. v. Matthews, 64 Ohio St. 419, 60 N. E. 605; Re Guardian Mut. L. Ins. Co. 13 Hun, 117; Atty. Gen. v. North American L. Ins. Co. 80 N. Y. 152; Hayne v. Metropolitan Trust Co. 67 Minn.

established; here solvency is said to exist; there no statute had been provided concerning the case; here we have an explicit one." No cases passing upon this question as to solvent companies, except the reported case, have been found. In the note to American Casualty Ins. Co's Case, supra, in 38 L.R.A. 100, the earlier cases on this subject are cited.

The court in *VANDIVER v. POE* sufficiently sets out the facts in the case of *Cooke v. Warner*, 56 Conn. 234, 14 Atl. 798, and says that the statute involved was substantially like the one under consideration. The wording of the statute in the *Cooke* Case was as follows: "When any state shall require insurance companies of other states to deposit with some officer of such other state securities in trust for policy holders of such companies, as a prerequisite to their transacting business in such state, the treasurer of this state may receive from any insurance company of this state the securities required by the laws of such other state on deposit, and hold the same in trust for the policy holders of such company; but such company may collect and receive the interest and dividends thereon."

In *Betts v. Connecticut L. Ins. Co.* 78 Conn. 442, 62 Atl. 345, the question was not before the court the state treasurer having previously delivered the funds to the

245, 69 N. W. 916; *Relfe v. Spear*, 6 Mo. App. 133.

Stockbridge, J., delivered the opinion of the court:

On the 13th of January, 1911, the United Surety Company was placed in the hands of receivers. The bill filed in the case was by some of the stockholders and directors of the company, and, among other things, alleged that, through mismanagement and wastefulness in the conduct of its affairs, the surplus of \$250,000 had been altogether wiped out, and its capital stock had been impaired, but nevertheless the said company was solvent, but had been prohibited by an order of the state insurance commissioner from writing any further bonds of any nature or description until the impairment of its capital stock had been made good. The prayer of the bill was: First, that receivers might be appointed; second, for an injunction requiring the officers, agents, and employees of the company to deliver to receivers the books, papers, and accounts, and all the property of the company, and to refrain from interfering in any manner with the possession of the property by the receiver; and, third, that a day should be fixed before which all claims of every description should be filed in court or be forever barred from participation in the assets of the corporation. The allegations of the bill were admitted by the company by its answer.

receiver, who is by statute required to "administer the trust fund for the benefit of the policy holders, under the orders of the court."

The New York cases, *i. e.*, *Ruggles v. Chapman*, 59 N. Y. 163, affirming 1 Hun, 324, 2 Thomp. & C. 600; *Re Guardian Mut. L. Ins. Co.* 13 Hun, 115, affirmed in 74 N. Y. 617; *People ex rel. Ruggles v. Chapman*, 64 N. Y. 557; *Atty. Gen. v. North American L. Ins. Co.* 92 N. Y. 654; *Atty. Gen. v. North American L. Ins. Co.* 80 N. Y. 152; *Atty. Gen. v. North American L. Ins. Co.* 85 N. Y. 485; *People v. American Steam Boiler Ins. Co.* 147 N. Y. 25, 41 N. E. 423, reversing 87 Hun, 230, 33 N. Y. Supp. 834; *People ex rel. Stout v. Chapman*, 5 Hun, 222; *People v. American Steam Boiler Ins. Co.* 81 Hun, 498, 31 N. Y. Supp. 155; and *Re Home Provident Safety Fund Asso.* 129 N. Y. 288, 29 N. E. 323, as well as *Relfe v. Spear*, 6 Mo. App. 129, were all cited to appropriate holdings in the note in 38 L.R.A. 100, and nearly all of them have received comment by the court in *VANDIVER v. POE*. *Hayne v. Metropolitan Trust Co.* 67 Minn. 245, 69 N. W. 916; *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757; and *State ex rel. Cincinnati Life Asso. v. Matthews*, 64 Ohio St. 419, 60 N. E. 605, are also adequately explained in the opinion.

J. W. M.

In May, 1906, the company had deposited with the treasurer of Maryland \$100,000 of the registered stock of the city of Baltimore par value, in order to comply with the provisions of the act of 1896, chap. 160, Code 1912, art. 23, § 110. At the same time it had deposited with the treasurer of the state of Maryland an additional \$100,000 par value of the registered stock of the city of Baltimore, in order to meet the legal requirements imposed by the laws of some of the other states in which the company wished to do business. On the 27th of July, 1911, the receivers filed a petition, the object of which was to require the state treasurer to deliver over to them the \$200,000 par value of Baltimore city stock, and by its order of July 28, 1911, the circuit court of Baltimore city ordered such transfer from the state treasurer to the receivers. Thereafter, and before the decree had become enrolled, the state treasurer filed a petition to reopen the order of July 28th, in order that he and his bond might be heard thereon and present objections thereto. These objections came on to be heard later, and after such hearing, on March 16, 1912, the court reaffirmed its order of July 28, 1911, and directed the securities in the hands of the state treasurer to be by him delivered over to the receivers of the company, and it is from these two orders or decrees that the present appeal has been taken.

The question presented is a narrow one, and one for which no precise precedent has been cited or found. While there are a number of cases in which receivers of insolvent corporations, or corporations which have been dissolved, or the charters of which have been declared forfeited, have sought to recover from an official depository securities placed in his hands for the security of those doing business with the company, in order that the proceeds of such securities might be distributed among claimants according to their respective legal rights, no case has been found of a like application to gain possession of the securities of a solvent company. The solvency of the company in question is not merely alleged in the bill, but has been reiterated time and again by these receivers in various papers filed by them, and was distinctly testified to on the stand by one of the receivers, and it is alleged to have been the reason for the dismissal of an action instituted by certain of the stockholders of the company for the dissolution of the company. One of the receivers testifies in these words: "We are endeavoring to work out a practical liquidation that will result in a benefit to those who own the property; 46 L.R.A. (N.S.)

that is, those who own its bonds, policies, and stock."

In the case of the American Casualty Ins. Co. 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778, \$200,000 had been deposited in a similar manner with the state treasurer, and an application was made by receivers of that company to turn over to them such securities, but in that case no question appears to have been raised as to the power or propriety of Mr. Jones, then state treasurer, surrendering the property. At the time when the deposit was made in the American Casualty Case, the statute (act 1892, chap. 109) then in force did not require a deposit with the state treasurer of any securities by a company doing a surety business. In the able opinion filed in that case, the late Chief Judge McSherry held that the circumstances under which the deposit was made were such as to create a valid trust, and to be administered as a trust, and further that, if the state treasurer "did not care to take upon himself the responsibility of distributing the fund among the parties entitled to it, he had the undoubted right either to invoke the aid of a court in its distribution, or upon the petition of the receivers to surrender it to the court, whose officers the receivers were," and that the fund then in court "must be treated as impressed with a trust, and must be applied solely to the payment of the claims of the policy holders," subject to prior or paramount liens. By the act of 1896, chap. 160, companies doing a surety business were brought within the control of the law, and the securities of such companies so deposited with the state treasurer were required to be "registered in the name of said treasurer officially, as held in trust under and pursuant to this act, and the same shall be held by said treasurer in trust for all the holders of policies or guaranties of said corporation. . . . And all of the said stocks so held in trust by the said treasurer . . . shall be held by said treasurer subject to sale and transfer, and to the application of the proceeds of such sale by the said treasurer only on the order of any court of competent jurisdiction." This represents the case of a fund distinctly required by a legislative act of assembly as a condition of doing business, designated as a trust fund, for a specific purpose, with a trustee created by the act and the mode of the execution of his trust in some measure pointed out. The question is thus not identified with the situation which was presented in the Casualty Case. There the insolvency of the company was established; here solvency is said to exist; there no statute had been provided

covering the case; here we have an explicit one.

In *Beach on the Law of Insurance*, vol. 1, § 82, it is said: "The effect of statutes of the states providing for the deposit by insurance companies of securities with some state official, . . . for the protection of its policy holders, and the act of the companies in complying with such statutes is to create a trust fund in the hands of such official, he thereby becoming a trustee for the class of beneficiaries represented by the insured in those states. Such trusts have been held as perfect as those created by deed or will, and as much entitled to protection from courts. In a case where a life insurance company which had deposited with the state treasurer an amount in securities, under a statute passed to enable it to thus comply with the requirements of statutes of other states, that it might do business in those states, had become insolvent, and its affairs and assets had been placed in the hands of receivers, it was held that the receivers could not by action recover this amount from the state treasurer. It was a trust fund in his hands for the benefit of the various policy holders. The state had made him a trustee, placed no limitation upon his rights and powers as such, and presumably intended to leave him subject to the general law of trusts. When the trust terminates, it is his duty to distribute the fund among the beneficiaries."

The rule is thus expressed in *Joyce on Insurance*, vol. 4, § 3593: "In many states the insurance companies are required to deposit a fund with the state treasurer or other state officer for the security of the policy holders in such states. In case of a deposit being made in pursuance of such a requirement, the receiver of the company cannot obtain possession of the fund for the benefit of the general creditors, but it must be divided among the persons for whose protection it was deposited, and no others can acquire the benefits thereof."

The leading case on this subject is *Cooke v. Warner*, 58 Conn. 234, 14 Atl. 798. In that case the insurance Commissioner of Connecticut had taken proceedings against the Continental Life Insurance Company upon the ground that its assets were less than its liabilities, and asked the appointment of a receiver, and that the charter be annulled; and a decree was passed by which the charter was annulled (corporation dissolved) and receivers were appointed; and the receivers then demanded of the state treasurer the securities which had been deposited with him under a statute substantially like that in this state. The application of the receivers was refused, the court holding that the trustee could not

thus have the trust funds taken from him for use or even distribution by others, in the absence of an allegation that he was wrong either in possession or administration; that the statute could no more compel a trustee to surrender property lawfully subjected to a trust, than it could compel a mortgagee or pledgee to release the mortgage or pledge without payment; that, if turned over to the receivers, it might be diverted from the specific trust purposes to which it was dedicated.

The New York court of appeals in the case of *Ruggles v. Chapman*, 59 N. Y. 163, adopted the same rule, and an act was then passed by the New York legislature in which it was thought that the rule had been modified, and in that way, in the case of the *People ex rel. Ruggles v. Chapman*, 64 N. Y. 557, the question a second time reached that court, and its former ruling was affirmed. These cases were followed in the later case of the *Guardian Mut. L. Ins. Co.* 13 Hun, 115, although the judge deciding that case would evidently have been very glad if he could thus have diverted the fund from the hands of the trustee into those of the receivers.

In *Re Home Provident Safety Fund Asso.* 129 N. Y. 288, 29 N. E. 323, there was a voluntary dissolution of the company, and it was held that, while the court had power to make a distribution of its funds among those entitled, it had no power to take from a trustee funds placed in the hands of that trustee for a specific purpose, and distribute them through its receiver instead of through the trustee; that the trustee was entitled to hold the fund notwithstanding the dissolution; but the courts might require the trustee to make the distribution of the fund in accordance with the terms of the trust on which it was held.

The case of *People v. American Steam Boiler Ins. Co.* 147 N. Y. 25, 41 N. E. 423, was one which turned mainly upon the right of the receiver to demand of the trustee the interest which had been received on the deposit, and that right was affirmed; but it was further held that under the then existing statute of New York, which had been passed in part to obviate the effect of the decision in *Ruggles v. Chapman*, *supra*, that a receiver was not entitled to have the fund turned over to him until the rights of the policy holders had been settled.

The appellee relies strongly, for the purpose of sustaining the right of the receivers to the securities now in the hands of the state treasurer, upon the case of *Hayne v. Metropolitan Trust Co.* 67 Minn. 245, 69 N. W. 916. In that case certain securities had been deposited with the state insurance commissioner for the benefit of policy

holders, and subsequently an exchange was effected by the company by which securities of a less value were substituted for the securities originally deposited, and the receiver proceeded against the trust company which then held the original securities, to recover them for the benefit of the policy holders. This presented a far different case from the one before us; there had been a diversion of the trust fund; and it was a proceeding, not against the official who should have been the custodian of the security, but against a corporation which had gained possession of those securities to recover them back; or, in other words, restore a fund which had been permitted by the state official, whose duty it was to guard it, to be diverted, and under such a condition of facts there is no similarity to the present case.

The appellee has also cited the case of *Relfe v. Spear*, 6 Mo. App. 129. That was the case of a proceeding by the superintendent of insurance of the state of Missouri against the receivers of five different insurance companies, and the purpose of the application was to enable the superintendent to distribute the proceeds of the securities. In that case the phraseology of the Missouri statute differed from that of New York; the companies had been dissolved; and under the wording of the statute it was held that the distribution should be made under the supervision of the court through its receivers.

The case of *Atty. Gen. v. North American L. Ins. Co.* 80 N. Y. 152, arose under an entirely different statute, one which provided for the sale and conversion into money by the superintendent of insurance of the securities deposited with him, and then contained this further provision: "The proceeds of such sale or sales shall be paid to the said receiver on his giving his receipt to said superintendent." This was an express direction of law, not for the turning over to the receiver of the securities held by the state insurance commissioner, but of the proceeds of sale, and under such a mandate the court had no option when the insurance commissioner had made the sale required by the statute, but was bound to direct the turning over of the proceeds. This decision, therefore, cannot be regarded as a precedent for the present case.

In *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757, the court goes only to the extent of saying that "the superintendent of insurance should act and perform his trust, . . . and, when the trust is fully performed, the remainder of the deposit, if any," should then, and not until then, be paid over to the assignee.
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An Ohio statute read: "The securities deposited with the insurance department pursuant to this section shall be held by the superintendent in trust for the benefit and protection of, and as security for, the policy holders of such corporation, their legal representatives and beneficiaries;" [§ 3631-25, *Bates's Anno. Stat.*] and in *State ex rel. Cincinnati Life Assn. v. Matthews*, 64 Ohio St. 419, 60 N. E. 605, where a recovery of the securities was sought by the assignee of an insolvent corporation, it was held that the assignee could not recover them without first showing that the company was no longer liable to the policy holders, and that it was the duty of the superintendent of insurance to make the distribution among such policy holders. In all of these various cases, the corporations, the recovery of the securities of which was asked, were insolvent, and as set forth above there is hardly a break in the line of decisions to the effect that receivers and assignees are not entitled to demand or obtain the possession of such securities, and, if this be true with regard to insolvent corporations, with far greater reason must it be true in the case of a solvent corporation.

Much stress was laid in argument upon the complication and increased expense which would ensue from a distribution of the fund arising from the proceeds of sale of the securities in the hands of the state treasurer, if that were required to be done in a separate and independent proceeding. Upon the case as presented in the record, there is no case of distribution before this court, or even evidence that this fund, or any of it, will be required by the receivers for the liquidation of valid claims. From their report they apparently hold assets of the corporation to an amount somewhere between \$400,000 and \$500,000 not impressed with any trust, and if the company is, as they aver and testify, solvent, it may well be that no part of the \$200,000 will be required for the payment of any claims of policy holders. Apparently some such belief was in the mind of the court below, as it passed no decree dissolving the corporation, but in fact dismissed a bill having that ultimate object in view.

The state treasurer is now a party to the present proceeding; by his answer the disposition of the securities or the proceeds arising from them is under the control of the equity court in which these receivers were appointed; and while we do not decide that under a different condition of facts it might not be right and appropriate to direct the turning over of the proceeds of the sale of the securities to the receivers to distribute, or that the state treasurer might not make a distribution of them in the same

proceeding, we can find no sufficient warrant in the statute, or in the condition of the company as it now exists, to justify the turning over at this time, to the receivers of a solvent corporation, securities which have been placed in the hands of a trustee for a specific trust purpose, and with beneficiaries scattered in a large number of states. The decrees of July 28, 1911, and March 16, 1912, must therefore be reversed.

Decrees of July 28, 1911, and March 16, 1912, reversed, and cause remanded; the appellees to pay the costs of this appeal.

WEST VIRGINIA SUPREME COURT OF APPEALS.

J. S. LYNCH et al.

v.

WILLIAM MERRILL et al.

and

LITTLE KANAWHA LOG & TIE COMPANY, Plff. in Err.

(— W. Va. —, 78 S. E. 669.)

Sale — character — how determined.

1. Whether a sale of personal property is complete, or only executory, is to be determined from the intention of the parties as gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale.

Same — passing title — identification.

2. Where the goods sold are sufficiently designated, so that no question can arise as to the thing intended, it is not absolutely necessary to the passing of title that they should be in a deliverable condition, or that the quality or quantity, when the sale depends on either or both, should be determined. They are mere circumstances indicating intent, but are not conclusive.

(May 20, 1913.)

ERROR to the Circuit Court for Wirt County to review a judgment in favor of plaintiffs in an action brought to recover possession of certain saw logs. Reversed.

The facts are stated in the opinion.

Messrs. George W. Johnson and William Beard, for plaintiff in error:

The court erred in instructing the jury that the title to the timber could not pass under the verbal sale to the plaintiff in Headnotes by LYNCH, J.

Note.—The note to Barber v. Andrews 26 L.R.A.(N.S.) 1, as to the sufficiency of selection or designation of goods sold out of a larger lot, sets out, at page 38, many cases involving the sale of logs. In that note, at pages 7 et seq., will also be found 46 L.R.A.(N.S.)

error, until it was counted, measured, and branded.

Morgan v. King, 28 W. Va. 1, 57 Am. Rep. 633; Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432; Hood v. Bloch Bros. 29 W. Va. 244, 11 S. E. 910.

Messrs. L. H. Barnett and Brannon & Stathers for defendants in error.

Lynch, J., delivered the opinion of the court:

This is a writ of error obtained by the Little Kanawha Log & Tie Company to a judgment for plaintiffs. The action, originating before a justice, is to determine the right to the possession of thirty-two saw logs, if to be had, and, if not, to recover their value and damages for detention thereof.

The defendant log and tie company claims title to the logs under a contract with Beall dated February 15, 1909, whereby, at an agreed price per cubic foot, Beall sold the logs to it, to be "rafted," or delivered as rafted, at the mouth of Duck run in the Little Kanawha river, the company to furnish, and it did furnish, "chain dogs" and anchor ropes for the purpose. The logs being cut at the date of the contract, Beall proceeded with the work; but the exact date of completion is not shown, though some of the witnesses say the raft was completed in a floatable condition as early as April 20th. If then completed, the logs were rafted at an earlier date.

The plaintiffs trace title to the logs through a sale by an officer under an execution against Beall received at 4 o'clock P. M., April 19th, and levied about May 10th; the sale being made May 21st.

The summons as issued fixed the value of the logs at \$240 and damages at \$100, the aggregate of which exceeded the amount for which a justice could render judgment. Before appearance of defendants Merrill and Petty, by plea or otherwise, except to object thereto, plaintiffs with leave amended the summons by reducing the damages to \$50, thereby bringing the total within the jurisdictional amount. Defendants then entered the general issue of *non detinet*, and, thereafter, according to the record, moved to dismiss for want of jurisdiction, and, on denial thereof, proceeded to trial, ending in a judgment for plaintiffs.

On appeal to the circuit court, defendants Merrill and Petty disclaiming title to the logs, and averring title thereto in the log

a discussion of the influence of the intention of the parties on the question. And see also later cases in this series. *Seldomridge v. Farmers' & M. Bank*, 30 L.R.A.(N.S.) 337, and *McDermott v. Kimball Lumber Mfg. Co.* 30 L.R.A.(N.S.) 461.

and the company, the latter, pursuant to an order requiring it to appear, state, and defend its title, if any, thereto, appeared to the action and likewise moved a dismissal thereof. Upon the refusal of the motion, the court, at the instance of the company, continued the case until the next succeeding term, when a trial was had, resulting in a verdict and judgment thereon for plaintiffs.

The defendant company complains of the court's ruling on the motion to dismiss, and cites in support of its contention former decisions of this court. But the cases cited do not and could not discuss the question, because it was not therein involved. They hold, as will appear from examination, that, when there is conflict between the amount claimed or proven and that stated in the summons, the latter, and not the former, determines the right to maintain the action. The case of *Hynds v. Fay Bros. & Co.* 70 Iowa, 433, 30 N. W. 683, cited, does tend in some degree to support the view urged by the company. But that case does not cite any authority nor do the facts stated therein correspond in all respects with the facts of this case. In so far as it holds that the parties may not waive the irregularity, if any, it does not accord with our views. Under the circumstances of this case, to dismiss would make substance yield to mere technicality, and to sustain the motion after two trials, in both of which the parties joined, would operate to delay, if not deny, speedy termination of the litigation sought by this action.

The trial, however, proceeded upon the wrong theory, as appears from the instructions in bills of exception 8 and 10, and thereby the jury may have been and probably were misled. The first instruction told the jury, in substance, that if anything remained to be done, such as measuring, counting, and branding the logs, title thereto could not vest in the defendant until they were measured, counted, and branded, omitting entirely the intention of the parties as to the time at which title should vest in the purchaser. *Morgan v. King*, 28 W. Va. 1, 57 Am. Rep. 633; *Bank of Huntington v. Napier*, 41 W. Va. 481, 23 S. E. 800; *Bushkirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Justice v. Moore*, 69 W. Va. 51, 71 S. E. 204, Ann. Cas. 1912 D, 17; *Moore v. Patchin*, — W. Va. —, 76 S. E. 426. "Whether a sale of personal property is complete or only executory, is to be determined from the intent of the parties as gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale." "Where the goods sold are sufficiently designated, so that no ques-

tion can arise as to the thing intended, it is not absolutely necessary . . . that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined; these are circumstances indicating intent, but are not conclusive." *Hood v. Bloch Bros.* 29 W. Va. 244, 11 S. E. 910. This instruction, omitting, as it did, this essential element of intention, should not have been given; nor should the one contained in bill of exceptions 10. The facts did not warrant the latter. The logs were hauled and substantially, though perhaps not skilfully, bound together in a floatable condition about the date of the execution under which plaintiffs trace title. They were, as already stated, at first levied on as a "raft," and not as separate logs. If so, they had been hauled, and doubtless rafted, although it may be that some of the logs purchased by defendant in addition to those involved in this action were not hauled at that time. But they were not levied on or sold under the execution, and therefore are not now involved.

Defendant's instructions contained in bills of exception 15 and 16 should have been given, for reasons heretofore stated. They properly propounded the law applicable to the facts of the case.

The court should have permitted the witness Beall to answer the questions by defendant's counsel, shown in bills of exception 2, 3, 4, 5, and 6, because plaintiffs' witnesses J. M. Lynch and M. B. Summers testified to the same matter, and no sufficient reason appears for refusing Beall's on the same subject. If a proper inquiry, Beall should with propriety have had an opportunity to admit or deny their statements.

Invalidity of the sale under the execution, because the purchaser was not present at the time of sale, is also relied on by defendant. At the instance of the constable, he offered \$100, a definite and fixed sum, and to that extent only was the constable authorized to cry his bid. 2 Freeman, Executions, 2d ed. § 292, says: "The officer making the sale [cannot] act as the agent of a person desirous of bidding. He can neither bid for himself nor for another. We apprehend that this rule must be confined to cases in which the officer, in acting as agent, would be expected to exercise his discretion in making bids, and to purchase the property at the lowest price for which it could be obtained. It ought not to be extended to cases where he is authorized by letter, or otherwise, to offer a specified amount on behalf of an absent bidder." This we think is the true rule.

From what has been said, the conclusion is to reverse the judgment, set aside the verdict, and grant the defendant a new trial.

NEW YORK COURT OF APPEALS.

HENRY J. MIERKE, Admr., etc., of Minnie Mierke, Deceased, Appt.,
v.

JEFFERSON COUNTY SAVINGS BANK,
Respnt.

(208 N. Y. 347, 101 N. E. 889.)

Pleading — complaint — action for savings bank deposit — excusing non-presentation of pass book.

1. A complaint by an administrator to

Note. — Right to withdraw deposit from savings bank without presenting pass book.

While there are statutes in many jurisdictions, and most savings banks have rules or by-laws authorized by statute, providing, in substance, that no deposit shall be withdrawn without the presentation of the depositor's pass book, it has been generally held that such statutes, rules, and by-laws must be reasonably construed, and do not prevent the recovery of a deposit from the bank without the pass book, where it has become impossible for some reason for the depositor or his representative to produce it.

Thus, although a by-law of a savings bank requires the production of a depositor's pass book as a condition to withdrawing his deposit, the administrator of the depositor may recover the amount of the deposit without presenting the book or furnishing a bond of indemnity, upon his furnishing sufficient proof that the book has been destroyed by fire. *Hudson v. Roxbury Inst. for Sav.* 176 Mass. 522, 57 N. E. 1021.

And where a savings bank depositor lost his pass book and notified the bank thereof three years before his death, and no claim has been made for the deposit except by the depositor and his executor, the latter may recover the amount of the deposit from the bank without presenting the pass book or giving a bond of indemnity, although by-laws of the bank provide that no money whatever shall be drawn out without the depositor presenting his pass book and allowing such sum as is drawn out to be entered therein, and that, in the case of lost books, the bank will decide as to the person to whom payment shall be made. *Mills v. Albany Exch. Sav. Bank*, 28 Misc. 251, 59 N. Y. Supp. 149.

And the administrator of a deceased savings bank depositor cannot be required to present the pass book of his intestate as a condition precedent to recovering the latter's deposit, where he is unable to pro-

duce the book in consequence of its loss or destruction, or the wrongful withholding of its possession from him by the family of the decedent, although it is provided by the charter and by-laws of the bank that no person shall receive any part of his principal or dividends without producing the original book, that such payment may be entered thereon; nor can the administrator be required to tender a bond of indemnity under such circumstances, where no claim to the fund has been interposed by any other person, and the bank has had no notice of legal or equitable claims of any other person. *Palmer v. Providence Inst. for Sav.* 14 R. I. 68, 51 Am. Rep. 341.

Savings bank — loss of pass book — requiring bond of administrator.

2. A savings bank cannot require a bond of the administrator of a depositor as a condition to paying the deposit to him, in the absence of any by-law requiring it, although the pass book is lost, and both the statute and by-laws require presentation of such book as a condition to the withdrawal of deposit.

(May 6, 1913.)

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Jefferson

duke the book in consequence of its loss or destruction, or the wrongful withholding of its possession from him by the family of the decedent, although it is provided by the charter and by-laws of the bank that no person shall receive any part of his principal or dividends without producing the original book, that such payment may be entered thereon; nor can the administrator be required to tender a bond of indemnity under such circumstances, where no claim to the fund has been interposed by any other person, and the bank has had no notice of legal or equitable claims of any other person. *Palmer v. Providence Inst. for Sav.* 14 R. I. 68, 51 Am. Rep. 341.

Likewise, a savings bank depositor as to whose identity there is no doubt is entitled to recover his money on deposit without the giving of a bond of indemnity, although his book has been lost or stolen, and the by-laws of the bank provide that "no person shall have the right to demand any part of the principal or interest without producing the original deposit book, that such payments may be entered therein," and that, "should any depositor lose his book, he is required to give immediate notice thereof to the institution; and in cases of doubt as to the identity of the depositors or claimants, the board may require such testimony and security as they may deem necessary." *Wagner v. Howard Sav. Inst.* 52 N. J. L. 225, 19 Atl. 212.

And where there is no question about the identity of a savings bank depositor whose pass book has been lost or stolen, the bank cannot arbitrarily require him to give a bond of indemnity as a condition to paying his deposit, although it is provided by statute that "no payment or check against any such savings account shall be made unless accompanied by and entered in the pass book issued therefor, except for good cause and on assurances satisfactory to the officers of the bank;" and the bank has promulgated a rule, pursuant to statute, that in case of payments either to the depositor personally, or to any other person holding his written order or power of

County in defendant's favor in an action brought to recover a savings bank deposit. Reversed.

The facts are stated in the opinion.

Messrs. Kellogg & Crabb, for appellant:

A depositor in a savings bank is a creditor of the bank for the amount of the deposit, the deposit becomes the property of the bank, and the relation between the parties is that of debtor and creditor.

People v. Mechanics' & T. Sav. Inst. 92 N. Y. 7; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; People ex rel. Bridgeport Sav. Bank v. Barker, 154 N. Y. 128, 47 N. E. 973; People ex rel. Heermance v. Dederick, 35 App. Div. 29, 54 N. Y. Supp. 519; Dechen v. Dechen, 59 App. Div. 166,

68 N. Y. Supp. 1043; Re White, 119 App. Div. 140, 103 N. Y. Supp. 868.

The defendant has money belonging to the estate of the plaintiff's intestate. It cannot in equity and good conscience retain the same and deprive those to whom the money justly belongs of that which is rightfully theirs.

21 Cyc. 849; Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606; Mason v. Prendergast, 120 N. Y. 536, 24 N. E. 806; Lawatsch v. Cooney, 20 App. Div. 470, 47 N. Y. Supp. 54; Bleecker v. Balje, 138 App. Div. 706, 123 N. Y. Supp. 809; Weston v. Brown, 158 N. Y. 360, 53 N. E. 36; Bradbury's Rules, Pl. 264; Goodman v. Alexander, 165 N. Y. 289, 55 L.R.A. 781, 59 N. E. 145; Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. Supp. 443; Doherty v.

attorney, the pass book must be presented, "provided, however, that payments may be made without the production of the pass book, if the depositor shall prove, to the satisfaction of the executive committee, that his book has been lost, stolen, or destroyed, and shall give to the company a written discharge with satisfactory indemnity against loss for any payment without the production of said book." Bayer v. Commonwealth Trust Co. 144 Mo. App. 676, 129 S. W. 268.

So, in Newman v. Munk, 36 Misc. 639, 74 N. Y. Supp. 467, an action to recover, as damages for the conversion of a savings bank book, the amount shown thereby to be on deposit, it was held that the plaintiff could not recover such amount, but only the actual damages sustained, as he could still maintain an action against the bank for the amount of the deposit.

The absence of his pass book cannot be regarded as destroying a depositor's right to his deposit, although there is a statutory requirement that no savings bank may make any payments except upon production of the pass book; and such requirement is not conclusive in an action to recover a deposit, when the ownership and loss of the original book are undisputed, although it may be available to defeat a demand at the bank. Kenney v. Harlem Sav. Bank, 61 Misc. 144, 114 N. Y. Supp. 749, reversed on other grounds in 65 Misc. 466, 120 N. Y. Supp. 82.

Where a by-law of a savings bank provides that "no person shall receive any part of his principal or interest without producing the original book, that such payments may be entered therein, unless it be proved to the satisfaction of the trustees or the treasurer that such book shall have been lost or destroyed, in which case a legal discharge shall be given," it was held, in Webber v. Cambridgeport Sav. Bank, 186 Mass. 314, 71 N. E. 567, that the administrator of a depositor may recover the amount of the latter's deposit upon furnishing evidence sufficient to satisfy the mind of a reasonable man that the deposit

book is lost or destroyed, although the treasurer or trustees may not be satisfied as to that fact, as they are not rendered final arbiters of the question so as to oust the courts of their jurisdiction.

And in Vincent v. Port Huron Sav. Bank, 147 Mich. 437, 111 N. W. 90, an action by the administrator of a depositor to recover the amount of the latter's deposit without either producing the pass book or giving a bond securing the savings bank against loss from payment to him, where it appeared that a state statute provided that no payment against a savings deposit should be made unless accompanied by and entered upon the pass book, "except for good cause, and on assurances satisfactory to the officers of the bank," a judgment in favor of the plaintiff was affirmed by an evenly divided court, on the ground that "good cause" and "satisfactory assurances," under the statute, must be determined not by the officers of the bank, but by judicial triers, and that the evidence warranted the finding that good cause for not producing the pass book was shown, and that the facts furnished the satisfactory assurances necessary to defeat a prosecution for violation of the statute, and to defeat a recovery by any person who might thereafter apply for the money; the other division of the supreme court arguing that the statute was not complied with by the presentation of assurances which were unsatisfactory to the bank, so long as it acted reasonably and in good faith, but that it might require from the administrator either a bond of indemnity or other assurance satisfactory to it, and need not be satisfied with *ex parte*, *prima facie* evidence only as to the plaintiff's rights.

Where, however, a savings bank, in pursuance of statutory authority, has adopted a rule or by-law providing that "no person shall have the right to demand any part of his principal or interest without producing the original book, that such payment may be entered therein," and has had the same posted in a conspicuous place in its banking room and a copy pasted in the

Shields, 86 Hun, 303, 33 N. Y. Supp. 497; Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3; Sanders v. Soutter, 126 N. Y. 195, 27 N. E. 263; Marie v. Garrison, 83 N. Y. 14; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Abbey v. Wheeler, 170 N. Y. 127, 62 N. E. 1074, 22 Mor. Min. Rep. 86.

If the complaint was defective, the defect was cured by the evidence of these facts received on the trial without objections.

31 Cyc. 723; Strawn v. Edward J. Brandt-Dent. Co. 71 App. Div. 234, 75 N. Y. Supp. 698, affirmed in 175 N. Y. 463, 67 N. E. 1090; Crane v. Powell, 139 N. Y. 379, 34 N. E. 911; Frear v. Sweet, 118 N. Y. 454, 23 N. E. 910; Rogers v. New York & T. Land Co. 134 N. Y. 197, 32 N. E. 27.

A pass book is not negotiable so that the

front part of each pass book, neither a depositor nor his administrator can recover from the bank without the production of the pass book, or the giving of some evidence of its loss or destruction, or in some way accounting for its nonproduction. Warhus v. Bowery Sav. Bank, 21 N. Y. 543, affirming 5 Duer, 67.

And where it is provided by statute and by rule of a savings bank, duly promulgated pursuant to law, that no deposit or portion thereof or interest thereon shall be paid or withdrawn without the production of the pass book, for a proper entry of the transaction, an assignee of a part of a savings bank deposit standing in the name of a husband and wife, either of whom has the privilege of drawing against it, cannot, without presenting the depositors' pass book, recover such part from the bank under an assignment by the husband alone, together with an order for the money and an affidavit of the husband that the wife has the pass book and refuses to give it to him. Rosenthal v. Dollar Sav. Bank, 61 Misc. 244, 113 N. Y. Supp. 787.

Where it is provided by statute that a savings bank shall not pay any interest or deposit or portion of a deposit unless the pass book be presented and the proper entry made therein, and that the trustees may make by-laws for the payment in case of loss of the pass book, etc., and the by-laws of a savings bank, duly passed and assented to by a depositor, provide that in case of loss of a pass book, on satisfactory proof and adequate indemnity, a duplicate may be issued, and that no person shall have the right to demand or receive any sum as principle or interest without his pass book, that the amount demanded and paid may be entered therein,—unless by-laws are reasonable and valid, and form a part of the contract between the depositor and the bank, and the former cannot recover his deposit from the latter without presenting his original pass book or giving adequate security. Mitchell v. Home Sav. Bank, 38 Hun, 255.

So, where the pass book given to and accepted by a depositor upon his making 46 L.R.A. (N.S.)

defendant could, under § 1917 of the Code of Civil Procedure, require security.

Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653, 4 N. E. 123; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 13 L.R.A. 786, 28 N. E. 398; Warhus v. Bowery Sav. Bank, 21 N. Y. 543; Palmer v. Providence Inst. for Sav. 14 R. I. 68, 51 Am. Rep. 341; Mills v. Albany Exch. Sav. Bank, 28 Misc. 251, 59 N. Y. Supp. 149; Kenny v. Harlem Sav. Bank, 65 Misc. 466, 120 N. Y. Supp. 82, 61 Misc. 144, 114 N. Y. Supp. 749; Vincent v. Port Huron Sav. Bank, 147 Mich. 437, 111 N. W. 90.

Mr. Samuel Child, for respondent:○

The complaint does not state a cause of action against a savings bank on a deposit account.

a deposit in a savings bank contains a provision that "depositors are alone responsible for the safe-keeping of the book and the proper withdrawal of their money; no withdrawal will be allowed without the book, and the book is the order for the withdrawal,"—the depositor cannot recover the amount of his deposit against the bank upon evidence that his book has been lost or stolen from him, without his indemnifying the bank for its payment to him, although he is unable to furnish such indemnity. Heath v. Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194.

And where one of the by-laws of a savings bank, to which a depositor agreed in writing to assent, provides that "no persons shall receive any part of their principal or interest without producing the original book, that such payments may be entered thereon," the administrator of the depositor cannot maintain an action against the bank for such deposit without producing the book, or tendering to the bank a bond of indemnity against the production of the book by other persons. Wall v. Provident Inst. for Sav. 3 Allen, 96.

But if the administrator requires the amount of the deposit for the payment of debts of the intestate, he may recover it from the bank without presenting the book, upon his furnishing a sufficient bond to keep the bank harmless from all consequences of the payment to him, although the intestate voluntarily parted with the book to defraud his creditors. Wall v. Provident Inst. for Sav. 6 Allen, 320.

Where a savings bank pass book has been lost or destroyed, and upon demand by the depositor's administrator, who is legally entitled to the deposit, for payment of the amount thereof, the bank refuses payment on the ground that it has a meritorious defense on which it intends to rely, and gives no indication that its refusal is because the book is not presented, this constitutes a waiver by the bank of its right to require the presentation of the pass book. Wood v. Connecticut Sav. Bank, — Conn. —, 87 Atl. 983.

A. C. W.

Banking Law (Consol. Laws, chap. 2) § 152; *Mitchell v. Home Sav. Bank*, 38 Hun, 255; *People v. Mechanics' & T. Sav. Inst.* 92 N. Y. 7; *Winter v. Niagara Falls*, 190 N. Y. 198, 123 Am. St. Rep. 540, 82 N. E. 1101, 13 Ann. Cas. 486; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522; *Inman v. Western F. Ins. Co.* 12 Wend. 452; *Elting v. Dayton*, 63 Hun, 629, 43 N. Y. S. R. 363, 17 N. Y. Supp. 849, affirmed in 144 N. Y. 644, 39 N. E. 493; *LaChicotte v. Richmond R. & Electric Co.* 15 App. Div. 380, 44 N. Y. Supp. 75; *Todd v. Union Casualty & Surety Co.* 70 App. Div. 52, 74 N. Y. Supp. 1062; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Furlong v. Agricultural Ins. Co.* 28 Abb. N. C. 444, 45 N. Y. S. R. 856, 18 N. Y. Supp. 844.

In order to draw money, the book must be produced.

Banking Law (Consol. Laws, chap. 2) § 152; *Furlong v. Agricultural Ins. Co.* 28 Abb. N. C. 444, 45 N. Y. S. R. 856, 18 N. Y. Supp. 844; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185; *Doll v. Noble*, 116 N. Y. 233, 5 L.R.A. 554, 15 Am. St. Rep. 398, 22 N. E. 406; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49.

Savings banks must use ordinary care and diligence in the payment of accounts, and for the protection of its depositors.

Appleby v. Erie County Sav. Bank, 62 N. Y. 12; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Mahon v. South Brooklyn Sav. Inst.* 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118; *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 69 L.R.A. 317, 105 Am. St. Rep. 720, 72 N. E. 995, 17 Am. Neg. Rep. 337.

Indemnity may be required where it is provided for in the by-laws.

Mitchell v. Home Sav. Bank, 38 Hun, 255.

Security is required by statute in case of lost negotiable instruments.

Code, Civ. Proc. § 1917.

If the book has been transferred, the holder may rely on § 18 of the by-laws.

Mitchell v. Home Sav. Bank, supra.

Werner, J., delivered the opinion of the court:

The defendant is a savings bank in which plaintiff's intestate at the time of her death had money on deposit. The plaintiff's husband and administrator, being unable to find the pass book issued to her by the defendant evidencing the deposit, notified the officers of the bank, and requested payment to him of the amount credited to the decedent's account. The defendant's officers refused payment unless plaintiff should give a bond of indemnity against loss. This the 46 L.R.A. (N.S.)

plaintiff refused to do, and he brought this action to recover the deposit. The case was tried before the court without a jury, and judgment was rendered in favor of the defendant. The learned trial court held, in substance, that the complaint was fatally defective because it did not allege the loss of the pass book, or any facts tending to excuse its nonproduction and presentation, and that the proof did not show any excuse for its nonproduction. The judgment entered upon this decision was affirmed at the appellate division by a divided court.

Before proceeding to discuss the case on the merits, it may be well to dispose of the suggestion that the complaint was insufficient. Counsel for the defendant raised this point by motion to dismiss the complaint at the opening of the trial, and the motion was then denied, but the formal decision later filed by the trial court contains the express finding that the complaint does not state a cause of action. In this ruling we think the court was in error. The complaint alleges the plaintiff's appointment and qualification as administrator, the facts concerning the deposit, his demand for the money represented by it, and the refusal of the bank to pay. This was enough to put the defendant upon its defense. The answer of the defendant, after certain denials and admissions which need not be specified, sets forth the by-laws of the bank, which will be referred to hereafter, and alleges that the plaintiff had never presented the pass book.

The pleading simply raised the usual issue between a depositor and his depository where there is a failure to pay the amount deposited. There are, of course, special statutory and substantive legal rules applicable to savings banks as distinguished from the ordinary business or discount banks, but the relation between savings banks and their depositors is nevertheless that of debtor and creditor. *People v. Mechanics' & T. Sav. Inst.* 92 N. Y. 7. The defendant was therefore indebted to the plaintiff in the amount of the deposit. His complaint setting forth the facts on which that indebtedness was based was sufficient, and if for any reason the defendant deemed itself entitled to withhold the deposit for its own security, the facts justifying such conduct were properly to be pleaded in its answer. The defendant evidently recognized this as the proper procedure, for it alleged the nonpresentation of the pass book as one of its defenses. It was not necessary for the plaintiff affirmatively to plead the loss of the book; that was a matter of evidence admissible to meet the defense that it had not been presented. The complaint must therefore be regarded as sufficient.

The further question remains to be determined whether the defendant presented any evidence which justified it in withholding from the plaintiff the amount of this deposit. Upon that issue the material facts found by the trial court are undisputed. Wilhelmina Mierke, at the time of her death, on November 29, 1910, had on deposit in the defendant bank the sum of \$900. The plaintiff is her husband and administrator. Immediately after her death he searched for the pass book issued by the defendant to her, but was unable to find it, and on the day of her death he went to the bank and informed its officials of his inability to find the book. On January 6, 1911, the plaintiff was appointed administrator, and filed with the bank a copy of the letters appointing him. After that he had several interviews with the officials of the defendant, in which he repeatedly informed them of the loss of the pass book and demanded payment to himself as administrator of the amount of his wife's deposit. The officials of the bank refused payment unless he would give to the bank a bond in double the amount of the deposit indemnifying it against loss. This he refused to do. On the following February 28th, which was nearly two months after his appointment as administrator, he commenced this action.

The banking law (Consol. Laws, chap. 2) contains many provisions for the regulation of savings banks. Section 143 provides that the sums deposited shall be repaid to depositors or their legal representatives in such manner, and "after such previous notice, and under such regulations, as the board of trustees shall prescribe. Such regulations shall be posted in a conspicuous place in the room where the business of the corporation shall be transacted, and shall be printed in the pass books." Section 152, so far as material, provides that no check of a depositor shall be paid "unless the pass book of the depositor be produced. . . . The board of trustees may, by their by-laws, provide for making payments in cases of loss of pass book, or other exceptional cases where the pass book cannot be produced, without loss or serious inconvenience to depositors." In pursuance of these statutory provisions the defendant's board of trustees adopted by-laws which were regularly printed in its pass books and posted in its banking room. Among other provisions, these by-laws provided: "This bank will, as a rule, pay all deposits on demand, yet it reserves the right to require ninety days' notice at its office of intention to withdraw deposits; the intent of this rule being solely to protect the bank and its depositors in time of public excitement and

danger." "No money can be withdrawn or deposited except on production of the pass book." "In case a pass book shall be lost immediate notice shall be given to the bank in writing, when payment upon such book will be stopped." The by-law providing for ninety days' notice of intention to withdraw presents no obstacles to the plaintiff's recovery, as the bank never indicated its intention to require any such notice. Nor does the by-law requiring written notice in case of the loss of pass book avail the defendant. The proof here clearly discloses that, while the bank was promptly and repeatedly informed of the loss of the pass book, it never intimated any desire for written notice, but on the contrary based its refusal to pay squarely on the ground that the plaintiff must give a bond of indemnity.

We have therefore to decide whether the failure to produce the pass book under the circumstances disclosed by the record warranted the refusal to pay. The statute and the bank's by-laws provide that the book must be presented. The statute further provides that the bank may adopt by-laws to provide for a case in which the pass book has been lost. The defendant's trustees have adopted no by-law providing for such a case, except that it would require notice in writing. While the plaintiff gave no written notice, the defendant did not complain of that informality, and this requirement was clearly waived. No request was made of the plaintiff for further evidence of the loss of the book, or of the circumstances surrounding its disappearance, and the question whether he has given satisfactory evidence of the circumstances, by affidavit or otherwise, does not arise here, as it did in the case of *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543, where the plaintiff refused to comply with the defendant's reasonable request for satisfactory evidence of the loss. In the case at bar the refusal to pay is based solely on the ground that the bank was entitled to a bond of indemnity. There is nothing in its by-laws entitling it to insist upon such a condition, and in the absence of such a provision we do not think it was justified in resisting the plaintiff's claim on that ground. Whether a by-law requiring a depositor or his legal representatives to give a bond can be regarded as a reasonable condition is a question we are not now called upon to decide. All that we decide in the present case is that the plaintiff alleged and proved all the facts necessary under the circumstances to make out a good cause of action. *Zander v. New York Security & T. Co.* 178 N. Y. 208, 102 Am. St. Rep. 492, 70 N. E. 449.

The judgment should be reversed, and a

new trial granted, with costs to abide the event.

Cullen, Ch. J., and Gray, Hiscock, Collin, Cuddeback, and Miller, JJ., concur.

NORTH CAROLINA SUPREME COURT.

D. T. DOVER, Admr., etc., of William Dover, Deceased, Appt.,
v.

MAYES MANUFACTURING COMPANY.

(157 N. C. 324, 72 S. E. 1087.)

Master — teamster — authority to invite passengers.

1. It is not within the implied authority of a teamster to invite boys to ride upon

Note. — Liability of owner of vehicle for injury to child invited to ride by driver.

This note is limited to cases where a child is injured while riding on a road vehicle such as a wagon or automobile, and does not include cases of injury to a child invited or permitted to ride upon engine, hand car, and the like (see note in 4 L.R.A. (N.S.) 804, as to master's liability for injury to child invited into place of danger by employee); or upon elevator (see note to Davis v. Ohio Valley Bkg. & T. Co. 15 L.R.A. (N.S.) 402, as to liability of owner of elevator for injury to trespassers or licensees; also Sweeden v. Atkinson Improv. Co. 27 L.R.A. (N.S.) 124; McDonough v. Pelham Hod Elevating Co. 111 App. Div. 585, 98 N. Y. Supp. 90). Cases involving liability of master for injury to minor received while aiding servant at latter's request, in case of emergency, have also been excluded, since these cases have been treated in the note to St. Louis & S. F. R. Co. v. Bagwell, 40 L.R.A. (N.S.) 1180, which discusses the liability of the master for injury to an emergency assistant.

As to liability of master for injury to volunteer, see notes in 22 L.R.A. 663; 13 L.R.A. (N.S.) 561; and 43 L.R.A. (N.S.) 187.

It is generally held that where a servant invites or permits a child to ride against the master's orders, and without the master's knowledge, the master is not liable if the child is injured, the act of the servant not being within the scope of his employment or in furtherance of his master's business.

Thus, the master was held not liable for injury to child permitted by the driver to ride upon a wagon contrary to instructions. Scott v. Peabody Coal Co. 153 Ill. App. 103; Schulwitz v. Delta Lumber Co. 126 Mich. 559, 85 N. W. 1075; Mahler v. 46 L.R.A. (N.S.)

his wagon, and therefore if no express authority has been given him, his master is not liable for the death of a boy invited to ride and killed by the running away of the team.

Same — dangerous instrumentality — mule team.

2. A team of mules and wagon is not such a dangerous instrumentality as to render their owner liable for injury through the running away of the team, to a boy whom the driver without authority invited to ride.

(December 13, 1911.)

A PPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

Stott, 129 Mich. 614, 89 N. W. 340, 11 Am. Neg. Rep. 264.

So, the master was held not liable for injury to child invited (Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100, or permitted (Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 4 L.R.A. (N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553), to ride upon a wagon by the driver without authority, even though he apparently had received no instructions in that regard.

But where a driver permitted a boy to ride on a wagon in return for watching the horses, and after telling him to mount the step, drove rapidly over the stones, whereby the boy was jolted off and injured, it was held in Nudelman v. Borden's Condensed Milk Co. 77 Misc. 103, 136 N. Y. Supp. 49, that whatever service the plaintiff had been called upon to render having been completed before he went upon the wagon, he was not therefore, at the time, a fellow servant, but a licensee, and entitled to recover for injuries caused by the negligence of the driver.

In Marquis v. Robidoux, Rap. Jud. Quebec, 19 C. S. 361, as cited in Labatt's Master & Servant, 2d ed. vol. 6, p. 7617, a boy ten years old, after having been ejected, with other boys, from defendant's delivery wagon, secretly re-entered the wagon without the driver's knowledge, and, after having been observed by him, was tacitly permitted to remain because he was unwilling to leave him in the public road far from his father's home. The boy was injured by a collision between the wagon and a railroad train without any negligence on the part of the driver. It was held that the defendant was not liable for this injury, as the driver was not within the scope of his duties in permitting the boy to remain in the wagon.

In Lygo v. Newbold, 9 Exch. 302, 23 L. J. Exch. N. S. 108, 2 C. L. R. 449, 2 Week.

Messrs. Burwell & Cansler, for appellant:

It was the defendant's duty to protect plaintiff from danger by removing him from the wagon, and its failure to do so constitutes actionable negligence.

Biddle v. Hestonville, M. & F. Pass. R. Co. 112 Pa. 551, 4 Atl. 485; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 522, 32 Am. Rep. 472; *Holmes v. Missouri P. R. Co.* 207 Mo. 149, 105 S. W. 624; *Ashworth v. Southern R. Co.* 116 Ga. 635, 59 L.R.A. 595, 43 S. E. 36; *Tully v. Philadelphia, W. & B. R. Co.* 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; *Wynn v. City & Suburban R. Co.* 91 Ga. 344, 17 S. E. 649; *Levin v. Second Ave. Traction Co.* 194 Pa. 156, 45 Atl. 134; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *St. Louis S. W. R. Co. v. Abernathy*, 28 Tex. Civ. App. 613, 68 S. W. 539; *Davis v. St. Louis S. W. R. Co.* — Tex. Civ. App. —, 92 S. W. 831; *North Texas Constr. Co. v. Bostick*, 98 Tex. 239, 83 S. W. 12; *Brennan v. Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679, 2 Am. Neg. Cas. 77; *Cook v. Houston Direct Nav. Co.* 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 476; *Dublin Cotton Oil Co. v. Jarrard*, — Tex. Civ. App. —, 40 S. W. 534.

Defendant is liable for the death of the intestate, as its agent, in managing the team, was clearly acting within the scope of his employment.

Stewart v. Cary Lumber Co. 146 N. C. 47, 59 S. E. 545; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 425.

Messrs. A. G. Mangum and Osborne, Lucas, & Cocke for appellee.

Brown, J., delivered the opinion of the court:

The plaintiff's intestate, a boy ten years old, was killed by the running away of a team of mules belonging to the defendant, Mayes Manufacturing Company, and in charge of one of its servants. The evidence offered by the plaintiff shows that the team

was being driven by a negro boy seventeen years old, and was at the time pulling a wagon partially loaded with lumber, which was being moved for the defendant. After the lumber was loaded, the plaintiff's intestate and two other small boys climbed on the wagon. There was also on the wagon with the driver another negro boy, eighteen or nineteen years old. When the wagon was approaching a hill on a street in the village of Mayesworth, and just before starting up the hill, the negro driver made two of the white boys on the wagon get off, but let the Dover boy, plaintiff's intestate, remain on the wagon, and permitted him to drive the mules; and while the boy was driving, the negro boy stood up behind him and whipped the mules, so that they trotted up the hill, and he continued to whip them until they passed over the top of the hill and out of sight of the witness. Another witness for the plaintiff testified that when he saw the mules they were running down the hill on the opposite side; that one of the negro boys had the reins, and the Dover boy was sitting on the wagon in front of him; and that presently the negro boys jumped or fell from the wagon.

This witness then gives the following description of the manner in which the Dover boy was killed: "They ran on about 20 feet, and the lumber got to jogging, and he got on his feet in some way and leaned over, and the lumber carried him over, and as he went over the hind wheel struck him right across the head." There was evidence that the mules had run away several times before this accident, the runaways being attributed by the witnesses to several causes. Once the lumber was "punching" the mules; and in another instance a table which was being placed on the wagon fell on the mules; and one witness said he had seen them run away and did not know the cause.

Augustus Lay, a witness for the plaintiff, testified that he was manager of the defendant's store, and had charge of the teams and farms; that these mules "would run off if a man is not there sufficient to hold them, if lumber jumps up and strikes them, or if a table or box strikes them;" that the boys in the village were in the habit of riding

Rep. 158, the plaintiff contracted with the defendant to carry goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way the cart broke down, and the plaintiff was thrown out and severely injured. It was held that as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. 46 L.R.A. (N.S.)

The above case, however, is not strictly within the scope of this note, as plaintiff was a person of full age.

Neither a coal wagon (*Scott v. Peabody Coal Co.* 153 Ill. App. 103) nor a stone wagon (*Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A. (N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553) is so attractive and dangerous to children that the owner must take special precautions to avoid injury to such as attempt to ride upon it.

J. D. C.

on the wagons, and he would run them off three or four times a day.

At the conclusion of the plaintiff's evidence, the court overruled defendant's motion for judgment of nonsuit, and the defendant introduced a number of witnesses whose testimony was directly opposed to that of the plaintiff. At the conclusion of all the evidence, upon an intimation of the court that he would charge the jury that, if they believed the evidence, the plaintiff was not entitled to recover, the plaintiff submitted to a judgment of nonsuit. The correctness of this ruling is the sole question presented for our determination.

At the very threshold of this case, we are confronted with a state of facts which compels us to sustain the judgment of his honor, Judge Briggs. Construed in the light most favorable to the plaintiff, the evidence establishes the fact his intestate was invited by the defendant's servant to ride on the wagon. It is not alleged, nor does it appear in evidence, that the servant had express authority to invite or permit boys to ride on the defendant's wagons. It was shown that the servant's duties were those of an ordinary driver of a team of mules; and that at the time of the accident he was engaged in the performance of such duties. We must hold upon this state of facts that he had no implied authority to permit boys to ride on his wagon; and that in doing so he acted beyond the scope of his employment. As authority for this conclusion, we have only to repeat well-settled principles in the law of master and servant. "In an action of tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable." *Howe v. Newmarch*, 12 Allen, 49; *Fleishner v. Durgin*, 207 Mass. 435, 33 L.R.A. (N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291. This doctrine, so well expressed by the supreme court of Massachusetts, has found ready acceptance and frequent application by our court. *Roberts v. Southern R. Co.* 143 N. C. 178, 8 L.R.A. (N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375; *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440; *Vassar v. Atlantic Coast Line R. Co.* 142 N. C. 68, 7 L.R.A. (N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535; *Hayes v. Southern R. Co.* 141 N. C. 195, 53 S. E. 847; *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 46 L.R.A. (N.S.)

L.R.A. 738, 51 S. E. 1015; *Palmer v. Winston-Salem R. & Electric Co.* 131 N. C. 250, 42 S. E. 604; *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; *Willis v. Atlantic & D. R. Co.* 120 N. C. 508, 26 S. E. 784, 1 Am. Neg. Rep. 669; *Waters v. Greenleaf-Johnson Lumber Co.* 115 N. C. 648, 20 S. E. 718.

The recent case of *Marlowe v. Bland*, 154 N. C. 140, — L.R.A. (N.S.) —, 69 S. E. 752, presents an interesting application of this principle. In that case a farm hand was directed to cut and pile certain cornstalks, and, without being directed to do so, he set fire to the pile, from which sparks were blown by the wind to defendant's woods, causing a fire and doing two or three hundred dollars of damage. Upon these facts, we sustained a judgment of nonsuit, and in the opinion of the court, written by Mr. Justice Hoke, will be found frequent quotations from the very thorough discussions of this question by Mr. Justice Walker in *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015, and in *Daniel v. Atlantic Coast Line R. Co.* 138 N. C. 517, 67 L.R.A. 455, 48 S. E. 810, 1 Ann. Cas. 718. In the latter case, the learned justice says: "It is not intended to assert that a principal cannot be held responsible for the wilful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts, unless previously and expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as, when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, or to give vent to some private feeling of his own (*McManus v. Crickett*, 1 East, 106); and, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts.'"

In his learned opinion in *Stewart v. Cary Lumber Co.* 140 N. C. 112, 59 S. E. 568, Mr. Justice Walker quotes this language from his opinion in the *Daniel Case*, and well says: "What better authority can we invoke in support of our position than the opinions of the court of King's bench as delivered by Lord Holt and Lord Kenyon?"

"The test of liability in all the cases,"

says Mr. Justice Hoke in *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440, "depends upon the question whether the injury was committed by the authority of the master, expressly conferred, or fairly implied from the nature of the employment and the duties incident to it."

This doctrine of *respondet superior*, as it is now established, is a just but a hard rule. The master exercises care in the selection of his servant, and retains in his service only such servants as are prudent and trustworthy, the servant, in the prosecution of the master's business, must of necessity pass beyond his sight and out of his control, and yet the law makes the master liable for the conduct of the servant. The application of this principle, without working the greatest injustice to every employer of a servant, is made possible only by the limitation, established by the courts, that when the servant does an act which is not within the scope of his employment, the master is not liable. "Beyond the scope of his employment, the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication." *Holler v. Ross*, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472.

The authorities on this question from other courts are collected and fully discussed in the opinion of Mr. Justice Connor in *Stewart v. Cary Lumber Co.* 146 N. C. 85, 59 S. E. 545. The principal opinion in that case was not in conflict with the views expressed in the dissenting opinion upon the general principle of the liability of the master for the conduct of his servant when acting beyond the scope of his employment. The conflict arose upon the application of this principle to the wilful and wanton conduct for an engineer in blowing his whistle for the purpose of frightening plaintiff's horses. We said, in the opinion of the court: "This immunity from liability for tort referred to is not generally extended to railroads, whose servants are intrusted with such dangerous instrumentalities, and have thereby such unusual and extensive means of doing mischief." Mr. Justice Walker and Mr. Justice Connor entered vigorous dissents to this exception to the general rule, and maintained that the rule should be applied to railroads as well as to other employers, exempting them from liability for the wanton and malicious acts

of their servants when beyond the scope of their employment.

We have a number of cases from other courts which directly sustain the position that the defendant's driver was not acting for his master when he permitted plaintiff's intestate to ride on the wagon. In the leading case of *Bowler v. O'Connell*, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498, the servant of the defendant, a boy thirteen years old, was leading a colt belonging to the defendant from the stables to defendant's yard, and invited the plaintiff, a boy between five and six years of age, to ride, and the plaintiff was kicked by the colt while going forward to accept the invitation. The court, denying defendant's liability, says: "The true test of liability on the part of the defendant is this: Was the invitation given in the course of doing their work, or for the purpose of accomplishing it? Was this act done for the purpose, or as a means of doing what Frank [the servant] was employed to do? If not, then in respect to that act he was not in the course of the defendants' business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt." This case was followed in *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100, in which it is held: "If a driver of a cart invites an infant to drive with him, either for pleasure or to take his place in driving while he sleeps, and the infant falls from the cart and is run over by it, the act is outside the driver's authority, and his master is not liable to the infant."

"The owner of a wagon in charge of a skilful driver is not liable for the death of a child fatally injured in attempting to alight from the wagon, after having climbed thereon at the invitation of the driver, who was neither expressly or by implication authorized to invite children to get upon a wagon, and whose act in so doing was in no sense within the scope of his employment, or in furtherance of his employer's business." *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553.

In *Kiernan v. New Jersey Ice Co.* 74 N. J. L. 175, 63 Atl. 998, 20 Am. Neg. Rep. 431, it appeared from the testimony that the plaintiff, a boy of fifteen years, was invited by the defendant's servant, engaged at the time in driving an ice wagon, to take a piece of ice from the wagon, and while

he was in the act of doing so he was assaulted by the servant. In denying plaintiff's right to recover the court says: "There is nothing to show that Lahey [the driver] had any express or implied authority from the defendant to permit anyone to take ice gratuitously from its wagon. Therefore, when Lahey gave such permission, he did it on his own responsibility, and not as a servant of the defendant."

The supreme court of Michigan in *Schulwitz v. Delta Lumber Co.* 126 Mich. 559, 85 N. W. 1075, had occasion to apply this principle to a state of facts very similar to that presented in this case, and held that "a master is not liable for the negligence of his servant in permitting a boy, contrary to the master's orders, to ride upon a wagon provided for the servant's use in hauling lumber; such act not being within the scope of the servant's employment." *Mahler v. Scott*, 129 Mich. 614, 89 N. W. 340; 11 Am. Neg. Rep. 264; *Corrigan v. Hunter*, 139 Ky. 315, 43 L.R.A.(N.S.) 187, 122 S. W. 131, 130 S. W. 798; *Sweedon v. Atkinson Improv. Co.* 93 Ark. 397, 27 L.R.A.(N.S.) 124, 125 S. W. 439.

We cannot hold that a team of mules and wagon is a "dangerous instrumentality," and that the defendant should be made liable for the death of plaintiff's intestate, without regard to whether the servant was acting beyond the scope of his employment. *Pollock, Torts*, 480. But if we should so hold, it would not change our decision, because the character of the mules was not the cause of the death of plaintiff's intestate. The accident was the result of the conduct of the defendant's servant, for which the defendant is not liable. *Dougherty v. Chicago M. & St. P. R. Co.* 137 Iowa, 257, 14 L.R.A.(N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902.

The judgment of the Superior Court is affirmed.

UNITED STATES SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Plff. in Err.,

v.

HARDWICK FARMERS ELEVATOR
COMPANY.

(226 U. S. 426, 57 L. ed. 284, 33 Sup. Ct. Rep. 174.)

Commerce — state and Federal regulations — congressional inaction.

1. Any power which a state has over in-

Note. — For power of state as to demurrage charges by carrier on interstate shipments, see note to *St. Louis & S. F. R. Co. v. State*. 30 L.R.A.(N.S.) 137. 46 L.R.A.(N.S.)

terstate commerce because of congressional inaction ceases to exist from the moment that Congress exerts its paramount authority over the subject.

Same — conflicting state and Federal regulations — state demurrage law.

2. Congress has so taken possession of the subject of the delivery, when called for, of railroad cars to be used in interstate traffic, by the provisions of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591), imposing a specific duty upon railway carriers to furnish cars for such traffic upon reasonable request, and giving remedies for violations of that duty, as to invalidate, when applied to cars demanded for interstate transportation, the provisions of Minn. Laws 1907, chap. 23, requiring railway companies to furnish freight cars on demand, under penalty for each day's delay not due to certain excepted causes.

(January 6, 1913.)

ERROR to the Supreme Court of Minnesota to review a judgment affirming a judgment of the District Court for Rock County imposing a statutory penalty upon defendant for its failure to furnish freight cars on demand to be used in interstate traffic. Reversed.

Statement by Mr. Chief Justice White:

A statute passed by the legislature of the state of Minnesota, and known as the Minnesota reciprocal demurrage law, became effective on July 1, 1907. Laws of Minnesota, 1907, chap. 23.

The law, among other things, made it the duty of a railway company subject to its provisions, on demand by a shipper, to furnish cars for transportation of freight, at terminal points on its line of road in Minnesota, within forty-eight hours, and at intermediate points within seventy-two hours, after such demand, Sundays and legal holidays excepted. For each day's delay in furnishing cars when so demanded—except when prevented by strikes, public calamities, accident, or any cause not within the power of the railroad to prevent—the defaulting company was made liable to pay to the shipper \$1 per car, together with the damages sustained and a reasonable attorney's fee.

Alleging that, in respect of delays in the deliveries to it of fourteen freight cars, pursuant to eight applications made for such cars between September 19, 1907, and October 22, 1907, the 1st section of the act in question had been violated, the Hardwick Farmers Elevator Company, defendant in error here, commenced this action in a district court of Minnesota to recover from the railway company, plaintiff in error here, penalties aggregating \$218 and an attor-

ney's fee of \$50, together with the costs and disbursements of the action. As a defense, the railway company set up that the cars in question were demanded for the purpose of interstate traffic, and that the delays complained of were occasioned solely by an unusual and unprecedented congestion of traffic and a consequent scarcity of cars, arising from their use in moving traffic and commerce between the states, and that such delays therefore arose from causes not within the control and power of the company. It was also claimed that if the statute in question embraced interstate commerce, and was applied to the requisitions for cars referred to in the complaint, it would be repugnant to the commerce clause and to the due process and equal protection clauses of the Constitution of the United States. The action was tried to a jury. The trial judge refused to give instructions asked for by the railway company, embodying the constitutional objections made in its answer. A verdict was returned for the plaintiff for the amount claimed, including an attorney's fee; and a judgment entered on the verdict was affirmed by the supreme court of the state. 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088.

Messrs. McNeil V. Seymour, Edward C. Stringer, and Edward S. Stringer, for plaintiff in error:

The Minnesota reciprocal demurrage law is in violation of the laws of Congress and of the Constitution of the United States, —especially the so-called "commerce clause."

Wilson Produce Co. v. Pennsylvania R. Co. 14 Inters. Com. Rep. 170; *St. Louis, I. M. & S. R. Co. v. Hampton*, 162 Fed. 693; *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 466, 117 S. W. 238; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *St. Louis & S. F. R. Co. v. State*, 26 Okla. 62, 30 L.R.A.(N.S.) 137, 107 Pac. 929; *Gulf, C. & S. F. R. Co. v. Hesley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Atlantic Coast Line R. Co. v. Com.* 102 Va. 599, 46 S. E. 911; *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; *Pennsylvania R. Co. v. M. O. Coggins Co.* 38 Pa. Super. Ct. 129; *Southern P. Co. v. Campbell*, 189 Fed. 696; *Bethlehem Steel Co. v. United States*, 110 C. C. A. 513, 188 Fed. 879; *Peale v. Central R. Co.* 18 Inters. Com. Rep. 33; *Michie v. New York, N. H. & H. R. Co.* 151 Fed. 694; *United States v. Standard Oil Co.* 148 Fed. 719; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *McNeill v. Southern R. Co.* 202 U. S. 46 L.R.A.(N.S.)

543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *St. Louis Southwestern R. Co. v. Arkansas*, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; *Union P. R. Co. v. Updike Grain Co.* 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Mr. C. H. Christopherson, for defendant in error:

The validity of such a statute as the one here involved is sustained by text-book writers, railroad commissioners, the Interstate Commerce Commission, legislatures, attorney generals, and courts.

Watkins, Shippers & Carr. § 306; *Calvert, Regulation of Commerce*, pp. 4 et seq.; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *St. Louis Southwestern R. Co. v. Arkansas*, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476, 85 Ark. 311, 122 Am. St. Rep. 33, 107 S. W. 1180; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70; *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 466, 117 S. W. 238; *Patterson v. Missouri P. R. Co.* 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138; *Southern R. Co. v. Atlanta Sand & Supply Co.* 135 Ga. 35, 68 S. E. 807; *Martin v. Oregon R. & Nav. Co.* 58 Or. 198, 113 Pac. 16; *Chicago, R. I. & P. R. Co. v. Beatty*, — Okla. —, 42 L.R.A.(N.S.) 984, 118 Pac. 367.

Congress has not legislated on the subject, nor has the Interstate Commerce Commission been vested with power in the premises.

Mason v. Chicago, R. I. & P. R. Co. 12 Inters. Com. Rep. 61; *Richmond Elevator*

Co. v. Pere Marquette R. Co. 10 Inters. Com. Rep. 629.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

The argument at bar has been primarily concerned with the question of the validity of the Minnesota statute, considered as having been enacted in the exercise of a power assumed to exist to legislate reasonably in the absence of action by Congress on the subject of the delivery when called for, of cars to be used in interstate traffic. Thus, counsel for the defendant in error urges the correctness of the action of the supreme court of Minnesota in sustaining the statute, upon the hypothesis that Congress had not legislated on the subject, and that the act was a reasonable exertion of the power of the state. On the contrary, on behalf of the railroad company it is insisted that even upon the assumption that the state had power to deal with the subject for which the statute provides, in the absence of legislation by Congress, the enactment is nevertheless void, since it but expresses a policy which by penalization, fines, and forfeitures will substitute for a free and unrestrained flow of commerce a service favoring a particular locality and shippers within the confines of one state, to the disadvantage of others. We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, known as the Hepburn act (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

In the original act [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284] to regulate commerce the term "transportation" was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn act it was declared that the term "transportation" (italics ours)—

"shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes 46 L.R.A. (N.S.)

and just and reasonable rates applicable thereto." [§ 1.]

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement § 1 of the original act, imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper." Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by § 8 it is provided "that in case any common carrier subject to the provisions of this act . . . shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Further, by § 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages; and by § 10 it is made a criminal offense for an employee of a corporation carrier to "wilfully omit or fail to do any act, matter, or thing in this act required to be done."

As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects,

the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power. *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140.

The judgment of the Supreme Court of Minnesota must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

SOUTH DAKOTA SUPREME COURT.

H. A. DIXSON, Appt.,
v.

W. P. LADD, Respnt.

(— S. D. —, 142 N. W. 259.)

Chattel mortgage — building — desk as appurtenance.

1. A roller-top desk in the office of an elevator is not covered by chattel mortgage on the elevator, chutes, bins, machinery, and other appurtenances thereto belonging.

Note. — *What articles are included in such general terms as appurtenances, fixtures, and the like, employed in chattel mortgage.*

The question as to what articles will pass as appurtenances upon a sale of chattels is presented in the note to *Gazzam v. Moe*, 8 L.R.A. (N.S.) 793.

A chattel mortgage upon a warehouse and the appurtenances covers a pair of scales used by the mortgagor. *Bacon v. Thompson*, 60 Iowa, 284, 14 N. W. 312.

A mortgage upon a brewing establishment, accessories, appliances, and appurtenances includes beer kegs used in the business, where it appears that breweries are required by law to have all their kegs branded with the name of the company, and that beer kegs as a rule are never sold to the customer, but are to be returned when empty. *Schaub v. Dallas Brewing Co.* 80 Tex. 634, 16 S. W. 429.

A mortgage upon a certain flouring mill with appendages used in and about the same covers a platform weighing scale used in weighing grain and feed in the mill, worn-out mill picks that were used to dress the millstones, and a small hand corn shelter. *Miller v. Hart*, 32 Hun, 639.

A mortgage describing the property as one frame grain elevator warehouse, with all the appurtenances thereto belonging, does not cover a disconnected engine house with an engine and boiler, about 50 feet distant, nor an office building and a sta-

Replevin — right to recover.

2. A plaintiff in replevin must recover on the strength of his own title.

Foreclosure of mortgage — failure to remove property.

3. Allowing a desk to remain in an elevator at the time a chattel mortgage thereon is foreclosed and the property sold under the mortgage does not pass the title to the purchaser at the sale.

(June 28, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Lyman County in defendant's favor in an action brought to recover possession of a desk which plaintiff claimed under a mortgage foreclosure. Affirmed.

The facts are stated in the opinion.

Messrs. Bartine & Bartine and Wederath & Waggoner, for appellant:

The desk in controversy was covered by the mortgage.

Pickerell v. Carson, 8 Iowa, 544; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Hall v. Irvin*, 78 App. Div. 107, 79 N. Y. Supp. 614; *Frey v. Drahos*, 6 Neb. 1, 29 Am. Rep. 353; 2 Am. & Eng. Enc. Law, 524, note; *Swift v. Brownell, Holmes*, 467, Fed. Cas. No. 13,695.

If the description in the mortgage is

tionary Fairbanks scale over 100 feet distant from the warehouse. *Frey v. Drahos*, 6 Neb. 1, 29 Am. Rep. 355.

The term, "apparatus" as used in a chattel mortgage upon the buildings, machinery, tools, instruments, apparatus, and line of an electric lighting company, is broad enough to cover carbon lamps stored in the buildings. *Ramsdell v. Citizens' Electric Light & P. Co.* 103 Mich. 89, 61 N. W. 275.

A mortgage upon a sugar refinery, the land upon which it stood, "and also all the machinery and effects" therein, does not include sugar upon the premises, where it appears that at the same time the mortgagor also gave another mortgage upon the machinery, particularly describing it, and he was permitted to remain in possession and continue his business. *Thurber v. Minturn*, 18 N. Y. Week. Rep. 25, reversing 62 How. Pr. 27.

A chattel mortgage on the "fixtures, furniture, and appliances used in and about the carrying on of a first-class retail grocery store," does not cover the horses, harness, and wagons used by the mortgagor for delivering goods sold to customers. *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334.

A mortgage upon the stock of drugs, merchandise of every kind, office furniture, fixtures, and apparatus of every kind and description in the store, does not include a file of prescriptions which had been filled by the mortgagor and his predecessors.

not sufficient for its identification, the turning of it over to, or allowing it to be turned over to, the mortgagee for foreclosure, cured any defects in description.

Cuddy v. Becker, M. & Co. 146 Iowa, 250, 124 N. W. 1071; Kelley v. Andrews, 102 Iowa, 119, 71 N. W. 251; Frost v. Citizens' Nat. Bank, 68 Wis. 234, 32 N. W. 110; Mortgage Bank & Invest. Co. v. Hanson, 3 N. D. 465, 57 N. W. 345; Beaupre v. Dwyer, 43 Minn. 485, 45 N. W. 1094; Lumley v. Miller, 23 S. D. 16, 119 N. W. 104; Longley v. Daly, 1 S. D. 262, 46 N. W. 247; 35 Cyc. 304; 1 Jones, Ev. § 277; Western Min. Supply Co. v. Quinn, 40 Mont. 156, 28 L.R.A. (N.S.) 214, 135 Am. St. Rep. 612, 105 Pac. 732, 20 Ann. Cas. 173; 13 Current Law, p. 748.

Messrs. Jones & Jones and Charles D. Howe, for respondent:

The mortgage did not cover the desk.

Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201; Frey v. Drahos, 6 Neb. 1, 29 Am. Rep. 353; Gazzam v. Moe, 40 Wash. 593, 8 L.R.A. (N.S.) 793, 82 Pac. 912, 5 Ann. Cas. 650; Pickerell v. Carson, 8 Iowa, 544; Chapin v. Garretson, 85 Iowa, 377, 52 N. W. 104; 6 Cyc. 1027, 1034; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419; Brody v. Chittenden, 106 Iowa, 524, 76 N. W. 1009; Osborne v. Mc-

sors in business at that place during a number of years. R. C. Stuart Drug Co. v. Hirsch, — Tex. Civ. App. —, 50 S. W. 583.

A chattel mortgage on the fixtures and furniture in a store includes an iron safe used in connection with the business. Tollerlton & S. Co. v. Anderson, 108 Iowa, 217, 78 N. W. 722.

A chattel mortgage upon the stock and fixtures of a country store covers an iron safe, the show cases, platform scales, trucks, copying presses, and chandeliers. McCall v. Walter, 71 Ga. 287.

But a chattel mortgage upon "goods in the store" will not cover an iron safe kept in the store for private use. Curtis v. Phillips, 5 Mich. 112. The court said that while the term "goods," when used in contradistinction to real estate, would doubtless include all kinds of movable personal property, it cannot be supposed to have that extent of meaning in the chattel mortgage; that "the question here is one of intent; and we think it quite clear that when a merchant speaks of the goods in his store, he must generally be understood to have reference only to the merchandise and commodities kept on hand for the purposes of sale, unless there be some peculiar reason, which does not appear in this case, to give the term a broader signification. This certainly is the popular sense of the term in this country, when we speak of a merchant's goods in his store."

An iron safe in a manufacturing establishment used solely for keeping the books, 46 L.R.A. (N.S.).

Allister, 15 Neb. 428, 19 N. W. 510; Bacon v. Thompson, 60 Iowa, 284, 14 N. W. 312; Dargan v. Williams, 66 Neb. 1, 91 N. W. 862; Kellogg v. Anderson, 40 Minn. 207, 41 N. W. 1045; Gregory v. North Pacific Lumbering Co. 15 Or. 447, 17 Pac. 143; Cook v. Condon, 6 Kan. App. 574, 51 Pac. 587.

Whitting, P. J., delivered the opinion of the court:

This is an action of replevin brought in justice court, and seeking to recover the possession of one certain roll-top desk. Plaintiff claims to be the owner under and by virtue of a purchase upon foreclosure of a chattel mortgage, which covered "that certain elevator, together with the scales, bins, machinery, and other appurtenances thereunto belonging, located. . . ."

Defendant claims to be the owner by purchase from the mortgagor, and the evidence reveals the fact that, whether the owner or not, he was, at the time action was brought, holding under possession received by delivery of the property to him by the mortgagor. Judgments in justice court and upon a new trial in circuit court were in favor of the defendant. This appeal is from the latter judgment, and from an order denying a new trial.

papers, and money of the establishment, is an "implement" within the meaning of a statute securing title of a mortgagee notwithstanding the retention of possession by the mortgagor "of any manufacturing or mechanical establishment, together with the machinery, engines, or implements used therein." Talcott v. Meigs, 64 Conn. 55, 29 Atl. 131.

A chattel mortgage on "all the fixtures" contained in a storeroom is broad enough to cover show cases, counters, and wall cases. Myers v. Snyder, 96 Iowa, 107, 64 N. W. 771.

A chattel mortgage on the furniture of a jewelry store covers the implements and instruments used in carrying on the business. Brody v. Chittenden, 106 Iowa, 524, 76 N. W. 1009.

The court in the above case quoted with approval from the case of Fore v. Hibbard, 63 Ala. 412, wherein it is said, in construing a mortgage of a drug store, furniture and fixtures: "The articles, utensils [and] implements . . . used in a drug or other store, as the furniture thereof, differ in kinds according to the purposes which they are intended to subserve; yet being put and employed in their several places, as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some or one of those purposes, they pertain to such places respectively, and collectively constitute the 'furniture' thereof."

The appellant has assigned numerous errors based upon the rulings of the court in admitting and rejecting evidence, and upon certain instructions given the jury. Appellant has no right to this property unless he acquired it by the purchase on foreclosure. There is no claim that the desk in question was sold or offered for sale separate from the elevator. There was no evidence received or offered showing that, upon the foreclosure, there was any representation or claim that the mortgage covered the desk, or showing any fact that would estop either the mortgagor or respondent from claiming that title to the desk did not pass under the foreclosure. There was no evidence offered, other than the mortgage itself, that would tend to show in the slightest degree that the parties to the mortgage intended the same to cover the desk. There was, however, evidence received over appellant's objection showing that the parties did not intend the mortgage to cover such desk. The instructions complained of were based upon this evidence that was received over appellant's objection. There was no evidence offered or received which bore upon the question of whether or

not the desk was an appurtenance to the elevator, except evidence of the fact that the mortgagor had it to use in its office in the elevator. It therefore follows that, no matter how erroneous the rulings or instructions of the court may have been, they were errors without prejudice, unless, by the use of the words "other appurtenances," and proof that the desk was used in the office of the elevator, it appeared that the desk was covered by the mortgage, as otherwise the court would have been bound to direct a verdict in favor of respondent if one had been requested.

The word "appurtenance" is commonly used in connection with real property, and its meaning, when used in a transfer of a building which chances to be real property, would be no different than when the said term is used in a transfer of a building which chances to be personal property; that is, all other things being the same, whatever would be appurtenant to a building which is real estate would also be appurtenant to the same building if, owing to the fact that such building stood upon land not owned by the owner thereof, it chanced to be personal property. The term

A mortgage on all the furniture in and belonging to a certain house may cover a piano, billiard table, and pictures, where they are there for common use or ornament. *Sumner v. Blakslee*, 59 N. H. 242, 47 Am. Rep. 196.

A chattel mortgage upon the fixtures, furniture, and signs in a store covers a wooden statue used as a sign in front of the store during the day and taken inside at night. *Curtis v. Martz*, 14 Mich. 506.

A mortgage upon a sawmill, fixtures, and supplies does not cover an iron safe or saw logs, it appearing that a commissary was kept in connection with the mill and the court said that the word "supplies" was intended to include the stores of food kept on hand. *Conner v. Littlefield*, 79 Tex. 76, 15 S. W. 217.

A mortgage upon a foundry, working implements, and tools covers patterns used in the foundry. *Eason v. Miller*, 15 S. C. 194.

A mortgage upon a threshing machine includes the horse power by which it is propelled. *Osborne v. McAllister*, 15 Neb. 428, 19 N. W. 510.

A mortgage upon the machinery and equipment of a manufacturing plant includes office furniture, books, stationary, typewriter, and adding machine. *Landan v. Sykes*, 98 Miss. 495, 54 So. 3, Ann. Cas. 1913 B. 197.

A mortgage enumerating a list of articles used in and about a hotel and concluding, "together with all other goods, effects, furniture, chattels, property, things of every name and nature, now used, attached, situate, and being in or about the hotel," includes a schooner-rigged sailboat 46 L.R.A. (N.S.)

kept near the hotel and used in connection with it, although there were four other similar boats which were specially mentioned in the mortgage. *Veazie v. Somerby*, 5 Allen, 280.

A mortgage of the entire assets of a business does not cover the good will of the business. *Santa Fe Electric Co. v. Hitchcock*, 9 N. M. 156, 50 Pac. 332.

A chattel mortgage clause in a lease of a certain lot, to secure payment of the rent that "all goods, wares, and merchandise, household furniture, fixtures, or other property which are or shall be placed in or on said premises by them, shall be liable, and this lease shall constitute a lien or mortgage on said property," does not embrace the dwelling house placed upon the lot. *Kuschell v. Campau*, 49 Mich. 34, 12 N. W. 899.

A mortgage upon the groceries in a country and village grocery store does not embrace shovels, pails, baskets, and the like, though such articles are usually kept in such stores. *Fletcher v. Powers*, 131 Mass. 333.

In *Kern v. Wilson*, 73 Iowa, 490, 35 N. W. 594, it was held that "drug stock," as used in a chattel mortgage, includes all articles ordinarily and usually kept therein at the place where the stock was situated, and that what such articles consisted of was a question for the jury to determine.

And it seems that a mortgage upon a stock of clothing and furnishing goods does not include boots and shoes. *Clement v. Hartzell*, 57 Kan. 482, 46 Pac. 961.

A. L. R.

"appurtenance" is commonly confined in law to those purely incorporeal hereditaments that are commonly annexed to lands or to houses, and, strictly speaking, anything corporeal cannot properly become an "appurtenance." The use of the term "appurtenance" as a part of the description in a transfer is usually mere surplusage, as anything which, in the true and strict sense of the word "appurtenance," would be held to be appurtenant to the principal thing sold, would pass under a transfer merely describing the principal thing.

But, as was well said in the case of *Frey v. Drahos*, 6 Neb. 1, 29 Am. Rep. 353: "It is, however, doubtless true that the word is frequently used in a more enlarged and comprehensive sense, and when it can be gathered from all the attendant circumstances that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of a contract." Thus, it has been held that, under the term "appurtenance," corporeal articles of personal property passed under conveyances of land or buildings. But it is not all property situate upon land or within buildings that will pass as an "appurtenance" to such land or building; it must still be a thing which in its nature agrees with the use to which the building is put; in other words, it must agree in its nature with the thing whereunto it is appurtenant. Thus, in the case of a grain elevator, those tools and machinery therein contained and used, which from their nature are proper and convenient to be used in connection with the building in the handling of grain in said elevator, might in a proper case be held to be "appurtenant" to such building; it could not, however, be held to cover an article of personal property having nothing to do with the handling of grain,—the purpose for which the building was constructed. 2 Am. & Eng. Enc. Law, 520; 3 Cyc. 585; *Jones, Chat. Mortg.* 5th ed. § 136; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 720; *Frey v. Drahos*, 6 Neb. 1, 29 Am. Rep. 355; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388. It is therefore clear that the term "appurtenance" did not cover the roll-top desk.

Appellant must recover, if at all, upon the strength of his own title. If he procured no title or right of possession by virtue of the purchase on the foreclosure, then, as against the respondent, to whom possession was delivered by the elevator corporation, appellant could have no rights; and this regardless of whether or not the respondent was the owner of the property.

Appellant has urged that, for purposes of foreclosure, the mortgagor allowed the

desk to be turned over to the mortgagee along with the elevator, and that this delivery of possession cured any defect in description. There was no evidence to support any such contention. From its nature the elevator was incapable of seizure and removal by the sheriff. He did not remove the desk therefrom. The keys of the elevator were held by respondent for several days after the sale. The fact that the desk was allowed to remain in the building, and was therein at time of sale, did not cause it to pass under the foreclosure any more than would wheat or other grain therein have passed.

The judgment and order are affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HARRISON B. SMITH

v.

LULA D. BOYER, Appt.

(— W. Va. —, 78 S. E. 787.)

Vendor and purchaser — tax title — acquisition by vendee.

A vendee in possession cannot thereafter acquire a tax title to the land and claim thereunder adversely to his vendor.

(June 24, 1913.)

APPPEAL by defendant from a decree of the Circuit Court for Kanawha County in plaintiff's favor in a suit to enforce a vendor's lien. Affirmed.

The facts are stated in the opinion.

Mr. W. S. Laidley, for appellant:

After a tax title has matured in the hands of a stranger, even a tenant in common may purchase and hold adversely to his former cotenants.

Blackwell, Tax Titles, 401; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Reinboth v. Zerbe Run Improv. Co.* 29 Pa. 130.

Headnote by WILLIAMS, J.

Note. — Right of vendee to acquire tax title adversely to vendor.

A vendee in possession cannot acquire a tax title as against his vendor.

This principle has frequently been held where the tax title was founded on taxes subsequent to the contract. *Johnston v. Smith*, 70 Ala. 108; *Fitzgerald v. Spain*, 30 Ark. 95 (one claiming under vendee); *Voris v. Thomas*, 12 Ill. 442; *Hunt v. Rowland*, 22 Iowa, 53 (one acting in collusion with vendee); *Quinn v. Quinn*, 27 Wis. 168. See also *Petty v. Mays*, 19 Fla. 652.

And this has been held whether such sub-

One whose title has been extinguished by a tax title may become a purchaser of the same property afterwards.

Seymour v. Harrison, 85 Iowa, 130, 52 N. W. 114; *Atkison v. Dixon*, 89 Mo. 464, 1 S. W. 13.

Mr. E. C. Harrison, for appellee:

A vendee in possession under a general warranty deed which reserves a lien for unpaid purchase money cannot buy in the land for taxes which were a lien thereon at the date of said deed, and then refuse to pay the purchase money, claiming to own the land under the tax deed.

State v. Eddy, 41 W. Va. 95, 23 S. E. 529; *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926; *Williamson v. Russell*, 18 W. Va. 612; *Battin v. Woods*, 27 W. Va. 58; *Callihan v. Russell*, 66 W. Va. 524, 26 L.R.A.(N.S.) 1176, 66 S. E. 695; *Beckwith v. Seborn*, 31 W. Va. 1, 5 S. E. 453; *Jones, Mortg.* § 680; *Devlin, Deeds*, 3d ed. § 1416; *Black, Tax Titles*, 2d ed. § 277, p. 342; *Woodbury v. Swan*, 59 N. H. 22; *Kezer v. Clifford*, 59 N. H. 208; *Maxfield v. Willey*, 46 Mich. 252, 9 N. W. 271; *McAlpine v. Zitser*, 119 Ill. 873, 10 N. E. 901; *Manning v. Bonard*, 27 Iowa, 648, 54 N. W. 459; *Fells v. Barbour*, 58 Mich. 49, 24 N. W. 672; *Travellers' Ins. Co. v. Patten*, 98 Ind. 209; *Laton v. Balcom*, 64 N. H. 92, 10 Am. St. Rep. 381, 6 Atl. 37; *Cooper v. Jackson*, 99 Ind. 566; *Phinney v. Day*, 76 Me. 83; *Fair v. Brown*, 40 Iowa, 209; *Stears v. Hollenbeck*, 38

Iowa, 550; *Porter v. Lafferty*, 33 Iowa, 254; *Norton v. Metropolitan L. Ins. Co.* 74 Minn. 484, 77 N. W. 298, 539; *Ragor v. Lomax*, 22 Ill. App. 628; *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113, 7 N. W. 707; *Cain v. Brown*, 54 W. Va. 656, 46 S. E. 579; *Cowdry v. Cuthbert*, 71 Iowa, 733, 29 N. W. 798; *Curran v. Banks*, 123 Mich. 594, 82 N. W. 247; *Simons v. Rood*, 129 Mich. 345, 88 N. W. 879; *Eaton v. Tallmadge*, 22 Wis. 526.

Williams, J. delivered the opinion of the court:

Harrison B. Smith, grantor, sues *Lulu D. Boyer*, grantee, to enforce a vendor's lien reserved in a deed to her for a lot on Brooks street, in the city of Charleston. From a decree in favor of plaintiff, defendant has appealed.

The court sustained plaintiff's exceptions to defendant's answer and struck it out, and this is assigned as error. Plaintiff conveyed to defendant in April, 1904, by deed with covenant of general warranty. The answer avers that M. F. Clarke was the owner of the lot in 1902, and in February, 1903, sold it to M. D. Farley; that Farley sold and conveyed it to Harrison B. Smith in May, 1903; that in that year it was returned delinquent in the name of M. F. Clarke for nonpayment of taxes of 1902, and sold in February, 1904, and purchased by Wm. Shoemaker, who, in April, 1905, obtained a tax deed, and then conveyed the

sequent taxes came due before the vendee's possession began or not. *Pool v. Ellis*, 64 Misc. 555, 1 So. 725.

The same rule applies as to a tax title founded on taxes due at the time of the contract. *Baily v. Doolittle*, 24 Ill. 577; *Cowdry v. Cuthbert*, 71 Iowa, 733, 29 N. W. 798; *Curran v. Banks*, 123 Mich. 594, 82 N. W. 247; *SMITH v. BOYER*; and *Eaton v. Tallmadge*, 22 Wis. 526.

Thus, one contracting to pay a certain sum for land and all future taxes may not, as against his vendor, acquire a tax title founded on taxes prior to the contract, as he will be considered as buying it for his vendor. *Baily v. Doolittle*, 24 Ill. 577; *Cowdry v. Cuthbert*, 71 Iowa, 733, 29 N. W. 798; see also *Simons v. Rood*, 129 Mich. 345, 88 N. W. 879. (There seems some doubt whether in the *Baily* Case the vendee's possession began before buying the tax title.)

Similarly in *Eaton v. Tallmadge*, 22 Wis. 526, where one sold land with warranty, taking back a mortgage without warranty, and he foreclosed and bought in the property, it was held that he took a tax title bought in by the mortgagor before the foreclosure, founded on taxes due before the original sale and mortgage.

A fortiori a vendee under an executory contract of sale which requires him to

pay the taxes cannot acquire a tax title adverse to the vendor. *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926; *Oliver v. Crosswell*, 42 Ill. 41 (*obiter*); *Haskell v. Putnam*, 42 Me. 244 (here vendee was in possession); *Stinson v. Richardson*, 48 Iowa, 541 (vendee in possession); *Finch v. Noble*, 49 Wash. 578, 126 Am. St. Rep. 880, 96 Pac. 3 (vendee in possession).

The same is true of the vendee's tenant. *Bertram v. Cook*, 32 Mich. 518.

But a verbal executory contract of sale, void under the statute of frauds, does not estop the purchase of a tax title by the vendee. *Ball v. Harpham*, 140 Mich. 661, 104 N. W. 353, where, however, the decision was for the vendor on other grounds.

In *Petty v. Mays*, 19 Fla. 652, where the contract was oral, it was said that the person in possession was in either as purchaser or as tenant, and in either case his purchase of the tax title was no more than paying the taxes.

For the general subject of the right of grantee in possession to question right of grantor to collect purchase money see the note to *Lafferty v. Evans*, 21 L.R.A.(N.S.) 363.

For injunction against collection of purchase money where the title to land is defective, see the note to *Harvey v. Ryan*, 7 L.R.A.(N.S.) 445.

B. B. B.

lot to R. S. Spilman, the partner of plaintiff; that it was returned delinquent, in the name of Farley, for the nonpayment of the taxes of 1903, and sold in December, 1904, and purchased by defendant; and that she received a tax deed in June, 1908.

Defendant contends that plaintiff's failure to discharge the taxes assessed on the land in the name of the former owner gave her the right to buy at the tax sale to protect her title, and that by her tax deed she acquired an adverse title which defeats plaintiff's lien. This position is untenable. Defendant took possession under her deed from plaintiff, and in contemplation of law has not been even constructively ousted. Smith's breach of his covenant of warranty in failing to pay off the pre-existing taxes entitled defendant to damages, but it did not give her the right to set up an after-acquired tax title to defeat his suit. She does not seek to recoup damages, as she might have done, but insists that the Shoemaker tax title operates to extinguish both her title and Smith's lien, and that, by the subsequent tax sale and deed, she acquired an adverse title to the lot. After her purchase from Smith, defendant had ten months in which she could have redeemed from Shoemaker. Her answer does not explain why she did not do so. There was no outstanding title, at the time she purchased from Smith, which she was compelled to buy in for her protection. It is a well-settled rule that if one, having the right of redemption, buys at a tax sale, his purchase amounts only to a payment of the taxes. 1 Blackwell, Tax Titles, § 566; Calihan v. Russell, 66 W. Va. 524, 26 L.R.A. (N.S.) 1176, 66 S. E. 695.

"A vendee cannot acquire a title adverse to his vendor by the purchase of the land at a tax sale." Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926. It is a rule of universal application that neither party to a mortgage can destroy the right of the other by buying the property at a tax sale, if he objects thereto. The relation of the parties to this suit is essentially the same in equity as mortgagor and mortgagee, Mrs. Boyer being regarded as the mortgagor in possession of the land. If there had not been a second tax sale, and Mrs. Boyer, instead of Spilman, had acquired the tax title from Shoemaker, she could recoup damages to the extent of her reasonable expenses in acquiring the title; but she would not be permitted to claim under it adversely to plaintiff. Bigelow, Estoppel, 5th ed. p. 545; Bush v. Marshall, 6 How. 284, 12 L. ed. 440.

The same rule is applicable in this suit as would be applied if Mrs. Boyer had paid the full purchase price, and had brought

an action for breach of plaintiff's covenant. It is well settled that, in such case, her recovery would be limited to the amount of her expenses in buying in the adverse title. Leffingwell v. Elliott, 8 Pick. 455, 19 Am. Dec. 343; Roller v. Effinger, 88 Va. 641, 14 S. E. 337; Sanders v. Wagner, 32 N. J. Eq. 506; Cowdry v. Cuthbert, 71 Iowa, 733, 29 N. W. 798. The case last cited is very similar to the present one, and stronger, if any odds, in favor of the vendee, because he had notified his vendor to pay the taxes and he failed to do so. Cuthbert, the vendee, did not buy at the tax sale, but bought from the tax purchaser after he had received his tax deed. In a suit by Cowdry, the vendor, it was held that Cuthbert, the vendee, was entitled to have the amount paid for the tax title treated as a payment on his bond to Cowdry, but that he could not claim adversely to him under the tax title. The same question was decided in Curran v. Banks, 123 Mich. 594, 82 N. W. 247; in Simons v. Rood, 129 Mich. 345, 88 N. W. 879; and in Eaton v. Tallmadge, 22 Wis. 528.

Defendant's obligation as plaintiff's vendee is not affected by her purchase at a subsequent tax sale. The tax title which she acquired, being for taxes assessed in the name of a subsequent owner of the lot, operates to defeat the Shoemaker title.

The contention of defendant's counsel that the Shoemaker tax title extinguished her title, and also the lien of plaintiff, and that by her subsequent tax deed defendant acquired the land discharged of the lien, and is therefore under no obligation to make further payment, is not supported by the law. The lien of a vendor cannot be thus defeated.

The court sustained plaintiff's exceptions to defendant's answer on 21st of May, 1910, and allowed ten days in which to file further answer. On June 6th an order was entered filing further answer. But the final decree, made on June 10, 1910, recites that the order of June 6th was improvidently entered, and set it aside, and brought the cause on to be heard upon bill and exhibits, without further pleading. This action of the court is complained of, but it does not appear why it should be considered as error. The court has control over all interlocutory orders, even after the adjournment of the term at which they were entered, and, until adjournment of the term, has control also of its final orders and decrees. We must assume that the court properly set aside the order. Error must affirmatively appear. Only one answer appears in the record, and its averments constitute no defense to plaintiff's suit. It was not error, therefore, to exclude it.

Defendant did not ask to have the money expended by her in acquiring the tax title credited on plaintiff's lien, and it was not error to decree the full amount claimed by plaintiff.

The decree is affirmed.

WISCONSIN SUPREME COURT.

SIGMON GREEN et al., Appts.,

v.

NEIL GUNSTEN, Respnt.

(— Wis. —, 142 N. W. 261.)

Bills and notes — intoxicated maker — enforcement by bona fide holders.

1. A note signed by a maker when so in-

Note. — Intoxication as defense to bill or note in hands of bona fide holder.

Generally, as to the validity of contracts made with intoxicated persons, see notes to Wright v. Waller, 54 L.R.A. 440, and Miller v. Sterringer, 25 L.R.A. (N.S.) 596.

As to the rights of a bona fide holder of the promissory note of an insane person, see note to Hosler v. Beard, 35 L.R.A. 161.

As to the liability of one whose signature to commercial paper is secured by trick or fraud, see note to Yakima Valley Bank v. McAllister, 1 L.R.A. (N.S.) 1075.

The question with which this note is concerned necessarily starts with the assumption that the drunkenness of the maker must have so far incapacitated him as to render the note invalid as between the maker and the payee. If, in any given case, it be found that the maker, though somewhat intoxicated, nevertheless was so sufficiently in possession of his faculties as to be able to transact business, it will follow, of course, that his drunkenness is not a defense as against any holder of the note, whether a bona fide indorsee or not; and the question whether such an indorsee stands in a better position than the payee will not arise.

Unfortunately for the clarity of the subject, the case of one who signs a note while so intoxicated as to be more or less incapacitated for business presents a double aspect, according to the degree of incapacity which exists. In the lesser degree of intoxication, he retains his capacity to contract, but is liable to be imposed upon, so that a contract made by him may be voidable by reason of the fraud of the other party. Here his intoxication is simply a circumstance tending to show that he was imposed upon; and as in other cases where a note has been obtained by fraud, it will be valid in the hands of a bona fide holder. But where his intoxication is total, so that the minds of the parties do not meet, their contracts are void, and not merely voidable, and it would seem that a bona fide indorsee of a note obtained under such circumstances

will take it with this inherent vice; and this is the holding in GREEN v. GUNSTEN. The difference of opinion disclosed in the decisions on the subject is partly, though not entirely, due to their regarding the contracts of even totally intoxicated persons as merely voidable, and so applying in the latter situation a doctrine which has reference to the former situation.

Same — negligence — effect.

2. One who signs a note when so intoxicated as to be incapable of comprehending the nature of his act is not prevented from setting up his intoxication as a defense to the note, on the ground that he did not act with ordinary care.

(May 31, 1913.)

will take it with this inherent vice; and this is the holding in GREEN v. GUNSTEN. The difference of opinion disclosed in the decisions on the subject is partly, though not entirely, due to their regarding the contracts of even totally intoxicated persons as merely voidable, and so applying in the latter situation a doctrine which has reference to the former situation.

The decision in GREEN v. GUNSTEN accords with the position taken in Caulkins v. Fry, 35 Conn. 170, in which it was held that when intoxication is relied upon by the maker of a note as a defense in an action by a bona fide holder, he must show that he was utterly deprived of the use of his reason and understanding; and that such a defense was not made out where it appeared that he was capable of writing his name and, so far as appears, in a manner not to excite suspicion, and that his mind was in such a condition that he remembered the next morning that he had signed the note and what it was given for. The court said: "In 1 Parsons on Bills & Notes, 151, it is stated thus: 'Drunkenness is a species of insanity; but the law is not quite clear respecting this disability. Perhaps it stands thus: one cannot defend by proving his drunkenness, unless he can show that the drunkenness was known to the payee and taken advantage of by him; or that it was complete and suspended all use of the mind at the time.' See also 1 Story, Eq. Jur. §§ 231-233, and cases there cited. Such is the law generally. In its application, however, to negotiable paper, an important distinction is to be observed between actions brought by the payee, and actions brought by an indorsee. As against the payee, the maker may avail himself of any defense which shows that the paper was either void or voidable, while as against a bona fide holder for a valuable consideration, he can only defend by showing that the paper was void. In the latter case he is limited to those defenses which go to the essence of the contract, and, either by common law or by statute, annul and avoid the contract, or which interfere with

A PPEAL by plaintiffs from a judgment of the Circuit Court for Portage County in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

Statement by Vinje, J.:

Action on a promissory note, dated February, 16, 1911, for \$300, payable six months after date, alleged to have been executed and delivered by the defendants to the plaintiffs. The defendant Gunsten answered denying that he signed the note, and averred that his signature to the same was a forgery. He also set up the defense that, if he did sign the note, his signature there-to was procured by connivance and conspiracy between the plaintiffs and his comaker of the note, O. C. Loomis, and other persons

acting for and on behalf of O. C. Loomis, by reason of which said O. C. Loomis and others, acting for and on behalf of him, encouraged and induced the defendant Gunsten to drink of intoxicating liquors in such large quantities that he became so intoxicated that he was deprived of his reason and understanding, and that, if he did sign his name to said note, it was done while in such condition, and was not done of his own free will and consent; that he received no consideration whatever for said signature; and that the note was used by his comaker, O. C. Loomis, to secure his obligations to the plaintiffs, incurred prior to the making of the note, and accepted by plaintiffs as security for such obligations.

The jury returned a verdict finding: (1) That the defendant Gunsten, on or about

and prevent the indorsee from acquiring a legal title to the paper. Upon the same principle, complete incapacity of the maker, which shows that the paper is void, is a good defense as against a bona fide holder; while partial incapacity, which, in connection with other circumstances, may show that the paper is voidable, but does not render it absolutely void, is only available as against the payee. 1 Parsons, Bills & Notes, 275."

And see also Berkley v. Cannon, 4 Rich. L. 136, an action brought by the payee against the maker of the note, in which it was held that where the maker was at the time of the execution too drunk to know what he was doing, the note was wholly void, and therefore incapable of ratification by his subsequent conduct.

The leading case in support of the view that intoxication of the maker of a note is no defense as against a bona fide holder is *State Bank v. McCoy*, 69 Pa. 204, 8 Am. Rep. 246, in which it was found by the jury that the defendant received no consideration for the note, and that he was so intoxicated at the time he signed it as to be wholly unconscious of what he was doing. The court, after stating that the total drunkenness of the maker when he executed the note, if known to the payee, rendered it void as to the latter, went on to say: "But if the drunkenness of the maker, when known to the payee and taken advantage of by him, or when so complete as to suspend the use of the reason and understanding, renders the note void in the hands of the payee, the question recurs whether it avoids it in the hands of an indorsee for value without notice of the maker's condition when he gave the note, and of the fraudulent circumstances under which it was obtained? There is no case which so decides. But it is contended that drunkenness is a species of insanity, and therefore a contract made by one when in such a state of drunkenness as not to know what he was doing should, like the contract of an insane person, be regarded as absolutely void. But the contract of an insane man

is not under all circumstances an absolute nullity. As was said in *La Rue v. Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700, an insane man, like an infant, is liable on his executed contract for necessities; and it was more than intimated in *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573, that he would be liable for merchandise innocently furnished to his order by a person unapprised of his infirmity. But if, as ruled by Lord Tenterden, Ch. J., at nisi prius, in *Sentance v. Poole*, 3 Car. & P. 1, the note of an insane person, or of one perfectly imbecile, which he has been induced to sign by fraud and imposition, is void in the hands of an innocent indorsee, it does not follow that a note given by a person in a state of intoxication is void in the hands of a holder for value without notice of the maker's condition when it was given. There is this difference between the cases. Insanity or total imbecility is a permanent state or condition of the mind, disabling one from taking care of himself. Drunkenness is a temporary disability, voluntarily produced. Insanity is a misfortune,—drunkenness is a vice. No man voluntarily does an act necessarily producing madness, in order that he may be insane. But men drink in order that they may get drunk. And when they thus temporarily deprive themselves of the use of their reason, and voluntarily expose themselves to fraud and imposition, the law may wisely refuse to treat them with the same tenderness that it does those unfortunate beings who are deprived of their understanding by some Providential dispensation; and it may properly hold them to a different measure of responsibility for the consequences of their acts. If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. As between the contracting parties, where one is so drunk as not to know what he is doing, the contract

February 16, 1911, did sign and turn over to the defendant Loomis the promissory note sued upon in this action; and (2) that said Gunsten at the time of signing said note was so completely intoxicated that he was temporarily deprived of his reason and understanding. Upon such verdict, and on motion of defendant Gunsten, the court rendered judgment in his favor dismissing the action, with costs. From such judgment the plaintiffs appealed.

Messrs. Fisher, Hanna, & Cashin, for appellants:

The plaintiffs are bona fide holders for value of the note sued on.

Bowman v. Van Kuren, 29 Wis. 219, 9

is doubtless void, especially if the other is appraised of his condition, and, if not wilfully or culpably blind, he must know it. As was said by Parke, B., in the case already quoted: 'A person who takes an obligation from another under such circumstances is guilty of actual fraud.' [Gore v. Gibson, 13 Mees. & W. 626.] But if there is nothing, to give notice of the intoxication, or to put one upon inquiry, as where a contract is made by letter or message sent by post or telegraph, and is executed in good faith by the party receiving the order, if the other party should refuse to perform the contract on the ground that he was totally drunk when he sent the order or entered into the contract, it is clear that, on the principle already stated, the defense ought not to avail. Why, then, should the maker of a note be allowed to set up against an innocent holder the defense of drunkenness? But there is another and controlling reason for holding the maker liable to the indorsee in such case, founded on principles of public policy and the necessities of commerce. The exigencies of trade require that there should be no unnecessary impediments to the ready circulation and currency of negotiable paper, but that it should be left free to pass from hand to hand like bank notes, and perform the functions of money, untrammelled by any equities or defenses between the original parties. If, then, it should be held that the drunkenness of the maker avoids his note in the hands of the indorsee, it is obvious that such a rule would greatly clog or embarrass the circulation of commercial paper, for no man could safely take it without ascertaining the condition of the maker or drawer when it was given, although there might be nothing suspicious in its appearance or unusual in the character of the signature. It is evident that it would be a less evil to exclude the defense of drunkenness, though it might occasionally work individual hardship, than to clog the circulation of commercial paper, to the great inconvenience of the public, by admitting such a defense. If fraud and imposition in obtaining a note will not avoid it in the hands

Am. Rep. 554; *Heath v. Silverthorn Lead Min. & Smelting Co.* 39 Wis. 146; *Body v. Jewsen*, 33 Wis. 402; *Stevens v. Campbell*, 13 Wis. 376; *Exchange Nat. Bank v. Coe*, 94 Ark. 387, 31 L.R.A.(N.S.) 287, 127 S. W. 453, 21 Ann. Cas. 934; *Birket v. Elward*, 68 Kan. 295, 64 L.R.A. 568, 104 Am. St. Rep. 405, 74 Pac. 1100, 1 Ann. Cas. 272; 4 Am. & Eng. Enc. Law, 2d ed. 290-295; *American Sav. Bank & Trust Co. v. Helgesen*, 67 Wash. 572, 122 Pac. 26, 26 Ann. Cas. 390; *Burnham v. Merchants' Exch. Bank*, 92 Wis. 277, 66 N. W. 510; *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629; 7 Cyc. 936, note 24; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697;

of an innocent indorsee,—because such a rule would render commercial paper less valuable and convenient as a medium of exchange,—why should the drunkenness of the maker? Why should drunkenness be a defense if there has been no fraud or imposition? And if there has, and this is the ground of the defense, why should it not avoid the note in the one case as well as the other?"

The doctrine of *State Bank v. McCoy*, 69 Pa. 204, 8 Am. Rep. 246, was approved in *McSparran v. Neeley*, 91 Pa. 18, where, however, the evidence did not make out the existence of a state of absolute incapacity.

A similar conclusion was reached in *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753, where it was said: "A person entering into a contract while temporarily deprived of his reason by intoxication may avoid or ratify it when he becomes sober. It is not absolutely void. If the paper is negotiable, it cannot be avoided in the hands of an indorsee in good faith for a valuable consideration; and if such paper is indorsed before it has become due, for a valuable consideration, such defense cannot avail against the assignee, without proving that he had notice of the defense before the indorsement, or notice of facts or circumstances sufficient to induce a reasonable man to inquire of the maker as to the defense. The note in question was negotiable. It may be said that a person who executes a proposed negotiable paper while deprived of reason by insanity may avoid it in the hands of an innocent indorsee, and that the same rule should apply when the person is deprived of reason by intoxication. The consideration upon which the rules stand are dissimilar. Insanity is involuntary, it is a disease, and is a more permanent state, and usually is not the result of the act of the person imposed upon; while drunkenness is voluntary, and is a temporary state, and is regarded as a vice,—the helpless condition of the drunkard is his own fault. It appears from the evidence in the record that the payee assigned the note before it became due, for a valuable consideration, to the appellants,

Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904.

Complete intoxication of the maker of a note is not a defense to the note in the hands of a bona fide holder for value.

8 Cyc. 52; State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246; McSparran v. Neeley, 91 Pa. 17; Northam v. LaTouche, 4 Car. & P. 140; Stigler v. Anderson, — Miss. —, 12 So. 831; Caulkins v. Fry, 35 Conn. 170; State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246.

Complete intoxication is, in general, conclusive proof, of itself, of a failure upon the part of the person intoxicated to use ordinary care for his own protection. Intoxication to any extent is evidence of a failure to use ordinary care.

and there is no evidence to prove that the latter had notice of the defense urged, or that any fact was within their knowledge sufficient to put them upon inquiry. Other reasons support the rule that negotiable paper, cannot be avoided in the hands of innocent holders, because of intoxication. If the loss must fall upon one of two innocent persons, it should be borne by the one whose fault contributed to it, if the fault of either did. There are also considerations of public policy which contribute to support the rule. It is believed that the exigencies of business and the necessities of commerce demand that negotiable paper shall pass from hand to hand without unnecessary impediment."

The fact that defendant may have been intoxicated when plaintiff discounted certain notes for him in the regular course of business is no defense in an action to recover the amount of the notes, unless the plaintiff had knowledge of that fact. Pittsburg Nat. Bank v. Palmer, 22 Pittsb. L. J. 189.

In Abbeville Trading Co. v. Butler, 3 Ga. App. 138, 59 S. E. 450, where it was held that the fact that one has indorsed an obligation while intoxicated cannot affect the rights of a payee who had no knowledge that the indorser was drunk when he entered into the contract, and who had no hand in causing such intoxication, it was said that drunkenness of the maker would have been unavailable as a defense against a bona fide purchaser, citing as authority therefor the Pennsylvania decisions.

In Miller v. Finley, 26 Mich. 239, 12 Am. Rep. 306, where the evidence was conflicting as to the extent of the defendant's intoxication, but he admitted that he recollected the signing, it was said that while, of his story was true, the note would be voidable as against the payee, it would not be a nullity as to all persons; and that, there being nothing on the face of the paper to cast suspicion upon its character, it could be impeached in the hands of a holder for value only by evidence 46 L.R.A. (N.S.)

Kingston v. Ft. Wayne & E. R. Co. 40 L.R.A. 131, note; Covington v. Lee, 2 L.R.A. (N.S.) 482, note; Fitzgerald v. Weston, 52 Wis. 354, 9 N. W. 13; Seymer v. Lake, 66 Wis. 651, 29 N. W. 554; Rhyner v. Menasha, 97 Wis. 523, 73 N. W. 41; Palmer v. Schultz, 138 Wis. 455, 120 N. W. 348; Krause v. Merrill, 115 Wis. 526, 92 N. W. 231.

There must be no "laches" (negligence) on the part of the signer, or the fraud of the other party will not invalidate the note in the hands of a bona fide holder for value.

Kellogg v. Steiner, 29 Wis. 626; Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Butler v. Carns, 37 Wis. 61; Dowagiac Mfg. Co. v. Schroeder, 108 Wis. 110, 84

that he took it under circumstances which rendered him guilty of bad faith.

An inference that the court in Benton v. Sikyta, 84 Neb. 808, 24 L.R.A. (N.S.) 1057, 122 N. W. 61, entertained the view that intoxication would not be a defense as against a bona fide holder, is afforded by the statement that defense that at the time the maker signed the instrument, he was so intoxicated by the procurement of the payee's agent that he did not know or understand the character or consequences of his act, and that he had repudiated the note within a reasonable time after recovering his senses, would be legitimate as between the original parties, or one not a bona fide holder.

In Alloway v. Hutchison, 6 Terr. L. R. 425, an action by the indorsees of a promissory note against its maker in which the defense was set up that the maker was so drunk at the time of signing as not to know what he was doing, although it was held that, in the absence of evidence on the part of the plaintiffs that they were holders in due course, they could not recover, the court states that it was not necessary to decide whether under the findings the notes would be recoverable against the defendant, even assuming that the plaintiffs were innocent holders for value.

It may further be noted in this connection that it was held that a guaranty obtained by fraud from an intoxicated person, who is chargeable with negligence, may be enforced against him by an innocent party who has acted to his prejudice on the faith of the guaranty which was addressed to him. Page v. Krekey, 137 N. Y. 307, 21 L.R.A. 409, 33 Am. St. Rep. 731, 33 N. E. 311. The court said: "There can be no doubt that, as between the parties to this transaction, the instrument was void. It was also invalid in the hands of any person who received it with knowledge or notice of the circumstances under which the defendant's signature was obtained. Sometimes releases, discharges, and other instruments are procured by the fraud of a third person without the knowledge or participation in the fraud of the

N. W. 14; Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974, 92 N. W. 364.

Where a maker signs without asking any questions or informing himself of the contents of the instrument, he is guilty of negligence as a matter of law.

Mackey v. Peterson, 29 Minn. 300, 43 Am. Rep. 211, 13 N. W. 132; Chapman v. Rose, 56 N. Y. 137, 15 Am. Rep. 401; Williams v. Stoll, 79 Ind. 80, 41 Am. Rep. 60.

Defendant, in addition to being guilty of a want of ordinary care, is guilty of such conduct as estops him from now contesting the validity of the note.

Union & Planters Bank v. Jefferson, 101 Wis. 452, 77 N. W. 889.

Messrs. E. L. & E. E. Browne and Lloyd D. Smith, for respondent:

Complete intoxication is a defense to the note in the hands of a bona fide holder for value.

Wright v. Waller, 127 Ala. 557, 54 L.R.A. 440, 29 So. 57; J. I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 9 L.R.A. (N.S.) 970, 111 N. W. 602; Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; Cameron-Barkley Co. v. Thornton Light & P. Co. 138 N. C. 365, 107 Am. St. Rep. 532, 50 S. E. 695; Dewitt v. Bowers, — Tex. Civ. App. —, 138 S. W. 1147; Kuhlman v. Wieben, 129 Iowa, 188, 2 L.R.A. (N.S.) 666, 105 N. W. 445; Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Dre-fahl v. Security Sav. Bank, 132 Iowa, 563, 107 N. W. 179; Bush v. Breinig, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86; Wright v.

Fisher, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; Barnes v. McCarthy, — Tex. Civ. App. —, 132 S. W. 85; Walker v. Winn, 142 Ala. 560, 110 Am. St. Rep. 50, 39 So. 12, 4 Ann. Cas. 537; Voris v. Harshbarger, 11 Ind. App. 555, 39 N. E. 521; 1 Parsons, Bills & Notes, 149; Dan. Neg. Inst. §§ 209, 210; Gates v. Raymond, 106 Wis. 657, 82 N. W. 530; Burnham v. Burnham, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176; Tiedeman, Com. Paper, § 57.

It is always competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation.

Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212; Swanke v. Herdeman, 138 Wis. 654, 120 N. W. 414; Caulkins v. Fry, 35 Conn. 170; Berkeley v. Cannon, 4 Rich. L. 136; Reinskopf v. Rogge, 37 Ind. 207; Wade v. Colvert, 2 Mill, Const. 26, 12 Am. Dec. 652; McClain v. Davis, 77 Ind. 419.

In case of a bona fide purchaser of negotiable paper, inquiry is not cut off as to the contractual capacity of the signers.

Anglo-Californian Bank v. Ames, 27 Fed. 727; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212; Butler v. Carns, 37 Wis. 61; Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974, 92 N. W. 364; Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993; Home Nat. Bank v. Hill, 165 Ind. 226, 74 N. E. 1086; First Nat. Bank v. Wade, 27

party to be benefited, who, nevertheless, will not be permitted to reap the benefit of a fraud, though he was himself innocent. The case of Bedell v. Bedell, 37 Hun, 419, is an example of this class of cases. The decisions in these cases rest upon principles obviously just and reasonable. When the fraudulent act is not imputable to the person claiming the benefit of the instrument, upon the principle of agency, he is generally debarred from enforcing it, upon the ground of the fraudulent origin of the paper, and the fact that he has lost nothing upon the faith of it. Without examining all the cases cited by the learned counsel for the defendant, it may be assumed that in other jurisdictions the courts have held that in a case like this the instrument could not be enforced any more than if the signature of the defendant had been forged. That is the principle which is invoked in behalf of defendant to relieve him from all liability, but it has not received the sanction of the courts of this state. While it has been quite uniformly held here that an instrument procured by fraud, trick, or artifice or executed by a party in such a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction, these facts

do not always constitute a defense as against an innocent person who is himself free from any fraud or negligence, and who has advanced money or property to another upon the credit afforded by an instrument like this. But even in such a case the person who has signed the paper is not liable upon it unless it is found that he failed to observe proper care and caution, and was chargeable with negligence in attaching his signature. If he actually signed the paper, though procured to do it by fraud, and is chargeable with negligence, he is liable to an innocent party who acted to his prejudice upon the faith of the instrument. Such cases are not governed by the rules applicable to the bona fide holder of negotiable paper procured by fraud, but by the equitable rule that, where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss. . . . If this instrument had been a negotiable promissory note, the defendant's liability to the plaintiff would depend upon the question of negligence, and there does not appear to be any sound reason for a different ruling in this case."

E. S. O.

Okl. 102, 35 L.R.A.(N.S.) 775, 111 Pac. 205; Yakima Valley Bank v. McAllister, 37 Wash. 566, 1 L.R.A.(N.S.) 1075, 107 Am. St. Rep. 823, 79 Pac. 1119; Shenandoah Nat. Bank v. Gravatte, 4 Neb. (Unof.) 591, 95 N. W. 694.

Vinje, J., delivered the opinion of the court:

It is admitted that defendant Gunsten was an accommodation maker of the note if it was executed under such circumstances as to constitute him a maker in any sense. Plaintiffs claim they were holders in due course, which claim the defendant Gunsten disputes. The trial court, in the disposition of the case, evidently treated plaintiffs as such holders, and we shall assume that they were. That raises the question whether or not total or complete drunkenness on the part of the accommodation maker of a note at the time of the execution and delivery thereof is a defense as against a holder in due course.

On the grounds of public policy and the necessities of commerce, some courts have held that complete drunkenness on the part of the maker of a note at the time of its execution and delivery is no defense against a holder in due course. *State Bank v. McCoy*, 69 Pa. 204, 8 Am. Rep. 246; *McSparan v. Neeley*, 91 Pa. 18; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. The basis for the rule is thus stated by Joyce, *Defenses to Com. Paper*, § 69: "The reasons underlying this rule are that, where a man has voluntarily put himself in such a condition, and a loss must fall on one of two innocent persons, it should fall on him who occasioned it. It is also founded on principles of public policy and the necessities of commerce. The circulation and currency of negotiable paper should not be unnecessarily impeded, and, if drunkenness of the maker were a defense to a note in the hands of an indorsee, it would clog and embarrass the circulation of commercial paper, and no man could safely take it without ascertaining the condition of the maker or drawer when it was given, though there be nothing unusual or suspicious about the appearance of the note." That this rule is founded, at least in part, upon substantial grounds of public policy, cannot be denied. Though it should be observed that drunkenness alone, without the fraud or fault of another, does not lead to the signing of notes. In every case, as in the case at bar, the drunken maker has been taken advantage of by a designing payee or third party, and it is not strictly correct to say that the fault is that of the drunken maker alone. Were that so, there would be more reason for applying the rule that, where loss must

fall upon one of two innocent persons, it should fall on him who occasioned it. Nor can a holder in due course always rest upon the assumption that the maker of a note is competent to execute it. Insanity of the maker is a good defense against a bona fide holder, for the latter takes it charged with constructive notice of the legal disability of the maker. 1 Dan. Neg. Inst. §§ 209, 210; Joyce, *Defenses to Com. Paper*, § 71.

It is no greater hardship to charge a holder in due course with constructive notice of the incapacity of the maker resulting from complete drunkenness than from insanity. It is deemed that a doctrine more in consonance with the spirit of our decisions is stated by Daniel as follows: "If the drunkenness were so complete as to suspend all rational thought, the better opinion is that any instrument signed by the party would be utterly void, even in the hands of a bona fide holder without notice, for, although it may have been the party's own fault that such an aberration of mind was produced, when produced, it suspended for the time being his capacity to consent, which is the first essential of a contract." 1 Dan. Neg. Inst. 5th ed. § 214; 1 Parsons, *Bills & Notes*, 161; *Gore v. Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140. But the drunkenness must be so complete as to deprive the maker of the use of his faculties. *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Caulkins v. Fry*, 35 Conn. 170. Intoxication merely to the extent that he cannot give the attention to it that a reasonably prudent man would be able to give is not sufficient. *Wright v. Waller*, 127 Ala. 557, 29 So. 57, 54 L.R.A. 440. See authorities cited in note as to degree of intoxication that will avoid a contract. The rule that complete drunkenness is available as a defense in a suit upon a contract has been clearly recognized by our own court. *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176.

In *Bursinger v. Bank of Watertown*, supra, the contract under consideration was the assignment of an insurance policy, and the court said: "The evidence tended to show that, by reason of his intoxication, he was incapable of comprehending what he was doing at the time he executed said assignments, and was therefore within the well-established rule of law that a drunkard, when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract. 1 Benjamin, *Sales* (Am. ed. Corbin) 42; *Gore v. Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140; *Cooke v. Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137; *Story*,

Contr. 4th ed. §§ 44, 45, and cases cited in notes; *Belcher v. Belcher*, 10 Yerg. 121; *French v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Jenners v. Howard*, 6 Blackf. 240; *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Rice v. Peet*, 15 Johns. 503."

In *Burnham v. Burnham*, supra, the rule is stated thus: "A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to enter into contracts and convey property, unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed. *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271; *Van Wyck v. Brasher*, 81 N. Y. 260; *Reinskopf v. Rogge*, 37 Ind. 207."

The reason for the rule is that there can be no valid contract where there is no mind capable of contracting. That drunkenness may be so complete as to render a person utterly incapable of comprehending the nature of his acts, or that he is acting at all is a fact as sad as it is true. Drunkenness," says Tiedeman, "is, in legal contemplation, an aberration of mind similar in its effect upon the reasoning faculties as temporary insanity. Hence, we find that the legal effect of contracts made by one in a state of intoxication is affected in the same way by the intoxication of the contractor as they are by his insanity." Tiedeman, Com. Paper, § 57.

If complete drunkenness, by which is meant drunkenness to such an extent as to wholly destroy for the time being the rational faculties of the mind, renders a note absolutely void as between maker and payee, then, under the provisions of our negotiable instrument law, Stat. 1911, it is void in the hands of a holder in due course.

Section 1676—25 provides: "The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtains the instrument or any signature thereto, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud, and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument, and could not have obtained such knowledge by the use of ordinary care."

And § 1676—27 reads: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce pay-

ment of the instrument for the full amount thereof against all parties liable thereon, except as provided in §§ 1944 and 1945 of these statutes relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of § 1676—25 of this act."

By the provisions of this law it will be seen that a holder in due course takes no title where the note was absolutely void in its inception, as where there was no maker capable of executing the instrument. This result follows for the obvious reason that no life, or validity can be given by transfer to that which is absolutely void. It is the same as if it had no existence at all. And it is but the expression of the rule embodied in the decisions of this court. *Aukland v. Arnold*, 131 Wis. 64, and cases cited on page 67, 111 N. W. 212.

Plaintiffs argue that the rule of ordinary care, as applied in negligence cases, obtains under the provisions of § 1676—27 of the negotiable instruments law. It is not necessary to decide the question in this case. The jury found that at the time Gunsten signed the note he was so completely intoxicated that he was temporarily deprived of his reason and understanding. Manifestly, while in such condition, the rule of ordinary care does not apply. He was incapable of exercising any care whatever. Nor can it be held that he should have exercised care not to get drunk, for, as before observed, the signing of notes is not the usual or probable result of drunkenness. It is otherwise as to a personal injury. A man may well reasonably anticipate that if he gets drunk and becomes unable to care for himself he may, without the fault of another, sustain bodily harm or even death itself. But a drunken man, if left alone and not taken advantage of by others, is not, as a mere result of the drunkenness, likely to sign notes or execute any other contracts. The law does not favor drunkenness; nor does it place in the hands of a drunkard any shield against his conscious or rational acts. It simply says that when, through drunkenness or any other means, a man is temporarily or permanently wholly incapacitated from exercising his rational faculties, then he shall not be liable upon what purports to be a contract entered into while in such state, because a mind bereft of reason or conscious rational action is incapable of consenting or contracting. In speaking of the early English doctrine holding that a man should not be allowed to stultify himself by alleging his own lunacy or imbecility, Daniel says: "Such a doctrine sounds more like the gibberish of a lunatic than like the decree of a humane and enlightened

lawyer. The maxim of the civil law, *Furius nullum negotium agere potest, qui non intelligit quid agit*, expresses the sense of modern jurisprudence on the subject." 1 Dan. Neg. Inst. § 209. The same maxim applies equally well to a person in a state of complete intoxication as to an act or result that cannot be said to be reasonably anticipated from mere drunkenness.

Judgment affirmed.

ILLINOIS SUPREME COURT.

VIRGIA V. BARTON, Plff. in Certiorari,
v.

GEORGE E. SOUTHWICK.

(258 Ill. 515, 101 N. E. 928.)

Judgment — justice of the peace — physician's fee — bar to action for malpractice.

A judgment by a justice of the peace for a physician's fee is no bar to a subsequent action against him for malpractice in rendering the services for which the recovery was had, if the justice had no jurisdiction of an action for malpractice, and no defense was presented before him.

(Cooke, J., dissents.)

(April 19, 1913.)

Note. — Recovery by physician as bar to action for malpractice.

This note supplements the earlier note on the same question, appended to Jordahl v. Berry, 45 L.R.A. 541. It is stated in that note that the New York cases hold generally that a recovery by a physician is a bar to the patient's action for malpractice, being regarded as in the nature of an estoppel and governed by the principles of *res judicata*; and that the New York cases also base their conclusion upon the ground that the contract between the physician and patient was entire, and that performance thereof was necessary in order to enable the physician to recover, and that, by not defending, the patient admitted the performance thereof on the physician's part. The note states that, in most of the New York cases mentioned, the patient, as defendant in the action for services, appeared and answered in the first instance, although he subsequently withdrew his defense, and that in one case he confessed judgment. From the cases cited in that note the writer deduces the rule that there is a distinction between the cases in which the judgment recovered by the physician is one upon the merits upon a trial, and those in which the judgment has been rendered by default on the patient's part, and states that generally speaking a judgment of the former kind is a bar, while that of the latter kind is not.

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CERTIORARI to the Appellate Court, Third District, to review a judgment reversing a judgment of the Circuit Court for Sangamon County in plaintiff's favor in an action for malpractice. Reversed.

The facts are stated in the opinion.

Mr. W. St. J. Wines for plaintiff in certiorari.

Messrs. Graham & Graham and Stevens & Herndon, for defendant in certiorari:

In a suit by a physician for fees, unless the services are reasonably careful and skillful, he cannot recover, but it is not necessary that he be successful.

Yunker v. Marshall, 65 Ill. App. 667; Patten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593; Bellinger v. Craigie, 31 Barb. 534; Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; Alder v. Buckley, 1 Swan, 69; Langolf v. Pfromer, 2 Phila. 17; Ely v. Wilbur, 49 N. J. L. 685, 60 Am. Rep. 668, 10 Atl. 358, 441.

A judgment is conclusive of every fact which was offered, or might properly have been offered, as a defense to the suit on which the judgment was entered.

Gross v. People, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012; Brack v. Bond, 211 Ill. 290, 103 Am. St. Rep. 200, 71 N. E. 995; Rice v. Travis, 216 Ill. 260, 74 N. E. 801.

There appears to have been few cases decided upon this question since the preparation of the note mentioned. The Tennessee supreme court in Sale v. Eichberg, 105 Tenn. 333, 52 L.R.A. 894, 59 S. W. 1020, especially commending the note in 45 L.R.A., disapproved in a general way the New York decisions and reached a contrary conclusion, though the facts of the case were such that possibly a like conclusion thereunder might be justified even in New York. The case holds that a judgment in favor of a physician for services, confessed by the defendant as a condition imposed by the chancellor to granting an injunction to prevent the prosecution of an action to recover compensation therefor pending an action against a physician for malpractice, will not, upon reversal of the injunction order, operate as an estoppel against the action for malpractice. The controlling idea of the court seemed to be that the judgment was confessed for the express purpose of preventing an estoppel and that therefore it would be unjust to permit it so to operate thereafter.

The rule of the New York cases was recognized in Elebach v. Weed, 29 Misc. 754, 60 N. Y. Supp. 1136, involving an action to recover for plaintiff's services as a physician; and also in Martin v. Prentice, 133 App. Div. 741, 118 N. Y. Supp. 215, denying the right under the New York statute to consolidate an action for services with an action for malpractice.

L. A. W.

A judgment in favor of a physician for compensation for services rendered on hearing where defendant appeared, is a bar to the prosecution of an action for malpractice based on the services for which judgment for compensation is given.

Howell v. Goodrich, 69 Ill. 556; Sale v. Eichberg, 105 Tenn. 333, 52 L.R.A. 894, 59 S. W. 1020; Bellinger v. Craigie, 31 Barb. 534; Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455; Gates v. Preston, 41 N. Y. 113; Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570; 1 Herman, Estoppel, 325; Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; Lawson v. Conaway, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; Sykes v. Bonner, 1 Cin. Sup. Ct. Rep. 464; Jordahl v. Berry, 72 Minn. 119, 45 L.R.A. 541, 71 Am. St. Rep. 469, 75 N. W. 10.

Per Curiam:

The plaintiff in error, Virgia V. Barton, brought her action on the case in the circuit court of Sangamon county against Dr. George E. Southwick, the defendant in error, charging him with malpractice, and recovered a judgment for \$2,300. The appellate court reversed the judgment without remanding the cause, on the ground that the action was barred by a judgment before a justice of the peace in favor of defendant in error, Dr. Southwick, in an action brought by him against plaintiff in error and her husband for the services rendered plaintiff in error. The merits of the case were not considered by the appellate court. The case is brought to this court for review by writ of certiorari.

After this suit had been commenced in the circuit court and the declaration had been filed herein, defendant in error sued plaintiff in error and her husband, jointly, before a justice of the peace, to recover for his services, and recovered judgment therefor, and the only question argued and presented for our determination is whether the judgment thus secured before the justice of the peace is a bar to a recovery in this action.

It will not be necessary to make an extended statement of the facts. In substance the declaration charged, and the theory upon which the plaintiff in error seeks to recover is, that defendant was negligent and guilty of malpractice, in that having been called as a physician to attend and prescribe for her while she was suffering from some disorder of the generative organs, which had resulted in what is commonly known as "flooding," he improperly and wrongfully diagnosed her case as one of pregnancy, informed her she was about to have a miscarriage, and proceeded, by the 46 L.R.A. (N.S.)

use of various instruments, to attempt to remove the fetus supposed to be present; that plaintiff in error was not pregnant, and defendant in error was so careless and negligent in the use of such instruments as to lacerate the uterus, thereby compelling plaintiff in error to submit to a major surgical operation and suffer the removal of her uterus. The defense in the trial court on the facts was that defendant in error employed proper treatment to stop the flooding, that he did not diagnose the case as one of pregnancy, and that he did not insert any instrument into the uterus or attempt by the use of instruments to remove a fetus.

On the trial the following stipulation was entered into and admitted in evidence: "It is stipulated between the parties that the defendant in this suit now on trial, Dr. George Southwick, brought suit in December, 1910, before Justice of the Peace Knotts, at Chatham, Illinois, to recover compensation for services, including the visits, on which it is claimed in the case on trial that the defendant herein was guilty of negligence; that Virgia Barton was a defendant in that suit brought by Dr. Southwick, and is the same Virgia Barton who is the plaintiff in this case; that counsel appeared on the hearing in the trial of the case before the said justice of the peace representing the defendants; that the defendant in this case and plaintiff in that case, Dr. Southwick, testified on that trial to the rendition of the services upon which this action of negligence is based; that counsel for defendants in that case inquired of Dr. Southwick on that trial concerning the duration of his visits, what instruments he used, and what use he made of them, and that judgment for compensation for the plaintiff for said services was given against the defendants, Wesley Barton and Virgia Barton, as claimed by the plaintiff in that suit; and that said suit by Dr. Southwick was commenced before the justice of the peace after precept and declaration had been filed in the suit on trial."

Guy Wesley Barton, the husband of plaintiff in error, was a witness in her behalf on the trial of the case, and in his direct examination testified that defendant in error had sued him for his services. His cross-examination on this subject is abstracted as follows: "Southwick's suit for fees was brought against wife and myself. I was in Chatham, present at the trial, and Mr. Wines was there for us. He asked Southwick, on the trial, what instruments he used and how he used them. Mr. Wines told the squire I didn't deny I owed the doctor the bill."

The New York courts have held that a

judgment against a patient, before a justice of the peace, in favor of a physician for his services, is a bar to the prosecution of a suit for malpractice against the physician by the patient, even though no defense of malpractice or any attempt to set off or recoup damages on that account was made at the trial. This was held in *Bellinger v. Craigue*, 31 Barb. 534, and *Gates v. Preston*, 41 N. Y. 113, and has been followed by the courts of that state in later cases. The courts of some other states have followed the New York cases, but the majority of other courts have only partially followed the New York courts. *Bigelow on Estoppel*, *Van Fleet on Former Adjudication*, and *Black on Judgments* repudiate the New York rule, while *Herman on Estoppel* supports it. A number of both lines of authorities will be found in the decisions cited and reviewed by the supreme court of Tennessee in *Sale v. Eichberg*, 105 Tenn. 333, 52 L.R.A. 894, 59 S. W. 1020. Most, if not all, the reported cases to which our attention has been called follow the New York decisions to the extent of holding that a judgment before a justice of the peace is a bar to the prosecution of a malpractice suit only when the defendant in the suit before the justice of the peace appears at the trial and interposes the defense of malpractice.

This court held in *Howell v. Goodrich*, 69 Ill. 556, that a judgment in favor of a doctor before a justice of the peace, where the defendant appeared and interposed the defense of malpractice; was a bar to the prosecution of a suit against the doctor for malpractice; and it would seem from the fact that a justice of the peace in this state has no jurisdiction to entertain an action for malpractice, a party having pending or contemplating bringing such a suit in a court having jurisdiction to try and determine it could not be compelled to defend the suit by the physician before the justice of the peace, or be barred from prosecuting his suit for malpractice. The inconvenience, if not injustice, or requiring the party to defend against a judgment in the justice's court was referred to in *Ressequie v. Byers*, 52 Wis. 650, 38 Am. Rep. 775, 9 N. W. 779, where the court said: "If the plaintiff were compelled to make his defense in the justice's court that the professional services were of no value and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand, so that there might be two suits, instead of one, upon it, or content himself with merely defeating the claim for services, or limit his damages to \$200,—the extent of the jurisdiction of the justice. We are not inclined to adopt a rule which

would lead to any such inconvenient consequences."

Defendant in error contends that there was a defense made before the justice of the peace in the suit brought by him to recover for his services. We do not think the stipulation and testimony relied upon support this contention. Plaintiff in error did not appear at the trial, but her husband, who was sued jointly with her, was present and was accompanied by counsel. Defendant in error, as shown by the stipulation, testified in support of his claim, and counsel who was present with the husband of plaintiff in error inquired of defendant in error what instruments he used and what use he made of them. The husband of plaintiff in error testified on the trial of this case that he, with counsel, was present before the justice of the peace; that counsel asked defendant in error the questions stated in the stipulation, and counsel said to the justice of the peace plaintiff in error's husband did not deny owing the doctor the bill. Clearly this does not show that any defense was interposed or any attempt made to prevent a judgment being rendered. The question might well have been, and to all appearances was, asked by counsel to acquire information that might be of advantage to him in the prosecution of the malpractice suit. The mere presence of the husband of plaintiff in error and counsel before the justice of the peace, without any attempt to interpose any defense whatever, was not a bar to the prosecution of the malpractice suit by plaintiff in error, and *Howell v. Goodrich*, supra, is not applicable.

Inasmuch as the Appellate Court did not consider the merits of the case, the judgment of that court will be reversed, and the cause remanded to it, with directions to consider the case on its merits.

Reversed and remanded, with directions.

Cooke, J., dissents.

Petition for rehearing denied June 4, 1913.

INDIANA SUPREME COURT.

FRANCIS W. ACKERMAN, Appt.,

v.

LAWRENCE FICHTER, Exr., etc., of Elizabeth Ackerman, Deceased, et al.

(— Ind. —, 101 N. E. 493.)

Trust — competency of trustees — lack of incorporation.

1. Trustees of a charitable trust are not

rendered incapable of taking because they do not represent an incorporated body.

Same — exclusion of jurisdiction of court — effect.

2. That a testator places property under the control of trustees, free from the jurisdiction of the probate court, does not invalidate the trust if the public at large has no interest in it and it does not violate public policy.

Charity — trust for tuition — validity.

3. A devise to trustees of a fund the income of which shall be applied to payment of tuition in a parish school of an unincorporated religious denomination is valid.

Will — provision contrary to statute — effect.

4. A will is not invalidated because of provisions that the trustees of the fund created for benevolent purposes need not report to the court, contrary to provisions of the statute, although the provision as to report must give way to the statute.

Charity — bequest for masses — validity.

5. A bequest of a fund to be used for masses for the repose of all poor souls is a valid charitable trust under a Constitution forbidding interference with the rights of conscience.

Same — power to enforce.

6. Courts may enforce a trust devoting a definite sum to be expended annually for masses for the repose of all poor souls.

Note. — Who may enforce trust for masses.

There is a considerable difference of opinion as to whether a bequest for masses is good. See notes in 25 L.R.A. 360, and 40 L.R.A. 717, on validity of bequest for masses; also *Re Kavanaugh*, 28 L.R.A. (N.S.) 470. And see also notes in 14 L.R.A. (N.S.) 96, and 37 L.R.A. (N.S.) 1005, as to enforcement of general bequest for masses.

"One class of cases," says the court in *Sherman v. Baker*, 20 R. I. 446, 40 L.R.A. 717, 40 Atl. 11, "holds that they are good as charitable trusts, being for religious services. Another class holds that they are private trusts which are void because there is no living beneficiary to enforce the trust. A third class holds that they are good as outright gifts for a specified legal object."

Where the bequest is considered as an absolute gift, or as one conditioned upon the saying of masses (*Re Zimmerman*, 22 Misc. 411, 40 N. Y. Supp. 395), or where it is regarded as creating a private trust which is void for want of a living beneficiary (as in *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L.R.A. 360, 53 Am. St. Rep. 48, 18 So. 394; *McHugh v. McCole*, 97 Wis. 166, 40 L.R.A. 724, 65 Am. St. Rep. 106, 72 N. W. 631, and *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305) the question under consideration of course cannot arise.

Research has failed to disclose the exist-
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Same — beneficiaries to enforce — competency.

7. Since a trust for masses for the repose of all poor souls is for the benefit of both living and dead, living persons have an interest in its enforcement both for themselves and as kindred of the dead, so that the trust will not fail for lack of beneficiaries competent to enforce or invoke its enforcement.

(April 15, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Decatur County in an action brought to set aside the will of Elizabeth Ackerman, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. J. K. Ewing, Frank Hamilton, and Oscar R. Ewing, for appellant:

If the will proves invalid, or is invalid on its face, the plaintiff should recover all the property.

Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; *Adams v. Perry*, 43 N. Y. 487; *Holmes v. Walter*, 118 Wis. 409, 62 L.R.A. 986, 95 N. W. 380.

To constitute a charitable use it is essential to its validity that there should be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary.

ence of any direct authority on the question.

In *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L.R.A. 360, 53 Am. St. Rep. 48, 18 So. 394, where a bequest to a church, "to be used in solemn masses for the repose of my soul" was held to be invalid as a private trust for the want of a living beneficiary, it was said: "Argument is unnecessary to show that there is no imaginable being possessing power to enforce the use declared in this bequest. The executor cannot do it, for he succeeds only to the property rights of the testator. His powers and functions do not, and cannot extend to the well being of the soul of his testator. As said by appellant's counsel, 'If the church should receive this bequest and apply it to paying its debts, repairing its building, supporting its priests, and paying the expenses of their ceremonies, the purpose of the bequest would be clearly violated. But what living person is authorized to call the trustee to an account for the misuse of the fund?'"

In *Moran v. Moran*, 104 Iowa, 216, 39 L.R.A. 204, 65 Am. St. Rep. 443, 73 N. W. 617, where a bequest to a pastor of a specified church "that masses may be said for me" was held to create a valid private trust, even though there was no living beneficiary, the *Festorazzi* Case is distinguished upon the ground that in the bequest therein involved the trustee was the church, the court saying: "That is not true of this case. The priest of the church designated, at a specified time, is made the

Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; 27 Am. & Eng. Enc. Law, 23; Ayres v. Methodist Episcopal Church, 3 Sandf. 351.

An illegal trust is one that is contrary to public policy or in contravention of some public statute.

27 Am. & Eng. Enc. Law, 7; Tiffany & B. Tr. § 24; Flint, Tr. § 76; Hill, Trustees, § 45; 1 Perry, Tr. § 94; 39 Cyc. 32.

The will contravenes the following public statutes, and is therefore void.

Rev. Stat. 1908, §§ 4032-4039.

This will attempts to deprive the plaintiff of his property and inheritance without due process of law.

8 Cyc. 1082, notes.

It is not within the power of individuals or corporations to create judicial tribunals to settle controversies.

Bauer v. Samson Lodge, K. P. 102 Ind. 269, 1 N. E. 571.

The will in the case at bar provides not only for a sale without notice, but without petition, order of court, bond, appraisement, without report or confirmation. This is certainly without due process of law.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Stewart v. Polk County, 30 Iowa, 28, 1 Am. Rep. 238; San Jose Ranch Co. v. San Jose Land &

Water Co. 126 Cal. 322, 58 Pac. 824; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Gibson v. Mason, 5 Nev. 302; Re Curry, 1 N. Y. Civ. Proc. Rep. 326; Backus v. Shipherd, 11 Wend. 629.

The will in question is not in harmony with public policy in this state, in providing for a parochial school.

Gilman v. Hamilton, 16 Ill. 225.

Messrs. Tremain & Turner, Osborn & Harding, and Bennett & Davidson, for appellees:

The trust created by the will of Elizabeth Ackerman is a charitable use, and is not void for uncertainty and indefiniteness.

1 Beach, Trusts & Trustees, § 313; 6 Cyc. 910; Franklin v. Armfield, 2 Sneed, 305; Gass v. Ross, 3 Sneed, 211; Cobb v. Denton, 6 Baxt. 235; Frierson v. General Assembly, 7 Heisk. 683; Dickson v. Montgomery, 1 Swan, 348; Missouri Historical Soc. v. Academy of Science, 94 Mo. 459, 8 S. W. 346; Harrington v. Pier, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 922, 82 N. W. 345; Jackson v. Phillips, 14 Allen, 539; Hoeffler v. Clogon, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; 5 Am. & Eng. Enc. Law, 2d ed. 894; Hadley v. Forsee, 203 Mo. 418, 14 L.R.A. (N.S.) 49, 101 S. W. 59.

Charitable trusts are not within the rule

person to execute the trust; and when he accepts the money he becomes responsible to the court for the proper discharge of his duties as trustee."

In Holland v. Alcock, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305, where the testator gave his residuary estate to his executors "to be applied by them for the purpose of having prayers offered in a Roman Catholic Church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in Purgatory," the court said: "There is no beneficiary in existence or to come into existence who is interested in or can demand the execution of the trust. No defined or ascertainable living person has, or ever can have, any temporal interest in its performance; nor is any incorporate church designated so as to entitle it to claim any portion of the fund."

In Gilman v. McArdle, 65 How. Pr. 330, 12 Abb. N. C. 414, in discussing the validity of a trust to have masses said for the repose of the souls of the creator of the trust and her husband, it was said: "In the case at bar the beneficiaries are both dead and beyond the reach of human law. Their souls are intended as the beneficiaries, and the money is to be expended for masses for the repose of their souls. But the soul of one who has departed this life is incapable of taking an interest in the property left behind, nor is it in any sense subject to the jurisdiction of any legal tribu-

nal. A court of equity protects the rights of the living. It cannot extend its jurisdiction to beings which cannot be apprehended within the boundaries of the realm."

The foregoing case was carried to the court of appeals, which, after remarking that the conclusion of the court below, that a valid trust was not established as to the surplus to be applied to masses, for the want of a beneficiary who could enforce it, admits of much discussion, declined to decide the question; basing its decision that the holder of the fund was entitled to retain it on the ground that the transaction amounted to a contract to pay a sum of money to the defendant on his agreement to expend an equivalent sum in procuring the solemnization of masses; that this contract was valid; and that the representatives of the wife had no right of action except in case of a breach of the contract by the defendant. Whether the representatives of the husband had any right of action in any event, the court found unnecessary to determine. 99 N. Y. 451, 52 Am. Rep. 41, 2 N. E. 464.

But in Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068, the court, in sustaining the provision of a will directing the executor to expend the sum of \$1,000 for masses for the repose of the souls of testator and his mother and aunts, said that they did not see any reason why the application of the fund to the designated purpose might not be enforced by the courts upon the application of the heir.

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against perpetuities, nor are they within the scope of statutory or constitutional provisions against such perpetuities.

Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450; 2 Perry, Tr. 5th ed. § 687; 5 Am. & Eng. Enc. Law, 2d ed. 902; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270; Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520; Richmond v. Davis, 103 Ind. 449, 3 N. E. 130; 2 Beach, Trusts & Trustees, § 351; Clayton v. Hallett, 30 Colo. 231, 59 L.R.A. 407, 97 Am. St. Rep. 117, 70 Pac. 429; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Hopkins v. Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; Williams v. Williams, 8 N. Y. 525; 1 Perry, Tr. 8th ed. § 66.

Indefiniteness as to the beneficiaries is a necessary characteristic of a charitable trust.

Perry, Tr. 5th ed. § 687; 5 Am. & Eng. Enc. Law, 2d ed. 906; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Harrington v. Pier, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 922, 82 N. W. 345; St. James Orphan Asylum v. Shelby, 60 Neb. 796, 83 Am. St. Rep. 554, 84 N. W. 273.

A bequest of the residue of an estate to be "divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors," is not void for uncertainty.

Re Murphy, 184 Pa. 310, 63 Am. St. Rep. 802, 39 Atl. 70.

It is not necessary, in order to constitute a good charitable devise, that the beneficiary be *in esse* and capable of coming into a court of equity to enforce the trust.

Tappan v. Deblois, 45 Me. 122; Haines v. Allen, 78 Ind. 100, 41 Am. Rep. 555; White Lick v. White Lick, 89 Ind. 136; 5 Am. & Eng. Enc. Law, 2d ed. 933; Re Graves, 242 Ill. 23, 24 L.R.A.(N.S.) 283, 134 Am. St. Rep. 302, 89 N. E. 672, 17 Ann. Cas. 137; Strong's Appeal, 68 Conn. 527, 37 Atl. 395; Ex parte Lindley, 32 Ind. 367; St. James Orphan Asylum v. Shelby, 60 Neb. 796, 83 Am. St. Rep. 554, 84 N. W. 273.

Trusts for the promotion of education are charitable in a legal sense, and highly favored.

5 Am. & Eng. Enc. Law, 2d ed. 920; Clayton v. Hallett, 30 Colo. 231, 59 L.R.A. 407, 97 Am. St. Rep. 117, 70 Pac. 429; Perry, Tr. 5th ed. 687; 1 Beach, Trusts & Trustees, 315; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Almy v. Jones, 17 R. I. 270, 12 L.R.A. 414, 21 Atl. 616; Russell v. Allen, 107 U. S. 172, 27 L. ed. 46 L.R.A.(N.S.)

400, 2 Sup. Ct. Rep. 327; Barker v. Petersburg, 41 Ind. App. 447, 82 N. E. 996.

A gift to a school is no less a public charity because the school exists for the benefit of a restricted class of persons.

6 Cyc. 944; Meeting Street Baptist Soc. v. Hail, 8 R. I. 234; Dye v. Beaver Creek Church, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717; McDonald v. Shaw, 81 Ark. 235, 98 S. W. 952; 2 Perry, Tr. § 734; Hanson v. Little Sisters of Poor, 79 Md. 434, 32 L.R.A. 293, 32 Atl. 1052; Re Stickney (Congregation Church Bldg. Soc. v. Everitt) 85 Md. 79, 35 L.R.A. 693, 60 Am. St. Rep. 308, 36 Atl. 654; Ex parte Lindley, 32 Ind. 367; Craig v. Secrist, 54 Ind. 420; Barker v. Petersburg, 41 Ind. App. 447, 82 N. E. 996; Curling v. Curling, 8 Dana, 38, 33 Am. Dec. 475; Skinner v. Harrison Twp. 116 Ind. 139, 2 L.R.A. 137, 18 N. E. 529; McIntire v. Zanesville, 17 Ohio St. 352; Lagrange County v. Rogers, 55 Ind. 297; Erskine v. Whitehead, 84 Ind. 357; Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158; Miller v. Teachout, 24 Ohio St. 525; Hinkley v. Thatcher, 139 Mass. 477, 52 Am. Rep. 719, 1 N. E. 840; Tudor, Charitable Trusts, 3d ed. § 6; Staines v. Burton, 17 Utah, 331, 70 Am. St. Rep. 788, 53 Pac. 1015; Wood v. Fourth Baptist Church, 26 R. I. 594, 61 Atl. 279; Biscoe v. Thweatt, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136.

A bequest for the saying of masses is valid.

Hoefler v. Clogon, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; Re Schouler, 134 Mass. 426; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Tudor, Charitable Trusts, 3d ed. § 6; Kavanaugh's Will, 143 Wis. 90, 28 L.R.A.(N.S.) 470, 126 N. W. 672; Moran v. Moran, 104 Iowa, 216, 39 L.R.A. 204, 65 Am. St. Rep. 443, 73 N. W. 617; Harrison v. Brophy, 59 Kan. 1, 40 L.R.A. 721, 51 Pac. 883; Webster v. Sughrow, 69 N. H. 380, 48 L.R.A. 100, 45 Atl. 139; Jackson v. Phillips, 14 Allen, 539; Hoefler v. Clogon, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; 5 Am. & Eng. Enc. Law, 2d ed. 927; 1 Beach, Trusts & Trustees, §§ 345, 348; O'Donnell's Estate, 209 Pa. 63, 58 Atl. 120; Kerrigan v. Tabb, — N. J. Eq. —, 39 Atl. 701.

Myers, Ch. J., delivered the opinion of the court:

Appellant, the adopted son of Elizabeth Ackerman, deceased, instituted this action by next friend against the rector, Fichter, executor, and the parish council of St. Mary's Catholic Church of the city of Greensburgh, Indiana, trustees, under the

will of Elizabeth Ackerman, by a complaint in two paragraphs. The first paragraph alleged the undue execution of the will and asked that it be declared null and void. It was held sufficient on demurrer, as to which ruling no question is presented here. The second paragraph, which was an amended one, sets out appellant's relation to the decedent, the admission of the will to probate, the will itself, the objections thereto, and asks that it be construed and be declared null and void and of no effect. Joint and several demurrers were sustained to this paragraph, and the rulings thereon are assigned as error on appeal.

The will provides:

In Item 1, for the payment of all just debts, and that only so much of the testatrix' real estate, after exhausting the personal estate, as is necessary, shall be sold by the executor without order of court, to pay debts.

"Item 2. I give, devise, and bequeath to the trustees hereinafter designated, all other property of every kind and description owned by me at my death, after paying my debts as directed in Item 1, in trust, for the benefit, maintenance, and support of the Parochial School of Saint Mary's Roman Catholic Church at said city of Greensburgh, and I direct that two thirds of the rents, profits, and income of said bequest shall be applied to the payment of tuition in said school; that one third be used for masses every year, for the repose of all poor souls, and the principal of said bequest shall always be kept separate and apart for the purposes herein expressed.

"Item 3. I hereby appoint and designate Reverend Lawrence Fichter, rector, and [four persons, naming them] parish councilors of said Saint Mary's Catholic Church of said city of Greensburgh, and their successors in office in said church as such rector and parish councilors, respectively trustees, to receive, hold, and manage in trust the property devised and bequeathed in item 2 above, for the benefit, support, and maintenance of said school. Said trustees shall receive, hold, and control said property in trust for the purposes specified above, and may sell said property, and if any part thereof shall be real estate, they shall have full power to sell the same without notice, at public or private sale, as they deem best, and may sell and convey the same without any appraisalment, or bond or authority or order of any court or report or approval of said sale; and said trustees shall invest all money, or proceeds of property devised herein, in bonds of the United States of any state therein, of any county, city, or town in the state of Indiana, or in first mortgage on real estate

in the state of Indiana; and said trustees shall manage said funds for the best interest thereof, that it may yield the best income consistent with a safe investment thereof. When any one of the persons named above as trustee shall die, or cease to hold the official position in said Saint Mary's Church now held by such person as aforesaid, then such person shall cease to be a trustee herein, or act as trustee herein, and he shall be succeeded as trustee hereinafter, by the person who shall be chosen or elected by the proper church authority to fill the official place in Saint Mary's Church vacated as aforesaid; and the person so chosen, or elected, shall have the same powers and duties as trustee herein, as each of the persons named above as trustee. It being my intention and desire that the same persons shall be and act as trustees hereunder, as shall manage the business affairs of said Saint Mary's Church. If at any time there shall be a failure of trustees under this will, and it shall be the duty of any court to appoint such trustees, then I request and direct that the court having jurisdiction of this trust, shall appoint as such trustees the rector and parish councilors of said Saint Mary's Catholic Church of Greensburgh. The trustees hereunder shall not be required to give any bond for the performance of their duties as such trustees, nor shall they be requested to report to any court, but they shall transact no business, except by three-fourths vote of all trustees aforesaid, and shall annually make report of said trust, and any funds or property thereof in their hands as such trustees, to the congregation of said Saint Mary's Church (Roman Catholic), provided, that at any time upon the petition of ten persons, who are members of said Saint Mary's Roman Catholic Church and heads of families therein, said trustees may be required to report to the court having jurisdiction thereof, fully and specifically under oath, the condition of said trust, and if said report be found correct and approved by the court, such petitioners shall be liable for all costs. Trustees appointed or acting hereunder shall not receive any compensation for their services as such trustees.

"Item 4. If any time the Roman Catholic Church shall cease to maintain a parish school at said church, at said city of Greensburgh, then in that case said funds shall be held in trust for, and managed as hereinbefore directed by the trustees above designated, but said request shall be held in trust for, and the interest or income thereof shall be applied by said trustees

to, the general support and maintenance of said Saint Mary's Roman Catholic Church.

"Item 5. When Saint Mary's Roman Catholic Church of Greensburgh shall cease to exist as a congregation or organization of the Roman Catholic Church of Greensburgh, Indiana, I direct that the property given, devised, and bequeathed as aforesaid, and all the income, rents, and profits thereof then held by said trustees under this will, shall be paid, transferred, and delivered to the bishop of the Diocese Indianapolis, of the Roman Catholic Church, or if the city of Greensburgh be not a part of that diocese, to the bishop of the Dioceses of the Roman Catholic Church of which the city of Greensburgh shall be a part, for the support of the Roman Catholic Church."

The questions raised by the complaint are: "That said will is illegal, against public policy, and in violation of the statutes of the state of Indiana, both civil and criminal, in this, to wit: That the terms of said will violate the Revised Statutes of the state of Indiana of 1908, from § 4031 to § 4040, inclusive. That the same is in direct violation of § 3173 of said statutes affixing a penalty for such violation. That said will, if enforced, would and will abrogate and abolish the jurisdiction of the circuit court over decedent's estates. That said will is against public policy, for the reason that the Catholic Church and the school therein named neither have any corporate existence, neither can they contract nor be contracted with, sue or be sued, and neither could be held accountable to any court for violation of any laws of the state of Indiana: and there is no beneficiary living, who is named in said will, having a legal capacity to enforce the execution of the trust. That said parochial school named in said will is not a free school, and does not share in public school funds, but said school is supported by tuition fees paid by its patrons, and is maintained in opposition to the policy of the public school system of the state of Indiana, and the pupils of such parochial schools are not permitted to attend the public schools of Indiana."

An attempt is made to interject the question of due process of law; but it has no place here, as the right of testatrix to dispose of her property to the exclusion even of her son cannot be denied.

The real question is whether the will is void as being in violation of law, and against public policy, and as being indefinite and uncertain, both as to beneficiaries and as to trustees, and whether there is a beneficiary capable of enforcing the trust.

It is contended that, since the trustees

are not representatives of an incorporated body, they are unable to take. It is not necessary that they be so; if they are in being, and ascertainable, the trust will not fail because of lack of corporate existence. In this case they are individuals, definitely fixed by name, and also as the rector and parish councilors, and they are capable of holding as trustees, and are vested with title, and succession provided for, and can be held to account for their acts as trustees by the constituted authorities, with respect to property matters. *Ramsey v. Hicks*, 174 Ind. 428, 30 L.R.A. (N.S.) 665, 91 N. E. 344, 92 N. E. 164; *Hatfield v. De Long*, 156 Ind. 207, 209, 51 L.R.A. 751, 83 Am. St. Rep. 194, 59 N. E. 483; *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449. They have the title of the *res*, the corpus, and its control, and therefore have powers coupled with an interest. *Cooley v. Kelley*, — Ind. App. —, 96 N. E. 638; *Hadley v. Hadley*, 147 Ind. 423, 46 N. E. 823; *Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676.

It is also contended that the probate courts of this state are ousted of jurisdiction over the trust and the decedent's estate. This is true to a certain extent, but it is not uncommon, and so long as the public at large has no interest in the tuition question, and it is not in violation of public policy, disposition and control may be directed by the donor of the trust.

It is also contended that the devise is void because it provides that sale of real estate without petition, order, appraisement, bond, or other statutory requirements be made by the trustees. There is no question as to this procedure, and it may be so done. *Burns's Anno. Stat.* 1908, § 2877.

An attempt is made to invoke the aid of §§ 3173 and 3174, regarding annual report of trustees of trusts for benevolent purposes, and that, as the will specifically provides that no report be made to the court, it is void, and under § 3174 criminal in its effect. Trustees ready, willing to, and capable of taking, and to execute powers, and to select objects of the trust, and thus make them certain, and apply the funds in aid of the objects so selected, are allowable. *Rush County v. Dinwiddie*, 139 Ind. 140, 37 N. E. 795.

If the trust is one falling within the provisions of §§ 3173 and 3174, *Burns's Anno. Stat.* 1908, as "benevolent purposes," then the provisions of the will would have to give way to the statute, but that would not affect the validity of the will, so far as its provisions refer to reports by the trustees. *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336;

Philadelphia v. Girard, 45 Pa. 9, 84 Am. Dec. 470, and cases there collected; Williams v. Williams, 8 N. Y. 525, 535, 539; McDonogh v. Murdoch, 15 How. 367, 14 L. ed. 732; Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516; Staines v. Burton, 17 Utah, 331, 70 Am. St. Rep. 788, 53 Pac. 1015; Perry, Trusts, 5th ed. § 835.

The fact that the beneficiary is a parish school of a certain unincorporated religious denomination, for tuition purposes, is immaterial in view of the fact that trustees capable of taking and holding, and designating the expenditures, are designated with provision for succession, and the specific object of the charity named, is sufficient, although the beneficiaries are uncertain in number and identity, for that is the essential feature of a charitable use, or public charity, as distinguished from a private trust. *Re Schouler*, 134 Mass. 426; *Jackson v. Phillips*, 14 Allen, 539; *Kavanaugh's Will*, 143 Wis. 90, 126 N. W. 672, 28 L.R.A.(N.S.) 470; *O'Donnell's Estate*, 209 Pa. 63, 58 Atl. 120; *Hoeffer v. Clogan*, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; *Coleman v. O'Leary*, 114 Ky. 388, 70 S. W. 1068; *Hadley v. Forsee*, 14 L.R.A.(N.S.) 104, and notes (203 Mo. 418, 101 S. W. 59); *Cottman v. Grace*, 3 L.R.A. 145, and notes (112 N. Y. 299, 19 N. E. 839); *Perry, Trusts*, § 687. It is sufficient that trustees are appointed capable of taking and ascertaining the objects, with power to effectuate them. *Haines v. Allen*, 78 Ind. 100, 41 Am. Rep. 555; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Witman v. Lex*, 17 Serg. & R. 88, 17 Am. Dec. 644.

Some of the devises which have been upheld are as follows: To county commissioners of a certain county "for the use of the orphan poor, and for other destitute persons of said county." *Lagrange County v. Rogers*, 55 Ind. 297. To named persons as trustees to be applied "to poor families, widows, and orphans, etc., of Vanderburgh county." *Erskine v. Whitehead*, 84 Ind. 357. To a designated board of commissioners "to establish a home for the benefit of worthy persons who have no home, and orphan boys." *Rush County v. Dinwiddie*, supra. "To the education of colored children in the state of Indiana." Ex parte *Lindley*, 32 Ind. 367. To trustees "for the sole relief and benefit of poor persons, etc." *De Bruler v. Ferguson*, 54 Ind. 549. To "boards of commissioners for colored children of said (Owen) county." *Craig v. Secrist*, 54 Ind. 419. "To the Beaver Creek Church (unincorporated) for poor

children for their tuition." *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717. To the "vestry of St. Mary's Church" to support a parish school. *Hanson v. Little Sisters of Poor*, 79 Md. 434, 32 L.R.A. 293, 32 Atl. 1052. To trustees "for a poor school for the benefit of poor children of Zanesville." *McIntire v. Zanesville*, 17 Ohio St. 352. See also *Wood v. Fourth Baptist Church*, 28 R. I. 594, 61 Atl. 279; *Re Stickney (Congregational Church Bldg. Soc. v. Everitt)* 85 Md. 79, 35 L.R.A. 693, 60 Am. St. Rep. 308, 36 Atl. 654; *Richardson v. Essex Institute*, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158; *Hinckley v. Thatcher*, 139 Mass. 477, 52 Am. Rep. 719, 1 N. E. 840; *Miller v. Teachout*, 24 Ohio St. 525; *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136. It will thus be perceived that in numerous cases in this and other states devises similar to the one in question as to the tuition fund have been upheld.

The question is more difficult as to the provision for masses. The language is "that one third [of rents, profits, and income] be used for masses every year for the repose of all poor souls." The trustees are the same as in case of the tuition fund, but it is specifically provided that the funds shall be kept separate. The objects of the testatrix' solicitude are uncertain, but it is of the essence of a charitable use or charitable trust, as distinguished from a private trust, that the beneficiaries are indefinite, and uncertain, as to persons or number, or in the definition of Lord Camden in *Jones v. Williams*, 2 Amb. 652, and adopted by Chancellor Kent in *Coggeshall v. Pelton*, 7 Johns. Ch. 294, 11 Am. Dec. 471, and by the Supreme Court of the United States, "a gift to a general public use, which extends to the poor as well as to the rich." *Russell v. Allen*, 107 U. S. 167, 27 L. ed. 399, 2 Sup. Ct. Rep. 327; *Kain v. Gibboney*, 101 U. S. 362, 365, 25 L. ed. 813, 814; *Ould v. Washington Hospital*, 95 U. S. 303, 309, 24 L. ed. 450, 451; *Perin v. Carey*, 2* How. 465, 506, 16 L. ed. 701, 711; *Coleman v. O'Leary*, 114 Ky. 388, 70 S. W. 1068; *Harrington v. Pier*, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St. Rep. 924, 82 N. W. 345; *Pennoyer v. Wadhams (School Land Comrs. v. Wadhams)* 20 Or. 274, 11 L.R.A. 210, 25 Pac. 720; *Massachusetts Soc. v. Boston*, 142 Mass. 24, 27, 6 N. E. 840; *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473, 4 N. E. 606; *Jackson v. Phillips*, 14 Allen, 539; *Detwiller v. Hartman*, 37 N. J. Eq. 347, 353. See cases collected in *Protestant Episcopal Edu. Soc. v. Churchman*, 80 Va. 718, 762.

A "mass" is an act of public worship, in

celebration of the Eucharist as observed in the Roman Catholic Church, and formerly observed in the Church of England, and yet observed in some Anglican churches. It is common, and public to all, as a religious ceremony, and is therefore a religious or pious use, and is a public charity, as distinguished from a private charity, which it might be if restricted to masses for the souls of designated persons. *Gilmore v. Lee*, 237 Ill. 402, 127 Am. St. Rep. 330, 86 N. E. 568; *Hoeffer v. Clogan*, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 49 N. E. 527; *Re Schouler*, 134 Mass. 426; *Kavanaugh's Will*, 143 Wis. 90, 28 L.R.A. (N.S.) 470, 126 N. E. 672; *O'Donnell's Estate*, 209 Pa. 63, 58 Atl. 120; *Kerrigan v. Tabb*, — N. J. Eq. —, 39 Atl. 701; *Jackson v. Phillips*, 14 Allen, 539; *Coleman v. O'Leary*, 114 Ky. 388, 70 S. W. 1068; *Webster v. Sughrow*, 69 N. H. 380, 48 L.R.A. 100, 45 Atl. 139; *Moran v. Moran*, 104 Iowa, 216, 39 L.R.A. 204, 65 Am. St. Rep. 443, 73 N. W. 617; *Seibert's Appeal*, 3 *Sadler (Pa.)* 412, 6 Atl. 105; *Harrison v. Brophy*, 59 Kan. 1, 40 L.R.A. 721, 51 Pac. 883; *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736; *Sherman v. Baker*, 20 R. I. 446, 40 L.R.A. 717, 40 Atl. 11; *Seda v. Huble*, 75 Iowa, 429, 9 Am. St. Rep. 495, 39 N. W. 685; *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305; 1 *Beach, Trusts & Trustees*, §§ 345, 348.

The matter presenting the most difficulty in the mind of the court is whether courts may enforce the trust, and also whether there is any beneficiary competent to enforce or invoke its enforcement. It will be seen that the annual income is directed to be annually disbursed; the beneficiaries are all poor souls, not the souls of the poor, but, as we understand it, all souls are regarded as poor souls, objects or subjects of meditation in their behalf, and, if so, all come within the classification, indefinite both as to persons and numbers, and this brings the devise within the doctrine of pious or charitable uses, or a public charity, if otherwise sustainable. The question of there being no beneficiary to require enforcement of the trust was before the court in *Haines v. Allen*, 78 Ind. 100, 41 Am. Rep. 555, in which it was held that where trustees capable of taking the legal estate were originally appointed, so that a valid use was raised in the first instance, a court of equity will supply any defect arising from disability or refusal of the trustee to act, and also that an otherwise indefinite devise is sufficiently ascertained if the trustees are empowered to devote the fund in such

manner as they deem just and the purpose is not unlawful or against public policy. Under the holding in that case it appears that this will is specific as to the amount (the entire income), the time of the expenditure (each year), and the definite purpose as a charitable use, and public charity. Just how it shall be expended is not material, so long as the duty is imposed on the trustees of exercising their judgment in its expenditure for masses.

Whether the language used refers to the souls of those who have passed from this life, or includes those who are living, is alike immaterial. We understand that it is one of the doctrines of the Roman Catholic Church that masses may be and are celebrated for the living; that they are also celebrated for the benefit of those souls which are in the intermediate state of Purgatory, as a doctrine of that faith. It is therefore a public and general religious service, and those who are living, and the living kindred of those dead to this life, have a direct interest in its observance, and can enforce the execution of the trust. We know that the material elements of bread and wine, and the attendant music, cost someone something, presumably the church; or its congregation or members; hence the devise in effect is a devise to the use and benefit of the public service of the church, a beneficial pious use, and a public charity, and this, we gather from the instrument, was the intention of the testatrix.

The Constitution expressly secures the natural right of worship according to conscience, and forbids any law controlling the free exercise and enjoyment of religious opinions, or interference with the rights of conscience. It necessarily follows that if, as a matter of conscience, the celebration of masses is either religious worship, or the exercise of religious opinions,—and to many they are both,—then the right to devote the property to their support is a necessary incident of that right, as sacred as conscience itself, and as necessarily the enjoyment of religious opinions, and in such aid as their donor may choose to extend in furtherance of them, irrespective of what those opinions are, so long as not in violation of law or against public policy; for the courts cannot know any distinctions or standards of religious opinion or of conscience, and either control or define either; that must rest with the individual and his Creator.

The judgment must be affirmed, and it is so ordered.

KENTUCKY COURT OF APPEALS.

FRANK GEE, Admr., etc., of James Gee,
Deceased, Appt.,
v.

CITY OF HOPKINSVILLE.

(154 Ky. 263, 157 S. W. 30.)

Municipal corporation — maintenance of ford — liability for death.

1. A municipal corporation which undertakes to construct a ford instead of a bridge across a stream flowing through its limits, which at low water is safe for vehicles and pedestrians, is not liable for the death of one who undertakes to cross when the river is swollen to such an extent as to make the crossing unsafe.

Note. — Liability for loss of life or property at ford.

Generally as to liability of municipal corporation for defects or obstructions in streets, see note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513; and as to liability of townships for defects in highways, see note to *James v. Wellston Twp.* 13 L.R.A.(N.S.) 1219.

As to contributory negligence as affecting liability of municipal corporations for defects and obstructions in streets, see note to *Lerner v. Philadelphia*, 21 L.R.A.(N.S.) 614.

See also, as bearing closely upon the questions involved in *GEE v. HOPKINSVILLE*, note to *Giaconi v. Astoria*, 37 L.R.A.(N.S.) 1150, on municipal liability for defective plan of street construction, as distinguished from other defects.

It should be noted that in the case of *GEE v. HOPKINSVILLE* the plaintiff did not know of the condition of the river at the ford, or of the heavy rainfall, and also that while it seems to be assumed that it was the duty of the municipality to make the ford reasonably safe, the holding indicates that the court regarded this duty performed if the ford was reasonably safe at the ordinary stage of the water.

A more equitable rule, as against those who have no knowledge of the conditions, and are not guilty of negligence, and who have a right to presume that, in the absence of indications to the contrary, the highway is safe for travel, seems to be laid down in the case of *Hopkins v. Rush River*, 70 Wis. 10, 34 N. W. 909, 35 N. W. 939, that it is the duty of a town to make provision for the flow of water caused by ordinary rainfalls or storms which are usually liable to occur; although it was held that it was not the duty of a town to keep a ford safe for an unusual or extraordinary rise of the water, although such a rise might be reasonably anticipated occasionally to occur; that while unusual and extraordinary rainfalls and freshets might reasonably be anticipated at long intervals and at uncertain times, the test of the 46 L.R.A.(N.S.)

Same — absence of light — effect on liability.

2. Even though a municipal corporation has undertaken to light its streets, and has failed to place a light at the ford across a stream, it is not liable for the death of a traveler drowned in the dark because of the swollen condition of the water, if the ford was safe for travel under ordinary circumstances.

(June 5, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Christian County in defendant's favor in an action brought to recover compensation for the death of plaintiff's intestate, which was alleged to

town's liability was not whether it had provided for these.

It was also held in *Hopkins v. Rush River*, supra, that an instruction was error which gave prominence to the idea that one had a right to presume that the authorities had properly kept the road, as applied to the plaintiff in that case, who was familiar with the ford crossing and the character of the stream, and could see its width for many rods before reaching it, and could have turned back after ascertaining its condition, the water being 8 rods in width and from 3 to 4 feet deep, and running with sufficient force to carry horses and carriage down the stream.

Upon the ground that a city bound by its charter to keep the streets in repair is liable for an injury through neglect to do so, it was held in the case of *Erie v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87, where a bridge across a street had been washed away and a road cut down to the creek (whether by the authority of the city did not appear), that the city was liable for an injury sustained by one in attempting to cross the creek, although he might safely have reached his destination by traveling over parallel streets. This case is distinguishable from *GEE v. HOPKINSVILLE*, since the injury here appears to have been caused by a defective condition of the road in its ordinary state. In regard to the contention that the plaintiff might have safely traveled another street, the court said that if officers of the city permitted the street to be used without warning the public of its condition, they could not charge the plaintiff with inexcusable negligence in doing what they themselves took no measures to prevent; that they invited him into the street by not closing it, by allowing it to be used without objection, and by putting certain repairs upon it which made it not safe, but passable with skilful driving and good luck. It was also said that except in cases where the suit is against the public officer in his individual character, and not against the corporation which he represents, it made no difference whether the neglect was wilful or otherwise.

have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. John C. Duffy, J. E. Byars, and Trimble & Bell, with Mr. Douglas Bell, for appellant:

It was the duty of appellee to maintain its streets in a reasonably safe condition for travelers.

Louisville v. Michels, 114 Ky. 551, 71 S. W. 511; Henderson v. Schlamp, 14 Ky. L. Rep. 575; 28 Cyc. 1403, 1431; Daniels v. County Ct. 69 W. Va. 676, 37 L.R.A. (N.S.) 1158, 72 S. E. 782; Grider v. Jefferson Realty Co. — Ky. — , 116 S. W. 691; Georgetown v. Groff, 136 Ky. 669, 124 S. W. 888; Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381; Louisville v. Keher, 117 Ky. 841, 79 S. W. 270; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87.

The bed of the river was in fact and in law a part of the street.

28 Cyc. 837; Henderson v. White, 20 Ky. L. Rep. 1525, 49 S. W. 764; Dill. Mun. Corp. § 1009; Kentucky C. R. Co. v. Paris,

95 Ky. 627, 27 S. W. 84; Louisville v. Brewer, 24 Ky. L. Rep. 1671, 72 S. W. 9.

Mr. Thomas P. Cook, for appellee:

Appellee, city of Hopkinsville, had a discretion to build a bridge or not to build it, and had also a discretion to put up lights or not; and by its failure to build said bridge or put up other lights, it exercised its discretion, and its acts or failure were governmental or legislative, for which it cannot be made to respond in damages.

Moore v. Harrodsburg, 32 Ky. L. Rep. 384, 105 S. W. 926; Clay City v. Abner, 26 Ky. L. Rep. 602, 82 S. W. 276; Clay City v. Roberts, 124 Ky. 594, 99 S. W. 651; Zehe v. Louisville, 121 Ky. 621, 96 S. W. 918; Maysville v. Brooks, 145 Ky. 526, 140 S. W. 665; Kippes v. Louisville, 140 Ky. 423, 30 L.R.A. (N.S.) 1161, 131 S. W. 184; Com. v. Boone County Ct. 82 Ky. 632; Arnold v. Stanford, 113 Ky. 852, 69 S. W. 726; Campbell v. Vanceburg, 30 Ky. L. Rep. 1340, 101 S. W. 343; Twyman v. Frankfort, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 Ann. Cas. 622; Park Comrs. v. Prinz, 127 Ky. 470, 105 S. W. 948; Maydwell v. Louis-

It was also held in *Erie v. Schwingle*, supra, that the city was not absolved from liability by reason of the fact that its charter forbade taxation for special purposes greater than a certain per cent, which had been laid and expended, where it was also provided that a larger tax might be laid with the consent of a majority of the inhabitants of the city.

In *Lowrey v. Delphi*, 55 Ind. 250, under a statute providing that the council should have exclusive power over streets, highways, and bridges within the city, it was held that a city would be liable for injuries sustained by one in attempting, without knowledge of defects and without fault on his part, to cross an apparent ford through a canal, if the city had, as alleged, negligently failed to erect another bridge in place of the one which had fallen, and carelessly left the apparent ford open and unguarded, without notice to strangers that it was dangerous, and that the tracks were made by persons in the immediate neighborhood, who merely drove into the canal, but did not attempt to cross it.

By a majority of the court it was laid down in *Hyde v. Jamaica*, 27 Vt. 444, that the urgency or importance of the business does not affect the question whether one is guilty of contributory negligence in attempting to cross a swollen stream by means of a ford, and that therefore the fact that the intestate was a physician, and upon his way to see a patient, was not to be considered in determining whether or not he exercised ordinary care. The court said that the true inquiry was whether, as a man of ordinary prudence, after making suitable observation and examination, he had good reason to believe that with due care he could pass in safety; and 46 L.R.A. (N.S.)

if he had, he was justified in making the attempt, whether he had any special business, or was merely on an excursion of pleasure; that if he had not good reason to believe he could go over in safety, but, from the urgency of his business, was led to try it, when otherwise he ought not and would not have done so, he took the risk upon himself.

In the case of *Hyde v. Jamaica*, supra, there being no witnesses of the manner in which the deceased lost his life in attempting to cross a ford, it was said by one of the judges that, it being granted that the intestate was not in fault in attempting to pass the stream, this was not enough; that he must have driven with due care and prudence while in the stream; that there was no evidence of what took place after he entered the stream, or of the manner in which the accident happened, and that the exercise of ordinary care was not to be presumed, but must be proved as an affirmative fact, and the burden of proof was upon the plaintiff.

In the *Hyde Case*, supra, there seems to have been a division of opinion upon the question of the liability of the town for the insufficiency of a ford on private land near a bridge which had fallen, where the ford had been cleared by the highway surveyor, and used for general travel for several weeks, but where there had been no dedication of the land for purposes of a highway, nor other evidence of acceptance by the town as a highway.

In *Welsh v. Argyle*, 89 Wis. 649, 62 N. W. 517, it was held that one who voluntarily turned aside from a highway which was safe, though inconvenient for travel, because of a thin covering of water and ice, into a well-marked passage lead-

ville, 116 Ky. 885, 63 L.R.A. 655, 105 Am. St. Rep. 245, 76 S. W. 1091.

Carroll, J., delivered the opinion of the court:

There runs through the city of Hopkinstown a stream of water called the West fork of Little river, that, during heavy rainfalls, becomes a swift, high, and dangerous current, although in ordinary conditions it is passable on foot. Several of the streets of the city, including Second street, cross this river. On two of these streets the city has built bridges, and many years ago it macadamized Second street on each side of the river to the center of it, thereby making it, when the river was low, a safe highway for vehicles as well as pedestrians. In March, 1910, James Gee, who lived in Hopkinstown, went out into the country in his buggy early one morning, and returned to the city on the same night after dark. During the day there was a heavy rainfall that made the river dangerous to cross at Second street, and when Gee, who did not know of the heavy rainfall, or of the condition of the

river, attempted, on his return, to cross it at Second street, he was caught in the current and drowned. Soon afterwards his administrator brought this suit against the city to recover damages for his death, charging that it was due to the negligence of the city in failing to have a bridge across the river at Second street, and in failing to have the street so lighted near the river as that travelers in the night might be able to discover, before getting into it, whether it was passable or not. On the trial of the case, after evidence for the plaintiff had been introduced showing that there was no bridge at Second street, and that the street lights did not furnish sufficient light to disclose the condition the river was in, and when the case for the plaintiff had been closed, the court directed the jury to return a verdict for the defendant, and the plaintiff appeals.

Leaving out of view for the moment the question of lights, we may say at the outset that three propositions relating to the duty of municipal corporations in reference to streets are well settled. One is that a

ing for some distance through a creek, and used for watering purposes, could not recover damages from the town for loss of his team by drowning.

Under a statute rendering a township liable for damages by reason of a defective highway, it was held in *Quincy Twp. v. Sheehan*, 48 Kan. 620, 29 Pac. 1084, that the township was not liable for damages caused by the neglect of a road overseer to comply with another statute making it his duty to erect and maintain water marks at fords that in high water became impassable. The court said that the neglect of the overseer to perform this duty might create a liability against him for consequent injuries, but that it was not intended to impute such negligence to the township, nor impose a liability upon it for failure of the overseer to erect water marks.

In *Day v. Crossman*, 4 Thomp. & C. 122, it was held that one familiar with a roadway, who, in the dark, attempted to ford a stream swollen by heavy rains, could not recover from the highway commissioners, who had made a temporary passage through the stream while the bridge was being repaired, for the loss of his team by drowning, the passage being safe in ordinary weather. The action was brought for alleged negligence in not keeping the bridge in repair, and the court said: "The plaintiff's injury was not proximate or consequent upon the neglect of defendants to repair the bridge. It was the immediate result of his own negligence in attempting, in a dark night, to ford the stream, rapidly swollen by a sudden and severe storm, where it was otherwise ordinarily safe to drive, and where he had passed safely a few hours before, and knew intimately the ground and situation of the highway, the

bridge, and the creek at that place. His injury did not result from the omission of the defendants to repair the bridge in question, in such a sense and with such intimacy of connection with the cause of neglect alleged as to furnish the basis for a cause of action."

In *Branan v. May*, 17 Ga. 136, it was held that one who sent his servant ahead to ascertain the depth of the water in a mill race, and was informed that it was only "ankle deep," was not guilty of contributory negligence in attempting to cross the same, and therefore that the defendant, who had unlawfully constructed the mill race across a public road, was liable for the resulting damages.

In several cases the question has arisen as to liability for injuries sustained by driving through water which temporarily submerged a causeway or highway near to, but not crossing, a stream. It should be noted that some of them are analogous to the above cases upon the question of contributory negligence of one in attempting to pass through the water. The following are cases of this class: *Smith v. Walker Twp.* 117 Mich. 14, 75 N. W. 141, 4 Am. Neg. Rep. 500 (where it was held there was contributory negligence in forcing a team through water which reached to the horses' knees and was becoming deeper as they advanced, and which was covered with a coating of ice 2 or 3 inches thick); *Merrill v. North Yarmouth*, 78 Me. 200, 57 Am. Rep. 794, 3 Atl. 575 (holding that it was negligence for one familiar with the road to attempt to cross a stream 30 to 40 rods wide and in places not less than 3 feet deep, having a current of 5 miles an hour, and carrying large cakes of ice); *Schrunk v. St. Joseph*, 120 Wis. 223,

city is under a duty to exercise ordinary care to keep its streets in reasonably safe condition for public travel. Another is that this duty does not arise except as to streets that the city has undertaken to improve; and yet another is that the manner or method adopted for the improvement of streets that the city undertakes to improve is left to the discretion of the governing authorities of the city. To state these propositions differently, the city may leave its streets, or any of them, in the condition in which they were when first established and set apart for public use, although they may have then been entirely unimproved; but, if it undertakes to improve them, it must exercise ordinary care to put and keep them in reasonably safe condition for public travel, having, however, a discretion as to the character and quality of the repairs or improvements that it will make, subject to the limitation that, when completed, the streets will be reasonably safe for public travel. *Clay City v. Roberts*, 124 Ky. 594, 99 S. W. 651; *Moore v. Harrodsburg*, 32 Ky. L. Rep. 384, 105 S. W. 926; *Harney v. Lexington*, 130 Ky. 251, 113 S. W. 115; *Arnold v. Stanford*, 113 Ky. 852, 69 S. W. 726; *Campbell v. Vanceburg*, 30 Ky. L. Rep. 1340, 101 S. W. 343; *Maysville v. Brooks*, 145 Ky. 526, 140 S. W. 665.

Applying, with some little elaboration, these principles to the case we have, we think it clear that the city was under no legal duty to construct a bridge across this river at Second street, and therefore its failure to do so could not be made the basis of an action for negligence. 2 Dill. Mun. Corp. § 728; *Leslie County v. Wooten*, 115 Ky.

851, 75 S. W. 208. The city, in the exercise of the discretion vested in it, decided, as it had the right to do, not to erect a bridge as a part of Second street, but to macadamize the street on each side of and across the bed of the river, and there is no claim that there were any defects or unsafe places in this improvement as it was made. The death of plaintiff's intestate was not caused by defects in the condition of the street as it was constructed, but by causes attributable to other agencies over which the city had no control, and to conditions that the city did not have any part in creating.

It is, of course, true that if the street had crossed the river on a sufficient bridge, the accident that brought about the death of Gee would not have occurred; but as the city had provided such a way as, in its judgment, was reasonably safe, and the accident was not due to any defect in this way, or in the manner of its construction, the city cannot be made liable on the ground that it should have erected a bridge. A city is only guilty of actionable negligence when defects or unsafe places in a street that it constructs are the proximate cause of the injury complained of. If the street it constructs is reasonably safe, it is not to be made liable for the failure to adopt other methods of construction, or for the failure to do something that it might or might not do, in its discretion. If, however, the city had erected a bridge across this river as a part of Second street, when the law would have imposed upon the city the duty of exercising ordinary care to maintain this bridge in reasonably safe condition for pub-

97 N. W. 946, 15 Am. Neg. Rep. 468 (holding there was contributory negligence as matter of law for one familiar with the condition to pass along a submerged highway built on a curved and narrow dirt fill, where there was nothing to suggest the location of the traveled track, and the water at the sides was 8 feet deep); *Farnum v. Concord*, 2 N. H. 392 (holding that one familiar with the condition of a submerged highway assumed the risk in attempting to pass along the same, and there could be no recovery from a town where the injury occurred by the horse being led off the traveled road); *Jung v. Stevens Point*, 74 Wis. 547, 43 N. W. 513 (holding that the question of contributory negligence was properly submitted to the jury, where the evidence showed that the line of a submerged road near a river bank was indicated only by a fence along the land side, that a team had just passed over the way in safety, and that the water was not moving rapidly); *Harris v. Clinton Twp.* 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425 (holding that the question of contributory negligence was one for the jury where a party with knowledge of

the general character and condition of the road had passed safely over it earlier in the day, but upon his return found the water had risen considerably, and the road was built on an embankment, and was crooked and narrow, with no guides or barriers).

Fox v. Glastenbury, 29 Conn. 204, and *Thompson v. Bridgewater*, 7 Pick. 188, were cases where injuries were sustained in attempting to cross submerged causeways, the former case holding that there could be no recovery, on account of contributory negligence, where it appeared that there was a strong current of water flowing over a causeway, that there were no means of calculating the depth of the water nor the location of the road, and especially where the party might have remained in a position of safety after attempting to make the crossing and finding it dangerous; and the latter case holding that a traveler was not bound to calculate at a distance the effect of containing his route over the submerged road, and was not guilty of negligence in this regard; at least, unless there was gross negligence.

R. E. H.

lie travel, but it assumed no liability for its failure to erect one.

Coming now to the question of lights, the same principles apply as do in the construction of streets. A city is under no duty to light its streets; it may, if it chooses to do so, leave them unlighted, and cannot be made liable in damages to a traveler who is injured solely because of its failure to light them.

There is, however, some apparent conflict in the authorities as to the duty and corresponding liability of the city where it undertakes to light its streets, but does not light them sufficiently to give notice to travelers of conditions that would not be unsafe or dangerous in the daytime, but that might be dangerous at night. We think, however, that this apparent conflict is due to the fact that the cases holding the city to the duty of furnishing adequate lights arose when the injury complained of was caused by some defect or unsafe place in the street that could have been avoided if the street had been properly lighted, rather than the failure to furnish sufficient lights when the streets as constructed were in reasonably safe condition for public travel.

Of course, if there are defects or unsafe places in a street, the city is under a duty to exercise ordinary care to warn the traveling public, by lights or other reasonably sufficient means in the nighttime, of these defects or unsafe places, and if it fails to do this, will be liable to any person injured by reason of such failure. *Grider v. Jefferson Realty Co.* — Ky. — , 116 S. W. 691; *Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888.

But where there are no defects or unsafe places in the streets, and they are in a reasonably safe condition for public travel, the city has a broad discretion as to the number and character of lights that it will establish, and cannot be made liable in damages for the failure to furnish such number and quality of lights as would better illuminate the streets than those provided. 2 Dill. Mun. Corp. § 1010; *Daytona v. Edson*, 46 Fla. 463, 34 So. 954, 4 Ann. Cas. 1000; *White v. New Bern*, 146 N. C. 447, 13 L.R.A.(N.S.) 1166, 125 Am. St. Rep. 476, 59 S. E. 992.

But if we should assume that a city was under a duty to maintain a greater number of lights than it had provided, and such number as would well light its streets, we are quite sure that the city is not required to do more in this respect than furnish such lights as may be necessary to light reasonably well the character of streets that it has constructed; and it is not required to furnish such a number of lights as might be required to make safe that character of 46 L.R.A.(N.S.)

street that it was under no duty to construct or maintain. In other words, when the city has provided sufficient lights to make the streets that it has constructed reasonably safe for public travel, this, in any state of case, is its full measure of duty in respect to lights. If this view is correct, it follows that, as the lights furnished were sufficient for the character of street that was constructed, the plaintiff failed to make out a case on account of inadequate lights, as there is no claim that the lights were not sufficient to afford reasonable protection for the character of street that the city had constructed at the place where appellant's intestate lost his life.

For the reasons indicated, the judgment of the lower court is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PETER ZEBROWSKI, Plff. in Err.,
v.

WARNER SUGAR REFINING COMPANY.

(83 N. J. L. 558, 83 Atl. 957.)

Master — rules — necessity.

1. No duty to make rules is imposed upon the employer for the safety of his employees in the conduct of his business, where the business is neither complex nor extrahazardous, nor where the dangers incident to it

Headnotes by VOORHEES, J.

Note. — Duty of master to make rules where work is of simple character.

As to duties of master and servant with regard to rules promulgated for the safe conduct of a business, see exhaustive note to *Nolan v. New York, N. H. & H. R. Co.* 43 L.R.A. 305.

It is well recognized that masters promulgate rules for a twofold purpose, that is, for the purpose of increasing the efficiency of the various instrumentalities which are brought into use, and for the purpose of lessening the risks which the servants will have to incur; but the law is not interested in the rules promulgated by the master except in so far as such rules are deemed necessary for the protection of the employees.

It is a general rule recognized by all authorities, that whenever the character of the master's work is complex and dangerous, it is the master's duty to promulgate rules to govern the conduct of the work, so as to protect the servants from injury. See *Labatt, Mast. & S.* 2d ed. § 1114. See also 26 Cyc. § 1157.

The obligation of the master to promulgate rules, however, is subject to some general exceptions. One exception is where danger is not reasonably to be anticipated.

are obvious, or of common knowledge, and are understood by the servants.

Same — custom — negligence.

2. Whether a particular rule should be enacted should not be left to the jury arbitrarily to find, but there should be proof that the practice of promulgating such rules in similar manufactories under similar conditions is general. In the absence of proof that it is the general usage of other employers engaged in similar lines of business, to adopt rules claimed to be necessary, and that they would be practicable and useful, a master will not be charged with negligence for failure to make them.

Same — known risk — assumption.

3. Where the danger is one that a servant should have reasonably anticipated as a result of the practices customarily carried on and participated in by himself, and their dangerous character one that he must have appreciated, whether such danger arose from a lack of rules or a defect in the system, it was a risk known to him, which he assumed.

(Kalisch and White, JJ., dissent.)

(June 19, 1912.)

ERROR to the Supreme Court to review a judgment of nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligent failure to adopt rules and a safe system of operating an elevator. Affirmed.

The facts are stated in the opinion.

See note to *Ahern v. Amoskeag Mfg. Co.* 21 L.R.A. (N.S.) 89.

Another well-recognized exception to the master's duty to promulgate rules is where the work is of a simple character, and it is not shown that it is customary for masters engaged in similar kinds of work to promulgate rules governing similar situations, nor that the safety of the servant would be advanced by such rules.

The above note deals with the duty to promulgate rules where the danger, though great, was not reasonably to have been anticipated, as for instance, where a sudden emergency arises. The present note is concerned only with cases which treat of the duty of the master to promulgate rules where the work is not complex or extrahazardous, and where the dangers surrounding the same are not great.

The rule that the master is not required to promulgate rules where the work is of a simple character has been enunciated and followed in the following cases, where the work was of the character indicated:

Olsen v. North Pacific Lumber Co. 40 C. C. A. 427, 100 Fed. 384 (employee engaged in carrying lumber from saw, injured by carriage starting in usual manner); *Larsen v. O'Rourke Engineering Constr. Co.* 102 C. C. A. 51, 178 Fed. 541 (fellow servant negligently started engine); *Punkow* 46 L.R.A. (N.S.)

Messrs. George D. Hendrickson and Merritt Lane for plaintiff in error.

Messrs. Marshall Van Winkle and Richard F. Jones, for defendant in error:

Plaintiff, by virtue of his long use of the elevator, was familiar with its use and operation, and with the presence or absence of safe-guards, while the conditions as to the light, whether natural or artificial at the time of the accident, were, of course, perfectly obvious to him.

Vellekoup v. D. Fullerton & Co. 79 N. J. L. 16, 74 Atl. 793.

Plaintiff was negligent in going upon the elevator with a hand truck without first having gone upon the elevator and prevented it from being moved by means of the third or center rope before taking the hand truck upon the elevator.

Smith v. Van Sciver, 58 N. J. L. 190, 33 Atl. 390.

Even had plaintiff, at the time of the accident, been directed to use the elevator, and, at the time, known nothing as to its operation, there could be no recovery against the defendant.

Wiackis v. Standard Oil Co. 79 N. J. L. 554, 76 Atl. 1075; *Mika v. Passaic Print Works*, 76 N. J. L. 561, 70 Atl. 327.

Voorhees, J., delivered the opinion of the court:

The trial resulted in a judgment of nonsuit, and the propriety of the court's action

ski v. New Castle Leather Co. 4 Penn. (Del.) 544, 57 Atl. 559; *Jemnienski v. Lobdell Car Wheel Co.* 5 Penn. (Del.) 385, 63 Atl. 935 (no rules required for controlling the running of small cars on railroad in manufacturing plant); *American Bridge Co. v. Valente*, 7 Penn. (Del.) 370, 73 Atl. 400 (no rules required to protect laborer painting iron columns on a car, from injuries by other columns being loaded by fellow servants); *Knickerbocker Ice Co. v. Smith*, 45 Ind. App. 445, 91 N. E. 28 (filling and dumping steam shovel); *McCafferty v. Maine C. R. Co.* 106 Me. 284, 76 Atl. 865 (steam fitter at work on track of traveling crane, injured by crane being moved against him); *Boyer v. Eastern R. Co.* 87 Minn. 367, 92 N. W. 326, 12 Am. Neg. Rep. 496 (unloading logs from flat car); *Parmaleau v. International Paper Co.* 75 N. H. 69, 71 Atl. 31 (no rules required for moving cars by hand); *Morgan v. Hudson River Ore & Iron Co.* 133 N. Y. 666, 31 N. E. 234 (employee crawled under car to remove ore which had fallen on track while car was being loaded); *Wagner v. New York, C. & St. L. R. Co.* 76 App. Div. 552, 78 N. Y. Supp. 696 (no rules required for anchoring derrick cars); *Deebach v. Robert Gair Co.* 143 App. Div. 489, 127 N. Y. Supp. 984 (no rules required respecting the closing of trapdoors); *Palmieri v.*

in ordering it forms the basis of the argument of the plaintiff in error.

The plaintiff, about thirty years of age, a Pole, speaking and understanding English imperfectly, having been in this country but three years, had been employed by the defendant in its sugar refinery to wash bags, for about ten months before the happening of the accident which resulted in the injuries for which the suit was brought, and during which time he had been accustomed to perform the same kind of service as that which he was doing on the day of the accident. His foreman and fellow workmen were Polish. On April 3, 1910, the plaintiff was working on the fourth floor of the defendant's building, picking bags, when the foreman ordered him to go to the eighth floor for a truck and bring it down on the elevator. He went up by the stairway, found the truck, took it to the elevator, which was in a position even with the floor, with the guard gate up, as it should be, and stepped into the car, drawing the truck after him, when the elevator began to move upward, the gate pinching his hands, and he, holding to the arms of the truck, was forced forward with his head down, while his feet went up, his head going through the opening in the safety gate. He was pulled up to the ninth floor, between the wall and the car, causing severe and painful injuries, and mutilating him seriously and permanently.

The declaration avers that the elevator

was a dangerous agency, and that it was the duty of the master to warn and instruct the servant, and, further, that the master failed to adopt rules and a safe system of operation. It was a Reidy Standard elevator, put in motion, stopped, and controlled by means of three ropes, one to move it up, another to move it down, and a third or center rope, called a "check rope," which would stop its movement. A further use of the third rope was to hold the elevator in any desired position by twisting the third rope around a catch or shoulder within the car. The plaintiff's insistence is that there was no proper scheme of operation or code of rules promulgated for the guidance of the employees in the operation of the elevator, and that, as elevators are dangerous machines, it was the duty of the defendant to have one man detailed specially to run the car.

The point is further made that there was an entire absence of system governing its use. It will not be denied that an employer may conduct his business in his own way, although another method might be less hazardous. No duty to make rules arises where the business is neither complex nor extrahazardous, nor where the dangers incident to it are obvious, or of common knowledge, and are understood by the servants, and where the practice pursued by the employees renders rules unnecessary. The question has usually arisen and been decided in railroad cases, where the business is admittedly dangerous and complicated, and

S. Pearson & Son, 128 App. Div. 231, 112 N. Y. Supp. 684 (no rules required for moving steam crane); *Forey v. Syracuse, B. & N. Y. R. Co.* 12 N. Y. S. R. 198 (unloading gravel from cars); *Johnson v. Portland Stone Co.* 40 Or. 438, 67 Pac. 1013, 68 Pac. 425 (drilling out tamping from hole loaded for blast); *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300 (taking down electric wires); *Blust v. Pacific Teleph. Co.* 48 Or. 34, 84 Pac. 847, 20 Am. Neg. Rep. 192 (putting up telephone cable); *Galvin v. Brown & McCabe*, 53 Or. 598, 101 Pac. 671 (unloading slings for putting lumber onto vessel); *Texas & N. O. R. Co. v. Echols*, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517 (piling ties on railroad); *Norfolk & W. R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604 (replacing brake rod on car); *Moore Lime Co. v. Richardson*, 95 Va. 336, 64 Am. St. Rep. 785, 28 S. E. 334 (unloading and moving cars by hand); *Jackson v. Wheeling Terminal R. Co.* 65 W. Va. 415, 64 S. E. 450 (company operating small terminal road not bound to promulgate rules governing running of train); *Pern v. Wussow*, 144 Wis. 489, 120 N. W. 622 (small gang shoveling dirt onto wagon).

There is no duty to make rules where the work is not complex, and there is no evidence that it is customary in similar cases.

L.R.A.(N.S.) establishments to have rules governing similar situations. *Olsen v. North Pacific Lumber Co.* 40 C. C. A. 427, 100 Fed. 384.

In *Moore Lime Co. v. Richardson*, 95 Va. 336, 64 Am. St. Rep. 785, 28 S. E. 334, the court said: "The evidence tends to show that the defendant had not adopted and published rules regulating the manner in which the cars were to be moved. The cars were left on the railroad siding to be loaded, and had to be moved a short distance, as we have seen, on a slight down grade, to the point where they were to be loaded. They were not moved by steam, but by the strength of the gang of hands. The work was neither complex nor difficult. It is not shown that there was anything in the nature of the work which made it necessary for the defendant to enact rules. Its failure to do so was not proof of negligence, unless it appeared from the nature of the work in which the servants were engaged (and it does not) that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such rules."

It should be noted that in a number of the cases cited above the master's work, as a whole, was what could be called complex and extrahazardous, but the particular operations in which the servant was engaged were simple.

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therefore rules are considered necessary in order to afford reasonable protection against the dangers arising to employees to and from each other in the performance of their several and respective reciprocal duties. In *Voss v. Delaware, L. & W. R. Co.* 62 N. J. L. 59, 41 Atl. 224, the supreme court said: "The general averment [in the declaration] of the failure to exercise reasonable care to make and establish or enforce rules and regulations furnishes no basis of liability against the master. No authorities have been cited to sustain such a proposition, and it cannot be founded upon any sound reasoning. . . . The master is not bound to make any such rule, but is entitled to have his liability to his servant for the dangers of the work determined by the application of the general principles of law regulating and governing the relation of master and servant, to each particular cause or case of injury as it arises, and to the system or manner in which his business is operated or conducted." The principle requiring a code of rules has never been applied except when the nature of the business requires it. The rule is thus stated in 26 Cyc. 1157, where the authorities are collected: "Where a master is engaged in a complex or dangerous business, he must adopt and promulgate such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection to them. But no duty to adopt rules is imposed upon the master where the business is neither complex nor extrahazardous, where the dangers incident to the work are obvious, or of common knowledge and fully understood by the servants, or where the practice actually in force renders a rule unnecessary; nor is the master bound to make rules as to how his servants shall conduct themselves outside the scope of their employment, nor as to how business shall be carried on, or any act done which is not carried on or done with his knowledge and permission."

There was no proof in this case that the business was of the complicated character which the law obligates the employer to guard by a scheme of laws. The only evidence on the point was that between 150 and 200 men were employed, and that an elevator must be regarded as dangerous. It is not perceived how, from the mere count of the employees, an inference of a dangerous and complicated business is raised; nor from the presence in a manufacturing plant of a single dangerous agency, a similar situation can be predicated. The plaintiff in error does not stop here, but contends that the specific duty cast upon the master, under these circumstances, was to employ a man specially to operate the elevator.

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The plaintiff produced a witness, a builder of elevators, and who had been in the business of installing them in large factories, who testified that "the general custom in large factories is to have one man to run the elevators; that is, in large factories where they have a good many men." The following answer given by him: "The custom is to have one man operate it [elevator] and give the instructions, so far as I can, when I put them up. Have been called on this week to give the instructions,"—was properly stricken out, because it related solely to his own business, and not to customary usage. He also gave further testimony in effect that he did not know that there was any special danger in running an elevator of this kind to the initiated,—to the man who knows how to handle it,—that it was not a complicated operation, but simple, and that a man of ordinary intelligence would learn how to run and operate it in a day or two. The foregoing is the only evidence in the case bearing upon the question of how others ran similar elevators, and it falls short of showing a general usage. It did not necessarily concern a rule of operation to guard against dangers. He had developed the fact that it prevailed in large factories where many men are employed. It was not at all predicated upon the safety of the operation of the appliance, but as well might refer to economy of operation, for rules are intended for economic efficiency, as well as for lessening the risks of servants. *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 26 N. E. 609.

Whether a particular rule should be enacted should not be left to the jury arbitrarily to find, but there should be proof that the practice of promulgating such rules in similar manufactories under similar conditions is general. In the absence of proof that it is the general usage of other employers engaged in similar lines of business, to adopt rules claimed to be necessary, and that they would be practicable and useful, a master will not be charged with negligence for failure to make them. See 20 Am. & Eng. Enc. Law, 101 et seq. What standard was proved by way of system to which it was incumbent upon the defendant to conform? It cannot be asserted that in a case like this each jury may say what they deem to be a proper rule, and thus arbitrarily direct the conduct of each manufacturing plant under regulations not general but special, in their application. Such a practice was denied with regard to the construction of railway station platforms, in *Feil v. West Jersey & S. R. Co.* 77 N. J. L. 502, 72 Atl. 362; and to the angle at which barriers to protect travelers on a highway should be placed to warn them of repairs

being made, in *Halm v. Hudson County*, 78 N. J. L. 712, 28 L.R.A.(N.S.) 946, 76 Atl. 1014; and as to the height of a car step, in *Kingsley v. Delaware, L. & W. R. Co.* 81 N. J. L. 536, 35 L.R.A.(N.S.) 338, 80 Atl. 327. Juries may decide whether the ordinary standard has been attained, but they may not impose a standard of their own.

In *Ford v. Lake Shore & M. S. R. Co.* 124 N. Y. 493, 12 L.R.A. 454, 26 N. E. 1101, cited by the plaintiff, it was proven that the rule which it was alleged should have been made existed on all other railroad companies. In *Abel v. Delaware & H. Canal Co.* 128 N. Y. 662, 28 N. E. 663, an exception was taken to a charge which proceeded as follows: "I think rules might have been suggested not adopted by any company. You have a right to consider whether some rule which occurs to you, even though no company has adopted it, would have been a better rule and given better protection, and such a one as ought to have been adopted and maintained." Upon review, the court of appeals said: "If the charge is to be construed as leaving it to the jury to determine, irrespective of the evidence, what rules ought to have been adopted for the safety of the repairmen, and to find the one way or the other on the question of the defendant's negligence in conformity with a conclusion so reached, the charge was undoubtedly erroneous." So, in *Atchison, T. & S. F. R. Co. v. Carruthers*, 56 Kan. 309, 43 Pac. 230, the court held that, in the absence of any testimony as to possibility or usefulness of a code of rules, a jury is not justifiable in finding the company negligent in failing to promulgate such system. In *Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 582, 30 N. E. 57, the rule is thus stated: "There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by a rule. The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury." See also *Morgan v. Hudson River Ore & Iron Co.* 133 N. Y. 666, 31 N. E. 234, where the court said: "The recovery was based entirely on the absence of rules. It was not suggested at the trial, nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character by other corporations of the same class carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and, if so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that, as the plaintiff was injured, the defendant ought in some way to have prevented it, or in case it did not, respond to him in damages. Almost every conceivable injury that a servant received in the course of his employment may in this way be submitted to a jury, and with the same result. . . . Even if it could be shown, after the accident occurred, that it might have been prevented by adopting and enforcing some suitable rule, that would constitute no proper test of liability. The failure to adopt rules is not proof of negligence, unless it appears, from the nature of the business in which the servant is engaged, that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions."

The plaintiff has failed to bring himself within the principle claimed, because he has not established by proof that the business was complex and extrahazardous, and that the special regulation insisted upon was by general custom adopted by employers in like lines of manufacture. But it is not perceived how, if such proof had in fact been made, it would have been possible for the plaintiff to recover in this case. The plaintiff had acquired knowledge of running the elevator. The accident happened because another employee, on another floor, wishing to make use of it, reached into the car and pulled the rope, causing the elevator to start upward. He admitted that the unannounced starting of the car, by other workmen, was a frequent occurrence, and

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that he was not only familiar with it, but had so started it himself. He, furthermore, knew that this was customary. He testified that, if anybody wanted it, they took it; that "anybody could take the elevator, and go up to the second or fourth floor or any floor and get off, and then soon another could come after, and that is all. I saw how the others did, then I put my work on the elevator and pulled it up. Yes, often happened when we was on the elevator and working on it and somebody from below started the elevator. I would come with my work down with the elevator and suddenly someone else wanted it." Whether the plaintiff knew of the risk that the elevator might be started by an employee in another floor, when he first entered the employment, is not material, for he had acquired that knowledge during his term of service, and had learned that it was customary for an employee wishing to make use of this agency, to reach in over the gate, pull the rope, and draw the elevator to the floor where he was, and that the one who first did it required the control of it. He had done that himself, and so he knew from his observation and practice, acquired during his service, of the danger, yet he continued in his employment without protest, and he must therefore be held thereby to have assumed this obvious risk. *Johnson v. Devoe Snuff Co.* 62 N. J. L. 417., 41 Atl. 936.

It is urged that the doctrine of obvious risk is inapplicable, because it is subject to the qualification that the master must take proper care to guard the servant from unnecessary hazards,—citing *Abel v. Delaware & H. Canal Co.* 128 N. Y. 662, 28 N. E. 663; *Pakusewski v. Ringwood Co.* 81 N. J. L. 552, 79 Atl. 319; and *Zellers v. Delany*, 80 N. J. L. 452, 78 Atl. 212. The rule is correctly stated in the last case thus: "The known absence of safeguards or precautions cannot prevent a recovery, where the danger that renders them necessary is unknown to the injured servant." The danger that the elevator was subject to movement by a fellow servant in another floor was one that he should have reasonably anticipated as a result of the practices customarily carried on and participated in by himself, and its dangerous character one that he must have appreciated. If the danger arose from a lack of rules or a defect in the system, it was a risk known to him, which he assumed.

The judgment under review will be affirmed.

Kallsch and White, JJ., dissenting.
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NEW JERSEY COURT OF ERRORS AND APPEALS.

EXILDA M. STEVENSON

v.

JOHN NELSON AKARMAN, Err., etc., of Annoria Akarman Pall, Deceased, Plff. in Err.

(83 N. J. L. 458, 85 Atl. 166.)

Husband and wife — personal services of wife — right to recover compensation.

A married woman living in the home of her husband cannot maintain an action upon an implied contract by a lodger to pay for personal services rendered by her as nurse in his illness, since, in the absence of express contract, the right of action is in her husband.

(November 18, 1912.)

Note. — Right of married woman to maintain action for board or lodging of, or services rendered to, a third person living in the home.

As is apparent from the title, this note does not purport to cover the general question as to the right of a married woman to recover for services rendered by her, but is confined to services rendered to persons living in the home.

Cases where the board was furnished or the services were rendered at a time when the husband had abandoned or deserted the wife are beyond the scope of the note. The question under annotation presupposes, of course, a liability on the part of the third person, and relates solely to whether the liability is to be enforced by the husband or the wife, or by them jointly.

General rule.

The general rule is that where husband and wife live together, and he provides for the household, and bears the expense of those maintained and lodged therein, and the wife devotes her time and labor to household duties cooking for and attending upon persons living in the family, the sums owed for board and lodging and services are due to the husband, and not to the wife, and that in the absence of an agreement on his part relinquishing his right thereto, the right to receive and recover such sums is in him, and the wife has no legal claim therefor. *Flynn v. Gardner*, 3 Ill. App. 253; *Parker v. Parker*, 52 Ill. App. 333; *Brown v. Walker*, 81 Ill. App. 396; *Davis v. Davis*, 85 Ind. 167; *Lyle v. Gray*, 47 Iowa, 153; *McClintic v. McClintic*, 111 Iowa, 615, 82 N. W. 1017; *Prescott v. Brown*, 23 Me. 305, 39 Am. Dec. 623; *Barnes v. Moore*, 86 Mich. 585, 49 N. W. 585; *Howe v. Hyde*, 88 Mich. 91, 50 N. W. 102; *Garretson v. Appleton*, 58 N. J. L. 386, 37 Atl. 150; *STEVENSON v. AKARMAN*; *Beau v. Kiah*, 4 Hun, 171;

ERROR to the Monmouth Circuit of the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover compensation for personal services alleged to have been rendered to defendant's testatrix. Reversed.

The facts are stated in the opinion.

Messrs. Bourgeois & Coulomb, for plaintiff in error:

A wife is not entitled to join with her husband or to sue in her own name alone for the care, attendance upon, or nursing of a sick boarder of her husband in his household.

Garretson v. Appleton, 58 N. J. L. 386, 37 Atl. 150; Peterson v. Christianson, 68 N. J. L. 392, 56 Atl. 288; Oakley v. Emmons, 73 N. J. L. 206, 62 Atl. 996; Sens-

felder v. Stokes, 69 N. J. L. 86, 54 Atl. 517.

Mr. Ruliff V. Lawrence for defendant in error.

Gummere, Ch. J. delivered the opinion of the court:

This suit was brought by Mrs. Stevenson against the executor of Mrs. Annoria Pall, deceased, to recover for services rendered to her as a nurse during the last seventeen months of her life. The trial resulted in a verdict for the plaintiff, and the present writ of error is sued out by Mrs. Pall's executor to review the judgment entered thereon.

The proofs on the part of the plaintiff showed that she is a married woman, and

Carpenter v. Weller, 15 Hun, 134; Kinert v. Kapp, 50 Pa. Super. Ct. 222.

And although the wife may make the contract for boarding a stranger, and may receive the moneys for the board, it will be presumed that in so doing she acts merely as agent for her husband; these facts do not prove that the compensation for the board is the separate property of the wife, so as to entitle her to maintain an action for the same. Flynn v. Gardner, 3 Ill. App. 253.

The law will not imply an agreement upon the part of the husband that the wife shall receive the compensation. McClintic v. McClintic, 111 Iowa, 615, 82 N. W. 1017.

And this rule holds even though the compensation is promised to the husband and wife jointly; the wife cannot maintain an action for it in her own name, unless the husband sells or assigns his interest in the claim to his wife, previous to the bringing of the suit. Howe v. Hyde, 88 Mich. 91, 50 N. W. 102.

In Kinert v. Kapp, 50 Pa. Super. Ct. 222, it was said that the wife has no right to bring suit in her own name for moneys due for board, unless the boarder promises to pay her.

Thus, a married woman cannot maintain an action for board furnished another while her husband is temporarily absent in search of employment; in such case he has not lost his right of action for such board. Young v. Ward, 24 Ont. App. Rep. 147.

But where a married woman contracts with a guardian to maintain his wards, boards them, washes for them, and cares for them, although the earnings may belong to her husband, if he absconds and she is authorized by court to sue for, collect, and reduce to possession all his outstanding accounts, she may recover in her own name from the guardian out of the estate of the wards for such services. Rooker v. Rooker, 60 Ind. 550.

As a corollary to the general rule stated above, the right to recover for the services of the wife rendered to others, not in any 46 L.R.A.(N.S.)

separate business, nor on her separate account, is in the husband, and not in the wife. Reynolds v. Robinson, 64 N. Y. 589; Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122; Birkbeck v. Ackroyd, 11 Hun, 365; Re Mallory, 13 Misc. 595, 35 N. Y. Supp. 155; Farrell v. Harrison, 14 Misc. 462, 35 N. Y. Supp. 1029.

Especially should he be allowed to recover for her services where she makes no claim therefor. Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122.

And this rule is not changed because the arrangements for the boarding were made by the wife in the husband's presence, and the promise was to pay the wife, or the husband and wife jointly. Re Mallory, 13 Misc. 595, 35 N. Y. Supp. 155.

And where a third person is boarded in a home, and in a suit by the wife for the value of the board and for her services, her claim for board is disallowed on the ground that presumptively it was furnished by the husband, and that there was no satisfactory evidence that the claim therefor belonged to her, judgment of such disallowance is no bar to the maintenance of an action by the husband for the value of the board; he was not a party to the former action, and, moreover, the former judgment was consistent with his claim in the succeeding action. Stamp v. Franklin, 144 N. Y. 607, 39 N. E. 634.

Likewise, where a husband makes arrangements to have another person cared for in the home, he may recover the value both of his own services and of the services of his wife, where she renders her services as his assistant, and not with a view to a charge by her in her own name; this is but another corollary to the general rule that she is not entitled to recover in her own right for such services. Switzer v. Kee, 146 Ill. 577, 35 N. E. 160; Tipton County v. Brown, 4 Ind. App. 288, 30 N. E. 925; Hensley v. Tuttle, 17 Ind. App. 253, 46 N. E. 594; Miller v. Dickinson County, 68 Iowa, 102, 26 N. W. 31; Harrington v. Gies, 45 Mich. 374, 8 N. W. 87.

And since payment to the husband in any case will be a bar to a recovery by

that during the period covered by the services which are the basis of her claim she resided with her husband at their home in the village of Frenau; that Mrs. Pall came to live with them as a boarder in March, 1909, and remained there until her death in July, 1910, paying her board each week; that during all of that period Mrs. Pall was suffering with sciatic rheumatism, and required considerable care and attention, which were given to her by the plaintiff, who also acted as nurse for the invalid

when occasion required; and that those services were rendered to her by the plaintiff without any promise on the part of Mrs. Pall to make any compensation therefor. At the close of the plaintiff's case there was a motion to nonsuit, upon the ground that the proofs disclosed no right of action on the part of the plaintiff against the executor of the decedent. The motion was refused, and in this we think there was error.

Services rendered by a wife in the home

the wife, it is immaterial whether she has assigned her claim to her husband or not. *Miller v. Dickinson County*, 68 Iowa, 102, 26 N. W. 31.

The husband's right to recover for the wife's services is especially clear where she makes no claim for herself, but by appearing for him in the case ratifies his contract for the services of them both. *Harrington v. Gies*, 45 Mich. 374, 8 N. W. 87.

But under a statute providing that any married woman may perform any labor or services on her sole and separate account, and may sue as if sole in regard to such labor or services, a married woman may recover in her own name the value of her services in the home. *Allen v. Eldridge*, 1 Colo. 287; *Hogg v. Lobb*, 7 Houst. (Del.) 399, 32 Atl. 631 (services as a nurse, rendered to a regular boarder, the court considering such services to be outside the usual duties of the wife); *Arnold v. Rifner*, 16 Ind. App. 442, 45 N. E. 618; *Fowle v. Tidd*, 15 Gray, 94; *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74; *Burley v. Barnhard*, 9 N. Y. S. R. 587.

The action should be brought in her name alone, and not jointly with her husband. *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74.

And under a statute providing that property of every kind owned, acquired, or earned by a woman before or during her marriage, shall belong to her, and not to her husband, a married woman may maintain an action in her own name for services in nursing and caring for a boarder in the home, although the contract for board was made by the husband. *Lewis's Estate*, 156 Pa. 337, 27 Atl. 35.

And under a statute providing that every married woman shall hold to her own use, free from control of her husband, all property at any time earned, and may sue in her own name upon any contract by her made, where the husband refuses to make the contract for her services, but allows her to make her own contract, she should not join her husband as plaintiff in an action upon such contract, but should sue alone. *Cooper v. Alger*, 51 N. H. 172; *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74.

A married woman who is engaged in the business of keeping a boarding house, and with whom the contract for boarding is made, may maintain an action in her own name to recover the value of the board

furnished. *Cavanaugh v. Corckran*, 11 Ky. L. Rep. 655; *Nunn v. Beauchamp*, 13 Ky. L. Rep. 93.

And her husband is not a necessary party. *Nunn v. Beauchamp*, supra.

But under a statute allowing a married woman to contract as if unmarried, but not affecting the common-law right of a husband to the earnings and services of his wife when not received or rendered expressly upon her sole and separate account, where the wife renders services such as nursing to a stranger under a contract made by the husband, the action on such contract for the value of the services is properly brought in the name of the husband alone. *Holcomb v. Harris*, 166 N. Y. 257, 59 N. E. 820.

Where a married woman keeps a boarding house and makes contracts for board, it has been held that the husband is owner of the demand or cause of action upon such contracts, and is entitled to the recovery, and husband and wife cannot sue together thereon. *Dunderdale v. Grymes*, 16 How. Pr. 195.

—where husband agrees that wife may have compensation.

There is, however, a well-recognized exception to the general rule stated above in cases where the husband consents that his wife shall take boarders or lodgers, or perform personal services to strangers residing in the home, and agrees with her that she shall receive the compensation therefor. In such cases the wife may maintain an action in her own name for such compensation. *Vincent v. Ireland*, 2 Penn. (Del.) 580, 49 Atl. 172; *Eichberg v. Bandman*, 74 Ga. 834; *Parker v. Parker*, 52 Ill. App. 333; *Lindsey v. Lindsey*, 116 Iowa, 480, 89 N. W. 1096; *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432; *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. 588; *Strayer v. Leonard*, 13 Mont. 435, 34 Pac. 880; *Stevens v. Cunningham*, 181 N. Y. 454, 74 N. E. 434; *Carver v. Wagner*, 51 App. Div. 47, 64 N. Y. Supp. 747; *Briggs v. Devoe*, 89 App. Div. 115, 84 N. Y. Supp. 1063; *Perry v. Blumenthal*, 119 App. Div. 663, 104 N. Y. Supp. 127; *Stokes v. Pease*, 79 Hun, 304, 29 N. Y. Supp. 430; *Sands v. Sparling*, 82 Hun, 401, 31 N. Y. Supp. 251; *Lashaw v. Croissant*, 88 Hun, 206, 34 N. Y. Supp. 667.

And where the husband so consents, and

of her husband to a lodger residing with them, even though they consist largely of the personal attendance of the wife, and include the nursing of the lodger when sick, are within the range of her domestic duties, and, without an express contract or promise made by the lodger to the wife, the latter cannot maintain an action against him, or, in the case of his death, his executor, for the recovery of compensation for such services. The implied contract which the law raises in such a case

is that the person to whom such services are rendered will make reasonable compensation therefor to the husband, and not to the wife. *Garretson v. Appleton*, 58 N. J. L. 386, 37 Atl. 150; *Peterson v. Christianson*, 68 N. J. L. 392, 56 Atl. 288; *Oakley v. Emmons*, 73 N. J. L. 206, 62 Atl. 996.

There having been nothing in the proofs offered on the part of the defendant to vary the situation as exhibited by the testimony in the plaintiff's case, the judgment under review must be reversed.

the wife recovers for care and nursing and preparing the food, but waives her cause of action for the value of the uncooked food furnished, the husband cannot subsequently recover for the latter. *Bowers v. Smith*, 28 N. Y. S. R. 346, 8 N. Y. Supp. 226.

No distinction can be drawn between the services of a wife, performed in and about the house, and those performed elsewhere, as a foundation for a claim to recover for her own benefit. If the husband can consent to her giving her time and attention to the management of any regular business away from her home, and if this makes the business her own, there seems to be no conclusive reason why he may not consent to her making her services in the household available in the accumulation of independent means on her own behalf. He relinquishes his right to her services in the one case no more than in the other, and perhaps in the last case the ordinary course of marital relation is least disturbed. *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432.

Under such circumstances, the married woman is engaged in the prosecution of a separate calling and the person served incurs no liability to the husband, and the latter is vested with no cause of action. *Stevens v. Cunningham*, 181 N. Y. 454, 74 N. E. 434; *Carver v. Wagner*, 51 App. Div. 47, 64 N. Y. Supp. 747.

Although, under the statute giving the wife a right to contract as if unmarried, the husband is still entitled to the services of his wife, he may forego his right to her earnings. *Carver v. Wagner*, *supra*.

So, a married woman may recover from her husband's estate the value of board furnished to a stranger in the home, where the husband consented to that arrangement, and gave her notes as evidence of her claim. *Re Kinmer*, 14 N. Y. S. R. 618.

And in a suit by a married woman for the value of board and washing furnished to a third person, the testimony of the husband in his wife's behalf amounts to a virtual assignment of any claim he may have in the right of action, and the wife may recover in her own name. *Ennis v. Nusbaum*, — Kan. —, 133 Pac. 537.

And where the boarder understands and declares that his liability is to the wife, and not to the husband, and the husband is shown to have consented to that arrangement, the representatives of such

boarder should not be allowed to urge that payment to the wife for board and personal services should be refused upon the ground that the marital right of the husband will thereby be infringed. That is a personal right, to be exercised by him alone, so far as they are concerned. *Parker v. Parker*, 52 Ill. App. 333.

But in *Woodbeck v. Havens*, 42 Barb. 66, it was held that at common law, a married woman cannot maintain an action in her own name for services rendered to a stranger in the home, although the agreement was made with her and with the knowledge of her husband, and without any objection on his part. Her earnings belong to him, the promise to pay her amounts in law to a promise to pay him, and his assent amounts simply to an assent that she may labor on his account, and receive the money for him as his agent. Nor is there any relation of trust between husband and wife; they are in law but one person as regards such a claim.

In *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432, where a father was cared for by his son and the son's wife, all residing together as members of one family, upon the father's farm, it was said that the presumption was against any contract relation, and that no presumption could arise that claims were to be made by either against another for services; and under such conditions it was said not to be enough to show that the husband had given his wife her services, but that the father must also understand that contract relations existed between himself and his son's wife, and that she expected compensation, and the father must expressly or impliedly assent thereto. The court remarked that great wrong would sometimes be done if each might present claims and recover thereon where the father supposed, and had a right to suppose, that he was dealing with his son alone.

But in *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. 588, it was expressly declared to be immaterial that the third person nursed in the home did not know of the understanding between husband and wife that she should receive the compensation.

—joinder of husband and wife.

In some cases, the right of the wife to join the husband in a suit for the value of

personal services rendered to a third person in the home is based upon the ground that she is the meritorious cause of action.

Thus where the promise of compensation for the care of a stranger in a home is made to the wife, and she performs the services, she is the meritorious cause of action, and may join the husband as plaintiff in a suit based thereon. *Baird v. Fletcher*, 50 Vt. 603.

And where husband and wife render services to another jointly, they may properly join as plaintiffs in an action for the recovery of compensation therefor. *Jordan v. Hubbard*, 26 Ala. 433; *Candy v. Smith*, 6 Mackey, 303; *Brinton v. Thomas*, 138 Mo. App. 64, 119 S. W. 1016; *Lambert v. Hodgdon*, — Mo. App. —, 154 S. W. 450.

But in *Candy v. Smith*, 6 Mackey, 303, it was said that a married woman who owns the premises where the family lives must sue alone for the value of lodgings therein upon a promise made to her; the husband cannot join her as plaintiff in such an action. H. C. Sh.

NEW MEXICO SUPREME COURT.

E. B. SEWARD et al.

v.

DENVER & RIO GRANDE RAILROAD COMPANY.

(— N. M. —, 131 Pac. 980.)

Carriers — regulation of rates.

1. The legislative branch of the government has the right to regulate rates and

Headnotes by ROBERTS, Ch. J.

Note. — Power to require carrier to keep agent at station.

This note includes only cases dealing with the question of the power to compel the maintenance of an agent at points where trains stop, and does not include cases involving the establishment or re-establishment of a station.

As to power to compel the establishment of a station or the stopping of trains at a station, where none previously existed, see note to *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 17 L.R.A. (N.S.) 821.

As to whether a railroad company can be required to establish or maintain a station that will not pay expenses, see *Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission*, 26 L.R.A. (N.S.) 444.

As to the power of a state to compel a railroad company to install and maintain a telegraph operator at one of its stations, see the case of *Chicago, R. I. & P. R. Co. v. State*, 24 L.R.A. (N.S.) 393, and note appended thereto.

Although the power of a state to re- 46 L.R.A. (N.S.)

compel the performance of other duties on the part of the public service corporations; but such rates so established, or required made, must be reasonable, both to the carrier or public service corporation and to the public.

Same — duties of legislature and court.

2. While the fixing of rates, or the determination of the facilities to be afforded, in the first instance, is a legislative question, the determination of the reasonableness and lawfulness of the rate or other requirement is a judicial function.

Same — constitutional law — review of order of commission.

3. Sections 7 and 8 of article 11 of the state Constitution construed.

(a) Held, that said sections provide for a review by the supreme court of the reasonableness and lawfulness of an order made by the state corporation commission, upon the evidence adduced before the commission; that such sections do not deny due process, because on such review additional evidence is not allowed, and because the court must act on the evidence already taken; the court not being bound by the findings of the commission, and the party affected having the right, on the original hearing, to introduce evidence as to all material points.

(b) Held, further, that where the cause is removed to the supreme court by the commission, upon failure to comply with the order within the time limited, by the public service corporation, additional evidence cannot be introduced.

(c) Where, however, the cause is removed by one of the parties, and a showing is made that new evidence has been discovered, which the party, by the exercise of reasonable diligence, could not have presented at the original hearing, the cause

quire a carrier under proper circumstances to maintain an agent at a station would seem on principle to be beyond dispute, the question as to what are reasonable and proper circumstances under which the carrier can be compelled to perform this duty seems seldom to have arisen. Indeed, in the case of *Chicago & N. W. R. Co. v. State*, 74 Neb. 77, 103 N. W. 1087, which dealt with this question, the court said that counsel for the respective parties agreed that no similar case could be found in the books; but it was said that the principles by which the case was to be decided were not difficult of discovery, and had not failed of announcement in the courts.

The rule by which the court should be guided in determining whether a railroad company should be compelled to appoint and maintain a station agent, as laid down in *Chicago & N. W. R. Co. v. State*, supra, is that the court should interfere only in exceptional cases in which it clearly appears that there has been an abuse of discretion by the railroad company, amounting in effect to the denial of a public right or the repudiation of a public obligation

may be remanded to the commission for the taking of such further evidence.

(d) Where the cause is removed to the supreme court by one of the parties within the time limited, the court may, of its own motion, remand the same to the commission for the taking of further evidence.

(e) The supreme court under the constitutional provisions, upon the evidence, determines the reasonableness and lawfulness of the order made by the commission; if it finds such order to be reasonable and lawful, it enforces it; if, on the other hand, it finds such order to be unreasonable or unlawful, it refuses to enforce the same.

(f) The direction in § 7 that the supreme court shall "decide such cases on their merits" means that the court shall decide such cases on a consideration of their sub-

stance and the legal right involved, in opposition to a decision based upon mere defects of procedure or the technicalities thereof; that the court shall do justice irrespective of informal, technical, or dilatory objections.

(g) The court decides, upon the merits, the question of the reasonableness and lawfulness of the order made by the commission, and whether the defendant shall be compelled to comply therewith.

(h) The defendant in such cases, under the Constitution, is not entitled to a trial by jury, and a denial of such right does not violate either the Federal or state Constitution.

(i) The railroad company, by its general appearance before the commission without objection, waived all irregularities preceding such hearing.

which the company has assumed. It was accordingly held in that case that there had been no such abuse of discretion as to warrant the interference of the court to compel the maintenance of a station agent at a point where the conditions appear as follows: A village consisting of eight buildings, and having a population of forty persons, was situated between two other towns on the same railroad 6 and 7 miles distant respectively, and 5 miles distant from a town on another line, all of which were places of considerable size and business; within a radius of 4 miles of the station in question, there were only twenty-nine families; little passenger business and inconsiderable freight business was done, except for the shipment at certain seasons of the year of live stock and hay in carload lots, for which provision was already made for ordering cars.

In *Missouri, K. & T. R. Co. v. State*, 24 Okla. 331, 103 Pac. 613, where the state corporation commission had made an order requiring the defendant to maintain an agent at a station and establish a depot instead of a mere waiting room, it was held that the presumption of the reasonableness of the order was not overcome by evidence as follows: A town of 750 people, the population of which was increased by an adjoining settlement to approximately 1,000, having six mercantile establishments, was situated between two regular stations on the same line of railroad 2½ and 3 miles distant respectively; little business was done at the point in question, but the exact amount did not appear, except that the freight and passenger earnings combined exceeded \$300 per month; six passenger trains stopped daily at said station, but baggage could not be checked and only prepaid freight was delivered; the expense of repairing and improving the building for a depot would be approximately \$500, but the expense of employing an agent was not shown.

An injunction will not be granted to restrain a railroad company from withdrawing a station agent, in order to protect one whose deed to the railroad company of

the land upon which the station is situated contains a provision requiring the maintenance thereof, the grantor on grounds of public policy being remitted to an action for damages. *Fritts v. Delaware, L. & W. R. Co.* 75 N. J. Eq. 384, 73 Atl. 92. The court said that public policy required that railroad companies be free properly to serve the public, which they could not do if the courts enforced private contracts concerning the number of trains and places of stopping, such enforcement tending to hamper them in the running of their roads; and, by inference at least applied the same reasoning to the maintenance of a station agent. It was also stated, although the point was not directly decided, that the matter should have been submitted in the first instance to the railroad commission.

The case of *Fritts v. Delaware, L. & W. R. Co.* supra, following an early decision in a suit to restrain the discontinuance of a station, is apparently authority also for the proposition that injunction is not the proper remedy to protect the rights of the public in regard to the maintenance of a station agent; but that the proper remedy is mandamus to compel the performance of the duty that the railroad company owes to the public to maintain an agent.

In *Winnipeg Jobbers & Shippers' Assn. v. Canadian P. R. Co.* 8 Can. R. Cas. 151, an action before the board of railroad commissioners for Canada, a general order was made that at stations where the total freight and passenger earnings amounted to \$15,000 per year, railroad companies should appoint and maintain permanent agents, and at points where the business consisted principally of shipping grain, and the shipments amounted to at least 50,000 bushels, agents should be appointed and maintained during the grain shipping season. It was said that the question was as to what amount of traffic warranted the appointment of a permanent agent, and that the Minnesota law in this respect was a reasonable one, which required the appointment of a permanent agent where the total freight and passenger earnings amounted to \$15,000. R. E. H.

Public service commission — review of order — findings.

4. While it is proper for the commission to make findings of fact, such findings have no force or effect in the supreme court, as this court is required to pass upon the merits of the case without indulging in any presumptions, and the court forms its own independent judgment as to each requirement of the order, upon the evidence.

Mandamus — discretionary duty.

5. Mandamus does not lie to compel the performance of a duty calling for the exercise of judgment and discretion on the part of the person at whose hands the performance is required; therefore the order made by the commission should be definite and certain.

Carrier — maintenance of adequate facilities — questions involved.

6. Under the Constitution the commission is authorized "to require railway companies to maintain adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express," and such as may be reasonable and just. Held, that, in determining what are "adequate facilities," the court must take into consideration the volume of business, the revenue derived by the railroad therefrom, the number of people to be accommodated, the present facilities, and all the facts and circumstances, considering on the one hand the rights of the stockholders of the railroad, and on the other the rights of the public.

Same — enforcement of duties.

7. A railroad company is chartered for the purpose of transporting freight and passengers, and so long as it continues to exercise its rights under such charter, and does not elect to surrender up its franchise, the performance of the duty for which it was called into existence and given its being may be enforced, even though such performance may entail a pecuniary loss.

Same — station facilities — provision.

8. While it is the absolute duty of a railroad company to transport freight and passengers, it is not its prime duty to provide depots, waiting rooms, station agents, telephone and telegraph facilities.

Same — expense — consideration of.

9. When a railroad company is called upon to perform an absolute duty, the question of expense is not to be considered; but when the duty sought to be enforced is only an incident to the main duty, the question of expense is to be taken into consideration in connection with the public necessities.

Public service commission — establishment of railroad stations.

The Constitution does not confer upon the corporation commission the right to arbitrarily establish a station or to require a station agent, regardless of the expense entailed upon the company, or the benefit to be derived by the public.

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Carrier — station facilities — adequacy.

11. The facilities afforded at any station to the general public must, in a measure, be commensurate with the patronage and receipts from that portion of the public to whom the service is rendered.

Same — telegraph service — necessity.

12. It is not reasonable to require the installation of telegraph service for the purpose of bulletining trains, where the cost of such service is out of proportion to the revenue derived from that portion of the traveling public benefited thereby.

(April 3, 1913.)

REMOVAL by the state corporation commission for the opinion of the Supreme Court of a proceeding in which defendant had failed to comply with its order with respect to the maintenance of adequate facilities at a certain station along the line of its road. Order not enforced.

Statement by Roberts, Ch. J.:

On the 7th day of May, 1912, certain residents of Tres Piedras, a small town in Taos county, New Mexico, about one-half mile distant from a station on the Denver & Rio Grande Railroad, bearing the same name, petitioned the railroad commission to require said railroad company "to maintain adequate station facilities for the accommodation of passengers and for receiving and delivering freight and express at its station of Tres Piedras," and further asked that said railroad company be required to maintain an agent at said station through whom the patrons of said railroad "may transact business with such railway company."

Upon the filing of such petition of complaint, the commission had more or less correspondence with the officials of such railroad company in an endeavor to secure the facilities requested "by mediation," as required by § 2 of chap. 78, S. L. 1912; but failing to come to an agreement therefor, on July 30, 1912, a notice of hearing was served upon the railroad company, together with a copy of the order of the commission requiring such hearing, which order was as follows:

Informal complaint having been presented to this commission by and on behalf of parties residing at and in the vicinity of Tres Piedras, a station on the line of railway operated by the said the Denver & Rio Grande Railroad Company within the state of New Mexico, to the effect that said company had failed to maintain at said station adequate facilities for the accommodation of passengers and for receiving and delivering freight and express, and that said com-

pany was not maintaining an agent as said station, to the great detriment of the complainants; the commission having made a personal examination into the matter, and it appearing to this commission that conditions are such as to require a more thorough investigation; it is hereby ordered that a hearing on the matter set out in said complaint be held at the office of the state corporation commission at Santa Fé, New Mexico, commencing at the hour of 10 o'clock A. M., on the 30th day of July, 1912, at which time and place the said complainants will be heard in support of the allegations of their complaint, and the said railway company will be heard in rebuttal thereto. The parties in interest will be notified accordingly. Done at the office of the state corporation commission at Santa Fé, New Mexico, on the 15th day of July, 1912.

Hugh H. Williams, Chairman.

Attest: George W. Armijo, Clerk.

Upon the date fixed, the cause was heard upon the evidence of Edwin B. Seward, for the complainants, and W. D. Shea, for the railroad company. From the evidence adduced it appears that Tres Piedras was established as a station on the Denver & Rio Grande Railway in 1880, and had been continuously maintained until December, 1910, with waiting room, freight room, and the usual station accommodations, including an agent, who was also a telegraph operator, and who, in conjunction with some arrangement by the railroad with the Western Union Telegraph Company, received and transmitted commercial messages. In December, 1910, the railroad company withdrew the agent from said station, and thereafter maintained no facilities for passengers at said place, but did stop its trains there and take on and let off passengers. Freight was received and delivered at said station, but, having no agent, freight charges were required to be paid in advance upon all incoming freight. When freight reached Tres Piedras, it was unloaded by the train crew and placed inside the freight room, the key to which was kept by the wife of the section foreman, who resided in the station, and who, upon application, delivered the key to persons receiving freight, who would then unlock the door and select their freight. It appears that no serious loss to any person had occurred by reason of such arrangements, but that it was more or less inconvenient to prepay the charges upon freight ordered, and also to personally superintend the loading of freight when it was shipped out.

Tres Piedras is a small town having one 46 L.R.A. (N.S.)

general store run by Mr. Seward, the witness who testified, and a harness shop. It is also headquarters for the Forest Reserve, where, all told, forty people are employed; but many of these employees are not permanently located in the town. Outside the members of the Forest Reserve, there are perhaps twenty-five residents within the town, and within a radius of 10 miles there are probably 150 people, not all of whom, however, are served by this station, as Servilleta, a station 10 miles from Tres Piedras, is also within the radius. Mr. Seward says that, all told, there are forty families who would receive freight at this station, should they have goods shipped in.

For the twelve months ending December 31, 1911, the earnings on passengers and freight, both inbound and outbound, were:

Freight forwarded	\$1,075 81
Freight received	1,850 66
Passengers	581 23
Total	\$3,507 70

Of this amount, \$868.26 was earned during the month of July by the shipment of several carload lots of wool by wool growers. No evidence was introduced tending to show the earnings and operating expenses of the road in New Mexico.

Mr. Seward did not testify that he had ever been a passenger upon the road, but he did testify to inconveniences suffered by people who sought passage, in that there was no shelter at the station in inclement weather, and no means of ascertaining the time of the arrival and departure of trains, except by using the telephone in his store and calling up Servilleta, 10 miles away. No contention was made, or supported by the evidence, that the installation of a telephone or telegraph service was necessary for the proper operation of the road, in order to secure the safety of employees and passengers, or to facilitate the service. The principal complaint of Mr. Seward in that regard seemed to be that there was no commercial telegraph station maintained at that place.

Upon the evidence taken, the commission made the following statement of facts, viz.: "The evidence adduced at the above hearing on behalf of the complainants shows the following: That station agent and adequate station facilities had been maintained at Tres Piedras for a period of thirty years prior to December, 1910. That there are some three or four outlying communities in addition to the town of Tres Piedras, which draw their supplies from the town of Tres Piedras. That Tres Piedras is a distributing point to those outlying communities in

the United States mail matters. That the freight receipts by the Denver & Rio Grande Railroad Company at Tres Piedras for freight received and forwarded amounted to between \$3,000 and \$4,000 in the year 1911. That there are considerable wool shipments from the station of Tres Piedras in the wool season of July each year. That the station building of the Denver & Rio Grande Railroad Company is kept closed to passengers, and that persons desiring to take a train at Tres Piedras must wait on the platform in inclement weather for the arrival of trains. That there is no means of communication from the railroad station for purposes of obtaining information as to the movements of trains, or whether or not they are running on time. That the freight received at Tres Piedras is unloaded at owner's risk, and it frequently happens that others than the consignee get this freight, on account of no representative of the railroad company being present to check out said freight. The evidence further shows that Mr. E. B. Seward pays a major portion of the receipts on account of freight shipments at this station, he being a general merchant in the town of Tres Piedras. The claim of the Denver & Rio Grande Railroad Company by its Mr. E. N. Clark, in his letter of June 7, 1912, to the commission, and testimony of their witness W. D. Shea, that the business of the station did not justify its being kept open, that the station was not self-sustaining, that it would have to be operated at a monthly loss to the company, if an agent were maintained,—is not borne out by the facts as shown in this cause."

And upon the facts so found the commission made the following order: "This commission holds railroad interests are not the only interests to be served at this station, owing to the fact that this railroad is a public service corporation and the interests of the public are coextensive with those of the defendant company, and the public is entitled to a reasonable degree of service in return for the patronage afforded. In view of these various facts as shown by the record in this cause, it is hereby ordered by the commission that the Denver & Rio Grande Railroad Company open its station building at the town of Tres Piedras for the purpose of affording accommodations to the traveling public who may desire to take a train at Tres Piedras or alight therefrom, and provide suitable seats, fuel, and water for the comfort of said passengers. It is further ordered by the commission that the Denver & Rio Grande Railroad Company maintain a representative at this station, whose duty it shall be to receive freight and properly store same in freight station

to protect same from pillage and the elements, and to properly check out such freight to the rightful owners when called for. It is further ordered by the commission that some adequate means of communication be maintained at this station for the purpose of obtaining information as to the running of trains. Whether this be by telephone or telegraph is left to the discretion of the company. This order shall be effective on and after the 15th day of September, A. D. 1912. Done at the office of the state corporation commission in the city of Santa Fe, New Mexico, on this 22d day of August, A. D. 1912."

Defendant neglected to comply with the order, and the commission removed the cause to this court, in compliance with the provisions of § 7 of article 11 of the Constitution of New Mexico.

Mr. Frank W. Clancy, Attorney General, for complainants:

The commission is much more than a mere administrative body.

Winchester & S. R. Co. v. Com. 106 Va. 264, 55 S. E. 692; Louisville & N. R. Co. v. Kentucky, 183 U. S. 512, 515, 46 L. ed. 304, 305, 22 Sup. Ct. Rep. 95.

Our state Constitution in no way violates or conflicts with the 14th Amendment to the Constitution of the United States.

Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253.

Messrs. E. N. Clark, R. G. Lucas, and Reneham & Wright, for defendant:

The order of the commission is not self-executing.

People v. Rome, W. & O. R. Co. 103 N. Y. 95, 8 N. E. 369; People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; Western New York & P. R. Co. v. Penn. Ref. Co. 70 C. C. A. 23, 137 Fed. 353, affirmed in 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

This court passes on the merits of the case *de novo*, and forms its independent judgment with regard thereto.

Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. 4 Inters. Com. Rep. 323, 50 Fed. 295; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 332, 56 Fed. 925, affirmed in 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 942, affirmed in 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. Rep. 766.

The court can enforce the order only in its entirety, or decline to enforce it. It cannot modify this order or make a new one.

33 Cyc. 53; 23 Am. & Eng. Enc. Law, 2d ed. 656; Gulf, C. & S. F. R. Co. v. State, 23 Okla. 524, 101 Pac. 258; State ex rel. Ellis v. Atlantic Coast Line R. Co. 51 Fla. 578, 40 So. 875; Bacon v. Boston & M. R. Co. 83 Vt. 421, 76 Atl. 128; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 5 Inters. Com. Rep. 146, 64 Fed. 723; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 942, affirmed in 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. Rep. 766; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Farmers' Loan & T. Co. v. Northern P. R. Co. 83 Fed. 249; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 805; Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. 4 Inters. Com. Rep. 261, 47 Fed. 772; Central Trust Co. v. Richmond, N. I. & B. R. Co. 54 Fed. 723.

The findings of fact of the commission are not made evidence and are of no effect.

Atchison, T. & S. F. R. Co. v. State, 27 Okla. 820, 117 Pac. 330; State ex rel. Great Northern R. Co. v. Railroad Commission, 60 Wash. 218, 110 Pac. 1075; State ex rel. Ives v. Kansas C. R. Co. 47 Kan. 497, 28 Pac. 208; Western New York & P. R. Co. v. Penn. Ref. Co. 70 C. C. A. 23, 137 Fed. 343, affirmed in 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. Rep. 268.

The commission is an administrative board with only such limited power as has been conferred upon it.

State ex rel. Railroad Comrs. v. Louisville & N. R. Co. 57 Fla. 526, 49 So. 39; 23 Am. & Eng. Enc. Law, 394; People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401; Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028; Libby v. Canadian P. R. Co. 82 Vt. 316, 73 Atl. 593; Chester v. Connecticut Valley R. Co. 41 Conn. 348; Railroad Comrs. v. Columbia & G. R. Co. 26 S. C. 353, 2 S. E. 127; State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co. 60 Fla. 465, 54 So. 394; Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. Rep. 417; People ex rel. New York, N. H. & H. R. Co. v. Willcox, 200 N. Y. 423, 94 N. E. 212; 23 Am. & Eng. Enc. Law, 2d ed. 653.

Railroads are private property and within the protection of constitutional guaranties.

State v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263; Interstate Commerce 46 L.R.A. (N.S.)

Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028.

Lawful regulation in the interest of the public welfare, not arbitrary control, is the extent of the governmental authority.

Atchison, T. & S. F. R. Co. v. State, 27 Okla. 565, 112 Pac. 1010; State v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263; State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co. 60 Fla. 465, 54 So. 394; State v. Alabama & V. R. Co. 68 Miss. 653, 9 So. 469.

An order of the commission need not be confiscatory in its character and effect, in order to be unreasonable and unlawful.

Atchison, T. & S. F. R. Co. v. State, 23 Okla. 510, 101 Pac. 262; Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 750; State ex rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 146, 121 N. W. 919.

The provision of the Constitution prohibiting the further reception of evidence by this court is in violation of the 14th Amendment to the Constitution of the United States.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Southern P. Co. v. Railroad Comrs. 78 Fed. 236; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 457, 461, 33 L. ed. 970, 980, 983, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Cooley, Const. Lim. 7th ed. p. 426; Columbia Valley Trust Co. v. Smith, 56 Or. 6, 107 Pac. 465; Board of Excise v. Merchant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; State v. Beach, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; Little Rock & Ft. S. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Howard v. Moot, 64 N. Y. 262; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; Cairo & F. Co. v. Parks, 32 Ark. 131; Peteralie v. McLachlin, 80 Kan. 176, 101 Pac. 1014; Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Re Lambert, 134 Cal. 626, 55 L.R.A. 856, 86 Am. St. Rep. 296, 66 Pac. 851; Re Grout, 105 App. Div. 98, 93 N. Y. Supp. 711; McNamara v. McNamara, 86 Neb. 631, 27 L.R.A. (N.S.) 1062, 126 N. W. 94, 21 Ann. Cas. 451; Hubbard v. Hubbard, 77 Vt. 73, 67 L.R.A. 969, 107 Am. St. Rep. 749, 58 Atl. 969, 2 Ann. Cas. 315; Yick Wo v. Hopkins, 118 U. S. 356, 369, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Ames v. Union P. R. Co. 64 Fed. 165; Modern Loan Co. v.

Police Ct. 12 Cal. App. 582, 108 Pac. 56; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864; *Dewell v. Sny Island Levee Drainage Dist.* 232 Ill. 215, 83 N. E. 811; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040.

Defendant is entitled to a jury trial of the issue of fact in this case.

Kennon v. Gilmer, 131 U. S. 28, 33 L. ed. 113, 9 Sup. Ct. Rep. 696; *Thompson v. Utah*, 170 U. S. 346, 42 L. ed. 1065, 18 Sup. Ct. Rep. 620; *Callan v. Wilson*, 127 U. S. 550, 32 L. ed. 226, 8 Sup. Ct. Rep. 1301; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *People ex rel. Gorman v. Havird*, 2 Idaho, 531, 10 L.R.A. 831, 25 Pac. 294; *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66; *Ex parte Ortiz*, 100 Fed. 955; *Territory ex rel. Galbraith v. Chicago, R. I. & P. R. Co.* 2 Okla. 108, 39 Pac. 389; *Chamberlain v. Warburton*, 1 Utah, 267.

A railroad corporation is vested with a broad discretion in the matter of operating its road, and in locating, maintaining, and discontinuing its freight and passenger stations.

Chicago & N. W. R. Co. v. State, 74 Neb. 77, 103 N. W. 1087; *State ex rel. Skeen v. Ogden Rapid Transit Co.* 38 Utah, 242, 112 Pac. 120; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; *Page v. Louisville & N. R. Co.* 129 Ala. 232, 29 So. 676; *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; *State ex rel. Smart v. Kansas City, S. & G. R. Co.* 51 La. Ann. 200, 25 So. 126; *Nashville, C. & St. L. R. Co. v. State*, 137 Ala. 439, 34 So. 401; 2 *Elliott, Railroads*, 2d ed. § 662; *People ex rel. Linton v. Brooklyn Heights R. Co.* 172 N. Y. 90, 64 N. E. 788.

The commission should not consider merely private interest or that of a limited few.

Louisiana & A. R. Co. v. State, 91 Ark. 358, 121 S. W. 284; *Railroad Commission v. St. Louis Southwestern R. Co.* 98 Tex. 67, 80 S. W. 1141; *People v. Rome, W. & O. R. Co.* 103 N. Y. 95, 8 N. E. 369; *Colon v. Hicks*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Missouri, K. & T. R. Co. v. Colburn*, 90 Tex. 230, 38 S. W. 153.

The action of the commission in ordering the installation of telegraph facilities is unjust.

St. Louis & S. F. R. Co. v. Newell, 25 Okla. 502, 106 Pac. 818; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

A railroad is not called upon to furnish facilities at prohibitive cost.

46 L.R.A. (N.S.)

Chicago & A. R. Co. v. People, 152 Ill. 230, 26 L.R.A. 224, 38 N. E. 562; *Chicago, R. I. & P. R. Co. v. State*, 24 Okla. 370, 24 L.R.A. (N.S.) 393, 103 Pac. 617; *Atchison, T. & S. F. R. Co. v. State*, 27 Okla. 565, 112 Pac. 1010; *State ex rel. Northern P. R. Co. v. Railroad Commission*, 62 Wash. 193, 113 Pac. 252; *St. Louis & S. F. R. Co. v. Newell*, 25 Okla. 502, 106 Pac. 818; *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883; *Darlington Local Board v. London & N. W. R. Co.* [1894] 2 Q. B. 694, 63 L. J. Q. B. N. S. 826, 9 Reports, 712, 71 L. T. N. S. 461, 43 Week. Rep. 29, 8 Eng. Ry. & C. Cas. 216; *Western U. Teleg. Co. v. Mississippi R. Commission*, 74 Miss. 80, 21 So. 15; *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

Roberts, Ch. J., delivered the opinion of the court:

Before reviewing the order of the state corporation commission, for the purpose of determining the reasonableness and lawfulness of the same, it will be necessary for us to consider and dispose of numerous constitutional questions raised by defendant, and questions of practice and procedure interposed by both parties. We believe that many of these questions will best be solved by a general *résumé* of the provisions of the Constitution under which they arise, and a statement of our views in regard thereto, supported by such authorities as we have been able to find, bearing upon the questions involved.

The corporation commission of New Mexico was created by § 1 of article 11 of the Constitution of the state, and by § 7 of said article it is provided: "The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating, and controlling all charges and rates of railway, express, telegraph, telephone, sleeping car, and other transportation and transmission companies and common carriers within the state; to require railway companies to provide and maintain adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express; and to provide and maintain necessary crossings, culverts, and sidings upon and alongside of their roadbeds, whenever, in the judgment of the commission, the public interest demand, and as may be reasonable and just. The commission shall also have power and be charged with the duty to make and enforce reasonable and just rules requiring the supplying of cars and equipment for

the use of shippers and passengers, and to require all intrastate railways, transportation companies, or common carriers to provide such reasonable safety appliances in connection with all equipment as may be necessary and proper for the safety of its employees and the public, and as are now or may be required by the Federal laws, rules, and regulations governing interstate commerce. The commission shall have power to change or alter such rates, to change, alter, or amend its orders, rules, regulations, or determinations, and to enforce the same in manner prescribed herein; provided, that, in the matter of fixing rates of telephone and telegraph companies, due consideration shall be given to the earnings, investment, and expenditure as a whole within the state. The commission shall have power to subpoena witnesses and enforce their attendance before the commission, through any district court or the supreme court of the state, and through such court to punish for contempt; and it shall have power, upon a hearing, to determine and decide any question given to it herein, and in case of failure or refusal of any person, company, or corporation to comply with any order within the time limit therein, unless an order of removal shall have been taken from such order by the company or corporation to the supreme court of this state, it shall immediately become the duty of the commission to remove such order, with the evidence adduced upon the hearing, with the documents in the case, to the supreme court of this state. Any company, corporation, or common carrier which does not comply with the order of the commission within the time limited therefor, may file with the commission a petition to remove such cause to the supreme court, and in the event of such removal by the company, corporation, or common carrier, or other party to such hearing, the supreme court may upon application, in its discretion or of its own motion, require or authorize additional evidence to be taken in such cause; but in the event of removal by the commission, upon failure of the company, corporation, or common carrier, no additional evidence shall be allowed. The supreme court, for the consideration of such causes arising hereunder, shall be in session at all times, and shall give precedence to such causes. Any party to such hearing before the commission shall have the same right to remove the order entered therein to the supreme court of the state, as given under the provisions hereof to the company or corporation against which such order is directed. In addition to the other powers vested in the supreme court by this Constitution and 46 L.R.A. (N.S.)

the laws of the state, the said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders, and decrees made in such cases, by fine, forfeiture, mandamus, injunction, and contempt, or other appropriate proceedings."

Section 8 is as follows: "The commission shall determine no question, nor issue any order in relation to the matters specified in the preceding section, until after a public hearing held upon ten days' notice to the parties concerned, except in case of default after such notice."

Other sections of the article will not be incorporated in this opinion, as they have no bearing upon the issues involved, but it is perhaps pertinent to add that § 12 makes the provision of the article applicable to all corporations doing business in New Mexico and subject to state supervision.

The provisions of our Constitution are peculiar to New Mexico. So far as we have been able to ascertain, no other state, either by statute or constitutional provision, has the same method of procedure. All similar commissions, whether the creatures of statute or constitutional provisions, are designed to control and regulate public service corporations; to secure the safety of employees; the protection of the traveling public; and to compel such corporations to discharge their duty to the public. The matter of such regulation is primarily a legislative function, but experience has demonstrated the inability of the various legislative assemblies to cope with the problem, charged as they are with so many other diversified duties, and their sessions usually of limited duration.

While the right of the legislature of a state to regulate rates and compel the performance of other duties on the part of public service corporations has always been recognized by the courts, the rule that such rates, so established, must be reasonable, both to the carrier or public service corporation and to the public, is equally well settled. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 402, 702.

While the fixing of the rates, or the determination of the facilities to be afforded, in the first instance, is a legislative question, the determination of the reasonableness and lawfulness of the rate or other requirement is a judicial function. This being true, it was early recognized that legislative assemblies could not give to such questions the required time to investigate and determine in advance the reasonableness and justness of the proposed rate or other requirement, necessitating, as such a question would, long and protracted hearings

and intricate knowledge of such matters. For this reason, we apprehend, the plan was devised, now in vogue in practically all the states, and adopted by the national government, of creating commissions supposed to be made up of especially trained men, and the delegation to such bodies of administrative and legislative powers. Such bodies are given great latitude and power in investigating all questions, and upon them is conferred the duty of fixing rates and requiring proper facilities for the public accommodation.

The final action of the commission, or rate-making body, was, in many instances, attended by long and protracted litigation, through various courts, before the reasonableness and lawfulness of the rate was finally established. The public service companies, not infrequently, would render no assistance whatever to the rate-making body when the matter was under investigation, so that body could arrive at a just rate, and, after the rate was established, would go into the courts and there disclose facts that would clearly demonstrate the unreasonableness of the rate, and compel its cancellation and revocation. By this method the almost impossible task of securing justice for the public was clearly discernible. To overcome this difficulty, plans were devised by which the public service corporation was required to present all its evidence before the commission in advance of the fixing of the rate or other requirement, so that the commission would have the benefit of such knowledge as it might impart, and thereby be enabled to arrive at a just conclusion, if possible. From the action of the commission in fixing the rate or other determination, an appeal or review in the courts was provided, for the determination of the reasonableness and lawfulness of the order made, but upon the evidence taken in advance before the commission. If the court found the action of the commission unlawful or unreasonable, it was set aside. That such procedure does not violate the Constitution of the United States, and is authorized, was held by the Supreme Court of the United States in the recent case of *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535, where the court had under consideration the Washington statute (Session Laws 1905, chap. 81, as amended March 16, 1907, chap. 226). The method provided by the statute of Washington was for a hearing before the commission, upon notice in advance to the company, as to the proposed order which the commission was asked or was proposing to make, at which hearing the company had the right to appear by counsel, cross-examine the witnesses

produced by the complainants or commission, and to introduce such evidence as it desired. After such investigation the commission made such order as it saw proper, and, if the company affected thereby deemed it contrary to law, it applied to the superior court of the proper county for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. In the superior court, the cause was heard without the intervention of a jury, on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court entered an order either affirming or setting aside the order of the commission under review, and remanding the cause back to the commission for further action. If such order was affirmed, the right of appeal to the supreme court was given.

In the case of *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, supra, it was contended that the Washington statute failed to furnish an adequate hearing or opportunity for judicial review, especially in prohibiting the submission to the court of competent evidence as to the unreasonableness of the order; and, further, that there was no evidence of a public necessity, and that the order was void as taking property without due process of law. Speaking of the objection that the statute failed to furnish an adequate hearing or opportunity for judicial review, the court says:

"So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the 14th Amendment. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336.

"2. This was recognized by the supreme court of the state, which held that this constitutional right was not denied, but that the statute furnished, first, an adequate opportunity to be heard before the commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the superior court. Both of these rulings are assigned as error by the Oregon Company. It complains that the statute did not afford it the means of making a defense before the commission, and yet required it to attack the reasonableness of the order on such evidence as it might have been able to produce before

the administrative body. If this were true, the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established. But, as construed by the state court, all these rights were amply secured by the statute which declared that the commission, 'after a full hearing,' might require track connection. On such investigation, the company could have objected to the sufficiency of the complaint and obtained an order requiring it to be made more specific as to the exact location of the proposed tracks. The defendant was given the benefit of compulsory process to secure and present evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents, and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the commission and the privilege of offering evidence on every matter material to the investigation.

"3, The defendant insists, however, that, no matter how complete the right to be heard before the commission, the statute, having denied all other opportunity for testing the validity of the order in the state courts, furnished an utterly inadequate judicial review, because, as the carrier could not anticipate what decision would be made, it was unjust to require it to produce evidence to show in advance the unreasonableness of an order, the terms of which were not known. From this it argues that the statute was unconstitutional in so far as it prevented the court from receiving competent and noncumulative testimony tending to prove that there was no public necessity for making the track connection, and that the order was void.

"This position would be true if the defendant had not been put on notice as to what order was asked for, and then given ample opportunity to show that it would be unjust or unreasonable to grant it. In this case, and under the statute, it was given such notice. The complaint alleged that some of the towns were important shipping points, and that at all of them there was a public necessity that the roads should be connected. The defendant denied each of these allegations. The hearing, both on the law and the facts, was necessarily limited to that issue. There could have been no valid order which was broader than that claim. The defendant was charged

with notice that if the allegations of the complaint as to necessity were established, the order could then be lawfully granted, unless there was also proof that the cost, in comparison with the receipts, or other fact, made it unjust to require the connections to be made. The carrier was therefore given the right both to meet the charge of public necessity, and also to establish any fact which would make it unjust to pass the order for which the complainant prayed. The act further provided that, after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the superior court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the commission, it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence, since it acted judicially, 'under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties.' Kentucky Railroad Tax Cases, 115 U. S. 321, 334, 29 L. ed. 414, 417, 6 Sup. Ct. Rep. 57.

"4. Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order, and having adopted the statutory method of review, this company cannot complain. It has the right to offer all competent testimony before the commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master. Nor would there be any impairment of the right to a judicial review, because additional testimony could not be submitted to the chancellor. . . .

"5. If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing."

The Constitutional Convention of New Mexico, when it adopted article 11 of the Constitution, and provided for the somewhat novel procedure after the hearing and determination by the commission, for the judicial review of the action of the commission, were attempting to expedite the judicial inquiry into the reasonableness and lawfulness of the order made by the commission; provide a method of procedure that would be inexpensive and simple, and that would preserve the rights of the people

on the one hand, and of the owners of the public service corporations on the other.

To this end, notice to the company to be affected by a proposed order was to be given, and a hearing required thereon, at which the company and the complainant may produce all their evidence bearing upon the issues and the justness of the proposed order, cross-examine witnesses, etc. It was the evident intent of the framers of the instrument that all the known evidence should be produced before the commission in the first instance. After the commission has made its final order, the public service company has twenty days within which to voluntarily comply with the order. If it does so comply, and the order is satisfactory to the complaining party, no further proceedings are required. Should it fail to comply, unless an order of removal is taken from such determination by the commission, by the company affected, the commission must remove such cause, together with all the evidence adduced upon the hearing, with the documents, etc., to the supreme court. It is also provided that, when the case is removed to this court by the commission, "no additional evidence shall be allowed." If the case has been removed here by the defendant, the "supreme court may upon application, in its discretion or of its own motion, require or authorize additional evidence to be taken in such cause." We must confess that this provision of the Constitution has required a great deal of consideration to enable us to arrive at what we believe to have been the purpose and intent of the framers of the instrument in this regard. It has been suggested that the proper solution is that, in the event of a failure on the part of the company affected to remove the cause, it is our duty to affirm the order of the commission and carry into effect its determination; that the court, in such event, is not required to look into the question of the reasonableness or lawfulness of the order. We do not, however, believe that such was the intent, but rather that the court should, in either event, from the evidence adduced, determine such questions and mete out justice to the company and to the public. That being true, the only purpose or design, in giving to the company the right to remove the cause, was that such party could make a showing to the court that new evidence had been discovered or new facts developed which would have a material bearing upon the matter, and thus give to the court the power to remand the cause to the commission for the taking of such further testimony; or, to give to the court, where the cause was removed by the company, and it found the evidence not altogether satisfactory in some respect, or

upon some point, power to remand the cause and require the taking of additional testimony. In brief, then, the difference between the two methods, as we understand it, is that, where the cause is removed by the commission, this court must determine the lawfulness and reasonableness of the order upon the evidence adduced, even though it may appear to the court that other facts might be produced which might show the order to be unreasonable. Where the cause is removed by the company, it gives to the court more latitude, and enables it to require additional testimony before arriving at an ultimate determination of the question. We believe it was the intention to, in all cases, accord to both parties a judicial hearing upon the merits.

Upon the hearing in this court it was argued by the attorney general that this court had the right to form its own independent judgment in the matter; that it was not confined to a consideration of the reasonableness and lawfulness of the order made by the commission, with the power to either enforce such order by its judgment, or refuse to enforce it. That the court could, for instance, in a rate case, where the commission had fixed the rate at 2 cents a mile for carrying passengers, either raise or lower the rate by its judgment. That such power was conferred by the language, "The said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders, and decrees made in such cases, by fine, forfeiture, mandamus," etc. Now, if the contention is sound, then the provision just quoted invests this court with legislative power to fix rates. There is no doubt but that the people of the state, by constitutional provision, could confer such power upon the judges of the supreme court. If they saw fit, they might combine all the power of government in one department; but such action would not be in accord with the settled policy of the states of the Union, where it has been the studied purpose to, so far as possible, keep separate the three great departments, and we should not so construe the provision as conferring legislative power upon this body, unless compelled to do so by clear and unmistakable language.

Let us consider the results that would follow such a construction. Section 156 of article 12 of the Constitution of Virginia is in many respects similar to the provisions of our Constitution, for the regulation of public service corporations, but specifically provides, however, for an appeal to the supreme court, and that "whenever the court, upon appeal, shall reverse an order of the commission affecting the rates,

charges, or the classification of traffic of any transportation or transmission company, it shall at the same time substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from." This language, it will be observed, is free from doubt, and specifically confers the claimed powers upon the court. This provision of the Virginia Constitution was before the Supreme Court of the United States in the case of *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 87, on appeal from the circuit court of the United States, where a bill in equity was filed to enjoin the enforcement of a rate established by the Virginia commission. The court, speaking through Mr. Justice Holmes, held that the power exercised by the court in fixing a rate, under this Constitution, was legislative, and not judicial. He says, "The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind," and "Proceedings legislative in nature are not proceedings in a court within the meaning of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, no matter what may be the general or dominant character of the body in which they may take place. . . . That question depends, not upon the character of the body, but upon the character of the proceedings." And, "the decision upon them cannot be *res judicata* when a suit is brought. Now, if this be the correct rule, and it appears to be firmly settled in the United States, and certainly appeals to reason, were we to adopt the construction suggested, it would make of this court, in these cases, a mere legislative body. Its decisions would not be *res judicata*, and parties affected by the orders would be enabled to go into the courts and secure a judicial determination of the reasonableness and lawfulness of the ultimate rate fixed, or facility required to be furnished, by this court. Instead of a speedy determination, untimely delay and expense would be incurred. We do not believe that the case last cited had been called to the attention of the able attorney general prior to the argument, or the consequences considered in the light of the rule there announced.

What does the language used, "decide such cases on their merits," mean? The word "decide" means to form a definite opinion; to determine; to deliberate. The direction to decide such cases "on their merits" simply means that the court shall decide them on a consideration of their substance and the legal rights involved, in opposition to a decision based upon mere defects of procedure or the technicalities
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thereof. It means the court shall do justice irrespective of informal, technical, or dilatory objections or contentions. See cases cited in 5 Words & Phrases, pp. 4493 et seq., and also *Mulhern v. Union P. R. Co.* 2 Wyo. 465, and *Seely v. State*, 11 Ohio, 501.

But what is the court to decide on the merits? It is the question of the reasonableness and lawfulness of the order made by the commission, and whether the defendant shall be compelled to comply with such order. It is true the Constitution does not prescribe the question which the court is to decide, but we apprehend no other question could be involved. If the court finds the order reasonable and lawful, it enters a judgment to that effect and proceeds to enforce the same. If it finds it unlawful and unreasonable, it refuses to enforce it, and in such event the state corporation commission may proceed to form a new order, if necessary or proper, under proper rules to be prescribed by the commission.

The attorney for the railway company applied to the court for permission to introduce before this court additional evidence, for the claimed purpose of showing that the order entered by the commission was unconstitutional, unreasonable, unjust, and confiscatory, and in violation of § 1 of the 14th Amendment to the Constitution of the United States, and, because, under the provisions of our Constitution, said company was precluded from introducing said evidence, the argument was made that § 7 of article 11 was unconstitutional and in violation of said § 1 of article 14. This contention, however, is answered by the Supreme Court of the United States in the case of *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535, and need not be further considered. We might add, however, that in no case does the Constitution contemplate the taking of additional evidence in the supreme court; but, as has been said, in a proper case the cause will be referred back to the commission, for such purpose.

Having considered the provisions of our Constitution involved in this proceeding, we will notice such objections contained in the motion to dismiss, filed by the railway company, as have not already been disposed of by what has been heretofore said.

The company insists that it is entitled to a jury trial of the issues involved, because, by § 12 of article 11 of the Constitution of this state, it is provided that the right of trial by jury, as it heretofore existed, shall be secured to all and remain inviolate, and, at the time of the adoption of the Con-

stitution, the provision of the Federal Constitution that, "in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved," was in force in the territory. That the provision was in force cannot be disputed. But it is likewise true that the state could abolish trial by jury, if it so elected. In considering the conflicting provisions of a Constitution or a statute, the great object to be kept in view is the legislative intent. Viewing the instrument as a whole, we do not believe there is any conflict. It was evidently the purpose to retain the right to a trial by jury, as it theretofore existed in the territory of New Mexico, except in special proceedings, for which express provision was made in the same instrument. The later express provision carved an exception out of the previous general provision, and, of course, would be held to control. Were the two provisions irreconcilably repugnant, the last in order of time and local position would be preferred. *Quick v. White Twp.* 7 Ind. 570.

Objection is made because of the failure of the commission to serve upon the railway company copies of the petitions or complaints upon which the action was based; but the company is not in position to take advantage of such failure, were it vital, in that no objection was interposed before the commission because of such failure. It will not be conducive to orderly procedure to permit a company against whom proceedings are instituted, to sit quietly by in the commission and permit the hearing to be closed, and raise objections in this court which, if interposed before the commission, could be cured, and delay and expense avoided. Both parties to a proceeding are presumed to be familiar with the files in the case, and to know the record. The company, by its general appearance without objection before the commission, waived all irregularity preceding such hearing.

It is next claimed that the record discloses the commission did not, prior to the making of the order for the hearing, endeavor by mediation to effect a settlement of the grievances complained of, as required by § 2, chap. 78, S. L. 1912. No objection to such failure was interposed before the commission, and therefore it is not availing here. We might add, however, that the record does show that numerous letters passed between the commission and the company in an effort to bring about such settlement.

It is insisted that the cause should be dismissed, because it appears upon the face of the record herein that no certified copy of the order of the state corporation com-

mission made herein was served on the railway company, as required by § 4, chap. 78, S. L. 1912. The record contains the certificate of Edwin F. Coard, assistant clerk of the commission, wherein he certifies "that I served a copy of the within order upon the within named the Denver & Rio Grande Railroad Company by delivering a true copy thereof to," followed by a statement of the person served, etc., which is not questioned. It is true, the proof of service does not specifically show that a certified copy was delivered, but it does recite that a true copy of the same was served. This certainly was sufficient to convey notice to the company of the order and its terms and provisions, and was all the company could ask. This court is enjoined by the Constitution in these matters to disregard technicalities, and this objection is, we think, a trivial technicality, and without merit.

Passing now to the consideration of the question raised by the railway company upon the merits of the case, we find objections interposed to certain specific findings of fact made by the commission; the assertion being made that such findings are not supported by the evidence. While it is proper for the commission to make findings of fact, still such findings can have no force or effect in this court. Our Constitution does not require this court to consider or give any effect to such findings, but enjoins that this court shall "decide such cases on their merits." It does not even, as is usually the case, make the order of the commission *prima facie* just and reasonable, but, on the other hand, requires this court to pass upon the merits of the case without indulging in any presumptions. This being true, it is our duty to take the order made by the commission and test its reasonableness and lawfulness by the evidence adduced upon the hearing. This court forms its own independent judgment as to each requirement of the order, upon the evidence; therefore the findings made by the commission may not be justified by the evidence, yet, if the evidence sustains the reasonableness and lawfulness of the order made, it would be our duty to uphold and enforce it. It will not therefore be necessary for us to consider the objections interposed to the findings of fact; but we will pass to a consideration of the order made, and ascertain whether it is just, reasonable, and correct, and supported by the evidence.

The order made was divided into three separate requirements or provisions, and we will discuss them in their order. The first is as follows: "It is hereby ordered by the commission that the Denver & Rio Grande Railroad Company open its station building

at the town of Tres Piedras for the purpose of affording accommodations to the traveling public who may desire to take a train at Tres Piedras or alight therefrom, and provide suitable seats, fuel, and water for the comfort of said passengers."

The evidence discloses that the company has maintained a comfortable station building at Tres Piedras for the past thirty years; that it is ample to accommodate the traveling public in the matter of waiting rooms, etc.; but that the company keeps the building closed, and that during inclement weather no shelter is provided; that the section foreman and his wife reside in a portion of the station, and it appears that the railroad company with but little expense could fulfil these requirements. It is true there is but little passenger traffic originating there; but, still, a requirement that the company should maintain a waiting room and properly heat and light the same is but a humane provision, and we think fully warranted by the facts. Complaint, however, is made as to the form of the order; the company claiming that it is so vague and indefinite that it does not inform the company as to just what is required. The contention is urged that, by the use of the word "accommodations" in the clause, "open its station at the town of Tres Piedras for the purpose of affording accommodations to the traveling public," it might mean that the company was to install an agent to sell tickets, check baggage, and run a bureau of information. As we read the order, however, we do not so understand the language used, nor do we think that it is obscure or uncertain. It simply directs the company to open the building "for the accommodation of the traveling public;" to open it, so that the public using the road may have shelter. It does not direct the furnishing of accommodations, but the opening of the building, so that the accommodations will exist, *viz.*, a place to await the train, sheltered from the cold or inclement weather.

More trouble exists in the remaining part of the order, "and provide suitable seats, fuel, and water for the comfort of the passengers." The order made by the commission, if found to be reasonable and lawful, is to be enforced by this court by "fine, forfeiture, mandamus, injunction, and contempt, or other appropriate proceedings." Now, suppose we found this portion of the order to be in compliance with the law, and proceeded to enforce it. The company, claiming a compliance with the order, should show that it had provided two seats, and had provided a ton of coal or a load of wood, but no stove; could this court punish by fine, forfeiture, or contempt for a failure

to comply with the order? Who is to determine what number of seats are sufficient or the kind of seats? Who is to say whether the seats are suitable? While the order directs the furnishing of fuel, it does not require the waiting room to be heated. The court can only enforce an order which is reasonably definite and certain. The company may exercise its best judgment, and yet be met with a new complaint and be subjected to the burden of another investigation with reference to the same situation. The public may secure an order for certain accommodations, which will be absolutely fruitless, because of their inability to secure its enforcement. This precedent, if established, would ultimately prove unduly burdensome upon the court, the commission, the railroads, and the people. In the interest of justice there should be an end to litigation. Mandamus does not lie to compel the performance of a duty calling for the exercise of judgment and discretion on the part of the person at whose hands the performance is required. Spelling, Inj. & Extra. Rem. § 1384.

As said by the court in the case of *Ross v. Butler*, 57 Hun, 110, 10 N. Y. Supp. 444: "The appellant has not been directed to do any specific thing, and, if a commitment were issued upon such an order, it would be impossible for the sheriff to determine when the appellant had conformed to its requirements. It is absolutely clear that a party cannot be adjudged to be in contempt without definitely stating what he shall do in order to purge himself of the contempt." In order to be valid, binding, and enforceable, the order must be reasonably definite and certain in its terms and requirements. *Burlington & C. R. Co. v. People*, 20 Colo. App. 181, 77 Pac. 1026. See also 31 Cyc. 51, where it is said: "The orders of the railroad commission must be definite and specific as to what is required to be done by the railroad company." *State ex rel. La Follette v. Chicago, M. & St. P. R. Co.* 16 S. D. 517, 94 N. W. 406.

We think the order in the present case should have specified the number and kinds of seats, and, instead of requiring the furnishing of fuel, should have required the station to be comfortably heated during certain hours previous to the arrival of trains.

A more serious question, going to the merits of the order, is presented by the second requirement, *viz.*: "It is further ordered by the commission that the Denver & Rio Grande Railroad Company maintain a representative at this station, whose duty it shall be to receive freight and properly store the same in freight station to protect same from pillage and the elements, and to

properly check out such freight to the rightful owners when called for."

The evidence in the record—and, of course, we must determine the reasonableness and lawfulness of the order solely upon such evidence—shows that when this station was established, and for many years, it continued to be the shipping point for Taos, the county seat of Taos county, and the community surrounding it. While this condition existed, the station was very remunerative, and an agent and the usual station facilities were maintained. A few years before the railroad decided to discontinue the agent and telegraph station, a new wagon road was built from Taos to Servilleta, which was much shorter and easier of travel. The railroad company then established a station at the latter point, and by far the major portion of the traffic that had hitherto found an outlet through Tres Piedras went by Servilleta. Business at Tres Piedras fell off to such a point that the company decided that it was not warranted in continuing to keep an agent at that place, and accordingly removed the agent, and since December, 1910, said station has been operated as a "prepay" station. The railroad has continued to stop its trains at that place for both freight and passengers. The business of the station for the year 1911, as shown by the evidence, amounted to: Passenger receipts, \$581.23; freight forwarded, \$1,075.81; freight received, \$1,850.66,—or a total of \$3,507.70. Now it is very evident that the total should not be credited to this station, because to do so would be to deprive the stations from which the incoming freight originated, and the outgoing freight was received, of their proper credit, and their proper share of the necessary expense in handling the same. It is not clear whether the passenger receipts were all derived from outgoing passengers; therefore we will not consider them in the division of business, but will presume that they were properly all credited to this station. Should we divide equally the incoming and outgoing freight, between the station and the stations of its origin or destination, we find that this station should only be credited with the sum of \$2,044.46, which included the passenger receipts, for the purpose of arriving at the question—if it be material—as to whether the earnings of the station justify the requirement for the maintenance of an agent. The undisputed evidence shows that it will cost the railroad company \$75 per month to maintain an agent at this place, who is not also a telegraph operator, and, as the commission did not require the agent to be an operator, we will assume that that sum would be sufficient.

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This would require the yearly outlay of \$900, to which we add the sum of \$60, shown to be the added incidental expense in the way of fuel, etc. Deducting this sum from the total properly creditable to the station, it leaves a balance of but \$1,084.46 for this station to contribute toward the maintenance and operation of the road, payment of interest, and reasonable dividends. Of course, it goes without saying that, under the facts shown to exist in this case, the proportion is not reasonable.

The state corporation commission is authorized "to require railway companies to maintain adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express," and such as may be reasonable and just. Now, what are adequate facilities? We apprehend that it would be a very difficult matter to lay down a rule or general definition that would be in any wise satisfactory. "Adequate facilities" for the accommodation of passengers and freight in a city of 10,000 inhabitants, where a large volume of business was done, would be one thing, while in a small country station, with little business, altogether another. It would not do to say that the same facilities should be provided at each station. How then are we to determine what are adequate? Must we not consider the volume of business, the revenue derived by the railroad therefrom, the number of people to be accommodated, the present facilities, and all the facts and circumstances, considering on the one hand the rights of the stockholders of the railroad, and on the other the rights of the public? It would not be fair and just to arbitrarily require a railroad company to maintain a station and facilities which the business did not justify, or the requirements of the people demand. The supreme court of Oklahoma, in the case of *St. Louis & S. F. R. Co. v. Reynolds*, 26 Okla. 804, 138 Am. St. Rep. 1003, 110 Pac. 668, in considering what was meant by the term "adequate facilities," says: "The term 'adequate facilities' is not capable of exact definition, being a relative term, and calls for such facilities as may be fairly demanded; regard being had to the size of such station or place, the extent of the demand of transportation, its relative location to other places, the cost of furnishing additional accommodations asked for, and all other facts which would have a bearing upon the question of convenience and cost." See also *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121. Of course, it will not be disputed that where, for some exceptional reasons, the conditions are such as to require the

maintenance of an agent for the proper operation of the road, or the safety of the traveling public, or the accommodation of the patrons of the road residing at or near a station, the commission has the power to make an order so requiring, regardless of the fact that the maintenance of such service may entail a pecuniary loss upon the railroad.

But in the case now under consideration there is no claim that an agent is necessary for the proper operation of the trains run by the railroad company, or the safety of the traveling public; indeed, by the terms of the order the agent is not required to discharge any duty toward passengers or the train service. He is required only to "receive freight and properly store the same in freight station to protect same from pillage and the elements, and to properly check out such freight to the rightful owners when called for." Now, do the facts, as disclosed by the evidence, show that it is necessary to entail an expense upon the company of practically one half of the freight and passenger receipts properly credited to this station, for such purpose? Under the present arrangements the train crew unload the incoming freight and store it in the freight room, where it is protected from pillage and the elements, the door being locked and the key left with the wife of the section foreman, who lives in the building. There is no evidence showing that any freight has ever been damaged or injured by exposure, or lost by pillage. Indeed, during all the time the present arrangements have been in force, but two incidents have been recited when any inconvenience has resulted. Upon one occasion some person, by mistake, got a box of salt pork belonging to Mr. Seward, and upon another occasion a box of cheese; but Mr. Seward suffered no loss, as the party who received the goods either returned it or paid for it.

No person who was ever a passenger upon the road, so far as the evidence discloses, has made any complaint as to the character of the accommodations. No freight shipper has complained, with the exception of Mr. Seward, who was the only witness who testified for the complainants. It is true the original grievance or petition was signed by a great many people, but when the time for a hearing came, and they had the opportunity in an effective manner to give voice to their supposed grievances, not one of them appeared, except the merchant in Tres Piedras. Now the grievance of one man is not that of the public. The inconvenience of one man is not the inconvenience of the public.

Mr. Seward's principal grievance was

that, since the agent was discontinued, the station was what is known as a "prepay station;" that is, freight was required to be prepaid upon all goods ordered by him. Now, are the inconveniences of a few shippers, receiving freight upon which the railroad realizes \$1,850 a year, sufficient to warrant the railroad company in expending \$960? We do not believe that, under the facts disclosed by the record, the requirement is reasonable. As was well said by the supreme court of Louisiana in the case of *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission*, 109 La. at page 262, 33 So. 219: "In the consideration of matters of comfort and convenience, the number of persons who may be concerned or interested in some particular matter, at some particular point, enter as important factors in determining what is proper to be done." It might be that the railroad company could make some arrangement whereby it could maintain a representative at this place, who would do all that the order required done, at a much less cost than \$960 a year; but the commission has failed to develop any evidence to show such fact, and we cannot go outside of the record.

The attorney general contends, however, that, upon the facts disclosed by the record in this case, the court, in determining the reasonableness or unreasonableness of the order made requiring the maintenance of an agent, must necessarily presume that the order is reasonable and just, because the railroad company has failed to introduce evidence showing the receipts from the operation of its lines in New Mexico, and the expense, and the just proportion of the fixed charges, etc., upon the road; that, having failed to make such showing, the court must presume that its net profits upon its lines in New Mexico are sufficient to justify it in incurring the increased expense at the station in question. He evidently reasons upon the theory upheld by the Supreme Court of the United States in the case of *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, wherein the court says: "As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." In that case the court was considering an order made by the corporation commission of North Carolina, which was sustained by the supreme court of the state, requir-

ing the railroad company to install an additional passenger train, in order that the passengers on its lines could make connection with another road. The Supreme Court of the United States, in the case under consideration, differentiates between an order fixing rates and an order requiring the furnishing of a facility necessarily required in order that the road may carry out its absolute duty to the public. The court says: "The distinction between an order relating to such a subject and an order fixing rates, coming within either of the hypotheses which we have stated, is apparent. This is so, because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows therefore that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable, under the doctrine of *Smyth v. Ames*, or under the concessions made in the two propositions we have stated." The court sustained the order which required the railway company to run an additional passenger train, even though to do so resulted in a daily loss to the company of \$15. It is true the facts in the case disclosed that the company was making a large profit by its operation within the state of North Carolina, and it was contended that the same rule should be applied as that applied in rate cases. The court used language that might seem to imply that if that rule were applied it would be proper to take into consideration the net income; but, as we read the case, the court did not base its decision upon the fact that such net income was shown, but rather upon the theory that it was the absolute duty of the road to provide sufficient passenger and freight trains for the accommodation of the public, and that the duty could be enforced even though as a result a pecuniary loss was entailed. This is so, we think, because it is the primal and absolute duty of the railroad to provide such facilities. Such is the very purpose of its organization. It is chartered for the purpose of transporting freight and passengers, and so long as it continues to exercise its rights under such charter, and does not elect to surrender up its franchise, the performance of the duty for which it was called into existence and given its being may be enforced, even though such performance may entail a pecuniary loss. So long as it continues to exercise 46 L.R.A. (N.S.)

its franchise rights, it cannot escape the absolute duties thereby imposed.

Its absolute duty is to transport freight and passengers. It is not its prime duty to provide depots, waiting rooms, station agents, telephone and telegraph facilities. These duties are only incidental to the main purpose of its organization. It might discharge its absolute duties without any of these facilities, by merely stopping its trains at designated places and loading and unloading freight and passengers. When it is called upon to perform an absolute duty, of course, the question of expense cannot be considered; but when the duty is only an incident to the main duty, then the question of expense becomes of more importance, and, in determining the question of reasonableness, the revenue derived by the company from the public for whose accommodation the facility is to be furnished becomes of importance, and must be considered in connection with the public necessity.

This distinction we think was made more manifest in the case of *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330, where the court, in sustaining an order of the Kansas corporation commission requiring the railroad company to run a separate passenger train, say: "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road, is, then, the question to be considered. It may not be doubted that the road, by virtue of the charter under which the branch was built, was obliged to carry passengers and freight, and therefore, as long as it enjoyed its charter rights, was under the inherent obligation to afford a service for the carrying of passengers."

The same distinction is recognized by the same court in the case of *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224

U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535, where the court say: "If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order, the court must consider all the facts,—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts, the question of public necessity and the reasonableness of the order must be determined."

The Constitution does not confer upon the corporation commission the right to arbitrarily establish a station or to require a station agent, regardless of the expense entailed upon the company, or the benefit to be derived by the public. It is only authorized to make such an order in this regard, as "the public interests demand, and as may be reasonable and just." It is not to consider alone the interests of the public affected by the order, but must determine whether or not, taking into consideration both the interests of the public and the expense entailed upon the railroad company, the order is just and reasonable. Of course, were the question involved in this case of the safety or expedition of the operation of trains, or the performance of an absolute duty, a different proposition would be involved; but these questions are not involved.

Suppose, for instance, the railroad company had introduced proof as to its earnings in New Mexico, and it was shown that the railroad company was earning a net return of, say, 10 per cent over and above all operating expenses, would that fact, in and of itself, authorize the corporation commission to require the installation of a service at a station not reasonably warranted by the business which the station produced, or required by the public necessities? A little consideration of the ques-

tion will demonstrate clearly, we think, the fallacy of such argument. Suppose, for instance, that it was a fact that the railroad company in New Mexico was earning 10 per cent net, after making all proper deductions from its receipts; the corporation commission, in view of this large net revenue, and following the theory suggested by the attorney general, could require the installation of stations, agents, and facilities at divers places along the line of its road where the receipts did not fairly warrant the service, or the public necessities require, thereby entailing upon the company such an expense that its net earnings were reduced to, suppose, 6 per cent per annum, which we will assume, for the purpose of illustration, would be a fair return upon the property, and below which the corporation commission would have no right to reduce its earnings. The maximum passenger fare in New Mexico as fixed by statute is 6 cents per mile, and suppose, for illustration, that the company is charging the maximum amount of fare allowed by law, if the corporation commission is to be permitted, so long as the earnings upon the present rate of fares and charges show a net return above 6 per cent, to require facilities at a station not warranted by the business, how would it ever be possible for the people of New Mexico to secure a reduction in fares and charges? To sanction such a policy would be to impose an unjust burden upon the patrons of larger stations, whose receipts will be required to help make up the deficit caused by the smaller stations.

As said by the supreme court of Oklahoma in the case of *Chicago, R. I. & P. R. Co. v. State*, 24 Okla. 370, 24 L.R.A. (N.S.) 393, 103 Pac. 617: "Where the receipts of such stations will not justify the installation of such service, there being eliminated the question of the safety or expedition in the operation of trains, it would be unreasonable to require such service to be installed, creating a deficit at such station to be borne by the receipts at a larger station, except in exceptional instances. The patrons of a large station, after the expenditures for the reasonable maintenance of the station and the proper contribution towards maintenance, equipment, and operation of the line, and the paying of a reasonable dividend on the investment, are entitled, if it be reasonably practicable, to a reduction in rates; and except as stated, it is unreasonable and unjust to require the large stations to contribute to pay deficits at small stations."

And the same court, in the case of *St. Louis & S. F. R. Co. v. Newell*, 25 Okla. 502, 106 Pac. 818, say: "But the facilities

afforded at any station to the general public must in a measure be commensurate with the patronage and receipts from that portion of the public to whom the service is rendered. Otherwise, not only would an injustice be done the railroad company, which would be required to furnish the services at a financial loss, but the other portions of the general patronizing public would be required to pay an additional charge for the service rendered to them, over and above that necessary to pay the expenses of such services, and a fair and reasonable dividend on the investment of the railway company, in order to make up the deficit for the additional services required at such places."

Applying the facts to the principles above enunciated, it does not appear that the order made, requiring the maintenance of an agent at this station at the annual charge shown, is reasonable and just, and as the duty is imposed upon the court to determine the reasonableness and justness of the order upon the evidence in the record, we must decline to enforce the order.

The third provision of the order was as follows: "It is further ordered by the commission that some adequate means of communication be maintained at this station for the purpose of obtaining information as to the running of trains; whether this be by telephone or telegraph is left to the discretion of the company."

The evidence discloses that there are but two trains a day operated upon this road; one going north, and the other south. The train going north is usually on time, while the one running south is frequently late. But the passenger receipts from this station, as disclosed by the record, are but \$581.23 a year. To maintain an agent who is a telegraph operator would require an additional charge of \$20 a month, or an annual charge of \$240, almost 50 per cent of the receipts from this portion of the traffic. If it be contended that it is optional with the company to install telephone facilities, the answer is that there is no proof in the record showing the cost of installing this service. The court cannot speculate as to the probable cost, but it is the duty of the commission to present evidence as to all such facts, so that the court will be enabled to determine therefrom the reasonableness and justness of the order. If it be true that the telephone service could be installed for a reasonable amount, then an order so requiring would probably be just and proper. Certainly it would not be reasonable to require the installation of telegraph service for the purpose of bulletining trains, where the cost of such service would be out of proportion to the revenue derived from that portion of the traveling public to be benefited thereby. The position of the court is fully supported by the adjudicated cases upon the proposition. See *St. Louis & S. F. R. Co. v. Newell and Chicago, R. I. & P. R. Co. v. State*, supra.

For the reasons stated, the Court must refuse to enforce the order made by the Commission, and the cause is remanded to the Corporation Commission for further proceedings, should it so elect, in accordance with this opinion.

Hanna and Parker, JJ., concur.

NEW YORK COURT OF APPEALS.

RE *CARNEGIE TRUST COMPANY*, in Liquidation.

RE APPLICATION OF THE SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK for Leave to Declare and Pay a Supplemental First Dividend to the Creditors of Said Carnegie Trust Company.

GEORGE C. VAN TUYL, JR., Superintendent of Banks of the State of New York, Appt.

(206 N. Y. 390, 99 N. E. 1096.)

Appeal — banking superintendent — order fixing priority of claims.

1. Under statutory authority to appeal from a final order in a special proceeding, the state superintendent of banks, having authority to collect and distribute the assets of an insolvent bank, and present objections to claims to the court for determination, may appeal from an order giving the state priority over other claimants upon the assets of an insolvent bank which he is administering.

State — claims against insolvent bank — priority.

2. The claims of a state for money deposited in banks have, under a constitutional provision abrogating only such parts of the common law as are repugnant to the Constitution, priority in case of the bank's insolvency, over those of private depositors having no specific lien, even though the money belongs to special funds, if it is the property of the people.

(November 19, 1912.)

Note. — Common-law priority of state or United States in payment from assets of debtor.

This note is supplemental to that part of the note in 29 L.R.A. 227, 242, which treats of the common-law priority of the state or the United States in payment from the

APPEAL by the superintendent of banks from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County, Part III., confirming the finding of a referee that the deposit of state canal funds in the trust company did not entitle the state to a preference over the claims of general creditors. Affirmed.

The facts are stated in the opinion.

Messrs. Frank M. Patterson, Joseph M. Hartfield, and G. V. Smith, for appellant:

The state, as a general depositor, became divested of any priority attaching to it as a sovereign authority, and must share equally in the assets of the insolvent bank with other creditors of that class.

assets of an insolvent debtor. It is limited to the distinctive question whether the state or the United States is entitled to the preference as a prerogative, sovereign right, and is not concerned with cases where the question of preference is based upon a statute, or upon considerations not peculiar to the character of the claimant as a sovereign. Questions of preference of taxes are included only so far as they turn on this prerogative right. Generally, as to priority of claims for taxes against the assets of a debtor, see the note to *Bibbins v. Clark*, 29 L.R.A. 278.

Generally, as to right to preference in respect to public funds deposited in a bank which subsequently becomes insolvent, see the notes to *Page County v. Rose*, 5 L.R.A. (N.S.) 886, and *Watts v. Cleveland County*, 16 L.R.A. (N.S.) 918. See also on that specific question, *State v. Foster*, 29 L.R.A. 226, to which the note first referred to is appended.

Priority of the United States.

As stated in the former note (29 L.R.A. 227), the priority of the United States in payment of debts due it is exclusively founded upon statute. Re *Devlin*, 180 Fed. 170. The late cases in general do not discuss the matter of any common-law right to such a priority in the United States.

Priority of states.

As shown by the former note (29 L.R.A. 243), the courts of different states are not agreed whether or not a state has any priority apart from statute.

—theory of common-law priority.

In some jurisdictions it is held, as in *RE CARNEGIE TRUST CO.*, that the state has priority as a prerogative rule of the common law.

American Bonding Co. v. Reynolds, 203 Fed. 356 (district of Montana); Re *Niederstein*, 154 App. Div. 238, 138 N. Y. Supp. 952; Re *Traders' & Travellers' Acci. Co.*, 68 Misc. 440, 125 N. Y. Supp. 85; *Booth* 46 L.R.A. (N.S.)

Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704; *Bank of United States v. Planters' Bank*, 9 Wheat. 907, 6 L. ed. 244; *Bank of Kentucky v. Wister*, 2 Pet. 318, 7 L. ed. 437; *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *State ex rel. Atty. Gen. v. State Bank*, 1 S. C. 63; *State v. Bank of Tennessee*, 5 Baxt. 1; *Watts v. Cleveland County*, 21 Okla. 231, 16 L.R.A. (N.S.) 918, 95 Pac. 771; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; *San Diego County v. California Nat. Bank*, 52 Fed. 59; *McNulta v. West Chicago Park Comrs.* 40 C. C. A. 155, 99 Fed. 900; *Retan v. Union Trust Co.* 134 Mich.

v. Miller, 237 Pa. 297, 85 Atl. 457; *United States Fidelity & G. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397.

The same was probably held in effect in the somewhat insufficiently reported cases of *Brenner v. Lawrence*, 27 Misc. 755, 58 N. Y. Supp. 769; Re *Ripson & N. Fur Co.* 32 Misc. 56, 66 N. Y. Supp. 113; Re *Bowlby*, 34 Misc. 311, 69 N. Y. Supp. 783.

So, in Georgia it is held that the statutory priority of the state is declaratory of the common law. *Booth v. State*, 131 Ga. 750, 63 S. E. 502; *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S. E. 587; see also *Glynn County v. Brunswick Terminal Co.* 101 Ga. 244, 28 S. E. 604.

See also, as recognizing the rule, *Parlett v. Dugan*, 85 Md. 407, 37 Atl. 36.

As will be seen by the former note, the foregoing cases in New York, Pennsylvania, Georgia, and Maryland are in accord with the earlier decisions in those jurisdictions, while the above cases in Montana and Tennessee are of first impression in those states.

In *American Bonding Co. v. Reynolds*, 203 Fed. 356 (district of Montana) supra, in holding that without statute the state had priority for its debts on the bond of an insolvent bank with which it had funds, and that therefore one subrogated to the state's right had like priority, the court said: "There is no escape in reason from the conclusion that, by adopting the common law, Montana adopted the prerogative rule of priority of public debts. That the law may not have been heretofore invoked is not considered important. Many laws, statutory as well as common, are quiescent for years, but are not thereby repealed or abrogated. No occasion to appeal to them may have arisen."

In *United States Fidelity & G. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397, in holding that the state was entitled to priority on the bond of the clerk of a court for taxes due the state, the court said: "We are of opinion that the prerogative right of the sovereign to receive payment of fines, forfeitures, taxes, and

1, 95 N. W. 1006; *Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157; *MacMullen v. Middletown*, 112 App. Div. 81, 98 N. Y. Supp. 145, 19 Am. Neg. Rep. 466; *Murray v. Wilson Distilling Co.* 92 C. C. A. 1, 164 Fed. 1.

The common-law right of the state to be preferred over all creditors in the collection of taxes is unquestioned, but the prerogative of the English Crown, to be preferred over creditors generally, never existed in this state.

Middlesex County v. State Bank, 29 N. J. Eq. 268; *State v. Harris*, 2 Bail. L. 598; *Central Trust Co. v. Third Ave. R. Co.* 186 Fed. 291; *Potter v. Fidelity & D. Co.* 101 Miss. 823, 58 So. 714; *Re Taylor*, 75 Misc. 157, 134 N. Y. Supp. 1120.

There is no statute giving the state a preference as a general depositor, and the banking act, which must be regarded as containing the law on this question, infers a contrary intent.

revenues, and such demands as were due it in its sovereign capacity, was a part of the common law transmitted to this state from North Carolina."

In *Re Traders & Travellers' Acci. Co.* 68 Misc. 440, 125 N. Y. Supp. 85, it was held that the state was entitled to a preference for the expense of its examination of a company made under a statute directing that the expenses of the examination should be paid by the state and refunded by the company, where the company was put into liquidation as a result of the examination, and no specific liens of creditors would be disturbed, not only on the ground that the examination should be considered substantially as an expense of a liquidation proceeding, but also upon the general doctrine of the state's right of preference.

The *CARNEGIE CASE* was cited in *Re Niederstein*, 154 App. Div. 238, 138 N. Y. Supp. 952, where it was held that the state was entitled to preference excepting so far as it had been taken away by express provisions of statute, and that a statement in the statute concerning decedents' estates, that there should be no preference over debts of the same class, did not apply to the state.

So, in *Re Wesley*, 156 App. Div. 403, 141 N. Y. Supp. 1031, modifying 75 Misc. 157, 134 N. Y. Supp. 1120, the court, while deciding the case upon the provisions of the insanity law, said: "Not only does the insanity law in express terms give preference to the claims of the state, but that is in harmony with our laws and Constitution, making the claims of the state preferred over other creditors of an insolvent. *RE CARNEGIE TRUST CO.*"

The state, as a sovereign power, takes precedence over creditors, and a provision in a statute that it shall have a lien for money lent by it in pursuance of such statute is not repugnant to a constitutional 46 L.R.A. (N.S.)

Cook County Nat. Bank v. United States, 107 U. S. 445, 27 L. ed. 537, 2 Sup. Ct. Rep. 561; *Heckmann v. Pinkney*, 81 N. Y. 211.

The superintendent of banks is aggrieved by the order appealed from, and is entitled to maintain this appeal.

Re Union Bank, 204 N. Y. 313, 97 N. E. 737; *Lafayette Trust Co. v. Higginbotham*, 136 App. Div. 747, 121 N. Y. Supp. 489; *People ex rel. Burnham v. Jones*, 110 N. Y. 509, 18 N. E. 432; *People ex rel. French v. Town*, 1 App. Div. 127, 37 N. Y. Supp. 864; *People ex rel. South Shore Traction Co. v. Willcox*, 196 N. Y. 212, 89 N. E. 459; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407; *Bockes v. Hathorn*, 78 N. Y. 222.

Mr. Henry Selden Bacon, with *Mr. Thomas Carmody*, Attorney General, for respondent:

The superintendent of banks is not ag-

grieved by the enactment of a special law authorizing the creation of liens. *Booth v. Miller*, 237 Pa. 297, 85 Atl. 457.

—theory of no common-law priority.

On the contrary, other authorities hold that a state has no sovereign right to priority in the absence of statutory or constitutional authority. *Potter v. Fidelity & D. Co.* 101 Miss. 823, 58 So. 713.

So, in *Commissioner of Banking v. Chelsea Sav. Bank*, 161 Mich. 691, 125 N. W. 424, the court, after stating that the legislature might create a preference for debts due the state, but had not done so in the case in question, said, *obiter*: "The form of our government, the undoubted power of the legislature in this behalf, furnish reasons for saying that, in adopting the applicable rules of the common law as a part of the law of the state, the people did not adopt and thereby assert an arbitrary prerogative right to priority of payment of its debts, which was recognized by the common law."

Statutory abrogation.

In *Re Devlin*, 180 Fed. 170 (district of Kansas), it was held that if there was in Kansas any common-law right of priority in the state in the payment of its debts, the same had been abrogated by the statute in relation to voluntary assignments for the benefit of creditors (which was the only insolvency law of that state, and) which provided for the benefit of all creditors in proportion to their prospective claims, and, consequently, that the state as creditor was not entitled to a preference under the provisions of the United States bankrupt law giving preferences to "debts owing to any person who, by the laws of the states, . . . is entitled to priority."

Compare *Re Niederstein*, *supra*.

grieved of the order appealed from, and his appeal should therefore be dismissed with costs.

Bryant v. Thompson, 128 N. Y. 426, 13 L.R.A. 745, 28 N. E. 522; *Re Hodgman*, 140 N. Y. 421, 35 N. E. 660; *McLouth v. Hunt*, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; *Re Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795; *Re Coe*, 55 App. Div. 270, 66 N. Y. Supp. 784; *Re Heldmann*, 151 App. Div. 234, 135 N. Y. Supp. 143; *Isham v. New York Asso.* 177 N. Y. 218, 69 N. E. 387.

The state, as sovereign, has the absolute right to preference in payment over ordinary unsecured creditors.

Giles v. Grover, 9 Bing. 128, 2 Moore & S. 197, 1 Clark & F. 72, 6 Bligh, N. R. 277, 11 Eng. Rul. Cas. 550; *Grove v. Aldridge*, 9 Bing. 428, 2 Moore & S. 568; *Fulton Light, Heat & P. Co. v. State*, 200 N. Y. 400, 37 L.R.A. (N.S.) 307, 94 N. E.

199; *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92; *Re Atlas Iron Constr. Co.* 19 App. Div. 415, 46 N. Y. Supp. 467; *Re Ginsburg*, 27 Misc. 745, 59 N. Y. Supp. 656; *Re Traders & Travellers' Acci. Co.* 68 Misc. 440, 125 N. Y. Supp. 85; *Wise v. L. & C. Wise Co.* 153 N. Y. 507, 47 N. E. 788; *Seay v. Bank of Rome*, 66 Ga. 609; *Robinson v. Bank of Darien*, 18 Ga. 65; *Booth v. State*, 134 Ga. 163, 67 S. E. 803; *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *State use of Phillips v. Rowse*, 49 Mo. 586.

Haight, J., delivered the opinion of the court:

Under the findings of the referee it appears that the Carnegie Trust Company was a corporation transacting a banking and trust business, pursuant to the banking

Nature of the priority.

The reader will observe that it is stated in *RE CARNEGIE TRUST CO.*, upon the authority of *Wise v. L. & C. Wise Co.* 153 N. Y. 507, 47 N. E. 788, that the common-law priority is subject to a limitation where there is a prior specific lien. It was held in the *Wise Case*, that, where there is no statute giving the preference, taxes assessed upon the personal property of a corporation which became due subsequent to the levy of an attachment and execution thereon at the suit of creditors are not a prior lien upon the assets in the hands of a receiver for distribution under the direction of the court, which arose from a sale of the property subject to the levy. The court stated that it would be otherwise if, before the fund had come to the hands of the receiver or trustee, a warrant or some other legal process had been issued for the collection of the tax or debt, so that the fund had come to his hands impressed with a lien in favor of the government in consequence of the proceedings for collection.

The *Wise Case* was followed in *Central Trust Co. v. Third Ave. R. Co.* 186 Fed. 291, where it was held that the lien of a mortgagee was superior to a subsequent tax lien, where the property was in court for purposes of distribution, and the statute creating the tax lien did not give that lien a priority over claims of all other creditors.

So the lien of an attachment was held prior to taxes which were not a lien at the time the attachment was made. *Re Atlas Iron Constr. Co.* 19 App. Div. 415, 46 N. Y. Supp. 467.

Devestiture.

It has been held that an assignment for the benefit of creditors will cut off any common-law right of priority. *Re Devlin*, 46 L.R.A. (N.S.)

supra, where, however, the real ground of the decision was that any such priority had already been abrogated by the insolvency statute.

Upon the question of the state's right to priority when the property of the debtor is in the hands of a receiver, the courts do not seem to be entirely agreed.

In *Commissioner of Banking v. Chelsea Sav. Bank*, 161 Mich. 691, 125 N. W. 424, 127 N. W. 351, the court, while considering that there was no common-law priority in Michigan, held that, if there were, the appointment under the state law of a receiver of the property of an insolvent state depository would be in effect equivalent to an assignment for the benefit of creditors, and would oust the title of the depository, and destroy any general priority of the state; but this was not, it seems, necessary to the decision of the case.

In *State v. Williams*, 101 Md. 529, 1 L.R.A. (N.S.) 254, 109 Am. St. Rep. 579, 61 Atl. 297, 4 Ann. Cas. 970, where the state's property was destroyed by fire, and the insurer's assets passed into the hands of a receiver, it was held that the state's common-law right of priority did not entitle it to any preference either for the insurance or for the unearned premium, as, the state having no lien, its mere right of priority was lost by the passing of the property to the receiver.

On the other hand, in *American Bonding Co. v. Reynolds*, 203 Fed. 356, it was held that the appointment of a receiver for a state depository under the statute did not oust the title of the depository so that the state would lose its common-law priority on the depository's bond, the court considering that the receiver had no more title than the ordinary receiver in chancery, who took no title, but merely possession as an officer of the court.

B. B. B.

law of this state, and by a resolution of the commissioners of the canal fund of the state, it was designated as a depository of such fund; that thereafter, and from time to time, the treasurer of the state made deposits with the trust company in different amounts, and on the 7th day of January, 1911, the trust company held on deposit the sum of \$135,843.85 belonging to the state; that all of the amount of such deposit was a part of the canal fund, except the sum of \$3,418.93, which belonged to the general fund of the state. On the 29th day of October, 1910, at the instance of the treasurer of the state, the trust company caused to be executed and delivered to the state treasurer two bonds, conditioned that, in the event of default on the part of the trust company, the sureties will repay the state the percentage which the amount of the bonds bears to the total deposits. One bond was executed by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as security, in the sum of \$75,000; the other bond was executed by the Aetna Indemnity Company of Hartford, Connecticut, in the sum of \$190,000. Thereafter, and on the 7th day of January, 1911, the trust company went into liquidation and passed into the hands of the superintendent of banks of the state, pursuant to the provisions of the banking law; and thereupon the United States Fidelity & Guaranty Company paid to the treasurer of the state its proportional percentage of the claim, amounting to the sum of \$38,471.12. This payment was applied by the treasurer in discharging the amount of the deposit belonging to the general fund, and the rest upon the amount of the canal fund held by the trust company on deposit, leaving the sum of \$97,372.73 of the canal fund unpaid. It does not appear that the Aetna Indemnity Company of Hartford has paid any sum whatever on the indemnity bond executed by it to the treasurer. The referee found, as conclusions of law, that the treasurer of the state was not entitled to priority over the claims of the general creditors of the company, but that his claim should be allowed as a general claim against the company. Exceptions were taken by the state treasurer to the conclusions of law so found, and the question presented for our determination on this review is as to whether the appellate division properly reversed the judgment entered upon such conclusions.

In the first place we are met with a preliminary objection presented by the attorney general, in which he claims that the superintendent of banks has no power to appeal to this court, and that therefore 46 L.R.A.(N.S.)

his appeal should be dismissed. Under the banking law the superintendent is now authorized to take possession of insolvent banks, to collect in their assets, and to make distribution among the creditors and stockholders. He is empowered to declare one or more dividends after the expiration of time fixed by statute, to be paid "to such persons, and in such amounts, and upon such notice, as may be directed by the supreme court in the judicial district in which the principal office of such corporation or individual banker is located." Also, in case of objections made to any claim, he is required to present the same to the supreme court for determination; and in cases of doubt or conflicting claims, he may ask for an order of the supreme court disposing of such claims. In this case a claim was made on behalf of the state treasurer to have the amount of the state funds deposited with the bank preferred over the claims of ordinary depositors. The superintendent had the right, therefore, under the statute, to make application to the supreme court to determine that question. The application having been made pursuant to a statute, it became a special proceeding, and in view of the fact that the superintendent represented the creditors generally in his official capacity, as well as the state and the stockholders, and would be personally liable for any unauthorized distribution of the funds, we are of the opinion that he had the power to appeal from the order of the appellate division under the provisions of the Code empowering an appeal from a final order in special proceedings.

In considering the case upon the merits, the first question that arises is as to whether the funds of the state deposited with the trust company were preferred by any express provisions of the statute. The commissioners of the canal fund are created by the provisions of the Constitution. Article 5, § 5. Their powers and duties were originally prescribed by the Laws of 1817 (chapter 262, § 1), in which it was made the duty of the commissioners of the canal fund to receive, arrange, and manage to the best advantage all things belonging to the said fund, to borrow from time to time moneys on the credit of the people of the state, and out of such funds to make payments, etc. This provision, after passing through several revisions of the statute, has finally been incorporated in our present state finance law (Consol. Laws, 1909, chap. 56, art. 4, §§ 60, 61, 62). The latter section authorizes the commissioners to deposit the moneys belonging to such fund or the canal debt sinking fund with any safe incorporated moneyed institution

or banking association in this state, and may make such contracts therewith for the interest on, and the duration of, such deposits as will best promote the interest of the funds. Pursuant to this provision, as we have seen, the commissioners of the canal fund designated the Carnegie Trust Company as a depository for such funds, and thereupon the treasurer paid over to such depository the funds which he now seeks to have preferred.

Section 189 of the banking law (Consol. Laws, chap. 2), among other things, provides as follows: "Any court having jurisdiction to appoint a trustee, guardian, receiver, or committee of the estate of a lunatic, idiot, or habitual drunkard, or to make any fiduciary appointment, may appoint any such corporation to be such trustee, guardian, receiver, or committee, or to act in any other fiduciary capacity. All moneys brought into court by order or judgment of any court of record may be deposited with any such corporation," etc. Section 190, among other things, provides that such trust company, "if dissolved by the legislature or the court, or otherwise, the debts due from the corporation as such executor, administrator, guardian, trustee, committee, or depository shall have the preference."

The contention is made that the provision with reference to a depository was intended only to include moneys brought into court and deposited with the company by an order of the court, and that it was not intended to include public moneys or canal funds which the commissioners had authorized to be deposited with the trust company. In view of the fact that we have reached a conclusion upon another question upon which we prefer to rest the determination of this case, it becomes unnecessary to determine that question.

We think it clear that at common law the King was entitled to preference in the payment of debts due to him from an insolvent before that of a subject. This is stated in 1 Co. Litt. 131b. Under the statute (33 Hen. VIII. chap. 39, § 74) it was enacted that the King's debt shall, in suing out execution, be preferred to that of every other creditor who has not obtained judgment before the King commenced his suit. This apparently has remained the law of England down through and since the American Revolution. *Giles v. Grover*, 9 Bing. 128, 2 Moore & S. 197, 1 Clark & F. 72, 6 Bligh, N. R. 277, 11 Eng. Rul. Cas. 550. By our Constitution of 1777, § 35, it was provided that "such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New

York, as together did form the law of the said colony on the 19th day of April in the year of our Lord 1775, shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall from time to time make concerning the same. . . . That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this Constitution,—be, and they hereby are, abrogated and rejected."

While our present Constitution differs in phraseology, it is not apparent that there is substantial variation in the meaning. The clauses of the common law above quoted from the Constitution of 1777, which was abrogated and rejected under our present Constitution, are condensed in the single sentence, "but all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated." Const. 1894, art. 1, § 16. Under our Constitution we have no King. The King, therefore, and the prerogatives that were personal to him, being repugnant to our Constitution, are abrogated. But his sovereignty, powers, functions, and duties, in so far as they pertain to civil government, now devolve upon the people of the state, and consequently are not in conflict with any of the provisions of our Constitution. Inasmuch, therefore, as the claims or moneys due the King for the support and maintenance of the government, whether derived from taxes or other sources of income, were preferred over the claims of others, it follows that, under the first subdivision of the provision of the Constitution of 1777, quoted, such preference became a part of the common law of our state, and is so continued under our present Constitution.

In *Re Receivership of Columbian Ins. Co.* 3 Abb. App. Dec. 239, the receivers of the corporation, appointed in proceedings to dissolve the company, applied to the court, stating that they had received notice from the receiver of taxes that he held a warrant for the taxes due from the state, amounting to a large sum, and asked for its payment *pro rata* with the other claims. The receiver of taxes also applied to the court, at the same time, for an order to show cause why the taxes should not be

paid in full. The court made an order denying the application of the receiver, and ordered the payment of the claim of the state in preference to the other demands. In the court of appeals the order of the supreme court was affirmed, upon the ground that the warrant held by the receiver of taxes was entitled to take precedence over the other equitable claims of creditors of the corporation, as it had become a prior lien. Porter, J., however, in delivering the opinion of the court, added thereto the following: "There is great force in the argument submitted by the counsel for the corporation of the city of New York, in support of the broad position that the people of this state have succeeded to all the prerogatives of the British Crown, so far as they are essential to the efficient exercise of the powers inherent in the nature of civil government, and that there is the same priority of right here in respect to the payment of taxes, which existed at common law in favor of the public treasury." 3 Abb. App. Dec. at page 242. While it may be true that this expression of the learned judge may be regarded as *obiter*, still in the case of *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250-259, 1 L.R.A. 260, 18 N. E. 92, 96, Peckham, J., in delivering the opinion of the court, after holding that the claim of the state for the payment of taxes was paramount, stated: "We reiterate the statement of Porter, J., in *Re Receivership of Columbian Ins. Co.*," and then repeats the quotation above given. We thus find our court fully committed upon the question under discussion, and we entertain no doubt as to the wisdom of now adopting it.

There is one limitation, however, and that pertains to claims in which a prior specific lien has been obtained by the creditors. *Wise v. L. & C. Wise Co.* 153 N. Y. 507, 47 N. E. 788.

It is said that the moneys in question were part of the canal fund. We do not think it makes any difference whether it was the canal fund or the general fund, so long as it belonged to the people of the state. It was a public fund raised by taxation or by the sale of bonds which ultimately must be paid by the people; and, inasmuch as the sovereign power of the King devolves upon the people, they have the right to have the public funds preferred over those of the common creditors.

There may be some conflict in the decisions of our sister states, notably that of New Jersey, which have been considered in the able opinion rendered by Scott, J., in the appellate division. We do not here deem it necessary to further discuss them. We wish, however, to call attention to the 46 L.R.A.(N.S.)

recent decision of *Guarantee Title & T. Co. v. Title Guaranty & S. Co.* 224 U. S. 152, 56 L. ed. 706, 32 Sup. Ct. Rep. 457.

A question was raised with reference to the rights of the United States Fidelity & Guaranty Company, who paid to the treasurer its proportional percentage of its claim; but, inasmuch as it has not been considered or covered by any findings below, we do not deem the question now before us for determination.

The order of the Appellate Division should be affirmed, but without costs to either party; they being state officers.

Cullen, Ch. J., and Vann, Willard Bartlett, Chase, and Collins, JJ., concur. Hiscock, J., not sitting.

OREGON SUPREME COURT.

STATE OF OREGON, Resp.,

v.

HARRY A. START, Appt.

(— Or. —, 132 Pac. 512.)

Sodomy — receiving sexual organ in os.

1. One receiving the sexual organ of a male into his mouth is within a statute providing for punishment of one committing the crime against nature.

Trial — jury — who is accomplice.

2. The jury, and not the court, must determine whether or not one who accompanied to the room where a crime against nature is committed the person upon whom it was committed, and remained there during the commission of the crime, without protest or effort to prevent or discourage it, is an accomplice so as to prevent conviction on his testimony without corroboration.

Evidence — crime against nature — other offenses.

3. Evidence of the commission of similar crimes at other times is not admissible against one on trial for commission of a crime against nature.

(McBride, Ch. J., and Eakin, J., dissent.)

(May 20, 1913.)

Note. — Evidence of other crimes in prosecution for sodomy.

This note supplements, as to the particular crime of sodomy, the note to *People v. Molineux*, 62 L.R.A. 193, on the general question of the admissibility of evidence of other crimes in criminal prosecutions. Sexual offenses generally are treated in that note at pages 329 to 338 inclusive. And see also the case of *State v. Place*, 5 Wash. 773, 32 Pac. 736, involving an assault to commit sodomy, which is set out on page 274 of that note.

APPPEAL by defendant from a judgment of the Circuit Court for Multnomah County convicting him of the crime against nature. Reversed.

The facts are stated in the opinion.

Messrs. Sam M. Johnson and Wilson T. Hume, for appellant:

The insertion of the penis of man in man *per os* is not sodomy as defined in § 2099, L. O. L.

State v. Vowels, 4 Or. 325; Com. v. Poindexter, 133 Ky. 720, 118 S. W. 943; Weaver v. Territory, — Ariz. —, 127 Pac. 724; Kinnan v. State, 86 Neb. 234, 27 L.R.A.(N.S.) 478, 125 N. W. 594, 21 Ann. Cas. 335; State v. Dougherty 4 Or. 200; People v. Boyle, 116 Cal. 658, 48 Pac. 800.

Rodby and Van Hulen were accomplices, and their testimony was insufficient as a matter of law.

State v. Carr, 28 Or. 389, 42 Pac. 215; State v. Case, 61 Or. 265, 122 Pac. 304; State v. Kelliher, 49 Or. 77, 88 Pac. 867.

Testimony as to other alleged offenses, at other times and with other persons than the act charged in the indictment, was incompetent.

State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; Strong v. State, 86 Ind. 208, 44 Am. Rep. 292; State v. Williams, 36 Utah, 273, 103 Pac. 250; Jaynes v. People, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787; Underhill, Crim. Ev. § 92; State v. Baker, 23 Or. 441, 32 Pac. 161; Chipman v. People, 24 Colo. 520, 52 Pac. 677; People v. O'Brien, 96 Cal. 171, 31 Pac. 45; Lovell v. State, 12 Ind. 18; 11 Enc. Ev. 799; Com. v. Snow, 111 Mass. 411.

Messrs. Walter H. Evans, Robert F. Maguire, and Frank T. Collier, for the State:

Sodomy is the carnal copulation of human beings with each other against the order of nature, or with beasts.

In People v. Swift, 172 Mich. 473, 138 N. W. 662, which was a prosecution for gross indecency with a boy, it was held that evidence of two previous similar acts of misconduct between the same parties was admissible under the exception relating to sexual offenses, to the general rule that evidence of other crimes is inadmissible, the court saying: "Here, peculiar secret criminal relations are involved and testified to, which, unconnected with anything leading up to them, would appear in a marked degree unnatural and incredible."

In State v. McDowell, 61 Wash. 398, 32 L.R.A.(N.S.) 414, 112 Pac. 521, Ann. Cas. 1912 C, 782, it was held that, upon prosecution for assault with intent to commit sodomy, evidence of an attempt by accused to commit a similar act upon another per-

2 Bishop, New Crim. Law, p. 687; 1 Archbold, Crim. Pl. 1015; 1 Russell, Crimes, 937; Prindle v. State, 31 Tex. Crim. Rep. 551, 37 Am. St. Rep. 833, 21 S. W. 360.

Decisions of the English courts rendered after the separation of the American Colonies are not binding as authorities.

Marks v. Morris, 4 Hen. & M. 463; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411; Robert v. West, 15 Ga. 122.

The doctrine that sodomy, when committed *per os* instead of *per anum*, is not sodomy, rests alone upon the authority of Rex v. Jacobs, Russ. & R. C. C. 331.

2 Russell, Crimes, 937; Prindle v. State, 31 Tex. Crim. Rep. 551, 37 Am. St. Rep. 833, 21 S. W. 360; People v. Boyle, 116 Cal. 658, 48 Pac. 800; Com. v. Poindexter, 133 Ky. 720, 118 S. W. 943; Kinnan v. State, 86 Neb. 234, 27 L.R.A.(N.S.) 478, 125 N. W. 594, 21 Ann. Cas. 335; McClain, Crim. Law. 1153; 2 Bishop, New Crim. Law, 1193.

The case of Rex v. Jacobs, Russ. & R. C. C. 331, is erroneous, illogical, and incomprehensible.

Com v. Poindexter, 133 Ky. 720, 118 S. W. 943; Sate v. Vicknair, 52 La. Ann. 1921, 28 So. 273; State v. Whitmarsh, 26 S. D. 426, 128 N. W. 580; Herring v. State, 119 Ga. 709, 46 S. E. 876.

The act committed *per os* is both sodomy and the crime against nature.

Herring v. State, 119 Ga. 709, 46 S. E. 876; Reg. v. Allen, 1 Den. C. C. 364, Temple & M. 55, 2 Car. & K. 869, 18 L. J. Mag. Cas. N. S. 72, 13 Jur. 108, 3 Cox, C. C. 270; Honselman v. People, 168 Ill. 172, 48 N. E. 304; Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425; Means v. State, 125 Wis. 650, 104 N. W. 815; State v. Whitmarsh, 26 S. D. 426, 128 N. W. 580; White v. State, 136 Ga. 158, 71 S. E. 135, 9 Ga. App. 307, 71 S. E. 499;

son present at the time, immediately after making the attempt for which he was on trial, was admissible as part of the *res gestæ*.

In Com. v. Snow, 111 Mass. 411, a prosecution for sodomy, evidence that, about one week after the offense charged, defendant had, in soliciting another boy to commit a like offense, stated that he "had done it with other boys," was held to be admissible, inasmuch as the declaration was of such a nature as to be applicable to the act charged.

State v. Wedemeyer, — Or. —, 132 Pac. 518, was a companion case with STATE v. START in the supreme court, and was disposed of by reference to the opinion in that case.

R. L. S.

State v. Vicknair, 52 La. Ann. 1921, 28 So. 273.

Van Hulén is not an accomplice.

Clapp v. State, 94 Tenn. 186, 30 S. W. 214; State v. Light, 17 Or. 358, 21 Pac. 132, 8 Am. Crim. Rep. 326; State v. Carr, 28 Or. 389, 42 Pac. 215; People v. Zucker, 20 App. Div. 363, 46 N. Y. Supp. 766.

When evidence of other distinct offenses is offered simply for the purpose of proving the defendant's character or showing a tendency to commit an offense of that kind, it is admissible.

1 Wharton, Crim. Ev. 10, ¶ 59; 1 Wigmore, Ev. ¶¶ 300 et seq.

Burnett, J., delivered the opinion of the court:

According to the testimony of Rodby, the defendant performed the disgusting act upon him at the time mentioned in the indictment, by taking into his mouth the penis of Rodby and sucking the same until seminal emission ensued. The defendant contends that such an act does not constitute a violation of our statute providing that, "if any person shall commit sodomy or the crime against nature, either with mankind or beast, such person, upon conviction thereof, shall be punished," etc. L. O. L. § 2099.

Many precedents are cited by the defendant in support of his theory. They are all traced back to and have their origin in the case of Rex v. Jacobs, Russ. & R. C. C. 331. The prisoner there was convicted on evidence showing conclusively that he had accomplished the act by force in the mouth of a boy about seven years old, and the question was whether this was sodomy. All that is said in answer to the question in the report of the case follows: "In Easter term, 1817, the judges met and were of opinion that this did not constitute the offense of sodomy, and directed a pardon to be applied for." The authorities cited by the defendant have implicitly followed this *ipse dixit* of the English court without giving any reason therefor, always controlled solely by the doctrine of *stare decisis*, and often with protests against the authority of the rule. Although there are no common-law crimes in this state, we must turn to that law for the definition of certain crimes where the meaning thereof is not set forth in our Code. The rule at common law was that "all unnatural carnal copulation, whether with man or beast, seem to come under the notion of sodomy." 1 Hawk. P. C. p. 357. In the order of nature the nourishment of the human body is accomplished by the operation of the alimentary canal, beginning with the mouth and ending with the rectum.

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In this process food enters the first opening, the mouth, and residuum and waste are discharged through the nether opening of the rectum. The natural functions of the organs for the reproduction of the species are entirely different from those of the nutritive system. It is self-evident that the use of either opening of the alimentary canal for the purpose of sexual copulation is against the natural design of the human body. In other words, it is an offense against nature. There can be no difference in reason whether such an unnatural coition takes place in the mouth or in the fundament,—at one end of the alimentary canal or the other. The moral filthiness and iniquity against which the statute is aimed is the same in both cases. Each is rightfully included in the true scope and meaning of the common-law definition quoted above from Hawkins. By far the better reasoning is found in the cases of State v. Whitmarsh, 26 S. D. 426, 128 N. W. 580, Herring v. State, 119 Ga. 709, 46 S. E. 876, and others which might be cited.

It is said in § 1539, L. O. L., that "proof of actual penetration into the body is sufficient to sustain an indictment for rape or for the crime against nature." No particular opening of the body into which penetration can be made is specified in this section. It follows that the actual penetration of the virile member into any orifice of the human body except the vaginal opening of a female is sufficient for the establishment of the crime in question.

The state called as a witness Earl Van Hulén, for the purpose of corroborating the testimony of the witness Rodby. Van Hulén was present at the time the alleged offense was committed with Rodby. Their testimony was to the effect that Rodby met Van Hulén on the street, and asked him to go with him to the office of the defendant to keep an engagement. Arriving there, the two were seated in company with the defendant, who locked the door and immediately began to talk to them about "queans," the significance of which Van Hulén understood. This conversation led up to the act charged in the indictment. He remained seated in the room and watched the performance of the act, testifying substantially that he stayed there because he thought it was better than to go out, and for the reason that if he opened the door and left the room he would be liable to disclose what was going on inside; that he told the defendant he thought it was very daring, and that it was bad enough for two without three in the room. The defendant requested the court to instruct the jury that the witnesses Rodby

and Van Hulen were accomplices, and that a conviction could not be had upon such testimony, unless corroborated by others evidence. This instruction was refused by the court, which gave instead thereof the following: "The state has offered the witness Van Hulen as a witness corroborating the testimony of the complaining witness, Fred Rodby. The defendant contends that this man Van Hulen was an accomplice, and that therefore his testimony was not admissible. The court was unable to agree with the contention of the defendant on that point, and you are now instructed as a matter of law that the witness Van Hulen was not an accomplice of the defendant, and that therefore his testimony may be considered by you as corroborating the testimony of the complaining witness, Rodby."

It is provided in §§ 1458 and 2370, L. O. L., that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and are to be tried and punished as such."

It is also said in §1540 that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

"To 'abet' is to countenance, assist; to give aid. . . . The word 'abet' includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime." 1 Words & Phrases, p. 15.

Considering the facts: That the two witnesses went together to the defendant's office to meet an engagement with one of them; that on arriving there nothing else was talked of except what resulted in the crime; that the witness Van Hulen was present without protest, and remained until the consummation of the act without making any effort to stop the commission of the felony, or to do anything to prevent or discourage it,—there were circumstances from which the jury could believe, for instance, that he guarded the door to prevent detection, and so that he was at least abetting the commission of the crime, and hence was an accomplice. In *State v. Wong Si Sam*, 63 Or. 266, 127 Pac. 683, the deceased was said to have been murdered in the room of his paramour, a Chinese woman, Oi Sen, who stood by, offered no resistance, and called for no help. This was deemed sufficient to take to the jury the question 46 L.R.A. (N.S.)

of whether or not she was an accomplice, and it was held by this court, in an opinion by Mr. Justice Bean, that if the jury found that she was an accomplice, she must be corroborated, in compliance with the statute. Van Hulen in this case appears in a stronger light as an accomplice than did the Chinese prostitute. Under these circumstances the court had no right to assume, and so instruct the jury as a matter of law, that he was not an accomplice. The question should have been left to the jury, under proper instruction, to determine, in the first place, whether Van Hulen was present aiding or abetting in the commission of the crime, and, next, that if so, he should be corroborated by other evidence within the meaning of the statute above quoted.

Over the objection and exception of the defendant, the court permitted the state to call several witnesses, who testified that they themselves, at other times, had participated with the defendant in a like action as that described in the indictment. The court in its charge to the jury stated that "this evidence of other similar crimes will be admitted for whatever tendency it may have to show that he, the defendant, was in a state of mind that would naturally dispose him to commit the particular crime charged in the indictment with Fred Rodby." The defendant excepted to that instruction. The testimony showed that the transactions disclosed by the other witnesses were entirely disconnected from that with Rodby, and were committed at other times.

It is said in *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892: "The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions, speaking of which Mr. Underhill, in his valuable work on Criminal Evidence (§ 87), says: 'These exceptions are carefully limited and guarded by the courts, and their number should not be increased.'"

In that same case of *State v. O'Donnell*, Mr. Justice Moore sets down several exceptions to the general rule. He summarizes them as follows:

"(1) If several similar criminal acts are so connected by the prisoner, with respect to time and locality, that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. . . .

"(2) When the commission of the act charged in the indictment is practically ad-

mitted by the prisoner, who seeks to avoid criminal responsibility therefor by relying upon the lack of intent or want of guilty knowledge, evidence of the commission by him of several independent offenses before or after that upon which he is being tried, and having no apparent connection therewith, is admissible to prove such intent or knowledge, which has become the material issue for trial. . . .

"(3) If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or to conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial."

Neither of these three exceptions apply to this case. There is no testimony here tending in the least to show that the transactions with these several witnesses were in any way connected one with the other. An illustration of the exception would be where a man was killed by the defendant, who several times before had tried to shoot the deceased in the same manner in which he was shot at the time in question. Under the third exception an illustration would be where a burglar stole tools from a foundry with which to break the safe burglarized. Evidence of one crime could in such circumstances be given to support an indictment for the other. On the trial for burglary the stealing of the tools could be shown as preparation for the crime charged, and on an indictment for larceny of the tools the commission of the burglary with them would supply the motive for stealing them. Motive is that which impels one to do an act. In this case the proof of the crime mentioned with A would furnish no motive for the commission of the same species of felony with B. They are independent transactions, and neither one is the reason for the other.

Mr. Justice Moore then states a fourth exception: "When a crime has been committed by the use of a novel means or in a particular manner, evidence of the defendant's commission of similar offenses by the use of such means or in such manner is admissible against him, as tending to prove the identity of persons from the similarity of such means, or the peculiarity of the manner adopted by him." That the manner in which the defendant is said to have committed the crime is not a novel one is proved by the fact that for more than one hundred years precedents have appeared in the reports where the crime was committed in the same manner by men

with other offenders. The question has never been whether the method alleged to have been employed here was unique, but whether it constituted any offense at all. Cases under this exception are those where the crime is characterized by some personal peculiarity of the defendant not common to other people. An illustration of this exception is found in cases where a forgery has been committed of documents in which the peculiar writing of the defendant forms a part. Evidence of other writings, although they are forgeries, containing these peculiar earmarks of the defendant's writing, may be given in evidence in support of the particular crime charged. This doctrine is illustrated in the case of *State v. La Rose*, 54 Or. 555, 104 Pac. 299. There it was shown that within short intervals of time a number of persons had been attacked, and either slain or severely wounded, by a man who invariably used a gas pipe wrapped in cloth or paper. He was positively identified by one of his victims who escaped death at his hands, and this evidence was admitted against him in the trial for murder of another whom he had attacked fatally. His peculiar personal characteristics were therefore admissible to show that he did the act complained of.

The last exception noted by Mr. Justice Moore is: "(5) When a prisoner is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial." This exception limits illicit commerce among sexes to that between the same parties, and no authority has been cited where this rule is enlarged so as to admit testimony about acts of sexual intercourse with other parties than the one named in the indictment.

In *State v. Lapage*, 57 N. H. 245, 289, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506, the doctrine is summarized thus: "1. It is not permitted to the prosecution to attack the character of the prisoner unless he first puts that in issue by offering evidence of his good character. 2. It is not permitted to show the defendant's bad character by showing particular acts. 3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. 4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions." In that case the defendant was on trial

upon an indictment charging him with the murder of a young girl while passing over a certain road on her way to school. It was proved, and very properly too, that he had been previously seen about the same place, lurking in the bushes and at times running after school girls on their way to that school, and made various inquiries about different girls passing that way. The theory of the prosecution was that he had committed the murder in an attempt to rape the deceased. Besides the evidence already alluded to, the state was allowed to call another woman, who testified that at some time before the commission of the crime in question, he had raped her at an entirely different place in Canada. Sixty pages of the report are devoted to the exhaustive consideration of this case, and for the admission of the testimony about the former rape on the witness mentioned, the judgment of conviction was reversed. Summing up on that point, the court says: "However extreme the case may be, I think it will be found that the courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other."

In *Com. v. Snow*, 111 Mass. 411, a witness other than the accomplice who participated in the sodomy mentioned in the indictment was allowed to testify that the defendant attempted to commit the same offense with him; said that it would not hurt, and that he had done it with other boys. Under the peculiar circumstances as disclosed by the other evidence, the court admitted that part of the statement to the effect that he had done it with other boys as tending to show a confession of the defendant of the crime charged in the indictment, but said: "The fact that the defendant attempted to commit, with Emerson, a like offense to that charged in the indictment, was not competent by itself. . . . It is true, as the defendant contends, that other instances of a like offense committed by the defendant are not admissible to establish his guilt in the particular instance charged. For the same reason, his confession of such other offenses would not be competent."

Proper v. State, 85 Wis. 630, 55 N. W. 1040, is quoted in some of the cases relied upon by the prosecution here. That was a charge of statutory rape upon Clara O'Brien, a female child under the age of twelve years. A girl named Emma testified on behalf of the state that she and Clara slept together, and one night the defendant came and got into bed with them both and had intercourse with Emma. Commenting 46 L.R.A. (N.S.)

upon this testimony the court says: "A greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes. Upon a prosecution for adultery, evidence of previous acts of improper familiarity, amounting to adultery, between the same persons, was held competent either in corroboration of witnesses for the prosecution, or to show the disposition of the parties to commit the crime. . . . We do not suppose that evidence that the defendant had committed adultery or been guilty . . . of . . . familiarity with the girl Emma at another time or place would be competent evidence on the trial of the present issue, but rest our ruling on the ground, already stated, that the act of the defendant in going to the room where both Emma and the prosecutrix were sleeping, and getting in bed with them, was a grossly indecent assault on both."

The case of *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880, was a case where the defendant was charged with rape of his servant girl. The court allowed evidence of previous attempts to commit the crime upon the prosecutrix, but said: "In this case it would have been incompetent to prove that the defendant had committed, or attempted to commit, a rape upon any other woman."

In the cases of *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *Lamb v. State*, 66 Md. 285, 7 Atl. 399; *State v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. Crim. Rep. 207; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *People v. Skutt*, 96 Mich. 449, 56 N. W. 11; and *People v. Jenness* 5 Mich. 305,—the previous attempts and acts mentioned in the indictment were admitted, but in every case without exception they were expressly limited to acts between the same parties.

As said by Mr. Justice Gabbert in *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787: "It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he [the defendant] would commit another. The reason for the rule is that no person shall be convicted of an offense by proving that he is guilty of another. Evidence of this character tends to create a prejudice in the minds of the jury against the accused, multiplies the issues, and may confuse and mislead the jury."

In *Coleman v. People*, 55 N. Y. 90, Allen, J., enunciates the principle thus: "A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another

of a similar character, . . . but the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." That case is cited with approval in *State v. Williams*, a Utah case reported in 38 Utah, 273, 103 Pac. 250, where it was decided that "in a prosecution for rape on a child of ten, evidence of prosecutrix that after the assault had been completed, defendant stated that there were other female children that had come to his house with whom he had committed the same offense, was inadmissible." Mr. Justice McCarty, who wrote the opinion, comments on the subject thus: "The statement that he had committed like crimes with other girls in no way tended to elucidate or explain the alleged assault upon the complaining witness. It was a narrative or recital of transactions which were neither directly nor remotely connected with the crime under consideration. The crimes thus sought to be proved were committed on other parties at other times, and were entirely distinct and separate from the specific crime charged in the information, and formed no link in the chain of events leading up to and surrounding the offense, and did not tend in the remotest degree to prove any fact whatever material to the issue.

. . . We can conceive of no purpose for which this evidence was introduced, unless it was to show a general disposition on the part of defendant to commit crimes of that character, and thereby increase the probability that he committed the one charged in this case." The opinion in the *Williams Case* also refers to *Janzen v. People*, 159 Ill. 440, 42 N. E. 862, 10 Am. Crim. Rep. 489, where the defendant was charged with rape upon his daughter. Evidence that he had also raped another daughter was received over the defendant's objection, but the supreme court of Illinois held that such evidence was not admissible. Again, in *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649, Mr. Justice Agnew, quoted with approval by Mr. Justice Moore of this court in *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892, says: "It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime. Yet it cannot be

said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other."

To admit testimony that the defendant at other times and places, and under wholly disconnected circumstances, had committed like offenses with parties not named in the indictment, all for the purpose of making it appear that the accused has the bent of mind adapted to such actions, would cloud the issue and confuse the jury.

The relation of the sexes is so closely allied to all that mankind holds dearest that it is very difficult to get men to think and act with judicial calmness in cases where that relation is violated or debauched. Judges themselves are but human beings like other men, and this largely accounts for the exceptions that have been ingrafted upon the law in respect to sexual crimes. Yet these exceptions, as this court has already said in *State v. O'Donnell*, supra, should be carefully guarded, and not extended, for the law must protect the innocent while it pursues the guilty, so that the rule is, and should be, the same in both instances.

The defendant in this criminal prosecution had the right to "demand the nature and cause of the accusation against him, and to have a copy thereof." Or. Const. art. 1, § 11. Here, however, he was in real truth brought to trial upon some half dozen charges, while the indictment gave him information of but one offense. Logically, under the rule announced by the court at the trial, it could make no difference in the principle if the defendant had been acquitted or convicted of the other offenses. They could be still put in evidence to show a criminal propensity on his part, and he compelled to again defend against them. In a large degree the effect of such a proceeding is to "shut the gates of mercy on mankind," so that if but once an individual suffers a lapse of virtue, thenceforward the law will pursue him with the vindictive zeal of a Javert, using a single accusation to wreak upon him the cumulative vengeance of a general inquisition.

The judgment of the Circuit Court is reversed, and a new trial ordered.

McBride, Ch. J., dissenting:

In my judgment the court did not err in instructing the jury that the witness Van Hulen was not an accomplice. His testimony, in brief, is to the effect that about the first Sunday in October Rodby told him that he had an appointment with the defendant, and wanted him to accompany him to the defendant's office; that he knew nothing as to the nature of the appointment and nothing as to the relations between Rodby and the defendant; that when they arrived at the office Rodby introduced him to the defendant, and that defendant at once began talking about "queans" meaning persons who practise the crime against nature; that after some conversation on this subject defendant went over and sat by Rodby on a lounge, and finally committed the act charged; that he sat there and looked on, but made no protest; that he did not go out of the room for the reason that he was afraid that if he opened the door some passer-by might see what was going on, and would form a bad impression from seeing him come out under the circumstances.

"An accomplice is . . . [one] who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." "To constitute an accomplice, one must be so connected with a crime that at common law he might himself have been convicted either as the principal or an accessory before the fact." "A person who participates in the moral guilt of a crime, but is not connected therewith in such a way that he could be indicted for the offense, is not an accomplice." See, generally, 1 Words & Phrases, 75, 76, title, "Accomplice," from which the above definitions are taken. There is nothing in any definition that I have been able to find that will include the witness Van Hulen. He did not aid; he did not abet; he did not encourage; he did not advise; and he did not participate in the offense,—and one would have to travel outside the testimony into the realm of speculation and imagination to hold him as such.

The most serious question raised is that relating to the admission of testimony tending to show that defendant had sustained similar criminal relations with other parties. The general rule is that this cannot be done. The authorities on this subject are so well collected in the notes to *People v. Molinex*, as re-reported in 62 L.R.A. 193, that I have only to cite the latter publication to indicate the rule and 46 L.R.A. (N.S.)

most of its exceptions. I think this case falls within an important exception. It is this: "Where a crime is an unusual crime, committed by unusual means, indicating a peculiar habit or system, evidence of other like offenses committed in the same manner may be admitted." Underhill, *Crim. Ev.* p. 107; Wharton, *Crim. Ev.* § 39; *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892; *State v. La Rose*, 54 Or. 555, 104 Pac. 299. Every condition of this exception is present in this case. The crime is unusual and unnatural, as its name indicates. Indeed it was committed in the present instance in so unusual a manner that a strong and plausible argument has been advanced that the facts proved do not constitute the crime charged, and it is evident that we are dealing with an offense not usually committed, and rarely committed in the manner described in the testimony. This narrows the field of investigation to the inquiry, "Who in the community would be likely to commit so unusual a crime in so unusual a manner?" The response naturally is, "Show us a person in the community who has in other instances perpetrated the offense in the same manner, and we will show you the man most likely to have perpetrated this particular offense." Murder, rape, and larceny are common. They are not infrequently associated with normal minds, but this offense is uncommon and abnormal. The mentally normal man is as incapable of committing it as the physically normal man is incapable of carrying away a rail from a railway track. Let us suppose that a man was indicted for taking, stealing, and carrying away such a rail, and that there was evidence tending to show that some one person had committed the theft, would not evidence that the person on trial was a man of enormous strength, and that he had frequently carried such burdens on other occasions, be some evidence that he was the person who carried away the particular rail charged in the indictment? Standing alone, it would not be sufficient to convict, but it would be a circumstance tending to indicate the probability of his guilt. It would stand as a single witness tree stands in relation to a corner stake of a survey. Alone it may be of small value, but when a second or third witness tree is found, the location of the corner may become a certainty. So in the case at bar it might be said that it was morally impossible that the defendant, with a good reputation and engaged in a respectable business, was morally capable of committing the crime, but the facts that he had personally committed it with A, B, and C, are so many witness trees indicating

the principal fact that he possessed that abnormal moral nature that was equal to committing the act charged. It is evident that with the decay of morals that accompanies increase of wealth and luxury, we are compelled to deal with a comparatively new form of crime; the reports of this court covering a period of sixty years do not reveal a single instance of its occurrence up to the present year. It is a crime so unnatural and abhorrent that in the very nature of things it will be committed in secrecy. To apply to this new offense the rules applicable to murder, rape, and larceny will, in the vast majority of instances, be a grant of immunity to offenders. The rules of evidence are not arbitrary. They are the result of experience with prevailing conditions and the necessities of society. They are the servants, not the masters, of justice, and they change as the necessities of society change. Time was when the evidentiary test of the navigability of a stream was whether the tide ebbed and flowed in it, but as civilization advanced to new fields, the rule of evidence changed, so that the evidentiary test of navigation of a stream became the fact that vessels could actually float on its waters. No statute announced this change. It was brought about by new conditions and new necessities. Time was when an assaulted person could not justify under the law of self-defense until he had shown that he had "retreated to the wall," but under new conditions and weapons this rule was dispensed with. So here we have a new method of crime and new conditions, and to apply the archaic rules is like trying to fit a square peg into a round hole. In the days of the common law in England, when more than 160 offenses were punished with death, and cruel and long punishments were inflicted for several hundred minor offenses, and where the accused was not permitted counsel in his defense, courts were inclined to be exceedingly technical in the admission of evidence; but in this age where the presumption of innocence is emphasized at every trial, when the defendant is given double the number of peremptory challenges that is allowed to the state, where he has compulsory process to secure the attendance of witnesses, when he has the privilege of counsel, and is allowed to go upon the stand in his own behalf, the necessity for many of these archaic rules has ceased, and they may well be relegated to the scrap heap of unnecessary judicial machinery. "Where the reason for the rule ceases, the rule ceases."

Another reason for the admission of this testimony is the tendency to show the motive for the association with Rodby by de-

pendant. It might well be contended that the association was either on account of personal friendship or from professional reasons. The fact that other young men about the age of Rodby went to defendant's room at his invitation, for the purpose of committing like offenses, indicates to some extent the motive that might have induced him to so frequently be in company with a person with whom a man in his position in life would not ordinarily associate. For this purpose the evidence was admissible under the authorities already cited. It cannot be denied that the admission of the evidence told strongly against the defendant, not only in the particulars already mentioned, but because it corroborated the testimony of Rodby as to the fact that defendant, apparently as an inducement to him to submit to the act, told him that he committed the same act with other persons. It strengthened the case of the state as to the solicitation by making it clear that the defendant actually had solicited other persons, and that they had yielded to his solicitations. There is no error shown in the record, and the judgment should be affirmed.

Eakin, J., concurs in this dissent.

ALABAMA SUPREME COURT.

LEVI MILBRA, Admr., etc., of Edward Milbra, Deceased, Appt.,

v.

SLOSS-SHEFFIELD STEEL & IRON COMPANY.

(— Ala. —, 62 So. 176.)

Pleading — variance — pendency of action.

1. A plea of former action pending in favor of Albert Milbra, administrator of Edward Milbra, deceased, is not supported by a record showing an action in favor of Albert Milburn, administrator of Edward Milburn, deceased, even though it is attempted to show by parol that the parties are in fact the same.

Note. — Effect of misnaming estate in granting letters.

Where a court acts without jurisdiction, as where it admits to probate the will of a living person, or issues letters of administration when decedent had left a will, the letters issued in either case are *ipso facto* void, but if the court has jurisdiction, but the proceeding is irregular, defective, etc., the letters are merely voidable. See note to *Belton v. Summer*, 21 L.R.A. 146.

The court in *MILBRA v. SLOSS-SHEFFIELD STEEL & I. Co.* holds that a petitioner "can no more bring within the grasp of the court,

Name — *idem sonans*.

2. The names "Milbra" and "Milburn" are not *idem sonans*.

Judgment — appointment of administrator — second appointment — collateral attack.

3. A probate court which has appointed an administrator for an estate as that of a person designated by the wrong name may ignore such appointment and appoint another administrator for the estate under the proper name, without subjecting its action to collateral attack.

(April 23, 1913.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham dismissing a suit because of former action pending, brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Harsh, Beddow, & Flitts, for appellant:

The records of the probate court showing

nor has the court any more power to undertake, the administration of the estate of John Doe on a petition for the administration of the estate of Richard Roe, than they have a right and power to administer the estate of a living person," conceding, of course, that John Doe had never been at any time called Richard Roe, except in the petition and letters issued thereon. There are no other cases within the scope of this note in which the facts were such as to require the court to pass upon this jurisdictional question.

The holding in *Ellis v. State*, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660, was somewhat similar. Here, judgment had been entered upon a petition seeking the escheat of land belonging to the estate of "Thomas Stephens, deceased," and the citation called upon all persons interested in the estate of "Thomas Stephenson." It was held that the question was one that went to the jurisdiction of the court, and therefore it could be raised for the first time on the appeal, and the judgment was reversed. But here the defect was in the order and notice, and apparently not in the petition. Generally, as to effect of summons or notice to persons by wrong initial, see notes to *Illinois C. R. Co. v. Hasenwinkle*, 15 L.R.A.(N.S.) 129, and *White v. Himmelberger-Harrison Lumber Co.* 42 L.R.A.(N.S.) 151. As to the rule when the service is by publication, see note to *Butler v. Smith*, 28 L.R.A.(N.S.) 436.

The facts in the few cases within the scope of this note are such that they neither support nor oppose the holding on the question of jurisdiction. Thus, there are a few cases where the person was known by the name used as well as by another name. The question thus presented is one of identity. L.R.A.(N.S.)

the appointment of Albert Milbra to be administrator of the estate of Edward Milbra, deceased, cannot be collaterally impeached.

Henley v. Johnston, 134 Ala. 649, 92 Am. St. Rep. 48, 32 So. 1009; *Jones*, Ev. § 37.

Milbra and Milburn are not *idem sonans*. 21 Am. & Eng. Enc. Law, 2d ed. 313.

That record which speaks the truth, and describes correctly the deceased and the estate involved in the collateral suit, would be presumed to confer the only authority to administer the estate so correctly described therein.

Perry v. King, 117 Ala. 536, 23 So. 783; *Massey v. Smith*, 73 Ala. 173; *Patterson v. Burnett*, 6 Ala. 844; *Deslonde v. Darrington*, 29 Ala. 92; 23 Cyc. 1061; 17 Cyc. 572, 573.

Messrs. P. P. Waldrop and J. A. Simpson, with Messrs. Tillman, Bradley, & Morrow and L. C. Leadbeater, for appellee:

Parol evidence is admissible to identify a party to a record, or a person referred to in an instrument of writing.

Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515; *Moseley v. Martin*, 37 Ala. 216;

tification. Sporza v. German Sav. Bank, 119 App. Div. 172, 104 N. Y. Supp. 260; *Poillon v. Louisville R. Co.* 140 Ky. 707, 131 S. W. 996; *Ketland v. Lebering*, 2 Wash. C. C. 201, Fed. Cas. No. 7,744.

Where a person is known by three different names, and a petition is presented in one of the names upon which the court appoints a committee in lunacy for such person's estate, using the same name in making the order, there is not a jurisdictional defect, so that, upon application and a proper showing, the court may amend the order so as to show that the three different names describe the same person. *Sporza v. German Sav. Bank*, supra.

In *Poillon v. Louisville R. Co.* 140 Ky. 707, 131 S. W. 996, the administrator, in bringing an action for damages based upon defendant's negligence in causing the death of plaintiff's intestate, who was an employee of the defendant, used the name as designated in the letters, alleging that it was correct, and that defendant knew him by another name. It was held that, since defendant did not deny the identity of the person for whose death the action had been brought, but simply denied knowledge as to whether or not he had been called by the name in which suit had been brought, there was no issue as to name, and that judgment should be entered in the name in which suit had been brought, adding the other name as alias.

Where it appeared that there had been a man called "John Lebrun" or "John Lebring" on board a certain vessel as a mariner, to whom wages were due, and that there had not been anyone on board the vessel whose name was "John Lebering" it was held in *Ketland v. Lebering*, supra, that the wages due should

Taylor v. Strickland, 37 Ala. 642; Lamar v. Minter, 13 Ala. 31; Boyd v. Gilchrist, 15 Ala. 849; Brown v. Johnson, 42 Ala. 208; Loveman v. Birmingham R. Light & P. Co. 149 Ala. 515, 43 So. 411; Poillon v. Louisville R. Co. 140 Ky. 707, 131 S. W. 996; Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351; Mobile & M. R. Co. v. Yeates, 67 Ala. 164; Haines v. West, — Tex. Civ. App. —, 102 S. W. 436, 101 Tex. 226, 130 Am. St. Rep. 839, 105 S. W. 1118; Freeman, Judgm. § 175; Ward v. Clendenning, 245 Ill. 206, 91 N. E. 1028; Lamberton v. Dinamore, 75 N. H. 574, 78 Atl. 620; Bailey v. Crittenden, — Tex. Civ. App. —, 44 S. W. 404; Garwood v. Garwood, 29 Cal. 514; Bennitt v. Wilmington Star Min. Co. 119 Ill. 9, 7 N. E. 498; Morris v. State, 101 Ind. 560, 1 N. E. 70; Shirley v. Fearne, 33 Miss. 653, 69 Am. Dec. 375; Stone v. Powell, 5 Mo. 435; New York v. Ryan, 7 Daly, 436; Riley v. Gourley, 9 Conn. 154; Simpson v. Dix, 131 Mass. 179; Graham v. Bates, — Tenn. —, 45 S. W. 465; Crafts v. Sikes, 4 Gray, 194, 64 Am. Dec. 62; Mc-

Laughlin v. Wilks, 42 Mich. 553, 4 N. W. 268.

The probate court is a court of general jurisdiction in the granting of letters of administration, and an error in name is at most a mere irregularity.

Morring v. Tipton, 126 Ala. 350, 28 So. 562.

An irregularity after jurisdiction has attached can be amended at any time.

Ibid.; Whorley v. Memphis & C. R. Co. 72 Ala. 20.

When the probate court has granted letters on an estate, though the grant is voidable, it is without jurisdiction to make a second grant until the first has been revoked, and a second grant is null and void, and the invalidity can be exposed in a collateral attack.

Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757; Hicky v. Stallworth, 143 Ala. 535, 111 Am. St. Rep. 57, 39 So. 267, 5 Ann. Cas. 496; Allen v. Kellam, 69 Ala. 442; Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765; Gray v. Cruise, 36 Ala. 559; Morgan v. Casey, 73 Ala. 222.

be paid to one who held letters of administration on the estate of "John Lebering." On the trial it was not proved that John Lebering was dead, but the court held that the letters of administration gave rise to the presumption of his death.

An application for letters of administration on the estate of "Morris Zerwinski," on the ground that the widow, who had the prior right, had made no application, will be refused where the widow appears and shows that she had obtained letters for the estate of the same person under the name of "Morris Siriski." Re Zerwinski, 51 Misc. 661, 102 N. Y. Supp. 203.

And in the cases cited, *infra*, there was the mixed question of identity and *idem sonans*. As to the doctrine of *idem sonans* generally, see note to Veasey v. Brigman, 13 L.R.A. 541, and as to the application of that doctrine to interchange of "d" and "t," see note to Napa State Hospital v. Dasso, 18 L.R.A. (N.S.) 643. The scope of this note does not include the doctrine of *idem sonans*, since the subject of the note presupposes that the name used is wholly different from the correct name, but the following cases suffice to show that incorrect spelling of the name in letters of administration is subject to the same general test that would be applied to misspelled names in other legal documents:

Letters of administration upon the estate of C. L. Cahill, issued to J. H. Griffin are admissible in a suit brought by J. H. Griffin, administrator of C. Cahill, deceased, to recover damages for the death of C. Cahill, since the insertion or omission of the decedent's middle initial makes no difference if his identity is certain. Alabama Steel & Wire Co. v. Griffin, 149 Ala. 423, 42 So. 1034.
46 L.R.A. (N.S.)

And in Loveman v. Birmingham, R. Light & P. Co. 149 Ala. 515, 43 So. 411, in an action by the administrator *d. b. n.* for damages on the death of "Laurine Schuler," a release by the administratrix in chief, releasing the defendant from all damages for negligence in causing the death of "Laurine Schuler," is a complete bar to the action. The court said that the real question involved was not that of *idem sonans*, but was a question of identity of the person, and that under the evidence there could be no doubt that the decedent named in the release was the identical person named in the letters of administration and in the complaint.

Partition proceedings by the heirs of "Valentine Schuetz," of land the title of which was in "Falladine Schutz," give good title to the land. The court, in Knickerbocker Ice Co. v. Surprise, — Ind. App. —, 97 N. E. 357, held that the names were *idem sonans*.

But in Cleveland, C. C. & St. L. R. Co. v. Pierce, 34 Ind. App. 188, 72 N. E. 604, there was held to be a fatal variance between the caption in a suit in the name of "Elizabeth Peirce, administratrix of the estate of Ferdinand N. Armstrong, deceased," and a complaint alleging that defendant's negligence caused the death of "Fernando W. Armstrong," notwithstanding the fact that the complainant also alleged that "Fernando W. Armstrong" was her husband. The court held that "Ferdinand" and "Fernando" are not *idem sonans*, and that, while a middle letter may be omitted, yet the use of a wrong one is fatal. The report does not disclose the name in the letters, but presumably they contained the same name as used in the caption.
J. W. M.

A difference in name is merely prima facie evidence of a difference in person.

Fowler v. Stebbins, 69 C. C. A. 209, 136 Fed. 365; Brum v. Ivins, 154 Cal. 17, 129 Am. St. Rep. 137, 96 Pac. 876.

Sayre, J., delivered the opinion of the court:

Appellee, being sued, pleaded at the same time a plea in abatement and pleas in bar of the suit, and the issues so raised were submitted together to a jury. More conveniently, perhaps, the two classes of pleas could have been determined separately; the plea in abatement being tried first in order. It was not impossible, however, to try the case on all pleas at once; but in that case the jury should have been instructed, in the event of a finding for defendant, to indicate by their verdict the issue on which they so found, for so only could the exact meaning and effect of such finding be determined and made to appear. As it is, we are unable to say whether the resultant judgment was intended to determine and conclude the merits of the asserted cause of action, or only the disability of the plaintiff to maintain the particular suit; but no objection to this feature of the procedure was taken, no suggestion made that the plea in abatement had been waived by the filing of the pleas in bar, no effort made to have the verdict discriminate between the issues submitted, and the court below tried the issues of law and fact as the parties presented them. We must now proceed in the same way.

Plaintiff (appellant) sought to recover damages for the alleged wrongful death of his intestate, those counts which were permitted to go to the jury under the evidence proceeding under the homicide act, § 2486 of the Code. In abatement of the suit, defendant pleaded that there was then pending another suit between the identical parties, on the identical cause of action. There was also plea of *ne unques administrator*. This, though a plea in bar, went only to plaintiff's right to maintain the suit. It did not deny deliction on the part of defendant. On these pleas, as well as on pleas in denial of defendant's wrong and pleas of contributory negligence, issue was joined and the case tried.

On a former appeal in this case the plea in abatement was held good. Sloss-Sheffield Steel & I. Co. v. Milbra, 173 Ala. 658, 55 So. 890. To the same effect we may cite Perkins v. Moore, 16 Ala. 17. The facts upon which this plea and the plea of *ne unques administrator* rested, and out of which the chief difficulty of this case has arisen, were these: Albert Milbra, a brother of plaintiff administrator, first took steps to have himself appointed administrator of

the estate of his father, Edward Milbra, for the purpose of bringing suit against defendant on account of the death of deceased. The testimony tended to show that, through inadvertence or misunderstanding of the attorney to whom he went, a petition was filed on behalf of Albert Milburn for letters of administration on the estate of Edward Milburn, deceased, and letters were so issued designating the administrator and the deceased exactly as they were designated in the petition. Likewise a suit was brought in which plaintiff described himself as Albert Milburn, administrator of the estate of Edward Milburn, deceased. That was the pending suit to which defendant referred in its plea in abatement, while the theory of the plea of *ne unques administrator* was that the prior issue of letters to Albert Milburn, as administrator of the estate of Edward Milburn, rendered the subsequent letters to plaintiff, Levi Milbra, as administrator of the estate of Edward Milbra, null and void. To establish these pleas defendant was allowed to prove by parol that the letters to Albert Milburn were intended for Albert Milbra, and permitted the jury to find that these letters authorized an administration of the estate of Edward Milbra, deceased. It may be observed, however, that the testimony offered tended only to show the attorney's mistake. There was no evidence to the effect that any of the Milbras were known or called by the name of Milburn, if that be of any consequence in this case, nor any that there was error, clerical or otherwise, in the probate record.

If defendant, instead of putting its plea in abatement into the form of mere conclusions, had pleaded the record of the alleged pending suit as it was without more,—*Prout patet per recordum*, as the old books put it,—it is manifest that on demurrer the plea would have been held bad. For Milbra and Milburn are not *idem sonans*, and prima facie they describe different persons. Defendant pleaded a record according to its supposed legal effect; but between the plea and the proof of it, there was a material and fatal variance which the testimony offered was incompetent to explain away.

"The record imports absolute and complete verity. It is neither to be increased nor diminished by any averment out of or beyond the record. It is to the record, as the law and the testimony upon which the pleader refers his claim." Dimick v. Brooks, 21 Vt. 578. And the rule is that what ought to be of record must be proved by the record. Munday v. Vail, 34 N. J. L. 418; Mondel v. Steel, 8 Mees. & W. 858, 1 Dowl. N. S. 1, 10 L. J. Exch. N. S. 426. But while the record cannot be contradicted or enlarged, consistently with it, and within

it, the parties and subject-matter may be identified. *Tarleton v. Johnson*, 25 Ala. 300, 60 Am. Dec. 515. A number of our cases to the same general effect are cited by counsel for appellee on their brief.

The question then is, How far, within the principles laid down in the cases referred to, may the defendant go in its effort to eke out by parol a record which on its face does not purport to deny plaintiff's authority to sue, in order to destroy the effect of another record regular on its face, and in perfect accord with the facts, granting that authority to plaintiff? This, in a certain aspect, is a question of due process in the probate court. It involves largely more than those considerations of policy advanced by the abatement plea, which would protect defendants against vexatious multiplicity of suits, though the two propositions may come at last to the same practical result, for the policy of the abatement plea does not obtain unless the judgment rendered in the first action would conclude the parties and operate as a bar to the second. The legal effect of the plea was, at least the court on demurrer interpreted the plea as meaning, that plaintiff, to wit, Levi Milbra, as administrator of the estate of Edward Milbra, deceased, had a suit pending; but the proof was only that Albert Milburn, as administrator of Edward Milburn, deceased, had a suit pending. The defect in the situation thus disclosed could not be cured to meet defendant's purpose by assuming that, on the trial of Albert Milburn's suit, he might amend by alleging and proving that his own and his decedent's true name was Milbra. That would still leave defendant's plea in abatement wholly unsupported in its averment of the identity of the plaintiffs in the two actions.

Defendant's plea of *no unques administration* asserted its more essential right to be held answerable only to that plaintiff who had lawful authority to sue. Authorities cited by appellee are ample to show that when the probate court has granted letters of administration on the estate of a decedent, though the grant be voidable, it is without jurisdiction to make a second grant until the first has been revoked, and a second grant is null and void, and its invalidity may be exposed on collateral attack. But if its first effort is wholly ineffectual, then the court may ignore that effort and its record, and proceed to assert its jurisdiction and to appoint an administrator, and that, in our judgment, is what the probate court properly did in this case.

Jurisdiction attaches to persons, to things, to facts, not to mere words, and an error in name is nothing where there is

certainty as to the thing; but names are necessary to due process, and to the sense and effect of those records which the courts are bound to keep. Jurisdiction must not be usurped; it must not be taken of a matter not presented or described. Proceedings omitting the names of persons and the description of things to be dealt with would be absurd. 2 Hughes, Proc. 612, 697, 1021, 1053. As real parties and a real subject-matter are essential to jurisdiction, so certainty in their designation in the pleadings, which go in material part to make up the record, is essential. A person may adopt what name he pleases, and if he deals with others, or goes to court in a name, no matter what, no harm is done. No one with whom he deals or litigates can complain; hence, the rule that the real party directing and controlling litigation may be shown by oral proof. But no one can impose arbitrary, untrue, and unknown descriptions on another person or thing. The estate of a decedent is a definite thing upon which the probate court acts, without notice to persons, by taking jurisdiction for administration. The security of titles and the protection of purchasers at administration sales make it necessary that estates be known and designated by the name of the deceased owner. A petitioner for letters of administration may call himself what he pleases, so long as he does not offend the court by fictitious pleading, but he can no more bring within the grasp of the court, nor has the court any more power to undertake, the administration of the estate of John Doe on a petition for the administration of the estate of Richard Roe, than they have a right and power to administer the estate of a living person. Now, here, Milbra and Milburn are almost as far apart as John Doe and Richard Roe. There was no testimony that the decedent was ever known or called by the name of Milburn except on the occasion of the application for letters of administration on his estate. There was no mistake, clerical or otherwise, on the part of the probate court. The record was made to correspond precisely with the petition by which the court's jurisdiction was invoked. If the probate court had subsequently dealt with the estate of Milbra in the record entitled "The Estate of Milburn," the parties interested in the estate of Milbra being present, a different question would be presented. Perhaps that would be considered a *de facto* administration. Perhaps, also, if defendant had been required to respond in damages to Albert, as administrator, for the death of decedent, it might have relief somewhere and somehow against a second suit by Levi. But those questions have not

arisen. Defendant's only right at this time is that it be impleaded by a plaintiff with authority to bind the estate. Plaintiff in this case shows an authority of unimpeachable authenticity and regular on its face, whereas defendant's effort is not to explain who it is that is managing the first suit, for it may be conceded that Albert Milbra is doing that, but to enlarge the meaning of the probate record upon which Albert relies for authority, by showing that a grant of letters to administer the estate of Milburn concluded the court against a grant of letters to administer the estate of Milbra.

The court of probate is a court of general jurisdiction in the matter of granting letters of administration. All intendments must be indulged in favor of its records. Here the court in both instances was dealing with its own record, and must be presumed to have been informed of the facts. The facts authorized a finding that its first effort had been abortive; and, with the view of sustaining the second grant of administration, when collaterally assailed, it is proper to consider the action of the court as a finding that the first grant was ineffectual for the reasons we have stated, and that there was a vacancy in the administration of the estate of Milbra, because no administrator of his estate had been appointed. Or, if the validity of the subsequent proceeding could not be otherwise upheld, we would consider the record as having been amended so as to show a finding of the facts as they now appear. *Ragland v. King*, 37 Ala. 80; *Cogburn v. McQueen*, 46 Ala. 551; *Bean v. Chapman*, 62 Ala. 58; *Morgan v. Casey*, 73 Ala. 222. An examination of the cases cited by appellee will show that inferentially they sustain our position. Accordingly, we hold on the case presented that the letters issued out of the probate court to plaintiff in this action were not impeachable collaterally. It follows that on the issues raised by the plea in abatement and the plea of *ne unques administrator* plaintiff was entitled to the affirmative charge.

Other questions indicated by the assignment of errors have not been argued by counsel for appellee, and it would probably serve no useful purpose to discuss them at this time. Because the trial court failed to observe the principles which we think should have controlled its action in respect to the questions discussed, the judgment will be reversed.

All the Justices concur, except Dowdell, Ch. J., not sitting.
46 L.R.A. (N.S.)

COLORADO SUPREME COURT.

FRANK J. BECK, Plff. in Err.,
v.
SCHOOL DISTRICT NO. 2 IN BENT
COUNTY.

(— Colo. —, 131 Pac. 398.)

Settlement — mistake — setting aside.

The settlement of an account for a less amount than was due, because of a mutual mistake as to the state of the account, may be set aside and the true balance recovered.

(April 7, 1913.)

ERROR to the District Court for Bent County to review a judgment in defendant's favor in an action to recover a balance alleged to be due on the contract price of a schoolhouse erected by plaintiff for defendant. Reversed.

The facts are stated in the opinion.

Mr. H. L. Lubers, for plaintiff in error:

A mistake of fact consists in an unconscious ignorance or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing material to the transaction, which does not exist, or in the past existence of a thing which has not existed.

20 Am. & Eng. Enc. Law, 807; 2 Pom. Eq. Jur. § 839.

Note. — Mistake as to state of account or amount due as ground of relief from compromise agreement.

As to conclusiveness of stated or settled account containing inaccuracy or error in method of mathematical calculation, see note to *Ripley v. Sage Land & Improv. Co.* 23 L.R.A. (N.S.) 787.

Unless a mistake of fact "constitutes a material ingredient in the contract of the parties and disappoints their intention by a mutual error," or "is inconsistent with good faith and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party," it seems to be no ground of relief. 8 Cyc. 524.

And, accordingly, as said in *Brooks v. Hall*, 36 Kan. 697, 14 Pac. 236: "The rule is, if two parties having, or supposing that they have, claims upon each other, agree to compromise those claims, and to come to a general settlement of the matters in dispute between them without resorting to litigation, and they act with good faith, and stand upon an equal footing, and have equal means of knowledge as to the facts, the compromise is binding. It is not enough to set aside the compromise, that one of the parties may have been in error as to his figures."

So, where two parties have effected a compromise and settlement without any

A contract entered into because of mistake as to an essential element is void.

1 Page, Contr. § 71; St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 803; Teller v. Ferguson, 24 Colo. 437, 51 Pac. 431; Gutshall v. Cooper, 37 Colo. 212, 6 L.R.A. (N.S.) 820, 86 Pac. 125; 2 Pom. Eq. Jur. § 853; Colorado Fuel & Iron Co. v. Chappell, 12 Colo. App. 385, 55 Pac. 606; Lawler v. Jennings, 18 Utah, 35, 55 Pac. 60; Russell & Co. v. Stevenson, 34 Wash. 166, 75 Pac. 627.

If one party has overpaid his debt, the courts will decree repayment of such excess.

Gould v. Emerson, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065; McCurdy v. Breathitt, 5 T. B. Mon. 233, 17 Am. Dec.

65; Conville v. Shook, 144 N. Y. 686, 39 N. E. 406.

Any contract entered into under mistake as to the amount due on a pre-existing liability, and based thereon, may be avoided for such mistake.

Sweeny v. Bienville Water Supply Co. 121 Ala. 454, 25 So. 575; C. Aultman & Co. v. Graham, 29 Ill. App. 77; Powell v. Plant, — Miss. —, 23 So. 399; Scott v. Hall, 58 N. J. Eq. 42, 43 Atl. 50; Emery v. Royal, 117 Ind. 299, 20 N. E. 150; Reid v. Beyle, 39 Kan. 559, 18 Pac. 614; Meinecke v. Sweet, 106 Wis. 21, 81 N. W. 986; Armijo v. Henry, 14 N. M. 181, 25 L.R.A. (N.S.) 275, 89 Pac. 305; Fink v. Smith, 170 Pa. 124, 50 Am. St. Rep. 750, 32 Atl. 566; Wilson v. Moriarty, 88 Cal. 207, 26

mutual mistake or fraud or unfairness, it cannot be invalidated and set aside merely because one of the parties made a mistake in subtraction at the time of the compromise, and acted upon the resulting mistake in his figures. *Ibid*.

And a contract deliberately made in full settlement of all matters between the parties, whereby one of them voluntarily agreed to solicit insurance for the other until his commissions amounted to \$2,000, which sum was to be used toward reducing the indebtedness of the first party's deceased father to the second party, for which the former was not legally responsible, cannot be avoided by the second party, three years after it has become operative, merely on the ground that, although he had the means at hand to determine accurately the condition of the account between the parties, he executed the contract in ignorance of certain facts concerning it, and under a mistake as to the amount due to him from the first party. *Brevoort v. Partridge*, 156 Mich. 359, 120 N. W. 803.

Likewise, where the parties to certain long-standing and loosely kept accounts, without any computation by either of them of their respective claims, agreed to a "jumping settlement" of all matters between them, including certain notes and other matters in addition to the accounts, and gave, each to the other, receipts in full of all demands of every name and nature, one of the parties cannot, three years later, and after the death of the other party, avoid the effect of the compromise and settlement, and recover a further amount, by showing that at the time of the settlement, there was a mistake upon his books in not carrying forward the amount of one page of his ledger and adding it to the amount of his account, which mistake was discovered before the death of the other party, but never mentioned to him. *Blackmer v. Wright*, 12 Vt. 377.

And in the absence of fraud or mutual mistake, a compromise and settlement in full between a city and the sureties of its defaulting treasurer cannot be avoided by the city on the ground that, subsequently 46 L.R.A. (N.S.)

to the settlement, additional deficits of the treasurer have been discovered. *Perkins v. North End Bank*, 17 Wash. 100, 49 Pac. 241.

Where parties have joined in a written contract of mutual compromise and settlement on their respective demands against each other, which were largely unliquidated, although one of them was acting under a mistake, in that he had omitted from his books and statements a large payment which he had made to the other party, and the latter knowingly took advantage of this mistake, a court of equity will not grant any relief, where, notwithstanding the mistake, the party making it was at fault, and has paid no more than he should have paid in settlement of the whole controversy, and the substantial equities of the parties require no repayment to him, and the other party would not have been led to consent to any better settlement than he did, by knowledge that the first party was advised as to the true state of the matter as to which he was mistaken. *Armour & Co. v. Renaker*, 202 Fed. 901, affirming 191 Fed. 48.

And where, in the settlement of a claim against an estate upon a note given by the decedent, the holder of the note and the beneficiaries of the estate both acted upon a mutual mistake as to the amount due upon the note, based on a miscalculation of the holder, and the beneficiaries gave a new note and a mortgage for an amount which all parties assumed was considerably less than the amount due on the original note, the holder assuming to remit the difference in the compromise, but the amount of the new note and the mortgage was in fact more than the amount actually due on the old note, failure of the beneficiaries to discover which fact was the result of gross negligence on their part,—they cannot be relieved of their obligation, but the holder may enforce the mortgage against them for the amount actually due. *Otto v. Long*, 127 Cal. 471, 59 Pac. 895.

And a compromise and settlement of an open account cannot be avoided on the ground of a mistake in the written memo-

Pac. 85; *Corson v. Berson*, 86 Cal. 433, 25 Pac. 7.

One may surcharge by alleging and proving omissions in the account, or may falsify by showing error in some of the items stated in it.

Perkins v. Hart, 11 Wheat. 237, 6 L. ed. 463; *Gutshall v. Cooper*, 37 Colo. 212, 6 L.R.A.(N.S.) 820, 86 Pac. 125; *Colorado Fuel & Iron Co. v. Chappell*, 12 Colo. App. 385, 55 Pac. 606; *Russell & Co. v. Stevenson*, 34 Wash. 166, 75 Pac. 627; *Cross v. Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 96; 21 Enc. Pl. & Pr. 210; *Rehill v. McTague*, 114 Pa. 82, 60 Am. Rep. 341, 7 Atl. 224; 1 Am. & Eng. Enc. Law, 460-464; 2 Pom. Eq. Jur. § 871; 1 Story, Eq. Jur. § 527; *Carpenter v. Kent*, 101 N. Y.

591, 5 N. E. 787; *Conville v. Shook*, 144 N. Y. 686, 39 N. E. 405; *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065; *St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank*, 8 Colo. 70, 5 Pac. 800; 1 Enc. Pl. & Pr. 107; 14 Enc. Pl. & Pr. 39-45; *Sutherland, Pl. & Pr.* § 5053; *Gamble v. Knott*, 40 Ga. 199; *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 932; *Fletcher, Eq. Pl. & Pr.* § 95, p. 130.

Mr. Allen M. Lambright, for defendant in error:

There was neither mutual mistake nor mistake at all by the evidence; there was an unliquidated matter in dispute, a new consideration for the new agreement, and an agreement which is in legal effect an agreement under seal.

random in which the negotiations were conducted, where the mistake was known to and acted upon by the attorneys for both of the parties at the time of the settlement, and the settlement is a fair one in itself. *Peters v. Worrall*, 32 Can. S. C. 52.

But a compromise agreement whereby the conditional vendor of goods agrees to transfer the goods to the vendee, after default, for \$525, under the mistaken belief that only \$650 remains due and unpaid on them, whereas, in fact, the sum of \$950 remains due, will be rescinded and set aside in equity for the mistake, where the vendor discovers the mistake immediately and renounces the agreement, and the other party has not acted upon it to such an extent that it would be unjust to him to be compelled to submit to the rescission. *Scott v. Hall*, 58 N. J. Eq. 42, 43 Atl. 50.

And where the attorney for the holder of a note, through an inadvertent error, stated to the surety of the maker too small an amount as the balance due on the note, and offered to accept the amount stated in full of the surety's liability, and upon payment of such amount gave the surety a receipt in full, it has been held that this does not preclude the holder of the note from recovering from the surety the further balance actually due, although the offer was made by way of compromise of a disputed claim, and the surety did not know of the error or expect to take advantage of it, but accepted the attorney's offer in good faith as a compromise. *C. Aultman & Co. v. Graham*, 29 Ill. App. 77.

So, where an account has been compromised and settled under a mutual mistake as to one item, whereby credit has been twice given for one payment, but the mistake has not influenced the settlement of the other items of the account, the mistake does not avoid the whole settlement, but the amount thus erroneously credited twice may be recovered from the debtor. *Russell & Co. v. Stevenson*, 34 Wash. 166, 75 Pac. 627.

And where an account containing two or three disputed items has been settled by 46 L.R.A.(N.S.)

a compromise, and thereafter one of the parties discovers in the account a charge against him which is conceded by both parties to have been erroneous, but of the error in which neither party knew at the time of the settlement, the first party is entitled to recover the amount of that charge without opening the account; and in the absence of any mistake in reference to any disputed item, which could have affected the settlement, the other party is not entitled to have the whole account opened. *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787.

But where, in the compromise and settlement of certain mutual demands, largely unliquidated, one of the parties by mistake omitted from his books and the statements rendered, a payment which he had made to the other party, he cannot surcharge the settlement with the amount of this payment and recover judgment therefor, but, at most, is entitled only to have the settlement vacated and the parties restored to their original situation. *Armour & Co. v. Renaker*, supra.

And where one of the two partners of an insolvent firm, having commenced a suit to dissolve the partnership and for the appointment of a receiver, agrees, as a compromise, and without regard to the amount of the liabilities, for the purpose of avoiding a sacrifice of the good will of the business and a lessening of the assets by the expenses of a receivership, to pay to the other partner a certain sum for all his interest in the property and good will of the business, and to assume and pay all the indebtedness of the firm, the mere fact that, in arriving at the agreement, both parties labored under the mistake that the liabilities of the firm were about \$500 more than they really were,—the available assets still being considerably less than the amount of the liabilities,—does not entitle the selling partner to recover from the other partner one half of the amount of the error, but he is entitled, at most, only to a rescission of the compromise agreement for the mutual mistake. *Meinecke v. Sweet*, 106 Wis. 21, 81 N. W. 986.

A. C. W.

Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 365, 44 L. ed. 1106, 20 Sup. Ct. Rep. 924; 1 Cyc. 336-340; Storch v. Dewey, 57 Kan. 370, 46 Pac. 698; Berdell v. Bissell, 6 Colo. 185; Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556; Harvey v. Denver & R. G. R. Co. 44 Colo. 258, 130 Am. St. Rep. 120, 99 Pac. 31; 1 Am. & Eng. Enc. Law, 99; Rued v. Cooper, 119 Cal. 463, 51 Pac. 704.

Musser, Ch. J., delivered the opinion of the court:

The object of this proceeding is to review the action of the district court in sustaining a general demurrer to a complaint filed by the plaintiff in error, and a judgment against him for costs; he having elected to stand on the complaint. The complaint alleged that the plaintiff had entered into a contract with the school district to erect a schoolhouse for \$5,785, setting out the contract; that the plaintiff erected the schoolhouse, and thereafter, on the 26th day of May, 1910, sent to the directors a statement of the amount due him, wherein he stated that the balance unpaid on the contract price was \$2,285, and there was due him for extras \$100, and for damages for delay of removal of the old building and material \$100, making a total of \$2,485; that on May 27th, believing the statement rendered and sent by him to be true, he wrote a letter to the school board offering to accept \$2,300 in full, providing settlement was made at once. Then comes the following allegation: "That on the 4th day of June, A. D. 1910, the plaintiff and defendant came to an accounting and settlement, they mutually believing the statement made by the plaintiff to the defendant, dated the 26th day of May, 1910, wherein a balance of \$2,285 was shown in favor of the plaintiff on the contract price for the said building, to be a correct statement of the balance due, and both parties, acting in that belief, thereupon entered into a written settlement, which is in words and figures as follows:" Then follows the contract of settlement, wherein it was recited that the plaintiff and the school district, through its board of directors, entered into a written agreement for the erection of the school building; that divers sums of money had been paid to the plaintiff on account of the contract; that divers disputes existed between the parties, the board claiming that the contract had not been kept by the plaintiff, and that they had been delayed in the use of the building and thereby greatly damaged, and that they became liable for architect's charges, time, and expense, and had been otherwise damaged; 46 L.R.A.(N.S.)

and that the plaintiff also claimed that he had been delayed with his work by the failure of the board to remove the old schoolhouse, and furnish cement on demand; that the plaintiff had offered to compromise the differences and to take and accept the sum of \$2,385 in full payment, satisfaction, and discharge of all the balance due on account of the amounts to be paid under the said contract, and all extras and damages of whatever nature and in full for all sums due him, and the district had accepted the compromise offered. After the recital of these matters, the contract stated that, in consideration of the premises and of \$1 to each party in hand paid by the other, and in consideration of the payment of \$2,385 to the plaintiff, the receipt of which he acknowledged, each party acknowledged that settlement in full had been made of all amounts due or to become due under the building contract, or any extras or damages, in whatever manner arising out of said contract, and of all damages or claims held by said district against the plaintiff on account of any delays, damages, or default in any manner, and the parties released and discharged each other from all claims, debts, or liabilities which existed between them.

The complaint then alleged that, since the settlement, the plaintiff had discovered error and false credit given the district, of which he was ignorant at the time, and that the statement of account rendered by him, showing a balance of \$2,285 unpaid him on the contract price, was error and wrong; that the balance due was \$3,285, and set forth the payments made; that the error arose on the part of the plaintiff through the fact that he was erecting another school house for district No. 7, and had received a payment from that district of \$3,500, and, through inadvertence, error, and mistake, mixed the accounts of the two districts, and had given the defendant district a credit of \$3,500, which was \$1,000 more than he had received from it, and then alleges: "That on June 4, 1910, the plaintiff, believing that he had received from the defendant the sum of \$3,500 on such contract, and the board of directors of the defendant believing that they had paid such sum unto the plaintiff, they and each of them, in that belief, entered into said final written settlement of said date; and that said settlement is incorrect in that the balance therein should have been \$3,300 in favor of the plaintiff, instead of \$2,300."

The complaint then goes on and alleges that as soon as the plaintiff discovered the error, about one week after the settlement, he notified one of the directors of the mis-

take and asked that it be corrected, and that the defendant pay him the further sum of \$1,000; that from time to time thereafter he had demanded of the several directors the payment of said sum, and that the directors refused to correct the settlement of June 4th. Plaintiff prayed to be let in to prove the error in stating the account and in the settlement of June 4th, and that the same be corrected, and that there be judgment against the defendant for \$1,000, with interest.

There is no doubt that the complaint alleges that the settlement of June 4th, evidenced by the written contract, was made upon the understanding by each of the parties that the balance due on the contract price was \$2,285, and that it alleges that both parties were mistaken about this, and that the true amount unpaid on the contract price was \$3,285 instead of \$2,285. So that it appears from the complaint that the compromise offer made by the plaintiff and its acceptance by the defendant, and the written agreement of settlement of June 4th, occurred without consideration by either of the parties of this difference of \$1,000, and was based upon mutual error and mistake. There can be no question that the amount unpaid from the district to the plaintiff on the contract price was an essential element to be considered in the settlement of the controversy existing between them, and that the complaint alleges that there was a mistake made as to this element. In *Page on Contracts*, vol. 1, § 71, it is said that it is substantially unquestioned that the general rule is that a contract entered into because of mistake as to an essential element is void. Perhaps it is better to say that the general rule is that a contract entered into because of a mistake as to some essential element may be avoided in a proper action. If the plaintiff made his offer of compromise under the mistaken idea that he had received \$3,500 from the district, when he had received but \$2,500, and the directors, falling into the same error, or knowing that the plaintiff was in error, took advantage of it, accepted the compromise offer, whereupon the contract of full settlement was made, it certainly seems that in equity and good conscience the plaintiff ought to be relieved from such a contract, induced by such an error, and an examination of the authorities shows that they are practically unanimous in saying that such a mistake will vitiate such a contract. In *Page on Contracts*, vol. 1, § 72, it is said: "So if A gives his note to B, thinking that there is a balance due from him to B for which such note is given,

when in fact nothing is due, such note may be avoided as to B or an indorsee with notice. Thus, if A is mistaken as to the amount of his indebtedness, and under such mistake gives a note for too large an amount, equity will give rescission and cancel the note on payment of the amount due, and, if he has overpaid his debt, will decree repayment of such excess. A similar rule exists where one by mistake assumes a debt due him to be smaller than it is.

. . . So if, under a mistaken belief that no credit had been given for a payment which had been made, and in fact credited, the creditor gives a receipt in full on payment of less than the real amount due in pursuance of a contract settling the account, he may recover such difference. Any other contract entered into under mistake as to the amount due on a pre-existing liability and based thereon may be avoided for such mistake."

In *St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank*, 8 Colo. 70, 5 Pac. 800, it is said that an account stated or settled is open to impeachment for mistakes or errors. The following authorities, wherein settlements induced by or made through mistakes as to essential elements occurring in various ways, and wherein such settlements were set aside or the injured party permitted to recover the amount lost by the mistake, support the conclusion that, if the allegations of the complaint in this case are true, the plaintiff is entitled to relief. *Lawler v. Jennings*, 18 Utah, 35, 55 Pac. 60; *Russell & Co. v. Stevenson*, 34 Wash. 166, 75 Pac. 627; *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065; *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787; *Conville v. Shook*, 144 N. Y. 686, 39 N. E. 406; *C. Aultman & Co. v. Graham*, 29 Ill. App. 77; *Powell v. Plant*, — Miss. —, 23 So. 399; *Fink v. Smith*, 170 Pa. 124, 50 Am. St. Rep. 750, 32 Atl. 566.

The complaint sets out the contract of settlement, and the plaintiff prays to be let in to prove the error in the settlement, and that it be corrected. This shows sufficiently that the plaintiff desires that the contract of settlement of June 4th be set aside and a new settlement be made, based upon the true facts, and undoubtedly, if the allegations of the complaint are true, the plaintiff is entitled to such relief, and the court erred in sustaining the demurrer. The judgment is therefore reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

White and Bailey, JJ., concur.

GEORGIA SUPREME COURT.

L. T. PENICK, SR., Exr., etc., et al., Appts.,
v.
MRS. Z. D. ATKINSON et al.

(139 Ga. 649, 77 S. E. 1055.)

Tax — on perpetual lease.

A lease of land to A for as long as he, his heirs, or assigns shall pay a stipulated annual ground rent to the lessor or his heirs or assigns, and shall comply with the covenants therein stated, creates a base or determinable fee, and the property should be taxed to the lessee as owner.

(April 15, 1913.)

A PPEAL by defendants from a judgment of the Superior Court for Morgan County in plaintiffs' favor in an action brought to compel a lessor to reimburse a lessee for taxes assessed upon the leasehold and paid by the lessee. Reversed.

The facts are stated in the opinion.

Messrs. E. H. George, K. S. Anderson, John C. Hart, and T. S. Felder, Attorney General, for appellants.

Mr. Samuel H. Sibley, for appellees:

The lessee does not owe taxes on the unencumbered fee, but only on his interest at its market value.

Wells v. Savannah, 87 Ga. 401, 13 S. E.

Headnote by EVANS, P. J.

Note. — Taxation of land under perpetual lease or ground rent.

For the purposes of this note, leases for ninety-nine years and like periods are considered as perpetual leases.

Practically all of the cases support the holding in *PENICK v. ATKINSON*, that land under a perpetual lease is taxable to the lessee.

Thus, in *Ocean Grove Camp Meeting Asso. v. Reeves*, 79 N. J. 334, 75 Atl. 782, affirmed in 80 N. J. L. 464, 79 Atl. 1119, the assessment of taxes against a lessee on account of his interest in the land was held to be proper where he held under a lease for ninety-nine years, renewable to the lessee, his heirs, and assigns forever, where the rent reserved was grossly disproportioned to the value of the land and the lessee owned the buildings and improvements.

In *Elmira v. Dunn*, 22 Barb. 402, it was held that the interest of a lessee of land, held under a lease from a village given for 990 years in consideration of a certain sum in hand paid and a nominal annual rent, if demanded, was rightfully taxed to the lessee as real estate of which he was the owner.

In *Connecticut Spiritualist Camp-Meeting Asso. v. East Lyme*, 54 Conn. 152, 5 46 L.R.A. (N.S.)

442; *Mixon v. Stanley*, 100 Ga. 377, 28 S. E. 440.

Evans, P. J., delivered the opinion of the court:

On August 3, 1880, Atharates Atkinson and F. C. Foster, as executor of A. G. Foster, jointly executed the following instrument:

"Whereas, Atharates Atkinson of the said county did lease from Albert G. Foster, late of said county, deceased, two lots on the northeast side of the public square in the city of Madison in said county, one known as the Masonic Hall corner, and one the Goldberg lot, upon condition that the said Atkinson might erect houses thereon, paying the said Foster for the ground rent thereof the sum of \$300 annually on or before the 1st day of July in each and every year, the said Atkinson to retain possession so long as he paid said rent, and upon his failure to pay the same according to the terms of said contract, then in that event the said Foster to take absolute possession of said property and the buildings thereon as his property; and whereas, said contract went into effect during the year 1869, and the said Atkinson went into possession and has continually paid his rents for each and every year since the making of said contract, with the exception of the year beginning July 1, 1880, as appears from the receipts of said Foster; and whereas, the said Foster departed this life on the 9th day of

Atl. 849, it was held that leases made by a camp-meeting association of lots for a price paid in advance and running to the lessees, their heirs, and assigns forever, but forfeitable upon breach of certain conditions, constituted the lessees owners, their title being a determinable or base fee; and such lots were taxable to the lessees, and not to the association.

In *Dennis's Appeal*, 72 Conn. 369, 40 Atl. 545, capital of a corporation invested in a lease of real estate for 999 years, an annual rent being reserved and the lessee being liable for the taxes, was held to be invested in real estate within the meaning of a statute which provided that capital invested in real estate on which it is assessed and pays a tax shall be deducted from the market value of its stock in its returns to the assessors.

In *Cincinnati College v. Yeatman*, 30 Ohio St. 276, a lease of a part of the second story of a building for ten thousand years in consideration of a lump sum paid in advance, free of all rent and renewable forever, was held to be an estate in land liable to taxation in the name of the lessee.

In *Frank v. McCrossin*, 33 Pa. Super. Ct. 93, the holder of land under ground rent is held to be personally liable for payment of taxes on the land.

July, 1880, without having reduced said contract to writing:

"Now, therefore, for the purpose of having written evidence of the same, we, the undersigned Atkinson and F. C. Foster, as executor of A. G. Foster, late of said county, deceased, do hereby contract with one another, the same being the contract verbally entered into and put in execution by and between the said Atkinson and Albert G. Foster as hereinbefore set forth: The said Atkinson obligates and binds himself to pay to the said Foster, executor, as aforesaid, or to whomsoever may be the legal holder of this paper under a division in distribution of the estate of said A. G. Foster, and before the 1st day of July of each year, commencing with July, 1880, the sum of \$300, and on failure to do so he is to have ninety days' notice; then in that event he is to turn over the possession of said lots and houses and premises to the legal holder of said lots, houses, and possessions, and the legal holder of this paper, or otherwise will be considered as a tenant holding over. In consideration of which the said Fred. Foster, Ex'r, as aforesaid, agrees that so long as the said Atkinson, his heirs or assigns, pay said rent and comply with his contract herein set forth, he, the said Atkinson, his heirs, and assigns, shall remain in the legal possession of said premises as tenant."

The plaintiffs, alleging themselves to be the successors in title of Atkinson, brought

suit against the defendants, who are the successors in title of Foster, alleging that the city of Madison had assessed for taxation the land, together with the improvements thereon, at a stated sum, three fourths of which is attributable to the improvements, and one fourth of the assessment is attributable to the land without the improvements. The plaintiffs contended that the taxes should be borne in that proportion by them and the defendants. The defendants declined to admit the plaintiffs' contention. Whereupon the plaintiffs paid the whole tax under an agreement with the defendants that they would submit an issue to the courts as to what portion of the assessed tax, if any, was legally collectable of the defendants. The jury, under the court's instruction, found that the tax was apportionable, and fixed the amount to be paid by the defendants. The defendants moved for a new trial, which being refused they excepted.

The instrument out of which grows this suit was construed, in *Atkinson v. Orr*, 83 Ga. 34, 9 S. E. 787, to be a perpetual lease on condition of the prompt payment of an annual ground rent. The exigencies of the present action call for further interpretation, so as to determine the nature of the estate or interest passing thereunder to the lessee. As ordinarily employed, the word "lease" implies a term and reversion to the owner of the land after its termination, and only a chattel interest passes. In the argument of the learned chief justice, who de-

In *Franciscus v. Reigart*, 4 Watts, 98, and *Philadelphia Library Co. v. Ingham*, 1 Whart. 72, it was held that one holding land under a ground rent in fee is liable for the taxes on the land, and is not entitled to deduct the amount of taxes paid by him from the annual rent.

In *State ex rel. Glenn v. Mississippi River Bridge Co.* 134 Mo. 321, 35 S. W. 592, it is held that a lease by a bridge company to a railroad company in perpetuity, with a defeasance clause, leaves the legal title in the bridge company; and the bridge is taxable as a bridge, and not as railroad property.

However, in *Wilgus v. Com.* 9 Bush, 556, a lease for ninety-nine years, with a provision for perpetual renewal, is held to be personalty, and is not to be listed as real estate for purposes of taxation.

The fact that the fee of land is in the public does not prevent the levy of taxes upon the land when leased in perpetuity to an individual.

Thus, a municipality may lay taxes upon land which it has let at an annual rental for a term of ninety-nine years, renewable forever, to one who covenants to pay, in addition to the rent, the public taxes levied on the property. *Norfolk v. J. W. Perry Co.* 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867, affirmed in 46 L.R.A.(N.S.)

220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465.

In *Street v. Columbus*, 75 Miss. 822, 23 So. 773, it is held that school section lands leased to individuals for terms of ninety-nine years, renewable forever at the option of the lessees, are taxable.

In *Washington Market Co. v. District of Columbia*, 4 Mackey, 416, property leased by Congress to a corporation for ninety-nine years under a statute which declared the property of the corporation subject to taxation, and that the lease should be taken and considered as a determinable fee, was held to be taxable to the company on the same footing as property owned in fee by other property holders.

And in *Well's v. Savannah*, 87 Ga. 397, 13 Ill. 442, land held by purchase from the city, the terms of purchase being an annual ground rent forever, or, at the option of the purchaser, his heirs, etc., the payment of the full amount of the stipulated purchase money at the time, was held to be taxable as the property of the purchaser or his successor in title.

The general question as to the right to tax property leased to individuals by the public is discussed in a note to *Norfolk v. J. W. Perry Co.* 35 L.R.A.(N.S.) 167.

R. L. S.

livered the opinion in *Atkinson v. Orr*, supra, he made a clear demonstration that the parties to this instrument meant something more than the creation of a tenancy by the year, or from year to year. Two features were especially stressed by him, viz.: That there was no specification or limit to the character or value of the buildings to be erected by the lessee, and that all buildings, however expensive or valuable, were to become the absolute property of the lessor in the event of the nonpayment of rent for a single year. He also took into consideration that the lease was *in perpetuum*, and that the owner of the premises was to be restored to possession, not by the termination of any term, but by a forfeiture and re-entry upon failure to pay rent. And when it is further considered that the right of possession in express words is extended to the lessee, "his heirs, or assigns," it is clear that the learned chief justice was not speaking of leases in the ordinary acceptation of the word; but when he characterized this instrument as a perpetual lease he had in mind the quality of the estate that the lessee took, which was something more than a leasehold interest. A decisive indication that the instrument was not intended as a technical lease, or to create a chattel interest, is that the lessee shall have and retain possession of the premises for himself, his heirs, and assigns, so long as he complies with his contract. The original signification of the word "lease" is that the lessee has an estate into which he cometh by lawful means. Co. Litt. 43b. The grant of the possession of one's land to another and his heirs will pass a fee, for the reason that an absolute grant of exclusive possession of land is inconsistent with any other estate except that of a fee. The estate is to be held by the grantee, his heirs, or assigns, so long as the grantee, his heirs, or assigns, shall pay the rent reserved and comply with the conditions of the grant. The effect of this limitation is not to render the estate granted less than a fee, but only to render it a base or defeasible fee. A perpetual lease sometimes has been referred to and considered the legal equivalent of a conveyance in fee reserving rent. 1 Tiffany, Land. & T. § 11; *Folts v. Huntley*, 7 Wend. 210.

In *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159, it was held that "an instrument by which, for a consideration received all at one time, the grantors 'lease' certain land to the grantee, mentioning no time during which the estate is to continue, and reserving, 'so long as this lease shall continue, the right to any logs or pipes in the same leased premises,' and certain other rights connected therewith, to have and to

hold the same to the grantee, 'his heirs, and assigns under the restrictions and reservations aforesaid, so long as said grantors shall keep pipes in his land, as aforesaid, and no longer,' conveys a base fee." The supreme court of Pennsylvania has held that a lease to A B, his heirs, and assigns creates a base fee. *Robb v. Beaver*, 8 Watts & S. 107. In *Connecticut Spiritualist Camp Meeting Asso. v. East Lyme*, 54 Conn. 152, 5 Atl. 849, a corporation owning a camp ground upon which was erected a pavilion, and in which religious services were held, leased cottages on the camp ground to lessees, the lease being to the lessee and "his heirs and assigns forever," but forfeitable on breach of certain conditions; and it was held that such a lease created a determinable or base fee.

We think that a perpetual lease is the substantial equivalent of a fee reserving rent. A grant of land to another, reserving a fixed annual rent, with power to re-enter for nonpayment of rent, creates a defeasible fee. *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Stephenson v. Haines*, 16 Ohio St. 478; *Hudson Tunnel Co. v. Atty. Gen.* 27 N. J. Eq. 573. In the last-cited case lands under water were granted by the state, and in the grant a rent, payable to the state, was reserved, and in the instrument of grant power to re-enter for nonpayment of rent was also reserved. One of the questions was, What interest in the land did the state have under this grant? In the opinion it was said: "The interest which the state has in the premises is, not an actual estate. It consists merely in a charge to secure the payment of the rent reserved by distress and re-entry and taking possession. On a grant of the whole estate in fee simple, reserving a certain rent, with a clause for distress and re-entry for nonpayment of the rent, the owner of the rent has neither seigniority nor reversion. 2 Stephens's Com. 25; Co. Litt. §§ 217, 218. A right of entry is not a reversion or estate in the land. *Nicoll v. New York & E. R. Co.* 12 N. Y. 121. Nor is a mere possibility of reverter for condition broken, which may or may not happen, an estate in reversion. 4 Kent, Com. 354; 2 Washb. Real Prop. 390."

Ground rents are not unknown to the jurisprudence of this state. Three cases involving this subject have been considered by this court: *Laurence v. Savannah*, 71 Ga. 392; *Savannah v. Weed*, 84 Ga. 683, 8 L.R.A. 270, 11 S. E. 235; *Wells v. Savannah*, 87 Ga. 397, 13 S. E. 442. In the latter case land demised forever, subject to a perpetual rent, was treated as the property of the grantee, his heirs, and assigns, and ground rent reserved was treated as an

incorporeal hereditament, belonging to the vendor, his heirs, and assigns.

We have reached the conclusion, from the foregoing considerations, that under the instrument in this case Atkinson took a base fee,—that is, an estate in fee,—defeasible upon noncompliance with the conditions therein named; and that the estate of Foster reserved an annual rent charge, which, so long as the estate granted is not forfeited, is an incorporeal hereditament. The base fee and the ground rent are inheritable, and the heirs and assigns of each sustain the same relation to each other as did the original parties to the instrument. *Scott v. Lunt*, 7 Pet. 596, 8 L. ed. 797; *McCammon v. Cooper*, 69 Ohio St. 366, 69 N. E. 658.

Our Civil Code, § 1018, declares that “taxes are to be charged against the owner of property if known, and against the specific property itself if the owner is not known. Life tenants, and those who own and enjoy the property, are chargeable with the tax thereon.” Hence, while the public may treat property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rent or enjoying the use is liable for the tax.” [Civil Code, 1895, § 778.] Applying this principle to the case at bar, the owners of the base fee (the defendants in error in this case) are chargeable with the tax assessed against the land and improvements. *Wells v. Savannah* supra; *Franciscus v. Reigart*, 4 Watts, 98; *Connecticut Spiritualist Camp Meeting Asso. v. East Lyme*, supra.

The petition was projected and the case tried on the hypothesis that the two parties in the contract had separate interests in the land, and that as between themselves there should be an apportionment of the tax. But, as we have attempted to demonstrate, such is not the case. As we view it, the owner of the base fee is the owner of the property in possession, and is liable for such taxes as may be assessed against the property. It is true that his property is burdened with a ground rent, but that gives him no more right to call upon the owner of the ground rent for contribution than, if the property was encumbered by mortgage, to call upon the mortgagee to share in the payment of the tax assessed upon the property. The mortgagee pays taxes on his mortgage and the mortgagor on the property. Likewise, the owner of the ground rent is personally liable for the tax on his ground rent, and the owner of the base fee

is liable for the taxes assessed against the land.

Judgment reversed.

All the Justices concur.

IOWA SUPREME COURT.

W. F. STERMAN, Appt.,

v.

J. M. HANN.

(— Iowa, —, 141 N. W. 934.)

Exemptions — undivided interests.

1. That a physician owns only a half interest in a safe of which he is in possession, which he uses in his business, does not prevent his claiming it to be exempt from execution.

Same — office safe.

2. A safe used by a physician in his business for the keeping of his instruments and books and medicines is exempt from execution.

Same — notice of exemption — elements.

3. Under the Iowa statutes a debtor claiming property levied on under execution to be exempt need not state the extent of his interest in the property, from whom acquired, the consideration paid, and the nature of the interest claimed by the execution creditor.

(June 5, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Madison County in defendant's favor in an action brought to

Note. — Exemption of safe from execution.

The majority of the cases involving the question under consideration herein reach a conclusion similar to that arrived at in *STERMAN v. HANN*, but the several decisions of necessity turn largely upon the wording of the particular statute under which the exemption is sought to be had.

In *Cunningham v. Bricton*, 101 Wis. 378, 77 N. W. 740, holding that a merchant, under a statute exempting the tools, implements, and stock in trade of any mechanic, merchant, trader, or other person, used to carry on his trade or business, not exceeding a certain sum, may select as exempt from execution the safe used in his business, the court said that “Exemption laws must be liberally construed; that, in following out the constitutional mandate, the legislature must provide for the enactment of laws giving the debtor a reasonable amount of property to be held free from the claims of creditors; that such laws are founded on the soundest considerations of public policy, and are designed to stim-

recover a half interest in a certain safe levied on under execution and claimed by plaintiff to be exempt. Reversed.

Statement by Gaynor, J.:

Action in replevin to recover a half interest in a certain safe levied on under execution, and claimed to be exempt on the grounds that the plaintiff was a physician and surgeon and used the same in and about his business.

Messrs. C. A. Robbins, W. S. Cooper, and Leo C. Percival, for appellant:

Exemption laws are to be liberally construed to carry into effect the purposes for which they were enacted.

Equitable Life Assur. Soc. v. Goode, 101 Iowa, 163, 35 L.R.A. 690, 63 Am. St. Rep. 378, 70 N. W. 113.

An iron safe has been held to be exempt in the hands of an abstracter of titles, under a statute exempting to mechanics, miners, and other persons, necessary tools and instruments kept for the purpose of carrying on their trade or business.

Davidson v. Sechrist, 28 Kan. 324.

The safe of a jeweler, necessary in the profitable conducting of his business, is exempt under a statute exempting tools or implements of a mechanic or artisan necessary to carry on his business.

Re McManus, 87 Cal. 292, 10 L.R.A. 567, 22 Am. St. Rep. 250, 25 Pac. 413.

Also the safe of an insurance agent is likewise exempt.

ulate individual freedom and manly citizenship. . . . The law says that the 'tools and implements and stock in trade' belonging to classes named shall be exempt. Under the rule of liberal construction, the words 'tools and implements' should be construed to cover such articles as are usually used in, and are reasonably necessary to carry on, the trade or business of the claimant."

And the safe of a jeweler or watch repairer has been held exempt under a statute providing that the "tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution, it being said that the term "implements" is sufficiently broad to include any instruments needed and used for the purpose of carrying on a trade or business. Re McManus 87 Cal. 292, 10 L.R.A. 567, 22 Am. St. Rep. 250, 25 Pac. 413.

And an iron safe used by an insurance agent and abstracter of titles was held to be an instrument within the meaning of a statute exempting the "necessary tools and instruments" of any person "used and kept for the purpose of carrying on his trade or business," in Davidson v. Sechrist, 28 Kan. 324, quoted in STERMAN v. HANN.

So, in Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710, an insurance agent was held to be engaged in a "trade or profes-

Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

A tenant in common is generally allowed to claim an exemption in his undivided interest in a chattel.

18 Cyc. 1383; Rutledge v. Rutledge, 8 Bart. 34; Servanti v. Lusk, 43 Cal. 238; Radcliff v. Wood, 25 Barb. 52; Heckle v. Grewe, 125 Ill. 58, 8 Am. St. Rep. 332, 17 N. E. 437.

Mr. J. P. Steele, for appellee:

Where property is not of the same quality and cannot be divided by measurement or weight, the owner thereof cannot claim the same as exempt to him as the head of a family.

Newton v. Howe, 29 Wis. 531, 9 Am. Rep. 616; Wright v. Pratt, 31 Wis. 99.

If the proof had shown that appellant was the owner of all the property, possibly the description was sufficient, but the proof conclusively shows that he was not the absolute owner of the property, and only the owner of an interest therein.

Murray v. Thiessen, 114 Iowa, 657, 87 N. W. 672.

Messrs. A. W. Wilkinson and P. R. Wilkinson also for appellee.

Gaynor, J., delivered the opinion of the court:

The plaintiff, at the time hereinafter mentioned, was the owner of an undivided half interest in a certain safe. The defendant, as constable, under an execution issued

sion," and the safe used by him to keep his papers, etc., to be a "tool or apparatus," within the meaning of the Texas statute exempting such articles when belonging to "any trade or profession," from forced sale.

And under a statute exempting from seizure under execution the tools and instruments necessary for the exercise of the trade or profession by which a debtor gains a living, iron chests used by a merchant for the keeping of his books and papers were held exempt, in Farmers' & M. Bank v. Franklin, 1 La. Ann. 393.

And see Harrison v. Mitchell, 13 La. Ann. 260, wherein it was held that an iron safe was not subject to execution under the rule that the implements by which the business of a commercial firm is carried on are not legally subject to seizure or execution.

But a safe belonging to an undertaker and used by him in his business was held not to be within the meaning of a statute exempting "professional instruments and furniture" from execution, in O'Reilly v. Erlanger, 108 App. Div. 318, 17 N. Y. Anno. Cas. 254, 95 N. Y. Supp. 760, affirming 46 Misc. 278. 92 N. Y. Supp. 56 it being said that such provision did not apply to the office furniture and tools of an ordinary business man.

G. J. C.

out of the office of the justice of the peace, levied upon the safe and took the same into his possession as the property of the plaintiff. That at the time the safe was levied upon by the defendant it was in plaintiff's possession. He was a married man and the head of a family, and a practising physician and surgeon. The safe was kept by the plaintiff in his office, and he had the possession, custody, and control of the same, and was using it in connection with his business, and for the purpose of keeping therein his professional instruments, books, and accounts, and certain rare and valuable medicines. That soon after the levy on the safe the plaintiff served on the defendant the notice required by § 3991 of the Code of 1897, claiming the same as exempt, and demanding the return of the safe to him. The defendant, answering, admits that he received the notice to release the safe as exempt, but says that he took the same under an execution against the plaintiff, issued upon a certain judgment in favor of J. F. Tate. He says that all he did was to take and hold it under the execution, and was so holding it at the time this action was commenced. He denies that the safe was exempt from execution, and asks that plaintiff's petition be dismissed. Upon the issues thus tendered, the case was tried to the court without a jury, and the court found for the defendant, dismissing plaintiff's petition.

This is an action in replevin, and the only questions submitted for our consideration are: First. Can a person maintain exemption under § 3991 of the Code, where the property claimed to be exempt was held by him in common with another? Second. Can a physician hold, as exempt, a safe kept and used by him in his office in connection with his business as physician and surgeon, for the purpose of keeping therein his professional instruments, books, and accounts, and medicines?

It must be borne in mind at the outset that exemption laws are to be liberally construed; that they are given to the debtor to secure to him the necessary comforts of life for himself and family, and are enacted on the ground of public policy, for the purpose of saving debtors and their families from want, by reason of misfortune or improvidence and should be so construed as to carry out the intent and purpose of the legislature.

On the first proposition it seems to be well settled that a debtor may claim personal property exempt which he owns in common with another, and that title in severalty is not necessary. In support of this, see *Servanti v. Lusk*, 43 Cal. 238; 46 L.R.A. (N.S.)

Heckle v. Grewe, 125 Ill. 58, 8 Am. St. Rep. 332, 17 N. E. 437; *Rutledge v. Rutledge*, 8 Baxt. 33, 34; *Radcliff v. Wood*, 25 Barb. 52; *Moyer v. Drummond*, 32 S. C. 165, 7 L.R.A. 747, 17 Am. St. Rep. 850, 10 S. E. 952; *Bonsall v. Comly*, 44 Pa. 442.

In *Radcliff v. Wood*, 25 Barb. 52, the property in question consisted of a span of horses, harness, and wagon used in carrying vegetables from a farm to market. The court held that, where property is exempt under the laws of a state, it is none the less exempt because the debtor owns but an undivided interest in it, in common with a stranger to the judgment, and the court says: "To hold that, if a poor man be able to own a team by himself, it shall not be liable to sale under execution, but if he be too poor to own it alone, and joins another poor man in making the purchase, so that each has but half the benefit contemplated by the legislature, then neither shall be entitled to exemption, would, in my judgment, be a most unreasonable interpretation of the law." The same doctrine is laid down in *Servanti v. Lusk*, above cited.

It is true that some courts hold to a contrary doctrine. The defendant relies on *Wright v. Pratt*, 31 Wis. 99. The Wisconsin court holds that there may be exemptions in property held in common with another, but the exemption cannot be claimed unless the property so held is divisible. That is, it makes a distinction between divisible and indivisible property. In that court it was held that a tenant in common of personal property may claim his exemptions therein when the property is divisible in its nature, so that the share can be readily determined and set apart or apportioned with the consent of the other owner, but there seems to us no good ground for this distinction.

In the present case, the plaintiff owned the safe in common with his wife, each owning an undivided half interest. It was in his possession and under his control, with the knowledge or consent of his wife. It was used in and about his business. The defendant, under the execution, made no claim against the interest of the wife. Therefore, as against the constable, the plaintiff had the right to the possession of his wife's interest in the property, and if his interest in the property was exempt, he had the right to hold that, too, as against the levy of attachment. He therefore had dominion over the entire property. He had a right to take it, use it, and keep it, and this right came to him from the other party having a joint interest with him in the property. He had dominion

over the property, with the consent of his wife, and had a right to use it in connection with his business, and for the purposes for which it could, and would, be used, were he the sole owner.

On the second proposition we hold that the safe was exempt, in the hands of the plaintiff, the same as office furniture and the supplies of a lawyer are exempt, as held in *Equitable Life Assur. Soc. v. Goode*, 101 Iowa, 160, 35 L.R.A. 690, 63 Am. St. Rep. 378, 70 N. W. 113, and *Abraham v. Davenport*, 73 Iowa, 111, 5 Am. St. Rep. 665, 34 N. W. 767.

In *Davidson v. Sechrist*, 28 Kan. 324, it was held that an iron safe was exempt to an insurance agent and abstractor of titles, under a statute similar to ours, "as . . . tools and instruments used by the owner in carrying on his business." In this case the court said: "The exemption laws must receive a liberal construction for the purpose of carrying out their object and design, and one of the main objects . . . is that every person shall have the means of carrying on some useful business, and thereby of obtaining an honest livelihood."

In the case of *Re McManus*, 87 Cal. 292, 10 L.R.A. 567, 22 Am. St. Rep. 250, 25 Pac. 413, the California court held that a safe owned by a jeweler and watch repairer is exempt, under a statute exempting from execution the tools and implements of a mechanic or artisan necessary to the carrying on of his business.

In *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710, it was held that an iron safe is included among tools and apparatus exempt from forced sale. In this case the party claiming exemption was an insurance agent, and used the safe in which to deposit his notes and insurance policies, and other papers pertaining to his business as an insurance agent.

It is next claimed by the defendant that the notice served was insufficient, in that it failed to state truly the extent of interest in the property, from whom acquired, the consideration paid, and the nature of plaintiff's interest in the property. These requirements of the statute relate only to cases where a third person, a person other than the defendant, is claiming to be the owner of the property levied upon, and do not apply to cases where the defendant, admitting his ownership, seeks to have the property released on the grounds that it is exempt from execution. There is nothing in defendant's contention on this point.

On the whole record we think the case should be, and is, reversed and remanded. 46 L.R.A. (N.S.)

IOWA SUPREME COURT.

CHARLES K. BEIDENKOPF, Appt.,
v.

DES MOINES LIFE INSURANCE COMPANY, et al.

(— Iowa, — 142 N. W. 434.)

Injunction — temporary — discretion.

1. Application for a temporary injunction is addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case.

Same — disputed right — effect.

2. A temporary injunction will not ordinarily be granted, if the parties are in dispute concerning their legal right, until the right is established, especially if the legal or equitable claims asserted raised questions of a doubtful or unsettled character.

Equity — preventing sale of corporate property — right of minority stockholders.

3. Equity will not interfere to prevent the confirmation of a sale by the majority stockholders of the property of a business corporation, even though it is not insolvent, if, acting without fraud and upon reasonable ground, they conclude that the exigencies of the business and the best interests of all concerned require it, at least if the protesting members will not be likely to suffer any injury for which there is no other adequate remedy.

Corporation — sale by majority stockholders.

4. The holders of a majority of the stock of a life insurance company may, upon change of management and the advent of conditions which will result in declining profits and decreased assets which may lead to insolvency, sell the business while it is in a condition to command the highest possible price.

Same — dissolution — sale of assets.

5. The sale of all the assets of the corporation is not necessarily a dissolution within the meaning of a statute requiring unanimous consent of all the stockholders to a dissolution.

Same — purchase of stock for less than value — effect.

6. A dissenting minority stockholder in a corporation cannot take advantage of the fact that the majority purchased stock of other holders for less than its value before selling all the assets of the company, unless they can establish a general scheme to defraud of which the sale attacked is merely a part.

Same — one person dominating both companies — effect on sale.

7. The mere fact that one person owned

Note. — For power of officers or majority stockholders, against consent of minority, to sell property of corporation essential to its existence as a going concern, see note to *Maben v. Gulf, C. & C. Co.* 35 L.R.A. (N.S.) 396.

the majority of the stock of two corporations does not *per se* make the sale of assets of one to the other void.

Laches — temporary injunction — sale of corporate assets.

8. Laches will prevent a dissenting stockholder from securing a temporary injunction against a sale of all the assets of the corporation, if, with knowledge of a contract to do so, he delays action until the terms of the agreement have been substantially carried out.

(July 2, 1913.)

APPPEAL by plaintiff from a judgment of the District Court for Polk County in defendants' favor in a suit to enjoin the sale of the assets of the Des Moines Life Insurance Company to the National Life Insurance Company. Affirmed.

The facts are stated in the opinion.

Messrs. Louis S. Posner and Schenk & Lehmann, for appellant:

The investment of a stockholder in the corporation constitutes a contract measured by its charter.

Lucas v. White Line Transfer Co. 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; Harding v. American Glucose Co. 182 Ill. : 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Parsons v. Tacoma Smelting & Ref. Co. 25 Wash. 492, 65 Pac. 765; Eldred v. American Palace-Car Co. 96 Fed. 59; Thomp. Corp. 2d ed. §§ 315, 317; Cook, Corp. 6th ed. § 493.

In the absence of special circumstances, a sale of the entire property of a corporation is beyond the corporate powers; it is a diversion that violates contract rights against which courts protect the stockholders to the letter of such rights.

Abbot v. American Hard Rubber Co. 33 Barb. 578; Ervin v. Oregon R. & Nav. Co. 23 Blatchf. 517, 27 Fed. 625; People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; Thomp. Corp. 2d ed. § 4489.

It is only where the further prosecution of its business will lead to loss and insolvency that a corporation may transfer its entire assets or discontinue its business by other than unanimous consent of its shareholders.

Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229, 353; Arents v. Blackwell's Durham Tobacco Co. 101 Fed. 338; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Boston & P. R. Corp. v. New York & N. E. R. Co. 13 R. I. 260; Sieverts v. National Benev. Asso. 95 Iowa, 716, 64 N. W. 671; Colgate v. United States Leather Co. 75 N. J. Eq. 229, 72 Atl. 126, 19 Ann. Cas. 1262; Ervin v. Oregon R. & Nav. Co. 23 Blatchf. 517, 27 Fed. 625; Equitable L. Ins. Co. v. Board of 46 L.R.A. (N.S.)

Equalization, 74 Iowa, 178, 37 N. W. 141; 1 Cook, Corp. 6th ed. § 11; Traders & Mechanics' Ins. Co. v. Brown, 142 Mass. 403, 8 N. E. 134.

No such exigency existed in this case as would permit or necessitate the sale of the entire assets of the corporation.

Parsons v. Tacoma Smelting & Ref. Co. 25 Wash. 492, 65 Pac. 765; Eldred v. American Palace-Car Co. 96 Fed. 59; Arents v. Blackwell's Durham Tobacco Co. 101 Fed. 338; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407.

The contract of sale in substance constituted a dissolution of the corporation prior to the time fixed therefor in its articles of incorporation, and in the absence of unanimous consent was *ultra vires* and void.

Boston & P. R. Corp. v. New York & N. E. R. Co. 13 R. I. 260; 4 Thomp. Corp. 2d ed. § 4489; People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; Harding v. American Glucose Co. 182 Ill. 628, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Abbot v. American Hard Rubber Co. 33 Barb. 578; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Code § 1617.

Purchase of stock from other stockholders by a director and secretary of the company, without a full disclosure of the facts within his knowledge affecting its value, constitutes fraud, and is a breach of trust on the part of the purchaser.

Stewart v. Harris, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873; Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232; Strong v. Repide, 213 U. S. 419, 53 L. ed. 853, 29 Sup. Ct. Rep. 521; Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629.

Plaintiff is entitled to the injunction for which he prays.

Morris v. Elyton Land Co. 125 Ala. 263, 28 So. 513; 3 Thomp. Corp. 2d ed. § 2847; Kean v. Johnson, 9 N. J. Eq. 401; Lord v. Equitable Life Assur. Soc. 194 N. Y. 239, 22 L.R.A. (N.S.) 420, 87 N. E. 443; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; 2 High, Inj. 4th ed. §§ 1203, 1227; Small v. Minneapolis Electro-Matrix Co. 45 Minn. 264, 47 N. W. 797; Ranger v. Champion Cotton-Press Co. 52 Fed. 611; Eldred v. American Palace-Car Co. 96 Fed. 59; Abbot v. American Hard Rubber Co. 33 Barb. 578; Smith v. New York Consol. Stage Co. 18 Abb. Pr. 419; Teachout v. Des Moines Broad-Gauge Street R. Co. 75 Iowa, 722, 38 N. W. 145.

Messrs. Locke & Locke and Guernsey, Parker, & Miller, for appellees:

A corporation is not dissolved by the sale

of all its assets and the liquidation of its business, which is more than all the contract of reinsurance accomplished.

Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; 2 Clark & M. Priv. Corp. § 310; 2 Cook, Corp. 6th ed. § 631; 5 Thomp. Corp. 2d ed. § 6493.

The Des Moines Life had power to sell all its assets, reinsure its business, and go into voluntary liquidation.

Iowa Code, §§ 1607, 1609, ¶ 6; Code Supp. §§ 1821 m-u (Acts of 1904, chap. 58); 1 Kyd, Corp. 108; 2 Kent, Com. *281; Angell & A. Priv. Corp. § 187; Noyes, Intercorporate Relations, § 127; 3 Thomp. Corp. 2d ed. §§ 2415, 2417; 1 Clark & M. Corp. § 160; 2 Clark & M. Corp. § 336; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Warfield H. & Co. v. Marshall County Canning Co. 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467; Sawyer v. Dubuque Printing Co. 77 Iowa, 242, 42 N. W. 300; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Traer v. Lucas Prospecting Co. 124 Iowa, 107, 99 N. W. 290; Gulf, C. & S. F. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156; Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & R. Co. 106 Tenn. 651, 62 S. W. 162; McLeod v. Central Normal School Asso. 152 Pa. 575, 25 Atl. 1109; Parvin v. Mutual Reserve L. Ins. Co. 125 Iowa, 95, 100 N. W. 39; Moore v. Security Trust & L. Ins. Co. 93 C. C. A. 652, 168 Fed. 496; Watson v. National Life & Trust Co. 111 C. C. A. 134, 189 Fed. 872.

The unanimous consent of the stockholders was not essential to the validity of the contract of reinsurance.

1 Morawetz, Priv. Corp. 2d ed. §§ 474, 475; 4 Thomp. Corp. 2d ed. §§ 4480, 4483-4487; 3 Clark & M. Priv. Corp. § 628; 2 Cook, Corp. 6th ed. § 684; 2 Machen, Corp. § 1296; McBride v. Porter, 17 Iowa, 203.

In the absence of express stipulation, there is no implied agreement between a private corporation and its stockholders, or among the stockholders of a private corporation, that the corporation shall continue the transaction of its regular business when, in the opinion of the majority stockholders, the conditions are such as to render it inexpedient, from the point of view of the corporation and the stockholders as a body, so to continue.

Sawyer v. Dubuque Printing Co. 77 Iowa, 242, 42 N. W. 300; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Traer v. Lucas Prospecting Co. 124 Iowa, 107, 99 N. W. 290; Platner v. Kirby, 138 Iowa, 259, 115 N. W. 1032; Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490; Lauman v. Lebanon Valley R. Co. 30 Pa. 42, 72 Am. Dec. 685; Maben v. Gulf Coal & Coke Co. 46 L.R.A.(N.S.)

173 Ala. 259, 35 L.R.A.(N.S.) 396, 55 So. 607; Bowditch v. Jackson Co. 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913 A, 366; Hayden v. Official Hotel Red-Book & Directory Co. 42 Fed. 875; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155; State v. Chilhowee Woolen Mills Co. 115 Tenn. 266, 2 L.R.A.(N.S.) 493, 112 Am. St. Rep. 825, 89 S. W. 741; Wilson v. Central Bridge, 9 R. I. 590; Phillips v. Providence Steam Engine Co. 21 R. I. 302, 45 L.R.A. 560, 43 Atl. 598; Ritchie v. Vermillion Min. Co. 1 Ont. L. Rep. 654; Pringle v. Eltringham Constr. Co. 49 La. Ann. 301, 21 So. 515; Hancock v. Holbrook, 4 Woods, 52, 9 Fed. 353; Arents v. Blackwell's Durham Tobacco Co. 101 Fed. 338, affirmed in 109 Fed. 1058; Wilson v. Miers, 10 C. B. N. S. 348, 3 L. T. N. S. 780; Bartholomew v. Derby Rubber Co. 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45; Magowan v. Groneweg, 14 S. D. 543, 86 N. W. 626; Jameson v. Hartford F. Ins. Co. 14 App. Div. 380, 44 N. Y. Supp. 15; Raymond v. Security Trust & L. Ins. Co. 111 App. Div. 191, 97 N. Y. Supp. 557; Story v. Jersey City & B. P. Pl. Road Co. 18 N. J. Eq. 13, 84 Am. Dec. 134; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130; Noyes, Intercorporate Relations, § 110; 10 Cyc. 1302; 1 Clark & M. Priv. Corp. § 160; 1 Morawetz, Priv. Corp. § 413; 2 Machen, Corp. § 1296.

Special notice of the possible submission of a reinsurance proposition was not essential to the right of the stockholders in regular meeting assembled to authorize the execution of the reinsurance contract.

Warner v. Mower, 11 Vt. 385; Chicago, R. I. & P. R. Co. v. Union P. R. Co. 47 Fed. 15, affirmed in 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309, 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; Western Improv. Co. v. Des Moines Nat. Bank, 103 Iowa, 455, 72 N. W. 657; Morrill v. Little Falls Mfg. Co. 53 Minn. 371, 21 L.R.A. 174, 55 N. W. 547, 60 Minn. 405, 62 N. W. 548; Jones v. Hilldale Cemetery Soc. 23 Ky. L. Rep. 1486, 65 S. W. 838; State ex rel. Atty. Gen. v. Bonnell, 35 Ohio St. 10; Mutual F. Ins. Co. v. Farquhar, 86 Md. 668, 39 Atl. 527; New York Electrical Workers' Union v. Sullivan, 122 App. Div. 764, 107 N. Y. Supp. 886; Clark, Corp. 464; 2 Machen, Corp. § 1198.

A court of equity will not set aside at the suit of minority stockholders a voidable corporate act which has been, or yet may be, rendered valid by ratification upon the part of the majority stockholders.

Foss v. Harbottle, 2 Hare, 461; MacDougall v. Gardiner, L. R. 1 Ch. Div. 13, 45 L. J. Ch. N. S. 27, 33 L. T. N. S. 521, 24 Week. Rep. 118; Edwards v. Shrewsbury & B. R.

Co. 2 DeG. & S. 537; Lord v. Copper Miners Co. 2 Phill. Ch. 740, 1 Hall & Tw. 85, 18 L. J. Ch. N. S. 65, 12 Jur. N. S. 1059; Bagshaw v. Eastern Union R. Co. 7 Hare, 114, 6 Eng. Ry. & C. Cas. 152, 18 L. J. Ch. N. S. 193, 13 Jur. N. S. 602; Taunton v. Royal Ins. Co. 2 Hem. & M. 135, 33 L. J. Ch. N. S. 406, 10 Jur. N. S. 291, 10 L. T. N. S. 156, 12 Week. Rep. 549; Kent v. Jackson, 14 Beav. 367; Re Norwich Yarn Co. 22 Beav. 143, 25 L. J. Ch. N. S. 601, 2 Jur. N. S. 940, 4 Week. Rep. 619; Clinch v. Financial Corp. L. R. 5 Eq. 482; Harben v. Phillips, L. R. 23 Ch. Div. 14, 48 L. T. N. S. 334, 31 Week. Rep. 173; Burland v. Earle [1902] A. C. 93, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, 9 Manson, 17; Browne v. La Trinidad, L. R. 37 Ch. Div. 1, 57 L. J. Ch. N. S. 292, 58 L. T. N. S. 137, 36 Week. Rep. 289; Shaw v. Davis, 78 Md. 308, 23 L.R.A. 294, 28 Atl. 619; Gold Bluff Min. & Lumber Corp. v. Whitlock, 75 Conn. 669, 55 Atl. 175; Dudley v. Kentucky High-School, 9 Bush, 576; Scanlan v. Snow, 2 App. D. C. 137; Wallace v. Long Island R. Co. 12 Hun, 460; Hart v. Ogdensburg & L. C. R. Co. 89 Hun, 316, 35 N. Y. Supp. 566; Union Agri. Soc. v. Gamble, 52 Iowa, 524, 3 N. W. 531; Purdom v. Ontario Loan & Debiture Co. 22 Ont. Rep. 597; Ritchie v. Vermillion Min. Co. 1 Ont. L. Rep. 654; Trusts & G. Co. v. Abbott Mitchell Iron & Steel Co. 11 Ont. L. Rep. 403; 3 Clark & M. Priv. Corp. 1688; 2 Cook, Corp. 6th ed. § 683; 1 Morawetz, Priv. Corp. §§ 246, 249.

If the plaintiff and his associate have been injured, an award of damages or compensation is the proper and sufficient remedy.

Southern Mut. Aid Asso. v. Blount, 112 Va. 214, 70 S. E. 487; Freemyer v. Industrial Mut. Indemnity Co. 101 Ark. 61, 141 S. W. 508; Sabre v. United Traction & Electric Co. 156 Fed. 79; Mulverhill v. Vicksburg R. Power & Mfg. Co. 88 Miss. 689, 40 So. 647; Beling v. American Tobacco Co. 72 N. J. Eq. 32, 65 Atl. 725; Dana v. American Tobacco Co. 72 N. J. Eq. 44, 65 Atl. 730; Chapman v. Mad River & L. E. R. Co. 6 Ohio St. 120.

The right of the plaintiff and his associate to the relief sought, if it ever existed, was barred by laches before this suit was begun.

5 Pom. Eq. Jur. 3d ed. § 21; Mumford v. Ecuador Development Co. — N. J. Eq. —, 50 Atl. 476; Dana v. American Tobacco Co. 72 N. J. Eq. 44, 65 Atl. 730; Thompson v. Lambert, 44 Iowa, 239; International & G. N. R. Co. v. Brémont, 53 Tex. 96; Carter v. Ford Plate Glass Co. 85 Ind. 180; Holt v. Parsons, 118 Ga. 895, 45 S. E. 690; 46 L.R.A.(N.S.)

Atty. Gen. ex rel. Easton v. New York & L. B. R. Co. 24 N. J. Eq. 49; Wayne County v. Dickinson, 153 Ind. 682, 53 N. E. 929; Birmingham Canal Co. v. Lloyd, 18 Ves. Jr. 515, 8 Mor. Min. Rep. 166, 11 Revised Rep. 245; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Graham v. Birkenhead, L. & C. Junction R. Co. 2 Macn. & G. 146, 2 Hall & Tw. 450, 20 L. J. Ch. N. S. 445, 14 Jur. N. S. 494; Spencer v. Seaboard Air Line R. Co. 137 N. C. 107, 1 L.R.A.(N.S.) 604, 49 S. E. 96; Chapman v. Mad River & L. E. R. Co. 6 Ohio St. 120.

Weaver, Ch. J., delivered the opinion of the court:

The Des Moines Life Insurance Company is an Iowa corporation organized for the transaction of the business indicated by its title. Prior to October, 1907, it had been doing business as a mutual concern, but on the day named it was reorganized into a stock company, and adopted articles of incorporation appropriate to effectuate the change. Its capital stock was fixed at \$100,000, divided into 1,000 shares of the par value of \$100 each. Of these shares Charles E. Rawson and Louise C. Rawson, who were the principal figures in the company from the outset, held a numerical majority. The larger part of the minority stock was owned by Wilmot A. Harbach, a son-in-law of the Rawsons, and small holdings were in the hands of various individuals, among whom were the plaintiff herein and one Max Holtz, each owning one share. Plaintiff and Holtz were and are residents of New York. The company continued in active prosecution of the life insurance business, quite largely increasing the volume of insurance carried, as well as its showing of assets and profits, until the opening of the year 1912. On January 16, 1912, at the time and place fixed therefor in the articles of incorporation, the stockholders of the company assembled in annual meeting. Of this meeting plaintiff and Holtz were given no notice other than such constructive notice as was imparted by the provision of the articles naming the day, hour, and place of the annual meeting. That meeting was attended by the holders of 983 of the 1,000 shares of stock issued and outstanding. The business of the annual meeting not being completed on January 16th, it was adjourned for one week, when the transactions took place over which this litigation has arisen. Prior to this date negotiations had been begun by the Rawsons (who for alleged considerations of health wished to retire from the company) looking to the reinsurance of the business of the Des Moines Life

Insurance Company in the National Life Company, a corporation of the state of Illinois, and the sale of their shares of stock in the Des Moines Life Company to one Johnson, who owned a controlling interest in the National Life.

Referring to this situation, the stockholders at the meeting above mentioned adopted by unanimous vote a resolution as follows: "Resolved by the stockholders of the Des Moines Life Insurance Company in regular annual meeting duly assembled: That the inability of C. E. Rawson and L. C. Rawson, president and vice president respectively of the company, to whose unremitting efforts through a period of more than twenty years its past success has been chiefly due, to continue longer in the active management of its affairs, and the difficulty of securing officers of known experience, ability, and integrity to take their places, render it advisable for the company to reinsure its outstanding liabilities and to retire from business. That the proposition made by National Life Insurance Company of the United States of America to reinsure the company's outstanding liabilities is satisfactory to the stockholders, and that the directors be, and hereby they are, authorized and requested to cause the proper officers of the company in its name and behalf to sign, seal, acknowledge, deliver, and carry into effect a contract of reinsurance with said National Life Insurance Company of the United States of America in terms substantially as follows, to wit: [Here follows a copy of the contract with the National Life Company.] That from and after this date, the company transact no business except such as is properly incidental to the carrying out of such contract, and to the fulfilment of its existing obligations, and to the winding up of its affairs. That the directors be, and hereby they are, authorized and requested to take such steps as may be appropriate for the voluntary liquidation of the company's business." The contract is too voluminous to be here set out. It assigns and transfers to the National Life all the property and assets of every kind and nature owned by the Des Moines Life, and empowers and authorizes the former company to collect and receive all premiums, reserves, and income thereafter becoming due and payable to the Des Moines Life. In consideration of such transfer of all the property and assets of the last-named company, the National Life assumed as its own all the policy obligations and other indebtedness of the Des Moines Life except its liability to its stockholders. In addition to the foregoing, and as a further consideration for said sale and transfer, the National Life undertook to pay the Des Moines Life \$300,-

000 cash and the further sum of \$400,000 in five annual payments of \$80,000 each. The contract being executed, the cash installment of \$300,000 was paid. On January 24, 1912, Harbach, as secretary of the Des Moines Life, addressed letters to the plaintiff and Holtz, informing them of what had been done, and inclosing to each a check for \$300 as a "first liquidation dividend." In this letter the reasons for going into liquidation were stated as follows: "Owing to the continued ill health of Mr. C. E. Rawson, who has been for many years the president and manager of this company, it became necessary either to change the management of the company, or to arrange with some other company to perform its obligations. All things considered, it seemed that the latter course was most advantageous to the stockholders and the policy holders alike, provided suitable arrangements could be made with a company of the requisite financial strength and business character." The letter proceeds then to say that the National Life appears to be one of the necessary financial soundness, and the stockholders thus addressed are informed of the essential features of the sale and transfer. On January 30, 1912, plaintiff and Holtz, who appear to be acting together, each addressed a letter to Harbach, protesting that they had been given no notice of the meeting or of the proposed sale of the business, expressing their objection thereto, and returning the checks which had been sent them. No legal proceedings were instituted to prevent the carrying out of said contract until April 23, 1912, when this action was begun.

In his petition plaintiff sets out the facts above stated, and further alleges that Rawson and his wife were in substantial control of the business of the company under its original organization, and that the change thereof to a stock company was designed to perpetuate such control, and to enhance their personal profits in the business, and that said persons did in fact continue in such management until the date of the attempted liquidation. He further alleges that at the date of such liquidation the company was solvent and in the enjoyment of a large, profitable, and growing business, and owned and possessed property, money, securities, and other assets largely in excess of the securities and reserves which it was required to retain for the benefit of its policy holders, and that in such excess or accumulation of profits plaintiff was entitled to share in just proportion with other stockholders; that in making the sale of said assets and business to the National Life, and in entering upon a liquidation of its affairs, the said Des Moines Life ex-

ceeded its powers, and that the resolution authorizing such sale and the contract made in pursuance thereof are void and of no effect. He further charges that the officers of said company knew that plaintiff and other stockholders would be opposed to such proceedings and would not consent thereto, and that to prevent their opposition being made effective notice of the contemplated meeting and of the proposed sale to the National Life was fraudulently withheld from them until after the contract had been made. It is further charged that the sale of the assets and business of the company is in fact and in legal effect an attempted dissolution of the corporation, and in pursuance of such design its offices have been closed, and it has ceased to do or transact the business for which it was authorized, although under the terms of its organization it has yet many years of corporate life, and its dissolution cannot lawfully be effected except by the unanimous consent of its stockholders. As further illustrating the alleged fraudulent character of the transaction, plaintiff says that after the sale had at least been tentatively negotiated by the Rawsons at a figure making the stock worth at least \$700 a share, said Rawsons, aided by Harbach, the secretary, and one Donahey, a director of the company, entered upon an organized effort to purchase the stock held by the minority members at the price of \$200 per share, and, by falsely representing or concealing the fact and terms of the proposed sale to the National Life, did in fact induce many of said stockholders to part with their shares at the grossly inadequate price of \$200, and that the shares so obtained were by the purchasers voted in favor of ratifying and carrying out said contract of sale. He further alleges that the officers and directors of the company having had part and share in all said wrongful transactions, application to them to bring this action would be unavailing, and that he as a stockholder is entitled to bring the same in his own name and for himself and for all other stockholders similarly situated.

By amendment to the petition it is charged that at the date of the adjourned stockholders' meeting of January 23, 1912, Johnson had become the actual or beneficial holder of all the stock, except fourteen shares only, of the Des Moines Life Company, and that said Johnson, having thus acquired full control of such company, and having already full control of the National Life Company, was enabled to manipulate and direct the action of both companies in his own interest, and fix the terms of the agreement for both parties and to his own personal profit, and that this was done in

utter disregard of the rights of the Des Moines Life Company, and especially of its minority stockholders. It is finally charged that the true consideration for the sale to the National Life is not expressed in the contract, but that in addition thereto other large and valuable considerations were paid to the Rawsons and those with whom they were associated in the deal.

Upon the showing thus made, plaintiff prays the appointment of a receiver to take charge of the business and property of the Des Moines Life Company, and for a decree declaring the contract for sale and transfer of its assets and business to the National Life Company void and of no effect, and requiring the latter company to restore to the former all the property and assets delivered to or received by it in pursuance of said contract, and further requiring the Des Moines Life Company to use and administer such assets in conformity with the trust imposed upon it by its charter and by law. Plaintiff also asks for the issuance of a temporary injunction pending the final termination of the action, restraining the Des Moines Life Company and its officers from making any further delivery or transfer of its property and assets to the National Life Company, restraining said last-named company from further receiving such property and assets, and from disposing of any property or assets received from the Des Moines Life Company until the rights of the parties have been finally adjudicated.

Answering the petition, the defendants admit the sale and transfer of the assets and business of the Des Moines Life Company to the National Life Company, but deny all allegations of wrong and fraud in such transaction, and deny that they acted therein in excess of their lawful power and authority. They aver that of the 1,000 shares of capital stock of the Des Moines Life Company 998 shares were held by persons expressly consenting to such sale, and that all of said 998 shares have been transferred to and are now owned and held by Johnson, who is their sole owner. They further alleged that while the Des Moines Life had done a profitable business up to the date when liquidation was determined upon, yet by reason of the fact that Rawson and his wife, to whose efforts and business capacity such prosperity had been largely due, were compelled to retire from the company because of failing health, and by reason of the peculiar conditions then obtaining in the business of life insurance, rendering the same likely in the immediate future to be more hazardous and less profitable, it appeared both expedient and wise to accept an advantageous offer for the reinsurance of its risks and the sale of its as-

sets, rather than to continue the business under less favorable conditions than had theretofore attended it. Under such circumstances, and acting in good faith for the benefit of all concerned, they say they entered into the contract. They further represent that, beginning immediately after the making of said contract, they began the performance of its stipulations, and long before the institution of this action all the assets of the Des Moines Life (other than the price received for said sale) were transferred and turned over to the National Life, and the instalment of \$300,000, paid to the former company upon said contract, was distributed and paid out to its stockholders as a liquidation dividend. Prior to the beginning of this suit, defendants further say, more than 10,000 of the policy holders of the Des Moines Life Company had acquiesced in the contract of reinsurance, and executed their written consent to substitute the contract of the National Life for that of the Des Moines Life, thereby releasing the latter from such policy obligations, and that under the obligations so assumed by the National Life the latter has become liable to pay and has paid death claims to the amount of \$94,000. Thousands of policy holders have paid to the National Life the premiums falling due upon the insurance issued by the Des Moines Life, and it is averred that the court ought not and cannot make any order or enter any judgment herein affecting the rights of the policy holders, none of whom are parties to this proceeding.

The pleadings—petition and answer—with various affidavits, counter affidavits, and exhibits, of which more specific mention is not necessary, were submitted to the court upon plaintiff's application for temporary injunction. The writ was denied by the court in a brief opinion, stating, in effect, that the demand for an injunction having been delayed some three months after the contract complained of had been made, and such contract having already been largely performed, a temporary injunction might at that stage of the proceedings be productive of harm rather than benefit to the policy holders and to others interested in the controversy. It is from this order that appeal has been taken. No trial has been had upon the merits of the dispute, and the question before us is to be disposed of upon the petition and answer and the supporting documents to which we have referred.

The foregoing statement is perhaps of tedious length, but it has seemed necessary to a fair understanding of the position of the parties to a controversy which, however small the sum immediately involved in its

determination, effects directly or indirectly interests of great importance.

I. Counsel on either side have favored the court with carefully prepared briefs, discussing with great thoroughness the legal questions they believe raised by the appeal. Some of these we think unnecessarily anticipate or assume the merits of the litigation as they may appear on the trial yet to be had. The granting or refusal of the demand for a temporary injunction is not always a matter of right, even where the petition shows a probable right of relief on final hearing. Application therefore is addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case. High, *Inj.* 4th ed. § 11.

It is, of course, familiar doctrine that this court will not interfere in such cases except upon clear showing of abuse of the discretion so reposed in the court below.

The writ is to a great extent a preventive remedy; and where the parties are in dispute concerning their legal rights, it will not ordinarily be granted until the right is established, especially if the legal or equitable claims asserted raise questions of a doubtful or unsettled character. Says the Pennsylvania court: "As a preliminary injunction is in its operation somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity to avoid injurious consequences, which cannot be repaired under any standard of compensation." *Mammoth Vein Consol. Coal Co's Appeal*, 54 Pa. 183, 7 Mor. Min. Rep. 460.

On the same subject Baldwin, J., in *Boharte v. Camden & A. R. Co.* Baldw. 205, Fed. Cas. No. 1,817, uses this language: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages." So, also, in *Thompson ex rel. Bergen v. Pater-son*, 9 N. J. Eq. 624, in affirming the refusal of a temporary writ, it is said that "in the bill, answer, and affidavits, no case of threatening, irreparable mischief is made out. That is the only question he (the chancellor) had to decide upon the motion for a preliminary injunction,—in advance of the hearing of the cause, and before the case was in a situation to be decided upon the merits. Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before

it has an opportunity of examining the question of right." In the same line is the declaration of the same court: "An injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be a doubt, which has not been settled by the . . . law of this state." *Stevens v. Paterson & N. R. Co.* 20 N. J. Eq. 126.

Even where the technical right to injunctive relief is otherwise clearly established, it will be denied where the issuance of the writ may occasion inconvenience to the public and serious loss to the defendant, while the injury to the plaintiff can readily be compensated in damages. *Becker v. Lebanon & M. Street R. Co.* 188 Pa. 484, 41 Atl. 612; *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147, 40 Atl. 906.

We have cited but few of the many precedents upon this question, but they establish, we think, the general trend of judicial opinion, and indicate the conservative and safe rule to be observed in cases of this character. Applying that rule to the case made by the record before us, we hold that it shows no abuse of discretion by the trial court, justifying us in reversing its ruling, and requiring it to sustain the plaintiff's demand for a temporary injunction.

II. Strictly speaking, the conclusion announced in the preceding paragraph is as far as it is necessary for us to go in disposing of the plaintiff's appeal from the ruling on his motion for a temporary writ. But the manner in which the case has been presented and argued evidences a common desire of counsel on both sides that we express our views on some of the more fundamental propositions underlying the principal controversy. Within limits this may be proper and serve to keep the future course of the litigation within due bounds. These views will also have quite direct bearing upon the correctness of the position taken by the trial court in refusing the writ.

The basic contention of the plaintiff is that the sale of the business and assets of the Des Moines Life Company is, in law and equity, tantamount to a dissolution of that corporation, and that the dissolution of a corporation before the expiration of its charter period cannot be legally effected, or the business for which it was organized abandoned, except by the unanimous consent of all its stockholders. It is to be admitted that this rule, stated in a general way, has the support of numerous authorities, most of which are collected in appellant's brief. The leading and most frequently cited decision to this effect is *Abbot v. American Hard Rubber Co.* 33 Barb. 578. It is perhaps open to fair doubt whether the ques-

tion was necessarily involved in that case, but it has undoubtedly been treated as an authority, and not infrequently followed. See *Forrester v. Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 544, 55 Pac. 229, 353; *People v. Ballard*, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; 4 *Thomp. Corp.* 2d ed. § 4489, and cases there cited.

But the doctrine has by no means the unanimous support of the precedents, and it has frequently been held that its strict enforcement would neutralize the efficiency of that other and necessary rule to which every stockholder impliedly agrees in becoming a member of a corporation, that the management and control of the corporate business and interest shall be vested in the majority. See *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Bowditch v. Jackson Co.* 76 N. H. 357, 82 Atl. 1014, Ann. Cas. 1913 A, 366; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685; *Ritchie v. Vermillion Min. Co.* 1 Ont. L. Rep. 654; *Arents v. Blackwell's Durham Tobacco Co.* (C. C.) 101 Fed. 338; *Maben v. Gulf Coal & Coke Co.* 173 Ala. 259, 35 L.R.A.(N.S.) 396, 55 So. 607.

The rule of the *Abbot Case* has been mentioned arguendo by this court as affording a general standard by which corporate powers are restricted. *Traer v. Lucas Prospecting Co.* 124 Iowa, 112, 99 N. W. 290. But while frequently called upon to hold invalid the sale of all the property of a corporation, we have never applied or enforced the rule relied upon by the appellant. Looking to our decisions having any legitimate bearing upon the issues now presented, we find fairly sustained the proposition that, when the majority of the stockholders of a business corporation, acting without fraud and upon reasonable grounds, conclude that the exigencies of the business in which it is engaged and the best interests of all concerned therein require a sale of the property and a liquidation of the corporate affairs, equity will not interfere to prevent the consummation of such transaction at the suit of one or more minority stockholders, especially where it appears that the protesting members are not likely to suffer any injury for which there is no other adequate remedy. For example, while stating the general rule of the *Abbot Case*, it has been held that when insolvent or in a failing condition the corporation may sell all its property without the unanimous consent of its stockholders. *Traer v. Lucas Prospecting Co.* supra.

Where a minority stockholder was given no notice of a meeting at which a sale of the corporate assets was authorized (it being known to the majority that he was opposed to the transaction), the sale was held to be valid; it appearing that the

financial condition of the corporation made it advisable, and no fraud being disclosed. *Sawyer v. Dubuque Printing Co.* 77 Iowa, 242, 42 N. W. 300.

The same question arose in *Price v. Holcomb*, 89 Iowa, 135, 56 N. W. 410, and it was there said: "It is unquestionably true that a private corporation holds its property as a trust fund for the stockholders. . . . act together; they are in a sense the corporation, and must act with due regard to the right of the minority. If the majority decide arbitrarily, and without just cause, to sell the property of the corporation to the prejudice of the minority, and thereby compel the winding up of the business, . . . it is a fraud upon the minority, and courts of equity will interfere. If, however, just cause exists for selling the property, as when the corporation is insolvent and the sale is necessary to pay debts, or where . . . the business is a failure . . . and the best interests of all require it, the majority have clearly power to order the sale, and in such case their acts are not *ultra vires*."

While the cases here cited present instances of sales made under conditions of financial embarrassment, it is nowhere held that insolvency and financial stress afford the only occasion for the exercise of such power. Indeed the rule as stated in *Price v. Holcomb*, *supra*, fairly implies that such power may be exercised where any "just cause" exists therefor. In *Platner v. Kirby*, 138 Iowa, 265, 115 N. W. 1034, this court appears to have interpreted the effect of its former holdings in harmony with that view, saying that "in this state we have recognized the right of the majority to determine whether the corporation shall be continued or shall be wound up." This position finds support in precedents from other states already cited.

Speaking of the stockholders of a business corporation, Judge Bigelow of the Massachusetts court has said: "By accepting a charter they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual

insolvency. Such a doctrine is without any support in reason or authority." In that case the corporation was not insolvent, but the conditions were such that means to go forward properly with the business were not available. Of the power of the majority under these circumstances the court further says: "We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity."

The same line of reasoning is followed in the recent case of *Bowditch v. Jackson Co.* 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913 A, 366. The court there says, after reference to the various statements of the rule by which a corporation under proper circumstances may sell all its property: "All these are fairly summed up in the statement that the majority may close out the affairs of the company when it can no longer make a reasonable profit. It is believed no court would now hold that the rights of the minority were more extensive than this rule implies. If the majority may sell to prevent greater losses, why may they not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case the sale is made because it is of advantage to the stockholders. Whether the profit to be made is a reasonable one must be a relative matter." Further discussing the subject the court adds: "And the question is one of future prospects. Its decision requires the exercise of business judgment, sagacity, and power to forecast coming events. It is not an issue appropriate for trial and decision in courts, but rather one to be settled by the judgment of the men conducting the business in question. In a limited sense, the majority act as trustees for all the stockholders. When their acts are impugned by the minority, it is not the function of the court to set its judgment against theirs in settling the wisdom or policy of proposed action. By the contract of association all questions of this nature were committed to the majority for final decision (citations omitted)."

A brief reference to the text-writers upon this question may also be of interest.

Mr. Thompson, after quoting a judicial

holding that a corporation must remain in business unless all stockholders consent to its being wound up, expresses his own views as follows: "But it is believed that this *dictum* is unsound when applied to a case where a majority of the stockholders elect to wind up the affairs of the corporation and distribute its assets, because, although the affairs of the corporation may at the particular time be prosperous, yet circumstances may exist rendering it probable that this prosperity will not continue; and whether such circumstances do exist, or are likely to supervene, is a question committed exclusively to the judgment of the majority. It is believed that no case can be found in which a court of equity has granted an injunction, at the suit of a minority stockholder against the majority, to prevent them from discontinuing the business of the corporation and winding up its affairs. The exercise of such a power would be most extraordinary. It would be tantamount to compelling the specific performance of an agreement to form and carry on a corporation extending over an indefinite period of time, and when, in the judgment of the majority, on a question of mere economy and propriety, on which their judgment ought to be conclusive, it has been found more expedient to discontinue the business." 4 Thomp. Corp. § 4443.

To the same effect it is said by Mr. Morawetz: "Ordinary trading corporations are formed solely for the pecuniary benefit of their shareholders. It is therefore no more than reasonable that the majority of an association of this description should have a discretionary power to give up the joint speculation, and wind up the company's business, whenever they deem this step to be in the interest of the whole association. The law is settled accordingly; and it may be stated as a rule that it is an implied condition in the charter of every corporation, formed solely for the pecuniary profit of its shareholders, such as an ordinary trading or manufacturing corporation, that its business may be wound up whenever the majority deem this to be expedient. Under these circumstances the majority may, without the consent of the minority, sell the whole of the company's property, close up the business, distribute the assets, and surrender the charter to the state." 1 Morawetz, Priv. Corp. § 413.

And it seems to us that when appellant concedes, as he does in argument, that the majority may sell and dispose of the corporate property and assets when the necessities of business require it, they recognize a departure from the strict rule in the Abbot Case, the effect of which goes distinctly beyond the limits which he asks 46 L.R.A.(N.S.)

us to lay down for the government of the present case. We have no statute which, directly or by necessary implication, defines the line between a valid and invalid exercise of this power. If we look to the reasons which have led the court to say that a single stockholder, who has contributed perhaps a thousandth part of the capital fund, shall not be authorized to compel the owners of the other 999 shares to perpetuate the business of an insolvent corporation, they just as imperatively require that even a solvent corporation may be liquidated and closed out if those to whom the management of that business is committed foresee, or honestly believe they foresee, threatened perils which sound business wisdom warns them to avoid by disposing of the corporate assets and winding up its affairs. The business man who does not consult the future, and lay out his course with reference to what he there discovers, finds himself, sooner or later, involved in financial ruin. Nor can we suppose that a corporation for pecuniary profit is looking for that kind of blind leadership. If it be wise and just to say that a corporation may dispose of its assets when overcome by disaster, it is even more wise and just to say that they may do likewise to prevent disaster and preserve a solvency the permanence of which changed conditions have rendered insecure.

The defendants herein allege that by the retirement of the persons whose skill and industry had built up the business of the Des Moines Life, and by reason of radical changes which had taken place in the field of life insurance, rendering the business more hazardous and less profitable, they were persuaded that it was for the benefit of all concerned to withdraw from the competition and take advantage of an opportunity to sell at a figure which insured to each and every stockholder the full return of his investment with large added profits. And if this be true, and the majority saw or had reason to believe that while the business had theretofore been profitable, it had reached the high tide of its prosperity, and was quite sure to enter upon an era of declining profits and decreasing assets, which might lead the corporation to the verge of insolvency, then sound business policy and the due concern for the preservation of the trust imposed upon the corporation would appear to dictate a sale and transfer of the concern while it was in the condition to command the highest possible price. To say the least, there is no rule of equity to which we have ever given our adherence which requires a court to interfere by injunction to defeat a sale so made in good faith and for an adequate consideration.

Whether these conditions did exist in this company, and whether the majority had any reason to anticipate changes rendering a sale of the assets and a winding up of the corporate affairs advisable as a sound business proposition, we do not now stop to inquire. The defendants assert that such conditions did exist, and that the sale was made in good faith toward all stockholders. The plaintiff denies the plea thus made, and charges that the majority action was tainted with bad faith. The truth of this issue is yet to be tried, and we ought not to express any opinion upon controverted facts.

Before leaving this branch of the case we may say that the Code of 1897 introduced a significant change in the language of the statute referring to the dissolution of corporations. In the Code of 1873, § 1066, it was provided that "no corporation can be dissolved prior to the period fixed in its articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles." As re-enacted into the present Code, § 1617, the provision is that "a corporation may be dissolved prior to the period fixed in the articles of incorporation, by unanimous consent or in accordance with the provisions of its articles,"—a regulation far less sweeping in its terms than the one for which it has been substituted.

But the question presented in this appeal is not one of the limitation of the power to dissolve the corporation, but one of power to sell the assets of the corporation and wind up the business. That such sale is not necessarily equivalent to a dissolution has been determined by us. *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407. As we have already noted, there is no statute denying such power of sale. There is a statute permitting a life insurance company to reinsure its risks, or to consolidate with another company by observing certain conditions. Code Supp. §§ 1821, n, et seq. Among these conditions is none requiring the unanimous consent of the stockholders.

III. Concerning the alleged fraud and misrepresentation by which it is alleged that certain of the minority stockholders were induced to part with their holdings at \$200 per share, it is possible that upon that final hearing such acts, if proved, may tend to establish a general scheme to defraud, in which the sale of the assets of the company played a part, but, so far as is developed by the pleadings, it is not clear what relevancy such matter has to the plaintiff's claim in this proceeding. None of the persons so parting with their stock are in court demanding redress, nor does the plaintiff appear to be authorized to represent them. So far as the record discloses, they

are satisfied with the consideration paid them, and do not care to risk its loss or diminution by litigation. Neither plaintiff nor Holtz were so misled; they refused the offer, and have suffered no loss or damage because of that fraud. They constitute a class by themselves, and the claim of plaintiff to represent others "similarly situated" with himself would seem to affect the rights of no other stockholder, except perhaps those which may be asserted by Holtz.

IV. Of the claim that, Johnson being the holder of a majority of the stock of the National Life, and having made more or less complete arrangements for the purchase of the Rawson stock in the Des Moines Life, he stood in such a relation of trust to both companies that a sale negotiated by him of the assets of one to the other is *per se*, or at least presumably, fraudulent, it is sufficient to say (without going into an examination at this time of the argument and authorities presented in support of the point thus made) that, as at present advised, we think the fact that the control of both companies was actually or potentially in the hands of Johnson would not make the transaction *per se* fraudulent or void. If the fact be established, it is of course a material circumstance, and the court will scrutinize a deal so accomplished with care; and, if fraud in fact be found, will take proper steps to protect the interests of those injuriously affected thereby.

V. Believing that the ruling of the trial court may be sustained upon other and perhaps more vital principles, we have not entered upon any consideration of the question of plaintiff's laches, which that court deemed sufficient ground for denying a preliminary injunction. That view is, however, not without merit. While there was probably no such laches as leaves the plaintiff remediless, if he has been wronged as he alleges, yet he is not in a position to justly complain if it be said to him that he has waited so long the court will not listen with favor to his demand for the extraordinary aid of a temporary injunction. It is clear from his own showing that he knew a sale of the assets was in contemplation of those having a controlling interest; and, while he was living at a distance, and did not attend the meeting, he was promptly notified of its action, and of the contract which had been made,—a contract which called for immediate delivery of the company's property and assets,—yet he waited three months till, as it is alleged, the terms of the agreement had been substantially complied with and carried out, and then asked to have the writ issue. Even if otherwise the court should have granted the writ, we think it

was not reversible error to deny it under these circumstances.

Other matters argued by counsel it is not necessary to discuss at this preliminary stage of the case, and we shall pass them without further mention.

For the reasons stated, the ruling of the trial court denying plaintiff's prayer for a preliminary injunction is affirmed.

MAINE SUPREME JUDICIAL COURT.

BROOKS HARDWARE COMPANY

v.

J. B. GREER et al.

(— Me. —, 87 Atl. 889.)

Garnishment — soldier's home — jurisdiction.

A soldiers' home established on land,

Note. — Liability of Soldiers' Home to process of garnishment in state courts.

A search has failed to show the existence of any decision as to the liability of a Soldiers Home to garnishment or trustee process issuing out of a state court, other than *Foley v. Shriver*, 81 Va. 568, referred to in *BROOKS HARDWARE CO. v. GREER*. In that case it was held that a Soldiers' Home, a corporation created by Congress, and supported by appropriations made by Congress, and in the occupation of land purchased by the United States government with the consent of the state legislature, which ceded to the United States such jurisdiction as is within the contemplation of the 17th clause of the 8th section of the 1st article of the Federal Constitution, providing that Congress shall have power to exercise exclusive legislation over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, the state reserving such right to serve process, etc., as might be consistent with the exclusive jurisdiction of Congress over the ceded territory, was a nonresident of the state, and so not within the jurisdiction of the court. It was said: "In this case, the state legislature having given the required consent, and the United States having purchased the land in question, the United States have acquired, under the Federal Constitution, exclusive jurisdiction over the ceded lands, and they are no longer a part of the state of Virginia, and are not subject to the jurisdiction of the state courts. Persons residing there are not citizens of Virginia; the property situated there is not subject to the control or disposal of any state court, and the circuit court of Elizabeth City county is without jurisdiction within the said territory. The reservation in the act of cession of concurrent jurisdiction with the United States over the same 46 L.R.A.(N.S.)

jurisdiction over which is ceded to the Federal government, is not subject to garnishment in a state court for a debt due a citizen of the state, under a statute permitting all corporations having a place of business or doing business within the state to be summoned as trustee.

(May 3, 1911.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Kennebec County, exempting the trustee in a proceeding to reach a balance due under a contract for a drainage improvement for the National Home for Disabled Volunteer Soldiers, in satisfaction of a debt due to plaintiff by the contractor. Overruled.

The facts are stated in the opinion.

Messrs. Williamson & Burleigh, for plaintiff:

The National Home for Disabled Volun-

piece or parcel of land, so that the courts, magistrates, and officers of the state may take such cognizance, execute such process, and discharge such other legal functions within the same as may not be incompatible with the consent hereby given, is subject to the provisions of the 1st article and 8th section of the Federal Constitution,—that is, as may not be incompatible with the exclusive jurisdiction of the United States, and which may operate to authorize the service by the officers of the state of the civil and criminal process of the state courts, with reference to acts done within the acknowledged territory of the state outside of the ceded lands." The decision was also put on the further ground that the officers of the Soldiers' Home were disbursing officers of the United States government, and the money in their hands as such, appropriated by act of Congress for public uses, was the money of the United States until applied to the designated ends, and could not be reached by garnishee process.

It may be of interest to note in this connection that it has been held that a state lunatic hospital (*Dewey v. Garvey*, 130 Mass. 86) and a state asylum for the deaf and dumb (*O'Neill v. Sewell*, 85 Ga. 481, 11 S. E. 831), under the control and government of the state, are not liable to the process of garnishment in suits against persons to whom they are indebted.

As to whether one stationed on a military reservation within a state is a nonresident for purposes of attachment, see *Bank of Phoebe v. Byrum*, 110 Va. 708, 27 L.R.A. (N.S.) 436, 135 Am. St. Rep. 953, 67 S. E. 349.

As to whether a court of the county in which land is located which has been ceded to the Federal government for a Soldiers' Home has jurisdiction over the estate of an inmate dying in the home, see *Divine v. Unaka Nat. Bank*, 39 L.R.A.(N.S.) 586, and note.

E. S. O.

teer Soldiers is an eleemosynary corporation, created to administer a great national charity, and is not a part of the United States.

Thomas v. Dakin, 22 Wend. 9; Andrews Bros. Co. v. Youngstown Coke Co. 30 C. C. A. 293, 58 U. S. App. 444, 86 Fed. 585; Warner v. Beers, 23 Wend. 103; People ex rel. Bank of Watertown v. Assessors, 1 Hill, 620; Gifford v. Livingston, 2 Denio, 395; Foley v. Shriver, 81 Va. 568; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; Renner v. Bennett, 21 Ohio St. 431; Re O'Connor, 37 Wis. 379, 19 Am. Rep. 765; Overholser v. National Home, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; Re Kelly, 71 Fed. 545; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Galvin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; Orono v. Sigma Alpha Epsilon Soc. 105 Me. 214, 74 Atl. 19; Speir v. United States, 31 App. D. C. 476.

Being a corporation subject to suit, § 8 of chapter 88, Rev. Stat., is applicable to it, since it must be either a domestic or foreign corporation within the meaning of all the decisions.

Beale, Foreign Corp. § 78, 19 Cyc. 1208.

This court has jurisdiction independent of any waiver thereof. But the trustee has completely waived that question in this case.

It has appeared, has filed a disclosure "submitting itself to an examination upon oath, and praying for judgment and for its costs."

Thornton v. Leavitt, 63 Me. 384; Hibbard v. Newman, 101 Me. 410, 64 Atl. 720; Ballard v. Burrowes, 2 Robt. 206; 2 Enc. Pl. & Pr. 628; Belknap v. Charlton, 25 Or. 41, 34 Pac. 758; Coad v. Coad, 41 Wis. 26; Blackburn v. Sweet, 38 Wis. 578; Fry v. Hannibal & St. J. R. Co. 73 Mo. 126; Sargent v. Flaid, 90 Ind. 501; Layne v. Ohio River R. Co. 35 W. Va. 438, 14 S. E. 123; Handy v. Insurance Co. 37 Ohio St. 366; Bucklin v. Strickler, 32 Neb. 602, 49 N. W. 371; Aultman & T. Co. v. Steinan, 8 Neb. 109; Burdette v. Corgan, 26 Kan. 102; Bell Bros. v. White Lake Lumber Co. 21 Neb. 525, 32 N. W. 561; Lowe v. Stringham, 14 Wis. 223; Carlisle v. Weston, 21 Pick. 537; Sealy v. California Lumber Co. 10 Or. 94, 24 Pac. 197; Flint v. Comly, 95 Me. 251, 49 Atl. 1044.

This corporation is expressly vested with capacity to "sue and be sued," and therefore is subject to trustee process, for garnishment is a "suit."

Moore v. Stainton, 22 Ala. 831; Dewey v. Garvey, 130 Mass. 86; McKelvey v. Crockett, 18 Nev. 238, 2 Pac. 386; Laredo v. Nalle, 65 Tex. 359; Nylan v. Renhard, 10 46 L.R.A. (N.S.)

Colo. App. 46, 49 Pac. 266; Herring-Hall-Marvin Co. v. Bexar County, 16 Tex. Civ. App. 673, 40 S. W. 145; Hibbard v. Newman, 101 Me. 410, 64 Atl. 720; Drake, Attachm. § 452.

If a municipal corporation, a political division of the state, exercising a distinctly governmental function, is subject to garnishment, *a fortiori* should this eleemosynary corporation be subject to the process.

1 Dill. Mun. Corp. 4th ed. § 101; 3 Abbott, Mun. Corp. § 1153; Rodman v. Musselman, 12 Bush, 354, 23 Am. Rep. 724; Portsmouth Gas Co. v. Sanford, 97 Va. 124, 45 L.R.A. 246, 75 Am. St. Rep. 778, 33 S. E. 516; Clark v. Clark, 62 Me. 255; Wendell v. Pierce, 13 N. H. 502; Adams v. Tyler, 121 Mass. 380; Wilson v. Lewis, 10 R. I. 285; Bray v. Wallingford, 20 Conn. 416.

Many cases make the garnishee's capacity of being sued a leading or governing test of liability.

Tracy v. Hornbuckle, 8 Bush, 336; Rodman v. Musselman, 12 Bush, 354, 23 Am. Rep. 724; Bray v. Wallingford, 20 Conn. 416; Ward v. Hartford County, 12 Conn. 404; Speir v. United States, 31 App. D. C. 476; McClanahan v. Western Lunatic Asylum, 88 Va. 466, 13 S. E. 977; Western Lunatic Asylum v. Miller, 29 W. Va. 326, 6 Am. St. Rep. 644, 1 S. E. 740; Re Buffalo State Hospital, 47 Misc. 33, 95 N. Y. Supp. 209.

The weight of authority and of reason favors the allowance of the process, so far as the question of public policy is involved.

1 Dill. Mun. Corp. 4th ed. § 101; 3 Abbott, Mun. Corp. § 1153; Laredo v. Nalle, 65 Tex. 359; Jersey City v. Horton, 38 N. J. L. 88; Rodman v. Musselman, 12 Bush, 354, 23 Am. Rep. 724; Bray v. Wallingford, 20 Conn. 416; Portsmouth Gas Co. v. Sanford, 97 Va. 124, 45 L.R.A. 246, 75 Am. St. Rep. 778, 33 S. E. 516.

The United States did not acquire exclusive jurisdiction over this property, (1) because it did not acquire it in the constitutional method, and (2) because exclusive jurisdiction was not necessary for its purposes.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; Barrett v. Palmer, 135 N. Y. 336, 17 L.R.A. 720, 31 Am. St. Rep. 835, 31 N. E. 1017; Re O'Connor, 37 Wis. 386, 19 Am. Rep. 765; Re Kelly, 71 Fed. 545, 8 Fed. Stat. Anno. 664; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; Foley v. Shriver, 81 Va. 568.

Mr. Robert Treat Whitehouse, for trustee:

The alleged trustee, the National Home for Disabled Volunteer Soldiers, whether a corporate entity or not, is, in any event, merely an instrument or arm of the government of the United States.

7 Am. & Eng. Enc. Law, 637; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Money appropriated by Congress for the benefit of the Home is public money of the United States.

Public property or moneys of the United States in the hands of any department, public corporation, officer, or agent of the United States cannot be made the subject of a suit at law, or be interfered with or diverted.

29 Am. & Eng. Enc. Law, 174; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Case v. Terrell, 11 Wall. 199, 20 L. ed. 134; Reeside v. Walker, 11 How. 290, 13 L. ed. 700; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; The Davis (United States v. Douglass) 10 Wall. 15, 19 L. ed. 875.

No portion of any public moneys appropriated by the government can be held on trustee process in the hands of any person or public corporation which acts in the capacity of a disbursing agent or officer of the United States.

Buchanan v. Alexander, 4 How. 20, 11 L. ed. 857; Providence & S. S. S. Co. v. Virginia F. & M. Ins. Co. 11 Fed. 284; 14 Am. & Eng. Enc. Law, 812; Foley v. Shriver, 81 Va. 568.

King, J., delivered the opinion of the court:

This is an action of assumpsit, on an account annexed, brought in the supreme judicial court for Kennebec county, Maine, in which the National Home for Disabled Volunteer Soldiers is summoned as trustee. The principal defendant was defaulted. It was admitted that the alleged trustee had entered into a written contract with the principal defendant for the complete construction of the improvements of the sewage and drainage system of the Eastern Branch of the National Home for Disabled Volunteer Soldiers, located at Chelsea, in said county of Kennebec, and the plaintiff introduced evidence tending to show a balance due the principal defendant in the hands of the treasurer of the Home at the time of the service of the writ upon the alleged trustee. The case was heard by the presiding justice upon the preliminary question

whether the National Home could be legally charged as trustee in this action, and the justice ruled that it could not be so charged, because it was a disbursing agent of the United States government. The case is before this court on plaintiff's exceptions to that ruling.

The question thus presented leads at once to an inquiry as to the creation and constitution of the National Home for Disabled Volunteer Soldiers, and its character and functions. It was established under the provisions of an act of Congress, approved March 21, 1866, and now embodied in U. S. Rev. Stat. §§ 4825 et seq. p. 3337. Section 4825 is as follows:

"The President, Secretary of War, Chief Justice, and such other persons as have been or from time to time may be associated with them shall constitute a board of managers of an establishment for the care and relief of the disabled volunteers of the United States Army, to be known by the name and style of 'The National Home for Disabled Volunteer Soldiers,' and have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto."

In the other sections of the act, and in the subsequent statutory amendments and additions, it is provided, in substance, and so far as seems material here, that nine managers of the Home (the number was subsequently increased) shall be elected from time to time, as vacancies occur, by joint resolution of Congress; that the managers shall have authority to select sites for branch Homes, and have the necessary buildings erected; that the general treasurer shall give bond to the United States "faithfully to account for all public moneys and property which he may receive," and the treasurer of the branch Homes shall give bond to the general treasurer; that no money shall be appropriated or drawn for the support and maintenance of said Home, "except by direct and specific annual appropriations by law." In the original act it was provided that the managers should make an annual report of the condition of the Home to Congress on the first Monday of every January, and that they should audit the accounts of the treasurer; but later provisions in this respect, and as to the limit and regulation of expenditures, were more exacting and explicit, and are important as showing the relation of the "establishment" so created by Congress to the general government.

By the act of March 3, 1887, chap. 362, 24 Stat. at L. 539, U. S. Comp. Stat. 1901, p. 3348, it was required that "all of the expenditures of the said home, including the expenses of the board of managers, shall be made subject to the general laws governing the disbursements of public moneys, so far as the same can be made applicable thereto, and shall be audited by the proper accounting officers of the treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury."

By the act of March 3, 1891, chap. 542, 26 Stat. at L. 984, U. S. Comp. Stat. 1901, p. 3348, it was provided: "That the accounts relating to the expenditure of said sums, as also all receipts by said Home from whatever source, shall, in addition to the supervision now provided for, be reported to and supervised by the Secretary of War."

By the act of March 3, 1893, chap. 210, 27 Stat. at L. 653, U. S. Comp. Stat. 1901, p. 3349, it was provided that "the Secretary of War shall hereafter exercise the same supervision over all receipts and disbursements on account of the Volunteer Soldiers' Homes as he is required by law to apply to the accounts of disbursing officers of the Army."

And by the act of March 3, 1901, chap. 853, 31 Stat. at L. 1178, U. S. Comp. Stat. 1901, p. 3350, it was provided: "That the accounts relating to the expenditures of all public moneys appropriated for the support and maintenance of the National Home for Disabled Volunteer Soldiers shall be audited by the board of managers of said Home in the same manner as is provided for the accounts of the various departments of the United States government, and thereupon immediately transmitted directly to the proper accounting officers of the Treasury Department for final audit and settlement."

The Home can make no contract not authorized by Congress, or under an appropriation adequate to its fulfilment. Expenditures must be applied solely to the objects for which they are appropriated, and are not to exceed such appropriations. With some small exceptions, all the means for the establishment and support of the Home are provided by Congress.

A consideration of the provisions of the act of Congress of March 21, 1866, which created and provided for the perpetual maintenance of the National Home for Disabled Volunteer Soldiers, as a great national charity, to be supported by appropriations from the national Treasury, together with an examination of the many subsequent acts of Congress which have explicitly defined the purposes, limited the powers, regulated the management, and controlled the expenditures of the Home, leads us to the conclu-

sion that the essential character and functions of this "establishment" are those of an agency,—an instrumentality of the United States government.

It was the United States that had the purpose to establish this great public charity, and that was to provide the means for its perpetual maintenance from its treasury. To effectuate that purpose, it created this "establishment" as its agency to execute its will. The money appropriated by Congress from the national treasury for the support of this charity is the money of the United States, and not the money of the Home, and it so remains until expended for the purposes intended. This is clearly apparent from the explicit congressional provisions and requirements as to its expenditures, and especially that requiring the treasurer of the Home to give bond to the United States "faithfully to account for all public moneys and property which he may receive."

But the plaintiff contends that, if the National Home for Disabled Volunteer Soldiers is to be regarded as an agency or instrumentality of the United States, it is, nevertheless, subject to this trustee process, which is in effect a suit against it, because the act which created and established the Home expressly provided that it could "sue and be sued in courts of law and equity." The application of the well-settled principle that the sovereign cannot be sued is, of course, necessarily predicated upon the condition that the sovereign has not consented to be sued, which it may do.

It has been held that this power conferred upon the Home, to sue and be sued, is not to be construed as a consent that it may be sued in tort. *Overholser v. National Home*, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487. But no case has been called to our attention (except, perhaps, *Foley v. Shriver*, 81 Va. 568), and we have found none, in which the question has been considered whether the Home can be sued in the state courts in actions *ex contractu*. *Foley v. Shriver*, *supra*, was an action in the state court in which it was sought to charge the Home as trustee,—precisely the same question as here presented,—and the court there held (1) that the Federal government had exclusive jurisdiction of the territory of the Home under the ceding act of the state of Virginia, excepting only that civil and criminal processes of the state courts could be served there, and (2) that the officers of the Home were disbursing officers of the United States government, and that the funds in their hands as such cannot be attached under trustee process. The court did not consider, or at least comment, as to the effect to be

given to the provision that the Home could "sue and be sued."

Whether this provision of the act imposing upon the Home the liability to be sued must be construed as a consent by Congress that this governmental agency may be sued in the state courts, and if so, upon what causes of action, is an inquiry not necessary to be decided, we think, in the determination of the question now before us, for in this case the plaintiff regards the alleged trustee as an independent corporation, and as such seeks to charge it as a trustee of the principal defendant. And assuming, but not admitting, that it is such an independent corporation, the question presented is whether it is within the provisions of the statute of this state authorizing corporations to be summoned as trustees; that statute provides that "all domestic corporations, and all foreign or alien companies or corporations established by the laws of any other state or country, and having a place of business, or doing business, within this state, may be summoned as trustee." Rev. Stat. chap. 88, § 8. Our court, then, did not have jurisdiction to summon this National Home as trustee, unless the Home, which is not a domestic corporation, had a place of business, or was doing business, within this state. It is not contended that the Home as a corporation had any place of business, or was doing business at any place, in this state, other than upon the territory of the Eastern Branch of the Home in Kennebec county. The question, then, is whether this "establishment," irrespective of whether it is an independent corporation or not, had a place of business "within this state."

The title to the land comprising the Home is not in the United States, but in the "establishment," as it is called in the act of Congress, which was empowered to take and hold title to real estate. That title was acquired by the consent of Maine, expressed in chapter 66 of the Public Laws of 1867. In that act it was provided: "And jurisdiction over said lands is hereby granted and ceded to the United States; provided that this state shall retain a concurrent jurisdiction with the United States in and over said lands: so far that all civil processes, and such criminal processes as may issue under the authority of this state, against any person or persons charged with crimes or offenses committed outside of said lands, may be executed thereon, in the same manner as though this cession and consent had not been granted; and provided further, that no change shall be made in the location of highways over said premises without the consent of the county commissioners of Kennebec county." If by this act of cession the territory ceded ceased to be territory

over which the state of Maine has jurisdiction, and became territory over which the United States has exclusive jurisdiction and supremacy, then it follows that the Home has no place of business, and is not doing business, "within this state," for the import of those words as used is "within the jurisdiction of this state." The language used in this ceding act is practically identical with that used in the ceding acts passed by other states, where land has been purchased by the United States for public purposes, from which fact it is reasonable to infer that the use of such uniform language of cession was at the instance of the United States; and an examination of the cases in which this language has been construed discloses the reason for its use to be in the fact that its construction, by both Federal and state courts, has been definite and consistent from an early date.

It is provided in article 1, § 8, of the United States Constitution that "the Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding 10 miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." In the decisions construing ceding acts, where land has been purchased by the United States with the consent of the state, and determining the extent of the jurisdiction of the United States over such ceded territory, regard has been had to this constitutional provision.

In *Com. v. Clary*, 8 Mass. 72, involving the question of jurisdiction over lands at Springfield, purchased by the United States, with the consent of the state, for erecting thereon arsenals, etc., the court, by the chief justice, said: "On the facts argued in this case we are of opinion that the territory on which the offense charged is agreed to have been committed is the territory of the United States, over which the Congress have the exclusive power of legislation. The assent of the commonwealth to the purchase of this territory by the United States had this condition annexed to it, that civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals."

In *Mitchell v. Tibbetts*, 17 Pick. 298, the same construction was put upon the same language in the ceding act of the territory for the Charlestown Navy Yard.

In 1841 the house of representatives of Massachusetts requested the opinion of the justices of the supreme court of that state whether persons residing on lands in that state, purchased by or ceded to the United States for navy yards, arsenals, dockyards, forts, etc., were entitled to the benefits of the state common schools for their children in the towns where such lands were located, and the justices answered in the negative, saying: "Where the general consent of the commonwealth is given to the purchase of territory by the United States for forts and dockyards, and when there is no other condition or reservation in the act granting such consent but that of a concurrent jurisdiction of the state for the service of civil process and criminal process against persons charged with crimes committed out of such territory,—the government of the United States has sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence, with the single exception expressed." Accordingly it was there held that the persons residing on such territory were not entitled to the benefits of the common schools for their children in the towns in which such lands are situated; that they are not subject to taxation by said towns; that residence upon such territory for any length of time will not give such person a "legal inhabitancy" of such towns; and that such persons were not entitled to any elective franchise in such towns. Opinion of Justices, 1 Met. 580.

In *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995, the question of the jurisdiction over lands within a state, acquired by the United States with the consent of the state, is exhaustively considered, and the authorities as to the construction of the uniform language of the ceding acts are collated, showing "the consistency with each other of the decisions on the subject by Federal and state tribunals, and of opinions of the Attorneys General." It is there said: "When the title is acquired by purchase by consent of the legislatures of the state, the Federal jurisdiction is exclusive of all state authority. . . . The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice."

The *Ft. Leavenworth Case* was an action to recover back the amount of a tax paid, which the state of Kansas had assessed against the plaintiff upon its railroad property upon the military reservation. The 46 L.R.A. (N.S.)

land constituting the reservation was part of the territory acquired in 1803 by cession from France, and for many years prior to the admission of Kansas as a state the territory of the reservation had been reserved from sale. After the admission of Kansas, the legislature of the state passed an act ceding to the United States jurisdiction of the land of the reservation, containing substantially the same language as in other ceding acts, providing for the right to serve civil and criminal processes in the territory, and also "saving further to said state the right to tax railroad, bridge, and other corporations, their franchises and property on said reservation." The court held that this reservation was valid, and that the tax could not be recovered back. As we understand the opinion, it states the reason for the decision of the court, on the precise question involved, to be that the land of the reservation was not purchased by the United States with the consent of Kansas, and that the subsequent cession of jurisdiction to the United States was not exclusive, containing a saving clause of the right to tax the railroad, and that the exercise of the right under that saving clause did not interfere with the use of the reservation by the United States; and hence the right to tax the railroad existed in the state the same as before the cession. But the paramount idea of the opinion, as the conclusion of the court, after a review of the authorities, manifestly is that the effect of a cession of jurisdiction over certain territory within a state to the United States, by consent of the state, reserving to the state only concurrent jurisdiction to serve civil and criminal processes therein, is to put that territory under the exclusive jurisdiction and dominion of the United States, with the single exception expressed, at least when the property is purchased for the constitutionally specified purposes.

The following cases involved the question as to the jurisdiction over lands purchased, with the consent of the states, for sites for branches of this National Home. *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397; *Re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765; *Foley v. Shriver*, 81 Va. 568; *Re Kelly* (C. C.) 71 Fed. 545. It will be seen that these cases are to some extent conflicting.

In *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397, the supreme court of Ohio had before it the question of the legality of votes cast at an election of a county officer by inmates of the branch of the National Home located in that state, and the conclusion there reached is that the legislative cession of jurisdiction to the United States operated to fix "the exclusive jurisdiction of the general government over this institu-

tion, its lands, and its inmates, 'in all cases whatsoever,' except as to the execution of process issuing under state authority." Speaking of a person who becomes an inmate of the Home, the court said: "He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the state of Indiana or Kentucky, or the District of Columbia."

The court holds that "asylums for the disabled soldier in no substantial sense differ from hospitals in a fortress or in the field. All are alike necessary, and the power to erect and maintain them is incidental to the war power of the government;" and hence, that the land was acquired for a purpose reasonably within the constitutional purposes.

In *Foley v. Shriver*, 81 Va. 568, an action of foreign attachment against the Home, hereinabove referred to to some extent, the court of Virginia seems to regard the constitutional provision giving to the United States power to exercise exclusive jurisdiction over lands within a state, purchased by the United States with the consent of the state, as applicable to the question before it.

The court said: "In this case the state legislature, having given the required consent, and the United States having purchased the land in question, the United States have acquired, under the Federal Constitution, exclusive jurisdiction over the ceded lands, and they are no longer a part of the state of Virginia, and are not subject to the jurisdiction of the state courts." It was also held, as hereinbefore stated, that the officers of the Home were disbursing officers of the United States government, and for that reason not subject to trustee process. It is thus seen that in the Ohio and Virginia cases it is held that the lands acquired for the branch Homes, under the ceding acts of the respective states, are under the exclusive jurisdiction of the United States.

In the two Wisconsin cases, however, the conclusion was reached that the state courts has at least jurisdiction over criminal offenses committed on the land on which the branch Home in that state was located.

In *Re O'Connor* the question was whether the state court had jurisdiction to try an inmate of the Home for an alleged assault and battery committed upon another inmate upon the grounds of the Home. The court held in favor of such jurisdiction, treating the ceding act of the state as void, because the land was not purchased directly by the United States,—a feature of the decision commented upon somewhat adversely in the later case of *Re Kelly*, which arose in the 46 L.R.A. (N.S.)

United States circuit court of the same state.

In *Re Kelly* (C. C.) 71 Fed. 545, the question was reversed from that in the *O'Connor* Case, and was whether the circuit court had jurisdiction to try and punish the petitioner charged with the commission of a crime upon the grounds of the Home, and the court held that it did not have such jurisdiction. In the opinion the learned district judge reasons and holds that the constitutional provision giving the Congress power to exercise exclusive jurisdiction over lands purchased with the consent of the state in which the same is situated is only applicable to cases where there is an actual purchase, with the consent of the state, for the constitutional purposes; and when that is the fact all jurisdiction passes to the United States by virtue of the constitutional provision, and irrespective of any express cession of jurisdiction, other than an unqualified consent by the state that the purchase be made. He seems to regard the purposes of the establishment and maintenance of the National Home as not within the letter of the constitutional purposes, but he says: "But, whatever may be the rule pronounced when that question arises, it appears indisputable that all state jurisdiction is not excluded from every parcel of land purchased by the general government in a state with legislative consent, irrespective of its use; and therefore that, if the purpose is not one of those distinctly named in this clause of the Constitution, the act of Congress which provides for the purchase and requires the legislative consent must, in some unequivocal terms, declare that exclusive jurisdiction is intended and necessary for the proposed use, or at least the purpose stated must be one of which it is manifest that any exercise of co-ordinate or other jurisdiction would be incompatible therewith." And he further says: "I am therefore of opinion that this clause of the Constitution, upon which the Ohio and Virginia decisions mainly rest their view of the state enactments, respectively, is not applicable to this Wisconsin case, and cannot be invoked to exclude the exercise of state jurisdiction over the crime charged against the petitioner."

Passing to the consideration of the effect of the ceding act, he says: That "has impressed me as presenting the greatest difficulty;" but the conclusion is reached "that the purpose was not one for which exclusive legislation was prescribed, either by the Constitution or by congressional enactments; the omission of the word 'exclusive,' or some equivalent term, is material, and in my opinion the act must be interpreted as ceding—that is, yielding or surrendering—

to the United States such jurisdiction as Congress may find necessary for the objects of the cession, and for the exercise of which there must be clear enactments to that end within its powers."

This decision in *Re Kelly* is the only expression of the Federal courts, so far as we are advised, touching the question of jurisdiction over the sites of the branch Homes, and for that reason we have referred to it at some length. It seems very clear to us that the question involved in that case, whether the United States had such exclusive jurisdiction over the territory owned by the Home as would take from the state jurisdiction over crimes committed thereon, is entirely different from that involved in the *Virginia* case, and in the case now before us. In the *Wisconsin* cases the question of jurisdiction was respecting only a person on the territory of the Home, and his acts committed there, but forming no part in the execution of the functions of the Home. But the question here presented is whether the United States has the exclusive jurisdiction over the Home itself,—the "establishment" created by Congress for the sole purpose of maintaining and carrying on, under explicit congressional regulations, a great national charity supported by appropriations from the Treasury of the United States. We do not understand the Federal decision to hold, even by implication, that the United States does not have such exclusive jurisdiction. Such jurisdiction over the Home itself, over the impersonal entity, created by the general government to execute its purposes as expressed in the congressional enactments establishing the Home, and providing for its perpetuation and maintenance, must have been intended, for, in the language of the *Kelly* Case, "it is manifest that any exercise of co-ordinate or other jurisdiction [over the Home itself] would be incompatible therewith." Such exclusive jurisdiction is obviously necessary for the proper execution of the functions of the Home. And we are of opinion that, under the purchase of this territory in Maine, on which the Eastern Branch of the Home is located, the title to which was taken in the name of the Home, but which was paid for from the national Treasury and under the ceding act passed by the legislature of Maine, expressly consenting to purchase, "for the purpose of locating, erecting, and maintaining thereon an asylum for disabled volunteer soldiers," and ceding to the United States "jurisdiction over said lands," excepting only that civil and criminal processes issued from the state courts might be served thereon, the United States has the exclusive jurisdiction over the Home itself as the "establishment"

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which Congress created, and that the "establishment," though regarded as a corporate existence, and having the right to sue and be sued, does not have its place of business "within this state," and is not subject to trustee process issued from the courts of this state.

We do not here undertake to decide the question as to what jurisdiction the state courts may have over crimes committed on the territory of the Home, or over rights arising between individuals residing on the territory, or between them and persons residing elsewhere in the state, or any of the many other questions that might arise involving jurisdiction over the territory. Those questions are not now presented.

For the reason above stated, the entry must be:

Exceptions overruled.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS, Appt.,

v.

ANNIE REHAN.

(119 Md. 92, 85 Atl. 1035.)

Insurance — benefit society — reduction of benefit — suicide.

1. Agreement of a member of a mutual benefit society to be bound by subsequently enacted rules and regulations authorizes the society to reduce the benefit in case of suicide, while sane, but not while insane.

Pleading — benefit certificate — defense — suicide.

2. The defense of suicide, contrary to a by-law enacted after the issuance of a mutual benefit certificate which bound the member to comply with subsequently enacted rules and regulations, is not sufficient, but intentional suicide while sane should be alleged.

(December 5, 1912.)

Note. — Insurance: subsequent by-law excluding or reducing liability in case of suicide.

Generally, as to reasonableness of new by-laws as implied condition of consent to change of by-laws, see note to *Olson v. Court of Honor*, 8 L.R.A.(N.S.) 521.

As to retroactive effect of resolution or by-law of mutual insurance company changing period during which policy may be contested for suicide, see note to *Sexton v. National L. Ins. Co.* 12 L.R.A.(N.S.) 504.

For a note on suicide while sane as a defense to an action on a policy or certificate containing no provision as to effect of

A PPEAL by defendant from a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover the amount alleged to be due under a mutual benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Olin Bryan, Albert C. Tolson, and John C. Tolson, for appellant:

The power of corporations to make laws, and to amend them from time to time as necessity or convenience may require, always, of course, within the scope of their general powers, cannot be disputed. It is an inherent power, and belongs to all corporations, and is continuous.

3 Am. & Eng. Enc. Law, 2d ed. 1064: Bacon, Ben. Soc. 2d ed. §§ 91a, 185; Niblack, Ben. Soc. 2d ed. § 24; Supreme Lodge,

suicide, see Grand Legion, S. K. A. v. Beaty, 8 L.R.A.(N.S.) 1124.

This note does not cover the question whether subsequent by-laws and amendments were enacted by the proper authorities of the association, but this fact is assumed.

The decisions upon the question here considered are not in entire harmony.

The following cases, in which it is not clear whether the insured was sane or insane when he took his life, without referring to any distinction between sane or insane suicides, declare broadly that a subsequently enacted by-law excluding liability in case of suicide, while sane or insane, is reasonable and valid where the insured undertook to be bound by by-laws enacted after the issuance of the certificate, although the original contract contained no provision regulating the rights of the parties in case of suicide: Supreme Commandery, K. G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Lodge, K. P. v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; Supreme Lodge, K. P. v. Trebbe, 179 Ill. 348, 70 Am. St. Rep. 120, 53 N. E. 730; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712; Dornes v. Supreme Lodge, K. P. 75 Miss. 466, 23 So. 191; Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110; Protected Home Circle v. Tisch, 24 Ohio C. C. 489, subsequent appeal 72 Ohio St. 233, 74 N. E. 188; Supreme Lodge, K. P. v. LaMalta, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493; Hughes v. Wisconsin Odd Fellows' Mut. L. Ins. Co. 98 Wis. 292, 73 N. W. 1015.

See also the decisions infra, upholding provisions extending incontestable periods, and by-laws enacted after the expiration of such periods.

The court in Supreme Commandery, K. G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332, said: "It is not claimed that there is an inherent power in the association, by the adoption of a by-law, to work such radical changes in its existing contracts. The power is derived from, and 46 L.R.A.(N.S.)

K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Fugure v. Mutual Soc. 46 Vt. 362.

The duties of members prescribed by the by-laws remain subject to modification when a power of amendment is reserved.

Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 150; Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; Miller v. National Council, K. & L. S. 69 Kan. 234, 76 Pac. 830; Norton v. Catholic Order of Forresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893; Bowie v. Grand Lodge, L. W. 99 Cal. 392, 34 Pac. 103; Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112.

Subsequently enacted by-laws of fraternal

depends upon, the stipulations of the contract at the time it was made. The stipulations are expressed in varying terms, and several of them import no more than would be implied,—the observance by the assured of the requirements of the association, such requirements as were reasonable and intended to promote the harmony of the association, and the purposes and objects for which it was formed. They import also obedience to the by-laws, so far as reasonable, consistent with the charter and law of the land. We do not construe them as reserving, or as intended to reserve, to the association the power to change or avoid its contracts, to lessen its responsibilities, or to deplete its members of rights. This is not the proper office of a by-law; and from the general expressions to which we are referring, it cannot be fairly presumed or intended that it was contemplated to affect the members by other than such by-laws as it was within the competency of the association to enact. But in addition to these, the averment of the plea is that the certificate was accepted by the assured, 'subject to the laws of the order now in force or which may be hereafter enacted by the supreme commandery.' These are words of large signification, and clearly express that the assured consented that the contract should be subject to future, as well as to existing, by-laws. Parties may contract in reference to laws of future enactment, may agree to be bound and affected by them, as they would be bound and affected if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice.

. . . The fundamental principle of such organizations is the mutuality of duty and equality of rights of the membership, without regard to time of admission. This cannot well be preserved, if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time

benefit associations, relating to suicide, are valid and binding.

Tisch v. Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188; *Shipman v. Protected Home Circle*, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; *Plunkett v. Supreme Conclave*, 1. O. H. 105 Va. 643, 55 S. E. 9; *Chambers v. Supreme Tent*, K. M. 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712; *Eversberg v. Supreme Tent*, K. M. 33 Tex. Civ. App. 549, 77 S. W. 246; *Supreme Tent, K. M. v. Stensland*, 105 Ill. App. 267; *Supreme Tent, K. M. v. Hammers*, 81 Ill. App. 560; *Scow v. Supreme Council*, R. L. 223 Ill. 32, 79 N. E. 42; *Supreme Lodge, K. P. v. Kutcher*, 179 Ill. 340, 70 Am. St.

Rep. 115, 53 N. E. 620; *Supreme Lodge, K. P. v. Trebbe*, 179 Ill. 348, 70 Am. St. Rep. 120, 53 N. E. 730; *Supreme Lodge, K. P. v. LaMalta*, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493; *Clement v. Clement*, 113 Tenn. 40, 81 S. W. 1249; *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Fraternal Union v. Zeigler*, 145 Ala. 287, 39 So. 751; *Dornes v. Supreme Lodge, K. P.* 75 Miss. 466, 23 So. 191; *Hughes v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1016.

Messrs. John H. Richardson and George Washington Williams, for appellee:

A clause in a certificate of insurance issued by a fraternal benefit association,

and experience will develop a necessity for changes in the laws, and if the consent was not required, there would be a class of members bound by the changed laws, and a class exempt from their operation. The case before us is an illustration. Of the legality and propriety of the provision relieving the association from liability if a member while insane deprived himself of life, there is no good reason to question. If no other reason could be given, that it relieves the association from litigating with the representatives of a deceased member the distressing question of his sanity would be sufficient. If the law was applied only to certificates issued subsequent to its enactment, there would be a class of members having certificates of greater value than the certificates held by another class: yet each class would be subject to the same assessments and the same duties. There is but little room, if any, for the apprehension that advantage will be taken by the governing body of the assent of the member to be bound and affected by subsequent laws, to impose upon him unjust burdens, or to vary the contract, save so far as an alteration or modification of it may be promotive of the general good. Subsequent or existing by-laws are valid only when consistent with the charter, and confined to the nature and objects of the association."

And in *Clement v. Clement*, 113 Tenn. 40, 81 S. W. 1249, where the insured undertook to be bound by the laws and rules in force, and that might thereafter be enacted, it was held that a by-law passed subsequently to the issuance of the original certificate providing that only a proportional part of the fund named in the certificate should be recovered in case the insured should commit suicide sane or insane, was binding, especially as it was in force at the time a new certificate was substituted for the old one at the request of the insured, in order to effect a change of beneficiary. The insured in this case apparently committed suicide while insane, but no point appears to have been made of this fact.

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The following decisions, in which the insured was sane when he committed suicide, expressly limit the validity of subsequently enacted by-laws reducing or excluding liability in case of suicide to cases where the insured was sane when he took his life. *Mitterwallner v. Supreme Lodge, K. & L. G. S.* 86 N. Y. Supp. 786 (reducing benefit); *Shipman v. Protected Home Circle*, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83 (excluding benefit).

And see *Olson v. Court of Honor set out by the court in SUPREME CONCLAVE*, 1. O. H. v. REHAN, and cases *infra*, passing upon the validity of attempted changes of the incontestable periods provided for by the original contract.

And the court in *Plunkett v. Supreme Conclave*, 1. O. H. 105 Va. 643, 55 S. E. 9, upheld a subsequent by-law providing for a forfeiture in case the insured committed suicide, while sane or insane, in so far as it applied to a case where the insured, who had agreed to be bound by subsequent by-laws, committed suicide while sane, but reserved its decision as applied to a case where he was insane at the time he took his

And in *Reynolds v. Supreme Conclave*, 1. O. H. 24 Pa. Co. Ct. 638, where a contract of benefit insurance contained no provision making the insurer liable in case the insured committed suicide while sane, it was held that a subsequent by-law providing that in case a member committed suicide within three years after admission to the order, no benefits should be paid except where he was judicially declared insane, or the act was done in delirium, or in a case where the medical director had a reasonable doubt as to the mental responsibility of the insured, and also providing that when a membership of three years had been completed, a certain proportion of the total benefit should be paid,—was held valid and binding, the court saying that suicide by the insured while sane is a full defense to an action on a benefit certificate which contains no provision applicable to the situation, and that the section in question was in mitigation of the rigors of the law, and

providing that the member insured shall abide by all by-laws subsequently enacted, does not give the association an unlimited right to make by-laws, which will be binding upon said members. Only reasonable ones may be enacted by the authority of such provision.

Supreme Conclave, I. O. H. v. Miles, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845; Mathieu v. Mathieu, 112 Md. 628, 77 Atl. 112; Bacon, Ben. Soc. §§ 85, 93; Leahy v. Ancient Order of Hibernians, 54 Ill. App. 108; Dowdall v. Supreme Council, C. M. B. A. 196 N. Y. 405, 31 L.R.A.(N.S.) 417, 89 N. E. 1075; Wright v. Knights of Maccabees, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078; Supreme Council, A. L. H. v. Getz, 50 C. C. A.

153, 112 Fed. 119; Bornstein v. District Grand Lodge No. 4, I. O. B. B. 2 Cal. App. 624, 84 Pac. 271; Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224; Russ v. Supreme Council, A. L. H. 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697; Pokrefsky v. Detroit Firemen's Fund Asso. 121 Mich. 456, 80 N. W. 240; Makely v. American Legion of Honor, 133 N. C. 367, 45 S. E. 649; Pellazzino v. German Catholic St. Joseph Soc. 16 Ohio L. J. 27; Becker v. Berlin Ben. Soc. 144 Pa. 232, 27 Am. St. Rep. 624, 22 Atl. 699; Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066; Supreme Council A. L. H. v. Jordan, 117 Ga. 808, 45 S. E. 33; Wuerfler v. Grand Grove, W. O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; O'Neill v. Supreme Council, A. L. H.

an extension of the restriction of the rights of the insured and his beneficiary.

In Missouri and New Jersey the courts have held subsequently enacted by-laws excluding or reducing the right of recovery in case the insured committed suicide, whether sane or insane, unreasonable and void, even where the insured was apparently sane when he took his life, although by his contract he had agreed to be bound by by-laws enacted after he became a member. Lewine v. Supreme Lodge, K. P. 122 Mo. App. 547, 99 S. W. 821 (reducing benefit); Sautter v. Supreme Conclave, I. O. H. 72 N. J. L. 325, 62 Atl. 529 (excluding benefit).

The court in the first case said: "It must be conceded, however, that this was a matter within the power of the parties to determine by contract, and no one would question for a moment the right of the parties when entering into the contract here involved, to have stipulated in plain and express terms to the effect that the association reserved to itself power to provide by subsequent laws a reduction of the insurance in event of suicide, and had such express stipulation been inserted in the contract at the time, it would operate to have substantially modified the contract with the express assent of the member, and would therefore stand and be enforced as a valid provision of the contract of insurance. But no such express stipulation was incorporated. The argument advanced is that, even though such was not provided in express words, the language employed on that question was of such a character as to signify that the member contracted in advance to abide by the result of such subsequent law. It is true Lewine agreed that, first, 'I will be governed,' and second, 'This contract shall be controlled, by all laws' in force or hereafter enacted. There is no doubt that a fair interpretation of this agreement reveals that it was twofold. That the agreement should be twofold is natural indeed, for the members of these societies stand in a dual relation to the society; one relation is that of a member, the same as any other member, whether insured or not, regard being had to the social features of the 46 L.R.A.(N.S.)

organizations; and the second is that of an insured person having a valuable contract therewith whereby an indemnity is guaranteed to his designated beneficiaries. This, then, being the situation of the parties, it is clear that the agreement, 'I will be governed,' bore reference to such laws as were then in force, or future laws as might be provided tending to regulate his conduct as a member and the internal affairs of its lodge system, all of which were essentially within the contemplation of the parties, while the second agreement, to the effect that 'this contract shall be controlled' by present and future laws, bore reference only to such present and future laws as were in aid and in furtherance of the essential elements of indemnity vouchsafed in his contract for insurance, for it is reasonable indeed that both the member and the society should contemplate and intend, when looking into the future, that the society should reserve some rights with respect to bringing about such reasonable changes in aid of the provisions of the contract as experience might dictate were necessary, and it does not seem reasonable that the agreement bore reference to such subsequent laws which, instead of aiding the beneficial purposes of the organization, would modify or entirely abrogate such purpose, by destroying the insurance for which the member had contracted and paid."

And *a fortiori* it is held in Missouri that subsequently enacted by-laws reducing the benefit in case the insured commits suicide are invalid where the insured takes his life when insane. Smail v. Court of Honor, 136 Mo. App. 434, 117 S. W. 116; Umbarger v. Supreme Council, R. L. — Mo. App. —, 118 S. W. 1199; Wilcox v. Court of Honor, 134 Mo. App. 547, 114 S. W. 1155; Smith v. Supreme Lodge, K. P. 83 Mo. App. 512.

In Northwestern Benev. & Mut. Aid Asso. v. Wanner, 24 Ill. App. 357, where the insured appears to have been sane when he committed suicide, the certificate contained no provision regulating the rights of the parties in case of suicide, and the insured merely agreed to comply with the constitution and by-laws, it was held that a by-law

70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; *Zimmerman v. Supreme Tent*, K. M. 122 Mo. App. 591, 99 S. W. 817; *Olsen v. Court of Honor*, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; *Sisson v. Supreme Court of Honor*, 104 Mo. App. 54, 78 S. W. 297; *Makely v. American Legion of Honor*, 133 N. C. 367, 45 S. E. 649; *Knights Templars & M. Life Indemnity Co. v. Jarman*, 44 C. C. A. 93, 104 Fed. 638; *Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224; *Newhall v. Supreme Council*, A. L. H. 181 Mass. 111, 63 N. E. 1; *Gaut v. American Legion of Honor*, 107 Tenn. 618, 55 L.R.A. 465, 64 S. W. 1070; *Smail v. Court of Honor*, 136 Mo. App. 434, 117 S. W. 116; *Sautter v. Supreme*

Conclave, I. O. M. 72 N. J. L. 326, 62 Atl. 529; *Sovereign Camp*, W. W. v. *Thornton*, 115 Ga. 798, 42 S. E. 236; *Northwestern Benev. & Mut. Aid Asso. v. Wanner*, 24 Ill. App. 357; *Supreme Lodge*, K. P. v. *Kutscher*, 72 Ill. App. 462; *Hunziker v. Supreme Lodge*, K. P. 117 Ky. 418, 78 S. W. 201; 3 Am. & Eng. Enc. Law, 1084; *Supreme Conclave*, I. O. H. v. *Miles*, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845.

Burke, J., delivered the opinion of the court:

On the 10th day of November, 1898, the Supreme Conclave of the Improved Order of Heptasophs, a fraternal beneficiary association (a corporation duly organized and doing business in this state), issued its cer-

enacted subsequently to the issuance of the certificate, exempting the insurer from liability in case of suicide, whether sane or insane, was invalid, since it affected the vital principles of the contract.

In a number of cases in which the insured was apparently sane when he took his life, where he had undertaken by his contract to be bound by by-laws enacted after the issuance of his certificate, by-laws limiting the right of recovery in case of suicide, while sane or insane, have been upheld, notwithstanding the fact that the original contract contained an incontestable clause, applicable to cases of suicide. *Fraternal Union v. Zeigler*, 145 Ala. 287, 39 So. 751; *Scow v. Supreme Council*, R. L. 223 Ill. 32, 79 N. E. 42 (by-laws enacted after incontestable period, reducing benefit in case of suicide); *Supreme Tent*, K. M. v. *Hammers*, 81 Ill. App. 560; *Supreme Tent*, K. M. v. *Stenaland*, 105 Ill. App. 267, affirmed in 206 Ill. 124, 99 Am. St. Rep. 137, 68 N. E. 1098 (subsequent by-laws extending time during which suicide should constitute defense beyond incontestable period); *Knights of Maccabees v. Nelson*, 77 Kan. 629, 95 Pac. 1052 (by-law enacted after incontestable period excluding benefit in case of suicide).

The court in *Fraternal Union v. Zeigler*, 145 Ala. 287, 39 So. 751, said: "The logical and reasonable deduction from this argument would lead to the conclusion that the insured had the right after the lapse of two years from the date of the issuance of the certificate, to elect the mode and manner of his death, and, by suicide, to terminate the life expectancy which was in the contemplation of the parties, and entered into and formed the basis of the contract of insurance. Moreover, the argument, when analyzed and carried to its legitimate conclusions, would leave no field of operation for the provision in the contract relative to the adoption by the association of subsequent rules and laws for the government of its members. It cannot be doubted that the law which was here adopted by the association, and set up by the defendant in its pleas, was not only a reasonable one, but also beneficial to all its members, including 46 L.R.A. (N.S.)

the insured in this case. Conceding, for the sake of argument, that the incontestable clause contained in the constitution was applicable to cases of suicide, still the provision contained in the benefit certificate in reference to the adoption of subsequent laws by the association is more specific, and, if a conflict between the two exists, the latter should prevail, and for the reason, if no better could be given, by such construction a field of operation would be given to both provisions. We are of the opinion that the adoption of the subsequent law by the defendant association did not impair the obligation of the contract as entered into by the parties at the time it was made; and, from what we have said above, our conclusion is that the court erred in overruling the defendant's demurrers to the plaintiff's replications."

And provisions of this character have been upheld in cases where the insured committed suicide while insane.

Thus, in *Chambers v. Supreme Tent*, K. M. 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784, where a by-law provided at the time of the original contract was made, that no benefit should be paid in case the insured committed suicide, whether sane or insane, within one year, and the insured agreed that he would comply with the laws of the order then in force, or that might thereafter be adopted, it was held that a by-law adopted more than a year after he became a member, which provided that no benefit should be paid in case a member committed suicide within five years after admission, whether sane or insane, was valid and barred a recovery, although the insured was insane at the time he committed the act. The court said: "No right became vested in the plaintiff by virtue of said certificate until the death of her husband. The defendant's obligation to pay the benefit was conditioned on the member's compliance with the laws of the order then in force or that might thereafter be adopted. . . . At the time of the amendment of the by-laws in the present case, the member, George F. Chambers, was living and of sound mind. The amendment referred

tificate of membership of John P. Rehan. The certificate provided for the payment from the benefit fund of the association, under certain conditions hereafter mentioned, of \$1,000 to his wife, Annie Rehan, the plaintiff in this case and the appellee on this record. The certificate was issued upon the condition, among others, "that the said member complies in the future with the laws, rules and regulations now governing said conclave and fund, or that may be hereafter enacted by the supreme conclave to govern said conclave and fund."

In 1903 the association enacted the following law: "Sec. 257. No benefit shall be paid the beneficiary or beneficiaries of any member committing suicide (sane or insane): Provided, however, that where such

to the personal conduct of the members. It was such in my opinion as the order had power to make under the right of amendment reserved in the certificates in question."

And *Eversberg v. Supreme Tent, K. M. 33 Tex. Civ. App. 549, 77 S. W. 246*, where a by-law at the time the certificate was issued provided that no benefit should be paid in case the member should commit suicide within one year after admission, whether sane or insane, and the insured contracted to be bound by laws then in force, or that might thereafter be adopted, a subsequent by-law providing that no benefit should be paid in case the insured committed suicide, whether sane or insane, at any time, and stipulating for a return of twice the amount of the assessments paid, was held valid and binding, although the insured was insane at the time he committed suicide.

Some courts, however, have refused to hold provision of this character valid where the insured committed suicide while insane.

Thus, in *Weber v. Supreme Tent, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258*, where the rules of the insurer at the time the certificate was issued provided that the contract should be void if the party committed suicide within one year, whether sane or insane, a subsequent amendment of the by-laws adopted long after the named became a member, extending the time from one year to five within which self-destruction, whether the result of an intentional or unintentional act, should operate to destroy the policy, was held unreasonable and void, where the insured was irresponsible when he committed suicide.

And this case was followed in *Fargo v. Supreme Tent, K. P. 96 App. Div. 491, 89 N. Y. Supp. 65*, where the by-laws at the time the contract was made provided that no benefit should be paid when death was the result of suicide within one year after admission, whether the member was sane or insane, and it was held that a subsequent by-law striking out all time limit as to suicide was invalid, and did not bar a re-

suicide has completed one year of membership (although the supreme conclave shall by his act be released from all claims represented by the benefit certificate), his beneficiary or beneficiaries shall, nevertheless, receive from the supreme conclave a sum of money in full discharge of all demands which he, she, or they might otherwise have upon said supreme conclave, equal to an equitable proportion of the total benefit, such equity to be determined by the number of years the suicide was a member of the order as related to his expectancy of life when admitted." In the absence of anything to the contrary appearing in the record, we will assume that the law was regularly and properly passed conformably

covery where the insured committed suicide when insane.

In *Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89*, where the insured was apparently sane when he committed suicide, it does not appear that he agreed to be bound by subsequently enacted by-laws, and where his certificate provided that it should be incontestable after two years for any cause except fraud, it was held that a by-law enacted two years after the issuance of the policy, stipulating that in case of suicide only a part of the benefits should be payable, was invalid on the ground that it was unreasonable and impaired the obligation of the contract.

The decision in this case was followed in *Court of Honor v. Rausch, — Ind. App. —, 95 N. E. 1018*, where the insured was evidently sane when he committed suicide and a by-law enacted within two years after he became a member, which provided for the payment of a percentage in case of suicide, and did away with an incontestable clause making suicide unavailable as a defense after the expiration of two years, was held invalid as to the insured, who died after he had been a member about five years, although he had agreed to be governed by by-laws enacted after he became a member.

In *Bottjer v. Supreme Council, A. L. H. 37 Misc. 406, 75 N. Y. Supp. 805*, affirmed in *78 App. Div. 546, 79 N. Y. Supp. 684*, where the purposes of the order were to establish a fund for the relief of sick or distressed members, and a benefit fund for their families, a by-law enacted many years after the insured had become a member, which stipulated that only a portion of the amount named in the certificate should be paid in case a member committed suicide, sane or insane, was invalid, although the insured had agreed to be bound by by-laws thereafter adopted, and the right to alter or amend the laws covering the benefit was reserved to the insurer by its constitution, the court holding that such a by-law was in violation of the spirit and terms of the constitution and beyond the legislative power of the governing body. It does not ap-

to the constitution and laws of the association.

John P. Rehan died on the 6th day of September, 1911. The benefit was not paid; and this action was brought to recover the amount named in the certificate. The case was tried in the court of common pleas, and resulted in a verdict and judgment for the plaintiff for \$1,000, and from this judgment the defendant has appealed.

When this certificate was issued and accepted, there was no suicide law of the association in force. The defense relied on was that John P. Rehan committed suicide, and that the law we have transcribed governed the case, and that under that law the plaintiff was entitled to receive only the sum of \$471, which amount the defendant tendered itself ready to pay. The plaintiff, however, contends that this after-enacted law is not binding upon her, and does not affect her rights under the certificate.

The precise questions presented, which were raised by demurrer to the defendant's fourth and fifth pleas and by the plaintiff's demurrer to the defendant's rejoinder to the replication to the third plea, are these: First. Was it within the power of the defendant, by the enactment of this law, to reduce the amount payable to her as expressed in the certificate? Secondly. If the by-law is valid and binding upon her, do the defendant's pleadings disclose a defense within its terms? This is a narrow question, and is one which has not heretofore been passed upon by this court. It is an important question both to societies of this character and to their members. The trial court sustained the demurrers, and held

that the defendant's pleadings did not disclose a good defense to the suit. It, however, granted leave to the defendant to plead over within ten days. The defendant declined to plead further; and judgment was entered upon the demurrers in favor of the plaintiff.

There appears to be a general concurrence of authority in support of these two propositions: First, that a general power to amend the laws reserved either by the constitution or by-laws of a fraternal benefit society does not authorize an amendment which impairs the vested rights of the members. Secondly, that where a member of a fraternal benefit society agrees in his application for membership to be bound by the rules or laws then in force, or which might be thereafter adopted, the society, after he has become a member, may enact reasonable rules and amendments, and bind him to their observance. *Brown v. Grand Fountain*, U. O. T. R. 28 App. D. C. 200; *State ex rel. Strang v. Camden Lodge*, A. O. U. W. 73 N. J. L. 500, 64 Atl. 93; *Lange v. Royal Highlands*, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110; *Fraternal Union v. Zeigler*, 145 Ala. 287, 39 So. 751; *Court of Honor v. Hutchens*, — Ind. App. —, 79 N. E. 409; *Zimmermann v. Supreme Tent*, K. M. 122 Mo. App. 591, 99 S. W. 817; *Ayers v. Grand Lodge A. O. U. W.* 188 N. Y. 280, 80 N. E. 1020; *Sautter v. Supreme Conclave*, I. O. H. 72 N. J. L. 325, 62 Atl. 529; *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112.

pear in this case whether the insured was sane or insane when he committed suicide, and no point is made of this circumstance.

The mere substitution of a certificate in a benefit association for the original certificate, for the sole purpose of changing the beneficiary, has been held not to constitute such certificate a new and independent contract, and not to render by-laws passed between the date of the original certificate and that of the substituted one binding upon the insured. *Briggs v. Royal Highlanders*, 84 Neb. 834, 122 N. W. 69.

And it has been held that the insurer cannot invoke a subsequent by-law providing that it shall not be liable in case a member commits suicide, whether sane or insane, where it has not complied with an act stipulating that before any amendment or alteration in the constitution or by-laws of a benefit association shall take effect, a copy of the amendment or alteration duly certified must be filed with the auditor of public funds. *Knights of Macabees v. Nitsch*, 69 Neb. 372, 95 N. W. 626, 5 Ann. Cas. 257.

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And in *Hunziker v. Supreme Lodge*, K. P. 117 Ky. 418, 78 S. W. 201, where the insured agreed to be controlled by the rules in force at the date the certificate was issued, and that might thereafter be enacted, it was held that the insurer could not invoke the provisions of a by-law which was adopted subsequently to the issuance of the certificate, which provided that in case of suicide, voluntary or involuntary, the amount paid should be a sum in proportion to the whole amount as the matured life expectancy might be to the entire expectancy at the date of admission, where such by-law was never attached to the member's certificate in accordance with § 679, Kentucky Statutes, requiring by-laws and rules either forming a part of the contract or having any bearing on it to be attached to the policy or certificate, and stipulating that unless so attached the by-laws and rules should not be received in evidence in an action on the policy or certificate.

J. T. W.

In *Lange v. Royal Highlanders*, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110, the court said that a member of a fraternal benefit society, "who agrees in his application, or has the agreement incorporated in his policy or benefit certificate, that he will comply with the by-laws of the company then in force or thereafter to be adopted, is bound by subsequent by-laws the same as by those in force at the time his certificate was issued, provided that such subsequent by-laws are reasonable in their nature, and are properly adopted in conformity of the rules of the order and the statutes governing such associations."

In *Ayers v. Grand Lodge, A. O. U. W.* 188 N. Y. 280, 80 N. E. 1020, the court said: "An amendment of by-laws which formed part of a contract is an amendment of the contract itself; and, when such a power is reserved in general terms, the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable, and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only, and would leave him at the mercy of the former; and we have said that human language is not strong enough to place a person in that situation." The two cases from which we have quoted express the practically unanimous view of the courts upon the two propositions stated.

Although these general principles are well settled, there is a diversity of opinion as to what are reasonable changes or amendments. Confining our attention to the precise legal question first presented for consideration in this case, *viz.*, the right of the defendant, by the after-enacted law transcribed, to reduce the amount payable to the beneficiary named in the certificate, the plaintiff in this case, in the event the insured committed suicide, "sane or insane," we find some conflict in the authorities.

In some jurisdictions it is held that a subsequently adopted amendment, partially or totally depriving the beneficiary of rights under the certificate in the event of suicide of the insured while sane or insane, is reasonable and valid. Other courts hold that such an amendment is wholly ineffective as to outstanding certificates issued when there was no suicide law in force, notwithstanding 46 L.R.A.(N.S.)

ing the insured had agreed in the contract to be bound by after-adopted laws. In other jurisdictions it is held that such a retroactive law is valid so far as it relates to members committing suicide while sane, but is invalid so far as it attempts to affect the rights of the beneficiary where the member has taken his own life while insane. This is the position taken by the New York, Virginia, Minnesota, and some other courts, and is based upon reasons manifestly sound and just to both parties to the contract.

The crucial question in all the cases has been one of construction, the courts, however, differing upon the reasonableness *vel non* of the new law; and, in deciding this question, reference has always been had to the nature and purposes of the contract, read in the light of the objects of the order. These contracts, like other contracts, confer vested rights and interests upon the member; and it would be most unreasonable and unjust to hold that, under a general reserved power to amend, or upon a general stipulation of the insured that the society might amend, one party to the contract had the power to destroy the rights of the other. Such a construction would put the rights of one party to the contract wholly at the mercy of the other.

In *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622, the insured in his application expressly agreed that he would strictly comply with the constitution, laws, and rules then in force or thereafter to be enacted or adopted. When the certificate was issued and delivered, a by-law of the association then in force provided that "this order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but in all cases not within said exceptions the amount of money contributed to the benefit fund by such member shall be returned, and shall be paid to the beneficiary out of said fund in lieu of the benefit." The application for membership contained this provision: "I further understand and agree that the laws of the order now in force or hereafter enacted enter into and become a part of every contract of indemnity by and between the members of the order, and govern all rights thereunder." In the place of the original by-law, the association, after the issuance of the certificate, adopted the following: "If a benefit member commits suicide, whether sane or insane, voluntary or involuntary, there shall be payable to the beneficiaries entitled thereto five (5) per cent of the face of the certifi-

cate for each year he shall have been continuously a member of the society, and after twenty (20) years of continuous membership, the certificate shall be payable in full." The assured committed suicide, and suit was brought upon the certificate by the beneficiary. The trial court held that the by-law in force when the certificate was issued governed the case, and instructed the jury that the plaintiffs were entitled to recover the full amount named in the certificate, unless the insured committed suicide; but, if she did, then the defendant was entitled to a verdict, unless the jury further found that she was at the time under treatment for insanity. In passing upon this prayer, the court said: "It is the contention of the defendant that it was by virtue of the provisions of the original contract that the society might change its by-laws, and that the members should be bound thereby. It is obvious that such a provision must receive a reasonable construction. It would be unreasonable to construe it as giving the society plenary power to change its by-laws in any manner it might elect, for, if such construction were to obtain, then the original contract would be simply one to the effect that the society would pay the beneficiary in case of the death of the member, in accordance with the terms of the contract, or in accordance with such new, other, or further contract as it might elect thereafter to make for the parties. It seems clear that when the member—that is, the insured—gives in advance his general consent to a change in the by-laws, and agrees in his certificate to abide by all the laws thereafter enacted by the society, he does not intend thereby that the society shall have the power to impair, in essential particulars, the contract for the payment of a specific sum to his beneficiary which it agrees by its certificate to pay; or, in other words, he does not consent that the society may make, without consulting him, a new contract for both parties. It has accordingly been held by this court, in accordance with the weight of judicial authority, that the general consent and agreement of a member of a mutual fraternal benefit society, in his application and certificate, to be bound by any future changes in the constitution, by-laws, and rules of the society that it may enact in the future, are subject to the implied condition that they must be reasonable. . . . The precise question in this case is whether the change in the by-laws of the society was reasonable, whereby it attempted to relieve itself from liability to pay the stipulated benefit when the death of the member resulted from suicide while under treatment for insanity, which it contracted for by its certificate and orig-

inal by-laws. There are a number of cases which hold, in effect, that a mutual benefit society may legally make such a change in its by-laws, where a general power to change its by-laws has been reserved. See *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Hughes v. Wisconsin Odd Fellows' Mut. Ins. Co.* 98 Wis. 292, 73 N. W. 1015; and *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712. The change, however, in the by-laws in the case at bar is quite as fundamental as the respective changes in the cases of *Thibert v. Supreme Lodge, K. H. 78 Minn. 448*, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220, and *Tebo v. Supreme Council, R. A. 89 Minn. 3*, 93 N. W. 513, and unless we overrule those cases, we must hold that the change in the by-law in this case was also unreasonable." This case and the case of *Plunkett v. Supreme Conclave, I. O. H.* 105 Va. 643, 55 S. E. 9, followed the cases of *Shipman v. Protected Home Circle*, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83, and *Weber v. Supreme Tent, K. M.* 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258.

In the last-cited case, one of the precise questions now under consideration was decided. Chief Justice Parker, speaking for the court, stated the question and the reasons upon which the decision of the court permitting a recovery was rested. This case was directly approved in *Shipman v. Protected Home Circle*, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83, in which the court said that the conclusion reached was not in conflict with the doctrine announced in *Weber's Case*, supra, "for in that case there was a finding that the deceased member took his life while insane; and, as already pointed out, that was a risk which was included in his contract, and therefore his beneficiary was entitled to claim the fund." "At the time Weber joined the order and received his policy," said Judge Parker, "the rules of the defendant and the contract of insurance provided that the contract should be void if the party committed suicide within one year, whether sane or insane. Before Weber's death, defendant undertook to amend its by-laws and rules so as to extend the time from one year to five within which self-destruction, whether the result of an insane act or an intentional one, should operate to destroy the policy; and it insists the amendment was legally accomplished, and that the self-destruction of the . . . [defendant] within the five years, although an insane act, operated to deprive this plaintiff of all right of recovery. Plaintiff challenges the alleged amendment, and insists that it was not legally accomplished, and hence is not

available as a defense. But the disposition which we deem it necessary to make of this appeal renders it unnecessary to pass upon that question; and hence we shall assume, without deciding, that defendant took all the steps necessary to bring about this change in its laws. This brings us directly to the question whether defendant had the power by amendment, long subsequent to the taking out of the policy by its member, to deprive his beneficiary of all rights under the policy in the event of unintentional self-destruction on the part of the insured; for, in the eye of the law, the taking of life by an insane person, whether it be his own or that of some other person, is not an act for which he is responsible. In the Century Dictionary, a suicide is defined to be: 'One who commits suicide; at common law, one who, being of the years of discretion and sound mind, destroys himself.' And the act itself is defined to be: 'Designedly destroying one's own life. "To constitute suicide at common law the person must be of years of discretion and of sound mind."' This distinction was evidently in the minds of the draftsmen of the rules of the defendant, for they provided that members who should commit suicide within one year from the time of their admission, whether sane or insane, should not secure to others any benefits from the membership. It was entirely competent, of course, for the defendant to provide in the contract between it and its members that there should be no recovery in the event that, within a given period, the insured should take his own life, although insane; and it could as well have provided that the effect of a death by consumption should be to avoid the policy and deprive it of all force, and the same could be said of typhoid fever or any other disease. But it did not see fit to include any of these diseases, nor even unintentional self-destruction after a period of one year. The query, therefore, is whether one who has become a member of this order, and entered into a contract with it, may be deprived of rights under it by a subsequent amendment of the by-laws, providing that unintentional self-destruction shall avoid the policy. It needs no amendment to the by-laws to accomplish that result where a person of sound mind deliberately takes his own life, for in such case, as the Supreme Court of the United States held in *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300, it is an implied condition of the policy that insured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than deliberate, wilful self-destruction. So, if the proof were that this defendant, while of sound mind, inten-

tionally took his own life, there could be no recovery, although the policy were silent upon the subject. But unintentional self-destruction, whether due to insanity or accident, after the lapse of a year from the making of the contract, was as much insured against as death from typhoid fever or consumption; and an amendment to its by-laws, providing that the death of an existing member from any of these causes should render the policy void, would deprive the party of vested contract rights. An amendment which effects such a result, we have recently held, may not be made, because it is an unreasonable amendment, destroying contract rights, instead of regulating the administration of the corporation and its membership within reasonable bounds. *Parish v. New York Produce Exch.* 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977. The division line between proper and improper amendments, and the authorities bearing thereon, were sufficiently considered in that case. In this one it suffices in conclusion to say that this defendant cannot, by amendment to its rules, deprive persons already insured, or their beneficiaries, of their rights under contracts of insurance in the event that death should ensue from specified causes necessarily insured against by the original contract. This contract insured Weber against unintentional self-destruction after one year; and the defendant had not the power to take away the right thus secured without his consent. As against him and the beneficiary under his contract, therefore, that part of the amendment which provided, in effect, that self-destruction while insane, within five years from the date of the policy, should render the policy void, was unreasonable and ineffectual."

In the Shipman Case, *supra*, the question was, as one of the questions is here, as to the binding effect of a new law upon the wife of a member who had committed suicide while sane; the member having agreed to be bound by after-enacted laws of the society. The court held the by-law valid so far as it related to members committing suicide while sane, saying: "To the extent that the amended by-law provides for a forfeiture of contract rights in event of suicide by the insured while he was sane, it is valid: First, because it invades no vested right of the insured; and, second, because it is a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. If we assume, therefore, that the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the amended by-law is valid, because there can be no such thing as a vested right to commit suicide, and for

the further reason that it is nothing more than the written expression of a provision which the law had read into the contract at its inception."

We therefore hold, upon what we regard as the safer, sounder, and more reasonable rule upon this question, that the after-enacted by-law before us is not binding upon the plaintiff if her husband took his own life while insane, but that it is binding upon her if he committed suicide while sane. There is nothing in the case of *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112, in conflict with this doctrine. That case related to changes in the by-laws invalidating a previous designation of a beneficiary. The court found the change to have been reasonable upon the facts of the case. After quoting the by-laws and referring to the provisions of the application for membership, the court, in assigning its reasons for holding the by-laws reasonable, said: "The amended by-laws imposed no hardship on the member. They gave him the right to make a new designation of his beneficiary, if he desired to do so, in all cases in which the original designation was rendered inoperative by their passage, and also made it lawful for him to redesignate the same beneficiary. It was only in the event of his failure to exercise his right of making a redesignation or a new designation that the fund became payable on his death to the members of his immediate family in the order of precedence under which his widow was first entitled to it."

2. This brings us to the consideration of the only remaining question: Do the allegations of the defendant's pleadings disclose a defense under the valid and binding provision of this law, which we have held to operate upon her rights under the certificate? There is no allegation that the member was sane or insane at the time he took his own life; nor is it alleged, as it was in *Plunkett's Case*, 105 Va. 643, 55 S. E. 9, that the deceased "died from the effects of a pistol wound inflicted by himself with suicidal intent;" nor as in *Tisch v. Protective Home Circle*, 72 Ohio St. 233, 74 N. E. 188, that the death of the insured "was caused by a pistol shot fired purposely by herself with suicidal intent," which fact in that case was admitted by the plaintiff; nor is there any allegation that the member intentionally or purposely destroyed his own life. The defense rests upon the by-law and the mere allegation that the member committed suicide. The case of *Supreme Conclave, I. O. H. v. Miles*, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845, shows that this court has been careful to protect the rights of certificate holders in the defendant association.

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In the *Miles Case* this court held that the mere fact that the insured had committed suicide would not bar a recovery under the contract. Judge Jones, speaking for the court, said: "The court refused to instruct the jury that, notwithstanding there was no condition in the contract between the defendant and the assured that the defendant should be exempt from liability to pay the insurance to the beneficiary in case the death of the assured occurred by suicide, the plaintiffs were not entitled to recover if the jury found the cause of death to be suicide. We think this ruling is in accordance with what has been the generally accepted doctrine in regard to suicide as a defense in cases of the nature of this. In the present case this doctrine can be very justly applied. The charter of the defendants stated the object of the incorporation thereunder to be 'for beneficial purposes, and to provide an endowment fund to be paid to the family or friends of a deceased member.' Its constitution described one of the objects of the order to be 'to create and maintain, by stated and fixed contributions, a benefit fund from which, on satisfactory evidence of the death of a member who has complied with all the lawful requirements of the order, a sum not exceeding \$5,000 shall be paid to his beneficiary or beneficiaries.' The whole spirit and design of the order is, according to its professed objects, to assist members and relieve them in sickness while they live, and to provide for the needs of their families and friends in case of their death,—those of the families and friends of the deceased members who are made objects of care by the order, but have no more control over the cause of death than have the members of the order. Their need of assistance is the same, whatever the cause of death. To refuse them this assistance for a cause over which they have no control would not accord with the expressed objects of the order, and would be contrary to the spirit which professedly prompted its organization."

Had the defendant's pleadings showed that the insured, while sane, had intentionally or designedly taken his own life, they would have disclosed an excepted cause of liability within the terms of the by-law.

In *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906, the provision in the policy, upon which the defendant relied, was as follows: "If the insured 'shall die by suicide, whether the act be voluntary or involuntary, felonious or otherwise, or whether the insured be sane or insane at the time of the act, then . . . this policy shall be null and void and of no effect, except in the case provided for in the 6th section of his policy.'" There was no question of in-

sanity in the case. The evidence showed that the insured was found dead on the floor of his bathroom, fully dressed, with a pistol shot wound over his right ear, and the pistol on the floor near by. The court, at the instance of the plaintiff, instructed the jury "that, where death results from a pistol shot wound, self-destruction is not to be presumed; but the law presumes the wound was the result of accident, and the burden of proof is upon the defendant to show, by a preponderance of testimony, the wound was intentionally self-inflicted, and that it was not the result of accident, and that, unless the jury find from the evidence, that the insured intentionally shot himself, their verdict must be for the plaintiff." This instruction was approved; the court saying: "We do not understand that it was seriously contended that the propositions of law set forth in this prayer are not sustained by authority."

A full discussion of suicide provisions in policies of insurance, and a review of the decisions upon them, may be found in 2 Bacon, Ben. Soc. 3d ed. In § 336 the author says: "To avoid the effect of those decisions, it has become customary with life insurance companies to insert in their policies a stipulation that the contract shall be void if the insured shall 'die by suicide, felonious or otherwise, sane or insane,' or 'by suicide, sane or insane,' or 'die by his own act or hand, sane or insane.' These conditions have been generally upheld, and successfully eliminate the element of suicide, so that no kind or degree of insanity will prevent the avoidance if the insured had the intent to do the act, even though the intent of an unbalanced mind, or realized the physical consequences of his act."

Being of opinion, for the reasons stated, that the defendant's pleadings were insufficient, and that the judgment for the plaintiff was properly entered, it will be affirmed.

Judgment affirmed; the appellant to pay the costs above and below.

MARYLAND COURT OF APPEALS.

DR. JEPHTHA E. PITSNOGLE and Wife,
Appts.,

v.

WESTERN MARYLAND RAILWAY COMPANY.

(119 Md. 673, 87 Atl. 917.)

Eminent domain — condemnation of substitutes for private way taken by railroad company.

1. A railroad which takes, under the 46 L.R.A. (N.S.)

right of eminent domain, for the purpose of its track and yards, the space occupied by a private way which is necessary to permit the owner to reach a highway from his home, may, in order to afford him full compensation for the taking, condemn a strip of land belonging to a stranger as a substitute for the private way.

Same — special jury — statutory provision.

2. The use of the jury regularly drawn for the term, rather than a special jury, is not required by a statute providing that eminent domain proceedings shall be before a jury in court, instead of a sheriff's jury.

Jury — return of summons — failure to name — effect.

3. Failure of the sheriff to state in his return the names of the persons summoned as jurors under order of court in an eminent domain proceeding does not invalidate the return, or affect the eligibility of the persons so summoned to serve.

Trial — instruction — facts not proved.

4. The court should not base an instruction upon the existence of a state of facts which there is no evidence in the record to support.

(April 2, 1913.)

A PPEAL by defendants from a judgment of the Circuit Court for Washington County in plaintiff's favor in a proceeding to condemn land for railroad purposes. Affirmed.

The facts are stated in the opinion.

Note. — Eminent domain: taking property of one person to compensate another for property taken for a public purpose.

Upon the interesting question raised in *PITSNOGLE v. WESTERN MARYLAND R. CO.*, there is little to be found in the courts of the Union. No attempt is here made to deal with the English and Canadian cases on the subject, in view of the unlimited power of Parliament.

The railroad company may take land for its right of way. This is a public use, but in the taking the citizen's access to the highway is cut off. Is taking for him a right of way through his neighbor's land a taking of the neighbor's land for the use of him whose access has been destroyed, or is it not rather in the larger sense a taking, or an incident of the taking, for the use of the railroad company, which is trying to go through the country doing as little damage as possible? The strength of the position of the railroad company does not seem to increase upon consideration. If the matter is approached from the standpoint of the relation of railroad companies to public roads, it is found that in some juris-

Messrs. Harry Brindle and Frank G. Wagaman, for appellants:

The exercise of the right of eminent domain is purely a legislative function, and not a judicial one.

Heyward v. New York, 7 N. Y. 319; People ex rel. Herrick v. Smith, 21 N. Y. 596; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 381; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; De Varaigne v. Fox, 2 Blatchf. 95, Fed. Cas. No. 3,836; Challiss v. Atchison, T. & S. F. R. Co. 16 Kan. 117; Roanoke City v. Berkowitz, 80 Va. 616; Dingley v. Boston, 100 Mass. 544; Indianapolis Water Co. v. Kingan & Co. 155 Ind. 476, 58 N. E. 715; Brooklyn Park v. Arm-

strong, 45 N. Y. 234, 6 Am. Rep. 70; Sweet v. Buffalo, N. Y. & P. R. Co. 79 N. Y. 294; United States Pipe Line Co. v. Delaware, L. & W. R. Co. 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759; 3 Thomp. Corp. 2d ed. § 2758; Malone v. Toledo, 34 Ohio St. 541; Grafton v. St. Paul, M. & M. R. Co. 22 L.R.A.(N.S.) 55, note.

The legislature has no power in any case to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for the public benefit.

Cooley, Const. Lim. 6th ed. 651; Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 559;

ditions the companies have power to appropriate highways, provided they furnish in exchange other ways as good. In these cases it cannot be urged that the taking is not for a public use; and if the statute does not empower the company to condemn, and it is claimed that the taking is not for the railway's use, it would seem that the highway authorities might themselves conduct the proceedings (unless, perhaps, the law require as a prerequisite to jurisdiction a petition or the consent of the citizens). If then the railroad company may so act as to public roads, why may it not do the same as to private roads in those jurisdictions where the Constitution permits the taking of property for private roads? But here at once the undertaking becomes full of difficulties. Who shall start the proceedings? May the legislature authorize the railroad company or the highway authorities to petition for such a road? How can the legislature authorize a private road to be opened for the benefit of a citizen who does not ask for it? Again, what becomes of the principle, still vital in some jurisdictions, that "just compensation" means money compensation, and that no other compensation is permissible?

In the PIRSNOGLE CASE it will be observed that, while there was a statute which probably in terms permitted the railroad to take property for a private road, the case arose in a jurisdiction, as the court points out, where the citizen whose access to the highway was destroyed could not condemn a private road in place of that of which he had been deprived. So that the decision rests squarely upon the ground that a citizen's property is taken for a public use when it is taken to recompense another citizen for what has been taken from the latter for a public use. At the least, this is a dangerous door to open both legally and practically. Once opened, where would be the end? The legal and practical way would seem to be to require the condemning party, if necessary, to pay the entire value of the land of the isolated owner.

The taking of one person's property to 46 L.R.A.(N.S.)

compensate another arose incidentally in Wheeler v. Essex Public Road Board, 39 N. J. L. 291, where the highway authorities condemned a turnpike road, and, in widening and improving it at a stream crossing, removed the private dam of a mill owner and erected another dam on the land of a third party, and it was held that the erection of the new dam was *ultra vires*, and that therefore the mill owner had no action for the faulty construction of the new dam, as his remedy was solely for compensation for the taking of the old dam.

In Com. v. Peters, 2 Mass. 125, where the court of session, in altering a highway, deprived one of the benefit of his dam and attempted to make him compensation by giving him a right to build a dam on the property of the owner of the fee of the old road, it was held that the court of session had no power to give any compensation but money. And Sedgwick, J., said that the court could not give title to the land of the owner of the fee of the old road.

An interesting case in connection with the subject is Rogers v. Bradshaw, 20 Johns. 735, where it was held that canal commissioners, having selected a route for a canal covered in part by a turnpike road, had authority to condemn other property for and in place of the turnpike, under the statute declaring it to be lawful for such commissioners to enter upon and use any lands, waters, and streams necessary for the prosecution of the improvements intended by the act, and to make all such canals, locks, dams, and other works, and devices as they might think proper, for said improvements. It was also held that the commissioners had like power of condemnation under another act empowering them to discontinue or alter public roads or highways interfering with the construction of the canal, as a turnpike road was a public road or highway in the popular sense of the words.

As to exercise of power of eminent domain by one corporation for a public purpose to be subserved by another, see note to State v. Superior Ct. 21 L.R.A.(N.S.) 448.

B. B. B.

Hoye v. Swan, 5 Md. 237; Kane v. Baltimore, 15 Md. 240; Hepburn's Case, 3 Bland, Ch. 95; Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591.

The establishment of roads or ways for the benefit only of private individuals is not a public use, and lands cannot be taken for such purpose.

Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Allen v. Stevens, 29 N. J. L. 509.

The law provides specifically and minutely for the manner of the selection of the common-law juries, and any departure from the method of procedure described invalidates the jury so procured.

Green v. State, 59 Md. 123, 42 Am. Rep. 542; Avirett v. State, 76 Md. 510, 25 Atl. 676, 987.

The term "jury" used in a Constitution or a statute will be understood as meaning a common-law jury.

Baltimore Belt R. Co. v. Baltzell, 75 Md. 94, 23 Atl. 74.

Mr. Charles A. Little for appellee.

Per Curiam:

Judgment affirmed for reasons to be given in an opinion to be hereafter filed.

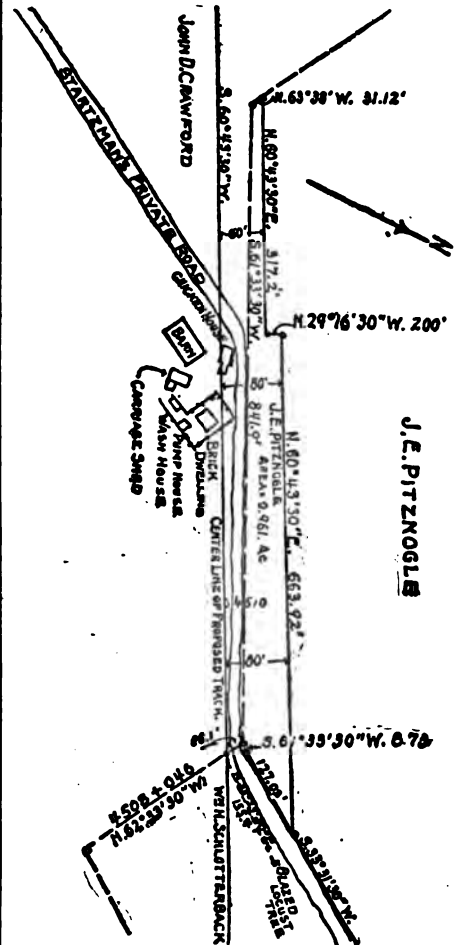
Judgment affirmed, costs in this court to be paid by the appellants.

Subsequently the opinion was filed by Pattison, J.:

This is an appeal from a judgment of the circuit court for Washington county condemning the right, title, and interest of the appellants in a parcel of land lying and being near Hagerstown, Maryland.

The appellee, the Western Maryland Railway Company, filed its petition in the court below against the appellants, under chapter 117 of the Acts of 1912, in which it alleges that it "desires to acquire the said parcel of land to be used for the purpose of locating its railroad tracks, switches, yard tracks, and side tracks . . . on part of the same, and for the location of a substitute private road on the remainder thereof, in place of the existing private road, which the petitioner desires to close and to use for railroad purposes, said private road being known and designated as the Startzman road. All of which above-described parcel of land it will be necessary for the petitioner to have and use for the said purposes, for the proper working and operation of its railroad and for the proper handling of its railway business, and for said private road." The land sought to be acquired by the appellee is particularly described in the petition, and its location is shown by the 46 L.R.A.(N.S.)

following plat therewith filed as a part of said petition:



The defendants demurred to the petition, contending (1) that chapter 117 of the Acts of 1912, the act under which the petition was filed, is unconstitutional; and (2) that the petition is insufficient as a basis of a judgment of condemnation, because all of the land sought to be acquired thereby is not, as alleged in the petition, to be used for railroad purposes, but a part of it is to be used "for the location of a substitute private road in place of the existing private road," which is to be closed and used by the petitioner for railroad purposes.

The questions here raised and relied upon by the defendants as affecting the constitutionality of this act were fully presented and argued in the recent case of Ridgely v. Baltimore, 119 Md. 567, 87 Atl. 909, and this court there held the act constitutional,

in adopting the opinion of Judge Burke, sitting in the lower court, in which the objections urged against the validity of the statute were fully and ably discussed by him. Therefore we think it unnecessary to further discuss this objection of the defendants made in support of the demurrer.

There is no prohibition in express terms against the taking of private property for private use, found either in our Constitution or the Declaration of Rights, but it is too clear to be questioned that there is such an implied prohibition contained in § 40 of article 3 of the Constitution of this state, which provides that "the general assembly shall enact no law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury being first paid or tendered to the parties entitled to such compensation." *Arnsperger v. Crawford*, 101 Md. 251, 70 L.R.A. 497, 61 Atl. 413. This constitutional prohibition, as was said by Judge Alvey in the case of *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 559, "is but declaratory of the previously existing universal law which forbids the arbitrary and compulsory appropriation of one man's property to the mere private use of another, even though compensation be tendered." And "the legislature cannot make a particular use, either public or private, merely by so declaring it. If it could do so, 'the constitutional restraint would be utterly nugatory.'" *Arnsperger v. Crawford* and *New Central Coal Co. v. George's Creek Coal & I. Co.* supra. Whether the use for which private property is taken is public or private, within the meaning of the above provision of the Constitution, is a judicial question, to be determined by the courts. *Van Witsen v. Gutman*, 79 Md. 405, 24 L.R.A. 403, 29 Atl. 608.

It is not contended by the defendants that the use of the land for railroad purposes is a private, and not a public, use, but they contend that the use of a part of the land for the location of a private road in substitution for the existing private road, which is to be closed and used by the plaintiff company for railroad purposes, is a private use of said land; and that inasmuch as the petition does not state or designate how much and what part of the entire parcel of land so sought to be condemned is to be used for the location of said private road, and how much and what part is to be used for railroad purposes, the whole must fail. The correctness of this contention must be conceded, should we hold, under the facts and circumstances of this case, that the use of a part of said lands for such private road or way is a

private use, and not a public use. But is it a private use? In determining this question we are to be controlled by the facts, circumstances, and necessities of this case. The increase in the business of the plaintiff company, as disclosed by the testimony, necessitates an enlargement of what is known as the yards west of Hagerstown, which is fully explained in the record. The road as it now runs is 700 feet south of the Pitznogle lands, but by the removal of curves in it the road will thereafter run about parallel with the south line of said lands, and its center line will be, as it appears from the plat, at the nearest point, about 30 feet, and at the farthest point not over 40 feet, from said lands. Upon this intervening narrow strip of land, for a distance of several hundred feet westward from the Schlottorbeck lands, and occupying the most of it, is located a private road or way which, at the point named, turns southward and crosses the proposed track of the railroad. This private road or way, known as the Startzman road, in which Startzman and others have at least an easement, is used by them in reaching the Clearspring pike, north of the railroad from their respective homes. It is shown that the whole of this intervening space, including the road or way thereon, is required for railroad purposes,—that is, for laying the tracks, side tracks, and switches of said road,—and this is also true of at least a portion of the land that they have sought to condemn. Without the use of this road or private way for the purposes that we have mentioned, the plaintiff would be defeated in its proposed plan of straightening its road and of enlarging its yard, and to close this road without substituting for it another road or way would deprive those entitled to its use of the means of reaching the pike from their homes, and they would not be permitted to condemn a private road or way (*Arnsperger v. Crawford*, supra) in substitution for the road lost to them, resulting from its necessary use for railroad purposes, which this court has time and again said was a public, and not a private, use.

The right of eminent domain having been conferred upon the plaintiff by legislative enactment, it has the undoubted right to condemn, if need be, the aforementioned Startzman road or private way for railroad purposes, and in our opinion it was not intended by the framers of the Constitution that there should be no adequate relief from the conditions that we have mentioned resulting from the taking of said private road for public use. The condemnation of a part of this land here sought to be condemned for a substitute private road or

way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution. The legislature of this state has, by enactment of § 278 of article 23 of the Code of 1912, declared it lawful for a railroad company, where its tracks cross any public or private road or way, "to carry said road or highway over its tracks by an overgrade crossing, or to carry it under its track or tracks by an undergrade crossing; and to make such crossings, such corporation may divert any road or highway, so crossed or to be crossed, from its present or existing location; and for entering upon, taking, or appropriating any buildings, gardens, yards, or others lands which may be necessary for the new route and the location of said road so diverted, said corporation may proceed as in case of land necessary for its railroad."

It is contended by the plaintiff, although controverted by the defendants, that this statute is applicable to the present case, but assuming, without deciding, that it does not apply, the uses for which private property is permitted to be taken thereunder are similar in character to the use here proposed to be made of the land sought to be acquired in these proceedings, and the validity of this statute, so far as we are informed, has never been assailed because of its contravening the Constitution of this state in permitting private property to be taken thereunder for private, and not for public, use, although, no doubt, it has been many times availed of when the necessity for its application arose in the construction of railroads. In the case of *Van Witsen v. Gutman*, supra, it was held by this court that the use to which the defendant, Mrs. Gutman, under an ordinance of the mayor and city council of Baltimore, appropriated the property of the plaintiff in any alley upon which his lands abutted, was a private, and not a public, use. In discussing that case this court said: "The extinguishment of their [the plaintiffs'] interests does not appear to inure in any way to the public service; nor to tend to the relief of any public necessity, nor to promote any public interest, nor to subserve any public purpose . . . nor, in short, to have any relation to the public convenience or public welfare." This cannot be said of the use to which the lands here sought to be condemned are to be appropriated, for the extinguishment of the defendants' interest in the property here mentioned inures to the public service, and has connection with and relation to the public welfare.

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Upon the court below overruling the demurrer, the defendants answered and the plaintiff filed its replication, whereupon the court, on the 13th of September, passed its order directing the sheriff to "summon twenty good and lawful men of Washington county to appear at the courthouse on the 17th day of September, 1912, at the hour of 9:30 A. M., to act and serve as jurors at the hearing and determination of said case." The sheriff's return thereto was "jurors summoned as commanded." For some reason not disclosed by the record, the case was not heard on the 17th, but on September 19th, two days thereafter, at which time the defendants moved to quash and annul the said order of court passed on September 13th. This motion being overruled, the defendants then moved to quash the proceedings of the sheriff under said order, and particularly his return thereto. This motion, too, was overruled, whereupon the defendants entered a "challenge to the array," which was denied them, when the defendants refused the list of jurors.

These various motions arose from the contentions of the defendants, which were (1) that the jury was not selected in the manner intended and provided for by said chapter 117 of the Acts of 1912; and (2) that the return of the sheriff, "Jurors summoned as commanded," was not a proper return, inasmuch as it did not give the names of the persons so summoned by him. The defendants contend that in cases like the one before us the Acts of 1912, chap. 117, prohibits the method here adopted of selecting persons to serve as jurors, and they insist that under that statute, which is now in force, jurors in such cases should be selected in the usual way from those regularly drawn as jurors to serve at a given term of the court. It is upon the following language found in the title, and repeated in the 1st section of the act, that the defendants base their contention, to wit: "Providing that the proceedings therefor shall be before a jury in court, instead of before a sheriff's jury." In addition to this language there is nothing in the act that sheds further light upon the question here raised.

Prior to the passage of this act, in proceedings like the one before us, the jury was not only selected by the sheriff, but the hearing was before him,—that is, in his presence, and out of the presence of the court,—and it is to such a jury that the statute has reference when it speaks of a "sheriff's jury," and it is it which the statute distinguishes from a "jury in court." Under the present law, there is no express direction as to how a jury shall be selected, but it is required that the proceedings shall

be before a "jury in court;" that is, the testimony shall be taken and the case tried in the presence of the court and subject to its direction as in other cases. In support of their contention, our attention has been called by the appellants to the language of this court in the case of *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. 74, in which it said: "The term 'jury,' used in a Constitution or a statute, will be understood as meaning a common-law jury." This expression of the court, however, taken from the body of the opinion, is misleading, when not considered in connection with what was also said by the court in relation thereto. The court there said: "But for the opinion of the judge below it would not have occurred to us there was any difficulty as to this question. Ordinarily, it is true, the term 'jury,' used in a Constitution or a statute, will be understood as meaning a common-law jury, and, if no other jury had been known in law at the time of the adoption of the Constitution of 1851, this argument might have been unanswerable. But it is conceded from the earliest colonial history, and from the formation of the state government down to the adoption of the Constitution, the legislature had provided for the taking of private property for public use upon making compensation to the owner as assessed by a special jury summoned on warrant. . . . As to railroads, the legislature, without exception, provided that the compensation should be awarded by a special jury summoned as directed by § 167. . . . In two thirds of the counties of this state, there are but two jury terms a year, each about six months apart, and we can hardly suppose the framers of the Constitution meant to delay and embarrass the construction of railroads and other public improvements by requiring compensation to be awarded in court by a common-law jury. At least, if such had been the intention, if they intended to deny to the legislature the exercise of a power in this respect,—a power which had been exercised from the beginning of the government,—it is but fair to presume this intention would have been declared in plain and explicit terms."

What was there said in no wise supports the contention of the defendants, but, on the contrary, furnishes us with authority to hold in this case that such is not the meaning of the Constitution. And what was then said as to the infrequent convening of the jury terms of our courts in many counties of this state is true at the present time, and it has special application to this case. They have in Washington county what are known as three jury terms in each year, which convene on the second Monday in February, 46 L.R.A.(N.S.)

May, and November, respectively, and one nonjury term, which convenes on the first Monday in August. It will thus be seen that between the first Monday in August and the second Monday in November in each year, a period of three and one-half months, there is no regular panel; that is, a panel regularly drawn for a given term, from which a jury could be selected to hear and determine cases of this character. The petition in this case was filed on August 9th, and therefore, if the case was to be heard only by a jury such as we have mentioned, regularly selected under a statute for a given term of court, this case could not have been heard for more than three months from the date of the filing of the petition. And, as was said in the case from which we have just quoted, we can hardly suppose the framers of the Constitution, or of the statute under which these proceedings were instituted, meant to delay and embarrass the construction of railroads and other public improvements for this length of time. If, "for any reason, there is no regular panel in attendance, and there are cases to be tried which require the intervention of a jury, the court has power to order a special venire. This is a common-law power" inherent in the courts. 24 Cyc. 230; 17 Am. & Eng. Enc. Law, 2d ed. 1192; *Rockford Ins. Co. v. Nelson*, 75 Ill. 552. When, however, at the time to be fixed by the court for trial of such matters as are to be heard by a jury, the regular panel for the term will be present, or under practice of the court or existing statutes, can be reconvened for the purpose of hearing such matters at that time, the court should, in the absence of some sufficient cause to the contrary, direct the jury to be selected from the regular panel, and for that purpose take such steps as may be necessary to have them present. If there be not a sufficient number of qualified jurors then present, the court can, of course, direct such number of talismen as may be necessary, to be summoned.

The objection made by the defendants to the return of the sheriff because of his failure to return therewith the names of the persons summoned by him under the order of court, to serve as jurors, cannot in our opinion have the effect of invalidating the return, nor can it affect the eligibility as jurors of those summoned by him under the said order of court to which such return was made. Had they asked for it, the court would no doubt have required the sheriff to have amended his return, giving the names of those summoned by him. But, in any event, it would not have invalidated the return, or rendered ineligible, as jurors, those summoned by him.

In the progress of the trial six exceptions

were noted by the defendants, five to the rulings of the court on the admission of evidence, and one to its rulings on the prayers. The petitioner offered five prayers, all of which were granted, and the defendants offered eighteen prayers, two of which, the third and eighth, were granted, and the others were rejected. The court, however, granted an instruction in lieu of the fifth prayer offered by the defendants. The defendants excepted to the granting of the plaintiff's prayers and to the rejection of their prayers, as well as to the instruction of the court granted in lieu of their fifth prayer. The five exceptions to the rulings upon the evidence were not pressed in the oral argument or alluded to in the brief. We, however, discover no error in the admission of the testimony. As we have already very fully stated the law of this case, we will not now discuss each of the five granted prayers of the plaintiff, or the sixteen rejected prayers of the defendants, but will state generally that the granted instructions, including the prayer of the court, properly presented the law of this case to the jury, and there is nothing contained therein that is materially inconsistent with the law of the case as we have stated it in this opinion.

We will, however, discuss briefly the sixteenth prayer of the defendants, to which our attention has been particularly called, and which is not covered by what we have already said. In this prayer the court was asked to instruct the jury that, should they find that land in addition to that already used and occupied by the railroad was reasonably necessary for the construction of the addition to the yards of the company, "still the verdict of the jury should be for the defendants if the jury shall further find that the plaintiff is the owner of the tract of land spoken of by the witnesses as the Crawford farm, and also of the tract spoken of by the witnesses as having been purchased by the plaintiff from Daniel Startzman, provided the jury shall further find that the said plaintiff can, with reasonable convenience, for the necessary extension and addition to its yards aforesaid, use the aforesaid lands spoken of by the witnesses as the Crawford farm and the Daniel Startzman lands, instead of the land described in the petition filed in this case, for such addition." In passing upon this prayer, it is not necessary for us to determine whether the law is properly stated therein; for, should it be properly stated, and we are not to be understood as saying that it is, there is nothing in the evidence tending to show that the plaintiff company can, with reasonable convenience, for the necessary extension and addition to its yards, use the lands 46 L.R.A.(N.S.)

in the prayer mentioned as belonging to said company. The evidence discloses that the Crawford farm, as well as a part of the Startzman land, is the property of the plaintiff, yet there is no evidence whatever as to the physical character and conformation of said land, or whether it was suitable or convenient for the purposes set forth in the petition. Two of the employees of the company were upon the stand, and the fact of the ownership of this property by the plaintiff company was elicited from them, yet no inquiry was made on the part of the defendants as to the physical character of this land, or whether or not it was suitable for the purposes for which the land sought to be condemned is wanted, or whether it could be conveniently used for such purposes. There is no evidence in the record tending to show the existence of the facts which, by this prayer, are left to the jury to find. It was, however, stated by one of the employees of the company that, if the road or right of way was moved to the south of the proposed railroad, it would be crowded into more tracks, and this they wished to avoid.

It follows from what we have said that the judgment of the lower court should be affirmed.

Judgment affirmed as *per curiam* heretofore filed, with costs in this court to the appellee, the costs in the lower court to be paid by the appellee, as provided for by the statute.

Petition for writ of error from Supreme Court of United States denied.

MISSISSIPPI SUPREME COURT.

NATIONAL SURETY COMPANY, Impleaded, etc., Appt.,

v.

HALL-MILLER DECORATING COMPANY et al.

104 626
(— Miss. —, 61 So. 700.)

Bond — power of trustees to require bond for subcontractors.

1. The trustees charged with the duty of securing the construction of a state build-

Note. — Implied power to incorporate in contract for public work or in contractor's bond the requirement that the contractor shall pay laborers and materialmen.

This note supplements the note upon the subject appended to, 11 L.R.A.(N.S.) 1028.

As to the right of a subcontractor, materialman, or laborer to maintain an action on contractor's bond to owner, see note in 27 L.R.A.(N.S.) 573.

ing have implied power to take a bond from the contractor to secure payment of subcontractors, laborers, and materialmen.

Same — absence of provision for — effect.

2. Recovery on a bond given by a contractor for a public improvement to pay subcontractors and materialmen cannot be defeated on the theory that it was not required by the contract, if it was executed at the same time with it and as part of the entire transaction.

Contract — consideration — contractor's bond.

3. A bond by a contractor for a public improvement to pay subcontractors and materialmen cannot be defeated for want of consideration, where its execution was necessary to secure an award of the contract.

(April 28, 1913.)

APPEAL by the defendant surety company from a decree of the Chancery Court for Hinds County in plaintiff's favor in a suit to recover claims of subcontractors against a contractor's bond. Affirmed.

The facts are stated in the opinion.

Messrs. R. H. Thompson and J. H. Thompson, for appellant:

Mechanics and materialmen, in the absence of statutory liens, have no greater rights than other unsecured creditors, in the enforcement of their debts for labor upon, or material used in, the erection of a building.

Jefferson v. Asch, 53 Minn. 446, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 604;

As pointed out in the note in 11 L.R.A. (N.S.) 1028, by the great weight of authority, public corporations, although not expressly authorized by statute, have the power to require an undertaking by contractors for public work to pay all claims for material or work furnished in the performance of such work, and this is the holding of the later cases considering the question.

Thus, in Missouri it is declared to be settled law by judicial decisions as well as by statutory enactment, that municipal and public bodies have power to contract for the payment of all claims which may be made for labor and material furnished in the construction of public buildings, and may cover same in the bond, so that it inures to the benefit of third parties not known. *Eau Claire-St. Louis Lumber Co. v. Banks*, 136 Mo. App. 44, 117 S. W. 611; *St. Louis v. Hill-O'Meara Constr. Co.* — Mo. App. —, 158 S. W. 98.

And it is no defense to an action by a board of education upon a contractor's bond obliging the latter to make prompt payment to all persons supplying him with labor or materials in the prosecution of a public work called for by a contract with such board, the performance of which is secured by the bond, that there is no stat-
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Baxter v. Camp, 71 Conn. 245, 42 L.R.A. 514, 71 Am. St. Rep. 169, 41 Atl. 803; *Knight & J. Co. v. Castle*, 172 Ind. 97, 27 L.R.A. (N.S.) 573, 87 N. E. 976.

The trustees had no express power to require any bond at all; and if, in requiring a bond, the act was *intra vires*, the power exercised was an implied one, which will not extend to providing for complainants.

Breen v. Kelly, 45 Minn. 352, 47 N. W. 1067; *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218, 25 S. W. 522; *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *Lyth v. Hingston*, 14 App. Div. 11, 43 N. Y. Supp. 653; *Knapp v. Swaney*, 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162.

No contract whatever was made by the board of trustees of the Mississippi State Charity Hospital for the benefit of laborers and materialmen, or for any other third party.

In the absence of a trust, at least, an action could not be maintained upon a contract by a person who was not a party to it.

Linneman v. Moross, 98 Mich. 178, 39 Am. St. Rep. 531, 57 N. W. 103; *Jefferson v. Asch*, 53 Minn. 446, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 604; *Baxter v. Camp*, 71 Conn. 245, 42 L.R.A. 514, 71 Am. St. Rep. 169, 41 Atl. 803.

There was no consideration for the pretended contract evidenced by the bond.

Cabot v. Haskins, 3 Pick. 92; *Wyman v. Smith*, 2 Sandf. 337; *Jefferson v. Asch*, 53 Minn. 446, 25 L.R.A. 258, 39 Am. St. Rep.

ute requiring the board to take a bond for the protection of subcontractors. *Board of Education v. Aetna Indemnity Co.* 159 Ill. App. 319.

And although a county is under no legal or equitable obligation to materialmen or subcontractors, it may nevertheless take a contractor's bond for public work, and may contract for protecting these parties, and a bond to this end will inure to their benefit. *Des Moines Bridge & Iron Works v. Marxen*, 87 Neb. 684, 128 N. W. 31.

Where a county is granted the power to contract for the construction of a building, the authority thus bestowed includes authority to make contracts for the benefit of third persons dealing with the immediate contractors of the county. *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 17 L.R.A. (N.S.) 906, 116 N. W. 238.

And a school district, as incident to the power given it to erect a building and to provide for payment therefor, has authority to contract for the protection of third persons furnishing material to the principal contractors, to be used in the erection of the building. *R. Connor Co. v. Aetna Indemnity Co.* 136 Wis. 13, 115 N. W. 811.

A. G. S.

618, 55 N. W. 604; Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609; Cottage Street Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617; Brandon v. Hughes, 22 La. Ann. 360; Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198.

There must have been an express intention to benefit the third party bringing the suit.

Baxter v. Camp, 71 Am. St. Rep. 190, note.

The promisee must have been under some legal (not moral) obligation to the third party.

Jefferson v. Asch, 25 L.R.A. 271, note; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195.

There must have been some trust, or the defendant must have become charged as for money which *ex æquo et bono* belonged to the complainants.

Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Torrens v. Campbell, 74 Pa. 470; Blymire v. Boistle, 6 Watts, 182, 31 Am. Dec. 458.

The promisee must have had a legal interest that the promise be complied with.

Ferris v. Carson Water Co. 16 Nev. 44, 40 Am. Rep. 485; Vrooman v. Turner, 69 N. Y. 284, 25 Am. Rep. 195; Gates v. Hames, 28 N. Y. S. R. 313, 8 N. Y. Supp. 287; Wheat v. Rice, 97 N. Y. 296.

Messrs. Watkins & Watkins, for appellees:

A third party has a right of action upon a promise made for his benefit, though he is a stranger both to the promise and the consideration.

Canada v. Yazoo & M. Valley P. R. Co. 101 Miss. 274, 57 So. 913; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Merriman v. Moore, 90 Pa. 78; M'Carty v. Blevins, 5 Yerg. 195, 26 Am. Dec. 262; Farlow v. Kemp, 7 Blackf. 544; Gwaltney v. Wheeler, 26 Ind. 415; Lamb v. Donovan, 19 Ind. 40; Waltz v. Waltz, 84 Ind. 403; Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Crone v. Stinde, 156 Mo. 282, 55 S. W. 863, 56 S. W. 907.

Where a contract is entered into for the erection of a public building, where, in either the bond or the contract, or both, there is contained a stipulation that the contractor shall pay for all labor and material used in the erection of the improvement, such materialmen or laborer may sue upon the same, and the consideration which supports the entire contract inures to his benefit.

Knapp v. Swaney, 56 Mich. 345, 56 Am. 46 L.R.A.(N.S.)

Rep. 399, 23 N. W. 162; United States Gypsum Co. v. Gleason, 135 Wis. 539, 17 L.R.A.(N.S.) 906, 116 N. W. 238; Denver v. Hindry, 40 Colo. 42, 11 L.R.A.(N.S.) 1028, 90 Pac. 1028; Knight & J. Co. v. Castle, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976; School Dist. ex rel. Koken Iron Works v. Livers, 147 Mo. 580, 49 S. W. 507; Devers v. Howard, 144 Mo. 671, 46 S. W. 625; Snider v. Greer Wilkinson Lumber Co. — Ind. App. —, 96 N. E. 960; Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; Fitzgerald v. McClay, 47 Neb. 816, 66 N. W. 828; Doll v. Crume, 41 Neb. 655, 59 N. W. 806; Lyman v. Lincoln, 38 Neb. 794, 57 N. W. 531; Korsmeyer Plumbing & Heating Co. v. McClay, 43 Neb. 649, 62 N. W. 50; Baker v. Bryan, 64 Iowa, 561, 21 N. W. 83; Williams v. Markland, 15 Ind. App. 669, 44 N. E. 562; St. Louis Public Schools v. Woods, 77 Mo. 197; Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550; National Surety Co. v. Foster Lumber Co. 42 Ind. App. 671, 85 N. E. 489; Ochs v. M. J. Carnahan Co. 42 Ind. App. 160, 76 N. E. 788, 80 N. E. 163; St. Louis use of Glencoe Lime & Cement Co. v. Von Phul, 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843; Union Sheet Metal Works v. Dodge, 129 Cal. 393, 62 Pac. 41; People's Lumber Co. v. Gillard, 136 Cal. 56, 68 Pac. 57.

Cook, J., delivered the opinion of the court:

This is an appeal from a decree of the chancery court of Hinds county overruling appellant's demurrer to several bills of complaint filed by certain subcontractors against the Reusch Contracting Company and the National Surety Company, surety upon its bond for the performance of its contract to construct the State Charity Hospital at Jackson. These bills made the board of trustees of the Mississippi State Charity Hospital parties thereto, and the state intervened in the litigation. All of these suits were consolidated, and all will be settled by this appeal.

It will be noted that a demurrer was sustained to the bill of the state and the board of trustees, from which decree there was no appeal. The board of trustees of the hospital made a contract with the Reusch Contracting Company to build the hospital, and the contractors made subcontracts with the several complainants to furnish material and construct certain parts of the building. The contractors failed to pay the subcontractors, and these bills were filed to hold the surety company upon its bond of indemnity.

The Reusch Contracting Company, in the

contract to erect the building, bound itself to furnish all material and labor necessary to the completion, within a specified time, of the building according to certain specifications named in or made a part of the contract. The owner, in consideration of the erection of the hospital, agreed to pay the builder an agreed sum of money, to wit, \$49,845. As an incident to this building contract, and in furtherance of its performance within the time limit, the contractor, contemporaneously with the execution of the same, executed a bond, with the National Surety Company as surety, obligating itself and its surety to pay the board of trustees of the Mississippi State Charity Hospital, and to all subcontractors, workmen, laborers, mechanics, and furnishers of material jointly, as their interests may appear, the sum of \$25,000, if it should fail to complete the building according to contract, or if it should fail to pay all of the subcontractors, workmen, laborers, mechanics, and furnishers of material whom it should employ under its said contract. In short, the contractors contracted to furnish all material and labor, and to build within the time fixed a certain building, and at the same time executed a bond in the penalty of \$25,000, with the National Surety Company as surety thereon, payable to the owners of the building, and to all subcontractors, materialmen, workmen, laborers, mechanics, and binding itself and its surety thereby to complete the work within the time limit, and binding itself and its surety to pay for all material used in said building, and to pay for all the labor done upon the building, and in default thereof binding itself and its surety to forfeit to the obligees, as their interest may appear, the sum of \$25,000.

It is contended by appellant that the bond sued on must be read in connection with the contract and the specifications made part of it; and, in reading the two together, the words in the condition of the bond, "and shall pay all subcontractors, workmen, laborers, mechanics, and furnishers of material whom he shall employ under his said contract," are mere surplusage and without legal effect. Two questions are presented by this contention, *viz.*: First, the power of the trustees of the hospital to make or accept a bond for the benefit of third persons; and, second, the right of third persons, the complainants (appellees), to sue upon the bond as a contract made for their benefit.

After stating the questions involved here, appellant tentatively admits that the board of trustees was impliedly empowered to require the contractor to execute a bond for the faithful performance of his contract

with the board of trustees, but that this power cannot be extended to cover an indemnity to subcontractors. In other words, it is conceded that, while an express power to erect the building carried with it the power to exact a bond from the contractors to insure their performance of their contract to erect the building, the board of trustees was not thereby authorized to demand anything more, and, in the absence of statutory authority, that part of the bond securing the claims of subcontractors was beyond the power of the board to take, or to enforce after it was taken. It does not appear that anything was required of the contractor which he was not perfectly willing to agree to, and we assume that this bond was executed without pressure from the trustees. It is probable that the bond was given voluntarily and in good faith, and the parties to same were not disturbed by the doctrine of *ultra vires*.

Was the provision of the bond for the benefit of subcontractors, materialmen, and laborers *ultra vires*? There is authority for and against the power. In *Knapp v. Swaney*, 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162, Judge Cooley rendered the opinion of the court, saying: "A county may go to great pains and great expense to make its courthouse unquestionably safe, that individual citizens may not suffer injuries consequent upon its construction. But if it may do this, it would be very strange if it were found lacking in authority to stipulate in the contract for the building that the contractors, when calling for payment, shall show that they are performing their obligations to those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people. . . . We are of opinion that there was nothing *ultra vires* in this condition, and that the relators are bound by it." In *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 17 L.R.A. (N.S.) 906, 116 N. W. 238, referring to a contract for the erection of a public building, wherein it was provided that the claims for labor performed and material furnished should be paid by the contractor, the court said: "This authority is one incident to the power given it to erect such a building and to provide for payment therefor."

. . . But in ascertaining the extent of a grant authorizing the doing of some specific thing it is to be taken as embracing the authority to do every proper act incident thereto and appropriate in the usual and ordinary course to carry such authority into execution. . . . We are of opinion that the county had power in this case to contract and secure the plaintiffs as pro-

vided in the contract and the bond given by defendants."

The same rule is announced in many of the states. In all of these cases it is held that public boards, like the board of trustees in this case, when given the power to contract for the doing of public work, have the power to require the contractor to do certain things for the benefit of third persons before they can collect from the public the money due them by the public for the doing of the public work; and some of them hold that such boards also have the inherent power, without statutory grant, to require bonds to secure subcontractors, laborers, and materialmen. *Denver v. Hindry*, 40 Colo. 42, 11 L.R.A.(N.S.) 1028, 90 Pac. 1028; *Knight & J. Co. v. Castle*, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976; *School Dist. ex rel. Koken Iron Works v. Livers*, 147 Mo. 580, 49 S. W. 507; *Snider v. Greer Wilkinson Lumber Co.* — Ind. App. —, 96 N. E. 980; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649, 62 N. W. 50; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 532; *Ochs v. M. J. Carnahan Co.* 42 Ind. App. 160, 76 N. E. 788, 80 N. E. 163; *St. Louis Public Schools v. Woods*, 77 Mo. 197. *Baxter v. Camp*, 71 Conn. 245, 42 L.R.A. 514, 71 Am. St. Rep. 169, 41 Atl. 803, and *Jefferson v. Asch*, 53 Minn. 446, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 604, are the two leading authorities for the lack of power in municipal boards and statutory boards generally to make contracts of the character here involved without express authority.

It would seem that there is no sound reason why the board of trustees would not be empowered to provide for the protection of subcontractors and others furnishing material and labor for the building. The legislature could have conferred this power upon the board, and such a statute would not be a subject of just criticism. But it is said that this was not done, and, that being true, the board of trustees were without power to accept this bond. It seems to us that the trustees had power to make any and all contracts necessary or proper to make in carrying out the erection of the hospital. The power to build certainly carries with it, as a necessary incident, the power to make such terms with the contractor as, in the opinion of the trustees, would best promote the speedy construction of the building. In the exercise of this power we can see no reason why the trustees should be confined to the mere making of the contract with some person to build the hospital, and it seems clear to us that the clause of the bond for the benefit of those who did the work or furnished material for the house does not violate any 46 L.R.A.(N.S.)

rule of law or equity; but, on the contrary, we can see the sound business policy in this clause, quite aside from any sentimental or moral obligation to treat "knights of the hatchet and saw" as preferred above other litigants.

Taking it as a cold-blooded business proposition, this clause in the bond would naturally encourage subcontractors of the best sort to take contracts to do certain parts of the work; it would tend to prevent the abandonment of the work by mechanics not promptly paid their wages by the contractors, who might be suspected to be of doubtful financial solvency; it would procure the best work and material, and the prompt services of all workers and subcontractors; and all of this would redound to the benefit of the public. It must be borne in mind that the mechanics, materialmen, and laborers could have no lien upon the building, and that the trustees, representing the state, would not be bound to reserve money with which to pay their claims; but they would have to depend upon the contractor alone. Taking these things into consideration, the bond, in a way, supplied the place of the mechanics' lien law, and thus gave an additional security to all persons working upon this building and supplying material therefor; and this alone was, in our opinion, of the highest importance to the state.

Another reason urged why this bond is void is that the contract does not require the contractor to give the bond to secure third persons not parties to the contract. We think this view unduly narrows the contract. The contract consists of the two instruments, and they must be taken together; and, when so taken, they make the final and complete contract between the parties. Besides the subcontractors are made parties to the contract, and the bond was executed in their interests. The bond does not require the contractor to do anything which the law did not require it to do, in so far as the subcontractors are concerned, and it is difficult to see why the surety could not be bound by its contract to insure his doing his plain legal and moral duty, although it be conceded that the board of trustees did not have the power to demand the bond. There is certainly no inhibition against the contractor entering into such a contract with his subcontractors, either by name or by a general clause in the bond.

Stated more accurately, as one of the conditions of the letting of the contract, and as one of the considerations therefor, the board of trustees exacted the bond to insure the payment of the subcontractors and materialmen. This was not an unreasonable or improper thing to do, and it required

nothing of the contractor which the law did not require it to do, except to obtain someone to insure the performance of a plain legal and moral duty.

The contention that the clause of the bond challenged as invalid was without consideration is, in our opinion, unsound. This was a part of the consideration which enabled the contractor to procure the contract, and would have the effect of encouraging contracts with the contractor, and the bills so allege. There can be no doubt of the intention of the parties. The language of the bond is unambiguous; and, if it was within the power of the trustees to require the bond, it manifestly inures to all persons named therein.

It is the policy of the law to look with disfavor upon the defense of *ultra vires*. The Supreme Court of the United States, in *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693, said: "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail, where it would defeat the ends of justice, or work a legal wrong." See also *Edwards County v. Jennings*, — Tex. Civ. App. — 33 S. W. 585. To discover what contract the bond refers to, it is necessary to read the contract; and it is thus both the bond and the contract constitute the entire contract. The contract requires the contractors to furnish all labor and material, and to furnish it they must pay for it, and to afford them credit for that purpose, and to expedite the work by mechanics capable and willing, the parties to the contract agreed that the bond in question should be executed. An advantage was obtained by the trustees, and an extra credit was given to the contractors; and, it being the duty of the trustees to erect a building with as little delay as possible, and to do so upon the best terms obtainable, we are of the opinion that the plea of *ultra vires*, if upheld, "would defeat the ends of justice;" and to deny the plea will only require the contractors and their surety to carry out their obligations advisedly assumed.

Affirmed, with leave to answer the bill within thirty days from the filing of the mandate in the trial court.

MISSOURI SUPREME COURT (Division No. 1.)

CHARLES DOUGHERTY, by Next Friend,
Appt.,
v.

CITY OF ST. LOUIS et al., Respts.

(— Mo. —, 158 S. W. 326.)

Highway — obstruction — storage of lumber.

1. A dealer in building materials has

no right to store in the street adjoining his yard, even temporarily, lumber for which there is no room in the yard.

Municipal corporation — permitting lumber piled in street — liability for injury.

2. A municipal corporation is liable for injuries caused by the fall of a pile of lumber which it permits to be stored in the street by a dealer, upon a boy who is playing around it, although the lumber had been in the street only a short time.

Same — notice of obstruction — necessity.

3. To hold a municipal corporation liable for injury caused by a pile of lumber stored in the street, it must have had notice of its existence.

Trial — instruction — delay in removing lumber pile.

4. Instructing the jury that if a municipal corporation permitted a pile of lumber to remain in a street for about three days, it would be liable for injuries caused by its fall, is misleading, as tending to indicate the reasonable notice to which the municipality was entitled before liability would attach.

(June 28, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court of the City of St. Louis in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. Otto F. Karbe and S. C. Rogers, for appellant:

The court erred in giving instructions to the jury offered by defendants Riechers.

Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30; Com. v. McNaugher, 131 Pa. 55, 18 Atl. 934; 15 Am. & Eng. Enc. Law, 2d ed. 444, 492, 493; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532; Kossman v. St. Louis, 153 Mo. 293, 54 S. W. 513; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Brennan v. St. Louis, 92 Mo. 482; Hull v. Kansas City, 54 Mo. 598, 14 Am. Rep. 487; Troll v. St. Louis Portland Cement Co. 160 Mo. App. 501, 140 S. W. 963; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep.

Note. — Liability of municipality for injuries from material placed in the street by individuals.

Earlier cases covering the question under annotation will be found at pp. 510 and 519 of the note to *McKim v. Philadelphia*, 19 L.R.A.(N.S.) 507, on liability of municipal corporations for permitting obstructions to be placed in the street.

As the title indicates, this note is confined to the question of the liability of a municipal corporation for material placed in streets for the benefit of third persons

418; *Sanderson v. Holland*, 39 Mo. App. 233; *Minster v. Citizens' R. Co.* 53 Mo. App. 276; *Meade v. Chicago, R. I. & P. R. Co.* 68 Mo. App. 92; *Burger v. Missouri P. R. Co.* 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439; *Sydnor v. Arnold*, 122 Ky. 557, 92 S. W. 289; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; *Barrows, Neg.* 18; *Heberling v. Warrensburg*, 204 Mo. 613, 103 S. W. 36; *Russell v. Columbia*, 74 Mo. 494, 41 Am. Rep. 325; *Barr v. Kansas City*, 105 Mo. 560, 16 S. W. 483; *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941, 3 Am. Neg. Rep. 419; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Chilton v. St. Joseph*, 143 Mo. 192, 44 S. W. 766, 3

Am. Neg. Rep. 690; *Straub v. St. Louis*, 175 Mo. 413, 75 S. W. 100, 14 Am. Neg. Rep. 384; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Donoho v. Vulcan Iron Works*, 7 Mo. App. 447, 75 Mo. 401; *Busse v. Rogers*, 120 Wis. 443, 64 L.R.A. 183, 98 N. W. 219, 15 Am. Neg. Rep. 743; *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442; *Rachmel v. Clark*, 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, 14 Am. Neg. Rep. 208; *Kelley v. Parker-Washington Co.* 107 Mo. App. 490, 81 S. W. 631; *Butttron v. Bridell*, 228 Mo. 622, 129 S. W. 12; *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587, 4 Am. Neg. Cas. 751; *Roberts v. Wabash R. Co.* 153 Mo. App. 638, 134 S. W. 89.

The court erred in giving instructions to

by individuals having no contractual relation with the city, and so does not include cases where the material has been left by the municipality itself, or by others doing work for it. And the cases considered are only those where the obstruction was not of a permanent nature, and do not include such obstructions as stepping stones, hitching posts, or stands erected for business purposes.

Generally as to liability of municipal corporations for defects or obstructions in streets, see note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513.

A municipality has been held liable for injuries sustained by reason of a horse taking fright at a pile of rubbish consisting of a bathtub, tin cans, etc., which it permitted to remain on the street, close to the part traveled by vehicles. *Nicholasville v. Fain*, 30 Ky. L. Rep. 564, 99 S. W. 275.

—or at logs and mill material piled in the road by an adjacent mill owner and permitted to remain there several months. *Kelly v. Whitechurch Twp.* 11 Ont. L. Rep. 155, affirmed without opinion in 12 Ont. L. Rep. 83. The court in this case said that a municipal council could not legally permit two thirds of the statutory road allowance to be made use of by an adjacent mill owner in an old, settled portion of the county, for the piling of his logs and other mill material, and say to the public that they must find their way as best they may through these obstructions.

And in *Sutter v. Kansas City*, *infra*, the city was held liable for injuries sustained by one who tripped over bricks which had been scattered on the sidewalk by children who had taken them from the side of the street, where they had been piled by the railroad company, engaged in repairs of its tracks. The court said that the railroad company had the right to pile the bricks at such place, to remain there a reasonable length of time for it to complete the work on its tracks, and to replace them in the street, and while the company had the duty as far as possible to prevent children from scattering the bricks on the sidewalk, the

city had a similar duty imposed by law to use every reasonable precaution to keep the sidewalk in a suitable condition for use of the public, and it had this duty primarily, and whether or not the company was negligent in its duty.

A disabled vehicle may be left in the street by the owner for such reasonable time as may be necessary for its removal, and its presence in the street for this time is neither a nuisance nor an obstruction; but after this time elapses, it is both an obstruction and a nuisance, and for any injury resulting therefrom the city may be held liable under a statute which makes it the duty of a city to keep its streets open and in repair and free from nuisances. *Cutter v. Des Moines*, 137 Iowa, 643, 113 N. W. 1081.

Material placed in street under an express permit from city.

A city which grants permission to a builder to place material in the street is liable for injuries sustained thereby, where it fails to take proper means for protecting and guarding against danger. *Blocher v. Dieco*, 30 Ky. L. Rep. 689, 99 S. W. 606; *Carlisle v. Campbell*, 151 Ky. 279, 151 S. W. 673; *Apker v. Hoquiam*, 51 Wash. 567, 99 Pac. 746; *Laporte v. Henry*, 41 Ind. App. 197, 83 N. E. 655.

In the *Campbell Case* the court said that the statute commits the streets to the care of the city, and imposes upon it the burden of keeping them reasonably safe for public travel. This burden the city cannot by its ordinance shift from itself to a property holder. He may be liable to it, but it is answerable to the person injured by reason of the unsafe condition of the street, where it knowingly suffers the obstruction to remain in the street without taking proper precaution for the safety of the traveling public.

And it is immaterial that the material was removed and replaced from time to time, and that the particular material causing the injury had been there but a short time. *Apker v. Hoquiam*, 51 Wash. 567, 99 Pac. 746.

the jury offered by defendant city of St. Louis.

Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; *Hull v. Kansas City*, 54 Mo. 598, 14 Am. Rep. 487; *Troll v. St. Louis Portland Cement Co.* 160 Mo. App. 501, 140 S. W. 963; *Straub v. St. Louis*, 175 Mo. 413, 75 S. W. 100, 14 Am. Neg. Rep. 384; *Kossman v. St. Louis*, 153 Mo. 293, 54 S. W. 513; *Brennan v. St. Louis*, 92 Mo. 482; *Warder v. Seitz*, 157 Mo. 140, 57 S. W. 537; *Buttron v. Bridell*, 228 Mo. 622, 129 S. W. 12; *State use of Heye v. Frank*, 22 Mo. App. 46; *Dales v. Chicago, B. & Q. R. Co.* 169 Mo. App. 183, 152 S. W. 401.

The court erred in refusing to admit in evidence testimony offered by plaintiff as to the proper way to have piled the lumber.

Schiller v. Kansas City Breweries Co. 156 Mo. App. 569, 137 S. W. 607.

Mr. Edwin Rosenthal also for appellant.

Messrs. Muench, Walther, & Muench, for respondents:

An abutting owner has the right to use a part of the highway for the receiving of freight, or the temporary deposit of articles connected with his business, so long as such temporary use does not unreasonably interfere with travel.

Gerdes v. Christopher & S. Architectural Iron & Foundry Co. 124 Mo. 347, 25 S. W. 557, 27 S. W. 615; *Watson v. Robberson Ave. R. Co.* 69 Mo. App. 548; *McKee v.*

Peters, 142 Mo. App. 286, 126 S. W. 255; *Davis v. Thompson*, 134 Mo. App. 13, 114 S. W. 550; *Dill. Mun. Ord.* 4th ed. § 730; *McQuillin, Mun. Corp.*

There is a difference between the paved and unpaved portions of a sidewalk, with respect to the use by the abutting owner and the public, respectively.

Bassett v. St. Joseph, 53 Mo. 303, 14 Am. Rep. 446; *Tritz v. Kansas City*, 84 Mo. 632; *Craig v. Sedalia*, 63 Mo. 417; *Brown v. Glasgow*, 57 Mo. 156; *Kling v. Kansas City*, 27 Mo. App. 231:

While the occupancy of a sidewalk by an abutting owner must not extend beyond a reasonable space of time, what is a reasonable time is to be determined by the circumstances of each case, and is a question of fact for the jury.

Hesselbach v. St. Louis, 179 Mo. 523, 78 S. W. 1009; *Loth v. Columbia Theater Co.* 197 Mo. 328, 94 S. W. 847; *Gerdes v. Christopher & S. Architectural Iron & Foundry Co.* 124 Mo. 355, 25 S. W. 557, 27 S. W. 615.

The pile of lumber was not a nuisance "*per se.*"

Hasselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009; *Gerdes v. Christopher & S. Architectural Iron & Foundry Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615; *Seibert v. Missouri P. R. Co.* 188 Mo. 657, 70 L.R.A. 72, 87 S. W. 995; *Loth v. Columbia Theatre Co.* 197 Mo. 328, 94 S. W. 847; *O'Hara v.*

Necessity of notice of condition.

In *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070, and *Friedman v. New York*, 63 Misc. 310, 116 N. Y. Supp. 750, it was held that where a city grants permission to place building material in the street, it will not be liable for injuries sustained thereby, unless it has notice of dangerous conditions.

But the better reasoning would seem to be that when it issues a permit for using the street for the storage of building material, a city is charged with notice of the dangerous condition of the street, and it must, without further notice, take means to protect the public from danger by reason of the obstruction contemplated in the permit, as was held in *DeGarmo v. Vogt*, — Ky. —, 152 S. W. 969; *Blocher v. Dieco*, 30 Ky. L. Rep. 689, 99 S. W. 606.

In *Rolsten v. St. John*, 36 N. B. 574, a demurrer to the complaint in an action against the city for damages sustained from a pile of lumber on the sidewalk was sustained, as there was no allegation that the city had notice of the obstruction. In this case there was no permit granted by the city.

Length of time sufficient to charge city with notice.

A city is not charged with notice so as 46 L.R.A. (N.S.)

to render it liable for injury sustained by the blowing over of a large signboard placed by the owner temporarily against a fence when it had been standing there not to exceed thirty minutes when the accident occurred. *Miller v. Kansas City*, 157 Mo. App. 533, 137 S. W. 998.

But where evidence tended to show that children had been in the habit of removing bricks from a pile placed at the side of the street, and scattering them on the sidewalk, which would again be piled up by the contractor, the city had notice of the continuing acts of the children in scattering the bricks, though the injury was caused by stumbling on bricks scattered but one hour before the accident happened. *Sutter v. Kansas City* 138 Mo. App. 105, 119 S. W. 1084.

And thirty days' obstruction of a main street with building material will impute to a city notice of its existence. *Apker v. Hoquiam*, supra.

While a city has not, as a rule, constructive notice of an obstruction where material is placed in a street for only from two to four hours before an injury caused thereby, yet, where the unloading of building material in the street had been going on for several days, the material being taken out of the street by the contractor in proceeding with the work, and replaced with other material, the question of notice was for the jury, though the

Laclede Gaslight Co. 244 Mo. 395, 148 S. W. 884.

If it was safe at the close of business on the day when it was piled, and was thereafter rendered unsafe by the act of a third person, the defendants were not liable.

Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009; O'Hara v. Laclede Gaslight Co. 244 Mo. 395, 148 S. W. 884.

The negligence declared upon in plaintiff's petition was the alleged careless manner of piling the lumber, and plaintiff could not therefore recover upon any other ground.

Hesselbach v. St. Louis, 179 Mo. 524, 78 S. W. 1009; O'Hara v. Laclede Gaslight Co. supra.

Plaintiff, in going upon the lumber, was guilty of trespassing.

Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891; Schmidt v. Kansas City Distilling Co. 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; Moran v. Pullman Palace Car Co. 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 459.

The manner of piling lumber is not a matter for expert opinion.

Smith v. Kansas City, 125 Mo. App. 158, 101 S. W. 1118; Benjamin v. Metropolitan Street R. Co. 133 Mo. 274, 34 S. W. 590; Rigby v. Oil Well Supply Co. 130 Mo. App. 128, 108 S. W. 1128.

particular lot of material which had caused the injury had not been placed in the street two hours at that time. Vance v. Kansas City, 123 Mo. App. 644, 100 S. W. 1101.

And when a disabled vehicle has been allowed to remain at the side of the road for several days, the question whether there had been sufficient length of time for a city to have knowledge of and to remove an obstruction in the street is one of fact for the jury. Cutter v. Des Moines, 137 Iowa, 643, 113 N. W. 1081.

Contributory negligence.

Knowledge that a building is in process of erection, and that the sidewalk is occupied by building material, will not, as a matter of law, preclude one injured thereby from recovering damages against the city if he was, at the time of the injury, using reasonable care. Blocher v. Dieco, 30 Ky. L. Rep. 689, 99 S. W. 606.

Nor will the fact that the injured party was pushed by someone, and thereby made to stumble and fall over the obstruction, lessen the legal liability of the city which permits an obstruction on the sidewalk, as its negligence in this respect directly contributed to the injury, and except for it the accident would not have occurred. Ibid.

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Messrs. William E. Baird and Robert Burkham also for respondents.

Graves, J., delivered the opinion of the court:

Charles Dougherty, a boy of ten years, sues through his next friend, to recover from the defendants for personal injuries received by him when a pile of lumber in the street fell upon him. The suit was against the city of St. Louis, the two co-partners in the business firm of J. P. Riechers & Son, and the Dimple Realty Company. The latter was dismissed by the trial court upon a demurrer to the testimony, and it is conceded in the briefs here that such ruling was correct. Upon trial a jury returned a verdict for the other defendants, and from that verdict and the judgment entered thereon the plaintiff has appealed.

The negligence charged is thus stated in the petition: "Plaintiff for cause of action states that on the 11th day of February, 1909, St. Louis avenue in said city of St. Louis, and the sidewalks pertaining thereto, constituted an open public highway of said city; that the premises heretofore mentioned abutted on said public highway, to wit, St. Louis avenue, and was surrounded and inclosed by a board fence; that on the day and date above mentioned, and for several days prior thereto, defendants J. P. Riechers, Charles P. Riechers, and the Dimple Realty Company owned and main-

In Brown v. Chicago, 135 Ill. App. 126, where a pedestrian traveling in the street in front of premises upon which a new building was being erected tripped on scantling lying on the surface of the street, in holding the city not liable, the court said the evidence shows that a 2 by 4 scantling was lying flat on the surface of that part of the street designated for vehicles and horsemen. "We do not think it can be held that the scantling lying on the surface of the street made the street dangerous for horsemen or vehicles, or that permitting it to lie there in the roadway was actionable negligence. It is to be inferred from the evidence that there was at the time of the accident sufficient light to enable appellant to see the projecting scantling, for he says he saw it after he fell. If he chose to use that portion of the street designated for vehicles instead of the portion designated for pedestrians, it was his duty to exercise sufficient care to avoid obstacles of that character."

Contributory negligence is a question of fact for the jury where one who sustains injuries from building material in the street had passed along that street earlier in the day on which the accident occurred, and saw or should have seen the obstruction. Apker v. Hoquiam, supra. J. H. B.

tained a pile of heavy lumber on the St. Louis avenue side of said premises, and on the open public highway, said pile of lumber being about 15 feet in length, about 5 feet wide, and about 8 feet high, and extended outwardly from said fence a distance of about 5 feet on the public highway; that it was the duty of said city of St. Louis to keep its sidewalks free from nuisances and dangerous obstructions and in reasonably safe condition to persons lawfully on said street; that the fact of said lumber being on said sidewalk was known to the defendants city of St. Louis and its agents and servants, or could, by the exercise of ordinary care, have been known to said defendant city of St. Louis; that said lumber was negligently, carelessly, loosely, and improperly piled, in this; to wit, that defendants failed to brace said lumber with proper ties or crosspieces, placed between the boards constituting said pile of lumber, and that said lumber was not guarded so as to warn persons who might come near or in contact with same of their danger; and that said pile of lumber was dangerous to persons who might come near or in contact therewith." The petition then alleges that plaintiff and other boys were playing in, upon, and around such pile of lumber, when a portion thereof fell upon him and injured him. Damages are asked in the sum of \$15,000. The two individual defendants, J. P. and C. P. Riechers, answer (1) by a general denial, and (2) a plea of contributory negligence. The answer of the city is to like effect. The answer of the realty company need not be considered. Complaint is made of the giving and refusing of instructions, the admission of improper evidence, and the refusing to admit proper evidence. Incident facts will be detailed in the course of the opinion in connection with the points made.

I. Plaintiff asked a general instruction, which the court refused to give, and this is one of the complaints urged here. The instruction as asked reads: "The court instructs the jury that if they believe and find from the evidence that the defendants J. P. Riechers and Charles P. Riechers placed the pile of lumber mentioned in the evidence on the sidewalk on St. Louis avenue, near Leffngwell avenue, prior to the 11th day of February, 1909, or owned same and allowed it to be done, and that they allowed it to remain there for about three days, and that the defendant city of St. Louis knew the same was so placed on said sidewalk, or might, by the exercise of reasonable care, have known through its officers and agents that same was there, and that the defendants J. P. Riechers and Charles P. Riechers and the city of St.

Louis knew, or by the exercise of reasonable care could have known, that same was improperly piled and unsafe and dangerous to children lawfully playing on or around same, and that said lumber was carelessly, negligently, loosely, and improperly piled by reason of not being braced with proper ties or crosspieces, placed between the boards constituting said pile of lumber, and that said lumber was unguarded, and that while said lumber was in said condition on said sidewalk, at the place mentioned in the evidence on or about the 11th day of February, 1909, the front tier of said lumber fell and injured Charles Dougherty, plaintiff herein, while he was playing on, near, at, or around same, and that the said plaintiff was, at the time he was injured, in the exercise of ordinary care, then you will find your verdict in favor of plaintiff." This instruction the court modified and gave. The modified instruction reads: "The court instructs the jury that if they believe and find from the evidence, that said St. Louis avenue was, on the 11th day of February, 1909, an open public highway, that the defendants J. P. Riechers and Charles P. Riechers placed the pile of lumber mentioned in the evidence on the sidewalk on St. Louis avenue, near Leffngwell avenue, prior to the 11th day of February, 1909, or owned same and allowed it to be done, and that they allowed it to remain there for an unreasonable length of time, and that the defendant city of St. Louis knew the same was so placed on said sidewalk, or might, by the exercise of reasonable care have known through its officers and agents that same was there, and that the defendants, J. P. Riechers and Charles P. Riechers and the city of St. Louis, knew or by the exercise of reasonable care could have known, the same was improperly piled and unsafe and dangerous to children lawfully playing on or around same, and that said lumber was carelessly, negligently, loosely, and improperly piled by reason of not being braced with proper ties or crosspieces, placed between the boards constituting said pile of lumber, and that said lumber was unguarded, and that while said lumber was in said condition on said sidewalk, at the place mentioned in the evidence, on or about the 11th day of February, 1909, the front tier of said lumber fell and injured Charles Dougherty, plaintiff herein, while he was playing on, near, at, or around same, and that the said plaintiff was, at the time he was injured, in the exercise of ordinary care, then you will find your verdict in favor of plaintiff."

Some pertinent facts should be first stated: The individual defendants were the lessees of the vacant adjoining lot, and had

it fenced, and for years had used it for the purpose of storing secondhand lumber and other building material. On St. Louis avenue the space between the board fence surrounding their lot and the curb line of the street was something like 20 feet, the outside portion having a sidewalk upon it. The lumber pile was on the inside portion, and not on the sidewalk portion. The evidence sharply conflicts as to whether the lumber was safely or negligently piled up. A jury could well find either way upon this question. Likewise the evidence sharply conflicts as to how long this particular pile of lumber had been in the street at this point. One witness for defendants says: "I have known Riechers for eight years. The lumber had been there five or six days. I took more interest in this particular case because I knew that these boys would get hurt if they would keep on playing around that lumber pile." Other evidence places the time much shorter, but it is sufficient for us to say that there is a conflict in the evidence, with substantial evidence both ways. The theory of the defense is largely founded upon the testimony of Charles P. Riechers. This is short, as condensed in the abstract, and we quote both sides of it, thus:

Direct examination by Mr. Muench:

My name is Charles Riechers. I am in the general construction business with my father, J. P. Riechers & Son. Have been about twenty-five years. We are occupying the lot at the corner of Leffngwell and St. Louis avenues for storing old building material. The lot is inclosed by a fence. Part of the sidewalk is paved and part unpaved. From the fence to the curb is about 25 feet and 6 inches. I have heard the testimony with reference to the pile of lumber which was outside of the fence, on the St. Louis avenue side of the lot. That lumber was moved from the southwest corner of Grand and Dodier street. We were wrecking a building there. This lumber came out of that building. I had all the nails drawn out of the lumber, perfectly clean, no rub-bish sticking to it, lath nails nor pieces of lath remaining, or anything else. It was absolutely clean. It was white pine joists, 2x6, 2x8, 2x10. I saw the lumber as it was piled and after it was piled. Under the bottom of the pile were two pieces of 4x6, laid on an incline toward the fence, by having two bricks under the outer edge of it, and on this we proceeded to pile the lumber about 5 feet wide up against the fence. The lumber leaned against the fence. The front of the pile was leaning towards the fence northwardly from 12 to 15 inches. That was brought about by the pile being 5 feet at the bottom and from 3½ to 3¾

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feet at the top. It was against the fence all the way up. I had last seen this pile of lumber before the accident, about 2 o'clock in the afternoon. It certainly looked good and safe to me.

Q. Why was it, Mr. Riechers, that this lumber was not piled in the yard? (Objected to by Mr. Rosenthal.)

Mr. Muench: The purpose of this question is simply to show that at that particular time there was not room inside the fence to store those boards, and for that reason they were placed just outside the fence. I expect to follow that up by other evidence.

The court: Well, he may answer that question upon the statement that you expect to follow it with further proof. (To which ruling plaintiff then and there duly excepted.)

A. On account of a lot of material accumulating on the inside, and we had to remove this stuff from Grand and Dodier in order to make room for other old material that was to be left there, to be reused in the construction of the new building. Consequently by not having room on the inside of this fence, we piled the lumber out against the outside of the fence, and just as quick as we could get these nails and stuff out we hauled it down, and then after we had room made in the lot we were going to proceed to move that stuff in the lot. This particular pile of lumber was laid up one plank on top of the other.

Q. About how long would it have taken one man to remove that lumber from the outside of the fence to the inside? (Objected to as incompetent and immaterial, objection overruled, to which ruling of the court the plaintiff then and there duly excepted.)

A. It might have taken a day and one half. At 2 o'clock in the afternoon of the 11th, the day of the accident, the pile was solid. About 11 o'clock that night I went by there and I saw some joists scattered, but I did not know that anything had happened. I just thought the boys had been playing. The fence is 7 feet high exactly, and the lumber was piled within 6 inches of the top of it. After the accident happened the braces were still under the pile.

Cross-examination by Mr. Rosenthal:

The lumber had been there possibly a day and a quarter. I am not positive whether it was put there on the same day or not, but it was put there on the 10th or 11th, which was Wednesday or Thursday. There had been some lumber out there about six or seven days before. On the 11th of February, 1909, I had timber piled on the Leffngwell side of this property. They were there off

and on for quite a number of years. This lumber was piled about 5 foot wide at the bottom, graduating up to the top so that it was narrower on the top than it was on the bottom. There were different sizes, 2x6, 2x8, 2x10. It was timber of different dimensions and we did not pull all of the 2x8 together, nor the 2x6, nor the 2x10. We piled across, one on top of the other, straight from the fence out.

Q. Explain how the lumber was piled 12 or 15 inches narrower at the top than at the bottom, and still have one of these planks lay right on top of the other, as you indicated.

A. Well, it consisted of various widths, 2x6, 2x8, 2x10. If the pile had consisted of only 2x10's, it would naturally mean that the front of the pile would have remained straight, and we would have got as many tiers on the top as we get on the bottom; but by having different widths we incline those piles in from 12 to 15 inches by putting 2x8's, 2x6's, and 2x10's together crossways.

Q. Well, I understood you to say you just took the lumber and unloaded it without any regard to the size, and placed it together?

A. Well, because the pile was going to be moved to the inside of the lot in a few days. That's the reason it was piled so as not to keep it separate. There had been some lumber piled there about six or eight days before. There were no ties or crosspieces or braces between the planks of the pile. There wasn't anything to warn anybody away from the pile or that there was any danger. The lumber was about 12½ feet long. The front tier was practically the same as a pair of stairs, leaning towards the fence from the bottom to the top, 12 or 15 inches. We didn't make any tiers. The back was close against the fence, and the bottom of the pile was close against the fence. The fence is about 4 inches out of plumb.

Redirect examination by Mr. Muench:

The last lumber was piled there on the morning of the 10th, or before 10 o'clock on the morning of the 11th of February. The 2x10's were the last piled on the pile. There has never been any pavement along the west side of that fence along the lot.

We have underscored all the evidence upon which one theory of the given instruction supra was predicated. This testimony is flatly contradicted both as to the manner in which the lumber was piled up, as well as to the length of time it had been there. This sufficiently outlines the additional facts for a discussion of these two instructions.

It will be noticed that the instruction given by the court precludes the right of the 46 L.R.A. (N.S.)

plaintiff to recover, unless the jury found that the pile of lumber had been in the street "for an unreasonable length of time." In other words, the instruction seems to be predicated on the idea that the Riechers had the lawful right to obstruct this street for a reasonable length of time, and they and the city only became liable for the obstruction after it had remained there more than a reasonable length of time. Under the facts of this case this instruction is vicious. Under certain circumstances abutting property owners have the right to reasonably obstruct a street in the conduct of their business, and of this class of cases the case of *Gerdes v. Christopher & S. Architectural Iron & Foundry Co.* 124 Mo. loc. cit. 353, 25 S. W. 557, 27 S. W. 617 et seq., states the very limit of the rule. In that case it is said: "The general rule which has been repeatedly declared by this court is that municipal corporations are bound to keep their streets and highways in a proper state of repair and free from obstructions so that they will be reasonably safe for travel; and if, having notice of defects or obstructions, they neglect to repair or remove them, they will be liable for all injuries, provided that he who received the injury was himself at the time in the exercise of due care. *Smith v. St. Joseph*, 45 Mo. 449; *Flynn v. Neosho*, 114 Mo. 572, 21 S. W. 903, and cases cited. There is a well-recognized qualification to this strict rule which is declared by Judge Dillon in this language: 'But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. . . .

Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no absolute necessity; it suffices that the necessity is a reasonable one.' 2 Dill. Mun. Corp. 4th ed. § 730, and cases cited: *Stephens v. Macon*, 83 Mo. 346; *Welsh v. Wilson*, 101 N. Y. 256, 54 Am. Rep. 698, 4 N. E. 633. There can be no doubt, under this obviously just qualification, that the manufacturing company had the right to make reasonable use of these streets for the deposit of their manufactured goods, for the purpose of loading and unloading them, though not directly authorized by an ordi-

nance of the city. But it had no right to make a permanent use of the streets for storing its property, or to make such temporary use as would unreasonably interfere with travel. The reasonableness of the use should be measured by the character of the articles to be handled." Other cases are cited by the respondents, but this case sufficiently illustrates the doctrine under which they attempt to sustain this instruction. The trouble is not with the doctrine of a reasonable temporary use of streets by abutting property owners, but in the case at bar the facts do not bring the use within the spirit of the rule. This doctrine of a reasonable temporary obstruction of public streets by abutting property owners has its origin in the law of necessity. In loading and unloading manufactured articles from a factory, a reasonable temporary obstruction of the public street may be necessary, but such obstruction must be both reasonable in kind and temporary in character. Building new buildings and repairing old ones may of necessity require their reasonable and temporary obstruction of streets. And it might be added that the reasonableness of the obstruction, as well as its temporary character, may vary with the facts of each case, and both may be questions for a jury. But under the facts in this case this pile of lumber was an unauthorized obstruction in a public street, and neither its reasonableness, nor its character as to being temporary or otherwise, were questions for the jury, and therein this instruction was error.

We have set out this evidence at length. It shows: (1) That Riechers & Son used the abutting property as a storage place for old building material; (2) that their storage room was full to overflowing, and for that reason they used a public street as a storage room; and (3) that they proposed to so use such street as a storage room for the conduct of their business until such time as the congested condition within their yards was relieved. This testimony does not show a temporary use within the rule established by the cases upon which the defendants rely. Had they shown that the lumber was temporarily thrown in the street at the gateway of their yard, until such time as it could be carried in and then stored, we might have a different question. If a merchant receives a carload of plows, and makes a reasonable use of the sidewalk until such time as, by the use of due diligence (and the situation demanded the use of the sidewalk), he could have them taken away and placed in his storage room or yard, such use might be said to fall within the rule stated in the Gerdes Case, *supra*; but, if such merchant deliberately stored his

carload of plows upon the sidewalk until such time as, in the course of his business, he could reduce his stock, so as to have room to store them upon his own premises, such case would not fall within the rule of a reasonable temporary use. Whilst such a use might not last long, yet the facts would make it in law a permanent and unlawful use. The case at bar falls within this latter class. Under defendants' testimony this lumber was being stored there until such time as they could use sufficient material from within to leave a place for its storage at this later date. Such an obstruction to a public highway is neither reasonable nor temporary, and should be so declared as a matter of law. This modified instruction given by the court does not declare the law under the facts of this case, and for this error, the judgment nisi must be reversed and the cause remanded.

II. Going now to the instruction asked by the plaintiff, *supra*, it must be said that it, too, is not without some fault. With the view we have expressed in paragraph I, notice to the Riechers was not required. They were the authors of an unauthorized obstruction, and an obstruction dangerous (under plaintiff's evidence) to children who might be lawfully using the street whilst at play. But the city of St. Louis is a defendant, and notice to it was essential to its liability. In this instruction is the clause "and that they allowed it to remain there for about three days," and it may be that this would make the instruction misleading. It might be construed that the court was saying that "about three days" was in law the reasonable notice to which the city was entitled before liability would attach. The clause is awkwardly used, and in redrafting it can be left out or changed as herein suggested. Otherwise this instruction properly declares the law.

III. Instruction No. 5 for the defendants is erroneous for the same reasons given in our paragraph I, and perhaps for others. In fact, there are numerous errors throughout the long list of instructions, but they mostly arise from the erroneous view taken by the trial court, as disclosed in our paragraph I, and for that reason need not be noticed in detail. The plaintiff's evidence is such as to justify the submission of his case both as to the city and the two individual defendants, and under proper instructions the jury may take a different view of the matter.

Let the judgment be reversed and the cause remanded, to be tried according to the views herein expressed.

All concur.

**NEW HAMPSHIRE SUPREME
COURT.**

GEORGE W. GARLAND, Admr., etc., of
Frank W. Garland, Deceased.

v.

BOSTON & MAINE RAILROAD.

(76 N. H. 556, 86 Atl. 141.)

**Carriers — trespasser on engine — col-
lision — liability for injury.**

One riding on the engine of a train under circumstances such that his presence there could not reasonably be anticipated by the employees or officers of the road other than those in charge of the engine cannot hold the railroad company liable for injuries received through a head-on collision due to unintentional acts of those in charge of another train, although permitting the collision may have been negligent towards passengers on the train on which he was riding, since they owed him no duty, and therefore were not negligent toward him.

(February 4, 1913.)

Note. — May one recover for injuries which would have been avoided by performance of defendant's duty toward another.

As was stated in *GARLAND v. BOSTON & M. R. Co.*, the authorities in this country are substantially unanimous to the effect that in actions for failure to use ordinary care a duty toward the complaining party must be shown to exist. That the reason for the imposition of the duty has been found in the relation of the parties, and while the detailed process of reasoning by which the conclusion is reached is not frequently stated, an examination of the cases generally shows that this is the test which has been applied. To permit one to recover because of a duty owed to another would set at naught this elementary rule which is the basis of liability in all negligent actions. The rule is one that underlies nearly all questions of negligence, and is reflected in the numberless questions that come before the court as to the duty owed by one party to the other.

Two cases, *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 25 S. E. 264, and *Carney v. Concord Street R. Co.* 72 N. H. 364, 57 Atl. 218, seem to have rendered decisions in conflict with the general rule. These cases have been sufficiently explained in the principal case, by showing that the decision in the *Pickett* Case depends upon a rule peculiar to that jurisdiction, and in the *Carney* Case by showing that so as far as it is in conflict with the general rule it has, in effect, been overruled by later cases in the same jurisdiction. See also comment on the *Pickett* Case in note in 55 L.R.A. 420.

As was said in *Akers v. Chicago, St. P. M. & O. R. Co.* 58 Minn. 540, 60 N. W. 46 L.R.A. (N.S.)

TRANSFER by the Superior Court for Strafford County for the opinion of the Supreme Court upon exception by plaintiff after the granting of defendant's motion for nonsuit in an action to recover damages for the alleged negligent killing of plaintiff's intestate. Overruled.

The facts are stated in the opinion.

Messrs. George E. Tebbetts and Mathews & Stevens for plaintiff.

Messrs. Robert Doe, Leslie P. Snow, and Kivel & Hughes, for defendant:

Plaintiff cannot recover, since defendant owed him no duty and was not negligent toward him.

Haltwanger v. Columbia, N. & L. R. Co. 64 S. C. 7, 41 S. E. 810; *Elkins v. South Carolina & G. R. Co.* 64 S. C. 553, 43 S. E. 19; *Burns v. Southern R. Co.* 63 S. C. 46, 40 S. E. 1018; *Koegel v. Missouri P. R. Co.* 181 Mo. 379, 80 S. W. 905; *Feeback v. Missouri P. R. Co.* 167 Mo. 206, 66 S. W. 965; *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L.R.A. 184,

669, in holding that the statutory duty to block frogs in railroad yards was not a duty due to a mere trespasser: "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to someone else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured. These principles are elementary, and are equally applicable whether the duty is imposed by positive statute or is founded on general common-law principles. And the principle is the same whether the statute expressly declares that a person shall be liable for any damage sustained by reason of its breach, or merely imposes the duty, with a penalty for its nonperformance. A violation of a statutory duty can be made the foundation of an action only by a person belonging to the class intended to be protected by such regulation, and all statutes requiring the owner or occupant of premises to adopt certain precautions to render them safe are designed for the protection, not of the wrongdoers or trespassers, but of those who are rightfully upon them. Hence it is held universally, except perhaps in Tennessee, that in case of noncompliance with such a statute the injured person, in order to recover, must have been rightfully in the place, and free from contributory negligence. Such statutes were never designed to abrogate the ordinary rules that, to recover, the neglected duty must have been due to the party injured, and that he himself must have been free from contributory negligence."

And in *Feeback v. Missouri P. R. Co.* 167 Mo. 206, 66 S. W. 965, an action to recover damages for death of a trespasser on a freight train who was killed in a wreck caused by a collision, in holding that there

15 S. W. 919; Illinois C. R. Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232, 6 Am. Neg. Cas. 460; Brown v. Louisville & N. R. Co. 97 Ky. 228, 30 S. W. 639; Clampt v. Chicago, St. P. & K. C. R. Co. 84 Iowa, 71, 50 N. W. 673; Earl v. Chicago, R. I. & P. R. Co. 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381, 6 Am. Neg. Rep. 274; Thomp. Neg. 1901 ed. § 3; Frost v. Eastern R. Co. 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; McGill v. Maine & N. H. Granite Co. 70 N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684; Hughes v. Boston & M. R. Co. 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070; Hill v. Concord & M. R. Co. 67 N. H. 449, 32 Atl. 766; Casista v. Boston & M. R. Co. 69 N. H. 649, 45 Atl. 712; Batchelder v. Boston & M. R. Co. 72 N. H. 528, 57 Atl. 926; Burrill v. Alexander, 75 N. H. 554, 78 Atl. 618; Chickering v. Thompson, 76 N. H. 311, 82 Atl. 830; Leavitt v. Mudge Shoe Co. 69 N. H. 597, 45 Atl. 558; Davis v. Boston & M. R. Co. 70 N. H. 519, 49 Atl. 108.

could be no recovery, the court said: "How can it be said, therefore, that the careless engineer of the south-bound train neglected any duty he owed to this man when he had no knowledge of, or reason to apprehend, his presence? It is argued by the learned counsel that the engineer knew that those trains habitually carried passengers, and therefore he ought to have apprehended that passengers were on this train, and his conduct was a reckless disregard of his duty in that respect. But disregard of a duty owing to passengers gives no cause of action to one who was not a passenger. . . . However careless the conduct of the engineer of the south-bound train may be considered, it cannot be adjudged to have been a violation of any duty the defendant owed the plaintiff's husband, and therefore it was not negligence for which the defendant is liable in this suit."

And also in *Dalton v. Louisville & N. R. Co.* 22 Ky. L. Rep. 97, 56 S. W. 657, an action to recover for the death in collision of one who was on a freight train by mere sufferance of the defendant's servants, it was contended that notwithstanding he was on the train by sufferance only, he might recover because of the gross negligence of the company's servants in allowing the two trains to collide; but it was held that the company owed no duty to carry him safely, as he took the risk of the journey when he rode upon the freight train in this way; that the only obligation the company owed to him was not to injure him after knowledge of his danger.

In *Talkington v. Washington Veneer Co.* 61 Wash. 137, 44 L.R.A. (N.S.) 1061, 112 Pac. 261, it appeared that a boy who had been doing gymnastic stunts on a shaft was injured upon the starting up of the shaft, and it was held that, though the shaft was not protected, inasmuch as the

Peaslee, J., delivered the opinion of the court:

The plaintiff's decedent, Garland, was killed in a head-on collision between two trains owned and operated by the defendant. Garland was riding in the engine cab on the up train, and his presence was not known to the defendant's servants, other than the enginemen on that train. There was no claim that these men were negligent; the charge being that the collision was caused by the fault of the men operating the down train, or of those ordering the movement of trains. It was admitted that Garland was a trespasser, and that there was no reason to anticipate his presence in the cab. There is no serious dispute as to the sufficiency of the evidence, and the substantial question in the case is one of law.

May one recover for an injury inflicted upon him through the defendant's failure to use reasonable care toward a third person? It is urged that such liability ought

injury did not occur during a performance of any duties, the defendant was not liable because of a violation of the statute in failing to provide proper protection, the court stating that such statute was only for the protection of employees while in the performance of duties. But the writer of the opinion stated that, speaking for himself only, he thought that if at times, as the evidence of one witness indicated, employees, while in the performance of their duties, might come in contact with the shaft, it was the employer's duty to safeguard it, and that had the employer not been negligent in failing to discharge this duty, the accident could not have occurred, and the injured party or minor employee of tender years, who should have been instructed, warned, and protected against such dangers, would not have been injured. As this is a mere *obiter* statement in expressing his dissent to the majority court, it is of practically no value as a precedent.

As intimated in the opinion in *GARLAND v. BOSTON & M. R. Co.*, while one person cannot recover because of a breach of duty owed to another, the fact that a duty is owed to one class of persons may be an argument or reason for the extension of a similar duty to another class of persons, who would perhaps not otherwise be so entitled. For example, the fact that a railroad company owes a duty to its passengers to keep a lookout for objects on the track that may endanger the safety of the train may serve in a measure to mitigate the hardship upon that railroad company of holding that it owes a similar duty to persons on the track. That, however, is not equivalent to a holding that such a person may recover because of a breach of duty that was owed not to him, but to the passengers.

J. H. B.

to exist, because the rule imposes on the defendant no added burden of conduct, because he is admitted to be in the wrong, and when acting wrongfully he should be held responsible for all the consequences of such conduct.

The law governing actions for negligence has for its foundation the rule of reasonable conduct. However much this rule has been infringed upon in certain lines of decisions as to the law of master and servant, it has been adhered to and applied as to other relations. The underlying reason for decisions that liability did not exist has not always been stated. The usual formula is that under these circumstances, or as to this plaintiff, the defendant owed no duty. But this dogmatic statement gives no answer to the arguments now advanced on behalf of the plaintiff.

The conclusion that there was no duty must be preceded by one that there was no unreasonable act or omission. Unless it has this foundation, it has no place in the law of negligence. The general rule is more fully stated as due care under all the circumstances of the particular case. That is, the standard is a relative one. It is not a fixed measure for action or inaction, applicable independent of the surrounding facts of time, place, and the like. "Nothing would follow from the act except for the environment. All acts, apart from their surrounding circumstances, are indifferent to the law." Holmes, Com. L. 54.

The rule of reasonable care necessarily includes two persons, or one person and some right or property of another. It has to do with one's acts in reference to the person, property, or rights of another. It is a rule of relation. If there be no relation, there is nothing upon which the rule can operate. The rule of reasonable care, under the circumstances, could not limit the conduct of Robinson Crusoe as he was first situated; but as soon as he saw the tracks in the sand the rule began to have vitality. He then had notice that there might be other persons on the island; and this knowledge of their presence made it his duty as a reasonable man to use reasonable care to the end that no act of his should injure them.

Unless and until one is brought into relation with other men or property or rights, he has no obligation to act with reference to them; and this is true whether the obligation be called legal, moral, or reasonable. "Most of the rights of property, as well as of person, in the social state, are not absolute, but relative." Losee v. Buchanan, 51 N. Y. 476, 485, 10 Am. Rep. 623; Brown v. Collins, 53 N. H. 442, 448, 16 Am. Rep. 372. The relation may be to a single per-

son, as where two travelers meet unexpectedly in the desert; it may be to a class; or it may be to the public generally.

It has usually been held that facts which create a relation, and therefore a duty, as to one, do not establish the same obligation to all mankind. To be within the right created, the complaining party must show facts which make the reason for claiming a relation applicable to him. The proposed rule is an abandonment of this idea, and seeks to make the obligation to use care, which springs from the relationship, a duty owed to everybody who, by chance, comes within range of the influence of the act complained of. The argument is that, since the act is one the defendant should have refrained from doing, it is just that he be responsible for all its consequences. But this is a partial view of the situation only. The act is not wrongful in itself. Its wrongfulness is found in its probable effect upon others who are in some relation to the actor. Remove these related parties from the situation, and the act is entirely lawful. As to unrelated parties, the happening is a pure accident.

When it is said that one has been guilty of the negligence denounced by the law, a fault in personal morality is not necessarily implied. The standard by which he is judged is not internal, but external. An outward criterion for legal culpability has been set up. Moral consideration undoubtedly entered into the establishment of the legal standard, but they form no part of the test to be applied. "If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience." Holmes, Com. L. 110; Jewell v. Colby, 66 N. H. 399, 24 Atl. 902. The defendant's liability being equally great whether he is or is not morally at fault, the argument that his liability should be enlarged, because he has been guilty of a moral wrong, has no application.

The ordinary act of negligence has in it no element of moral turpitude. There need be no purpose to commit a wrong as to anyone, nor a conscious remissness in legal duty. When such a purpose or consciousness exists, there is an added reason for holding the wrongdoer responsible for all the consequences of his act. It is this idea which is at the foundation of the law in many jurisdictions, imposing liability in a case like this when the fault was wanton or wilful, or what is sometimes called "grossly negligent."

If, in the case of purely unintentional injuries, the relation is not necessary to the existence of the duty,—if the duty exists as to all men, because a relation makes

it reasonable to impose it as to one man,—it follows that the law as to duty to trespassers has been wrongly stated. *Hobbs v. George W. Blanchard & Sons Co.* 75 N. H. 73, 18 L.R.A.(N.S.) 93, 70 Atl. 1082. The same thing is true of the law as to statutory signals (*Blatchelder v. Boston & M. R. Co.* 72 N. H. 528, 57 Atl. 926) and other safeguards. *Hill v. Concord & M. R. Co.* 67 N. H. 449, 32 Atl. 766; *Casista v. Boston & M. R. Co.* 69 N. H. 649, 45 Atl. 712; *Flint v. Boston & M. R. Co.* 73 N. H. 141, 59 Atl. 938. "It must appear, to render the defendants liable, that the action or omission to act, of which complaint is made, constituted a breach of a duty owed the plaintiff by the defendants." *McGill v. Maine & N. H. Granite Co.* 70 N. H. 125, 127, 85 Am. St. Rep. 618, 46 Atl. 684; *Hughes v. Boston & M. R. Co.* 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070.

This heretofore recognized rule of law or of conduct was adopted, and has been maintained and approved, because of its inherent reasonableness. Undoubtedly, some reason can be advanced why the liability should be more extensive. But this is true of nearly all rules by which human conduct and responsibility are governed. A rule is not unreasonable because some men would not naturally act according to its admonition; nor is one shown to be reasonable because a small portion of the people believe it to be so.

The authorities in this country are substantially unanimous to the effect that, in actions for failure to use ordinary care, a duty toward the complaining party must be shown to exist. The reason for the imposition of the duty has been found in the relation of the parties. While the detailed process of reasoning by which the conclusion is reached is not frequently stated, an examination of the cases generally shows that this is the test which has been applied. If there is no relationship, there is no duty. But in this case reliance is placed upon *Carney v. Concord Street R. Co.* 72 N. H. 364, 57 Atl. 218, to show that the rule is otherwise. It is there said that fault as to a trespasser may be predicated upon a failure to keep a lookout for persons rightfully upon the track. The case cited and relied upon in that opinion (*Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264) depends upon the rule, peculiar to that jurisdiction (*Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L.R.A. 287, 19 S. E. 863, 923), that as to everybody it is the duty of a railroad to keep a lookout ahead of its moving trains. This is an application (though in modified form and to one situation only), of the rule laid down in many 46 L.R.A.(N.S.)

ancient English authorities, that the actor is liable for all the consequences of his act. The rule had been largely abandoned in England, but was revised as to certain so-called dangerous agencies by the decision in *Fletcher v. Rylands*, L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129. The whole theory is contrary to the general trend of American authority, and has been repudiated in this state because it "pays no heed to the essential elements of actual fault." *Brown v. Collins*, 53 N. H. 442, 448, 16 Am. Rep. 372; *Moore v. Berlin Mills Co.* 74 N. H. 305, 307, 11 L.R.A.(N.S.) 284, 124 Am. St. Rep. 968, 67 Atl. 578, 13 Ann. Cas. 217.

That the rule in the *Pickett Case* does not go beyond this is made evident in the later decisions in the same jurisdiction. In *Peterson v. South & W. R. Co.* 143 N. C. 260, 8 L.R.A.(N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 618, the right of a mere licensee on a train to recover for failure to start the train with the care due to passengers thereon is denied, because the duty was not owed to the licensee. In the *Pickett Case* the fact there was a duty to look out for some people was urged as one reason why the duty should exist as to all. Because of this, of the great danger incident to the movement of trains, it was held that the duty to look is owed to all who chance to be in a position to be injured, when there is a failure to look. This being settled, the rest follows as a matter of course. *Pickett* recovered not because of a breach of the duty to look out for others, but because the duty was owed to his decedent. *Peterson* failed to recover because, although there was a breach of the duty owed to others, the duty did not extend to him, even when he was in a place to be injured exactly as one to whom the duty was owed might have been. See also *Arrowood v. South Carolina & G. Extension R. Co.* 126 N. C. 629, 36 S. E. 151; *Jeffries v. Seaboard Air Line R. Co.* 129 N. C. 236, 39 S. E. 836; *Sawyer v. Roanoke R. & Lumber Co.* 145 N. C. 24, 22 L.R.A.(N.S.) 200, 58 S. E. 598; *Snipes v. Camp Mfg. Co.* 152 N. C. 42, 67 S. E. 27; *Edge v. Atlantic Coast Line R. Co.* 153 N. C. 212, 69 S. E. 74.

The reasoning in the *Carney Case* is not along the line of the *Pickett Case*, but is directly in favor of the plaintiff's contention in the case at bar. If all that was said in the *Carney Case* were sound law, it would follow that this plaintiff was entitled to go to the jury. The opinion involves a general principle in the law of negligence. It adopts the theory that neglect of duty is sufficient cause for com-

plaint, without considering who the complaining party is, or to whom the duty was primarily owed.

In *Hobbs v. George W. Blanchard & Sons Co.* 75 N. H. 73, 78, 18 L.R.A. (N.S.) 939, 70 Atl. 1082, it is erroneously stated that the Carney Case is not an authority when the complaint is merely as to the condition of premises. But the theory upon which the Carney Case was decided is equally applicable in either class of cases. If, in the one case, it is enough to put the defendant in the wrong to show that his neglect of his duty to somebody had a part in causing injury to another, it must be equally so in all cases. The fundamental idea being that since he has failed to act as the law requires of him he is responsible for all the results flowing from his act, it can make no difference in principle whether that failure consists in carelessly obstructing a way by a fallen tree or by a moving train.

It is apparent that the rule in the Carney Case was a wide departure from the principles theretofore announced in this jurisdiction, and generally recognized elsewhere. The point is treated but briefly in the opinion, and nothing is said of the conflict thereby engendered. The later cases have been disposed of as though the rule theretofore applied was the law. Acts are or are not negligent, as to a person who is injured, according to whether he does or does not establish the relation between himself and the defendant because of which the duty arises or is imposed. *Chickering v. Thompson*, 76 N. H. 311, 82 Atl. 839; *Lydston v. Rockingham County Light & P. Co.* 75 N. H. 23, 70 Atl. 385, 21 Ann. Cas. 1236; *Brown v. Boston & M. R. Co.* 73 N. H. 568, 64 Atl. 194; *Flint v. Boston & M. R. Co.* 73 N. H. 141, 59 Atl. 938. So far as the Carney Case is in conflict with this principle, it has in effect been overruled by these cases.

The case of *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 741, which is also relied upon by the plaintiff, does not conflict with the view here expressed. It states the general rule as commonly applied. The defendant is responsible for all the consequences of his act to those whom he ought reasonably to have foreseen might be injured thereby. He is not liable to those who reasonable men would not have anticipated might be injured.

The rule of reasonable conduct is constantly invoked to fix responsibility upon defendants. Nonliability should be settled by the same test. The plaintiff must be in a position to say to the defendant: "You did not act as you should have acted towards me; you knew, or ought to have 46 L.R.A. (N.S.)

known, it was likely that I would be in a position to be injuriously affected by your carelessness." No such situation appeared in this case. So far as the actors upon whom fault is here charged are concerned, Garland's presence was unknown, and not to be anticipated. They were not required to foresee his chance or casual trespass upon the engine of the up train. *Shea v. Concord & M. R. Co.* 69 N. H. 361, 41 Atl. 774; *Myers v. Boston & M. R. Co.* 72 N. H. 175, 55 Atl. 892, 15 Am. Neg. Rep. 119.

Exception overruled. All concurred.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,

Resp'ts.,

v.

WILLIAM LINGLEY, Alias Harry Miller, alias "Big Bill," Appt.

(207 N. Y. 396, 101 N. E. 170.)

Evidence — weight — inability of witness to identify accused.

1. The inability of one of three witnesses present at about the time of the commission of a crime to identify accused as the person who was seen at the place where it was committed, and who the evidence tends to show did the deed, is not significant as against his explicit identification by the other two, and his own voluntary confession of guilt.

Trial — construction — presumption of character.

2. An accused in a criminal case who offers no evidence as to his good character is not entitled to have the jury instructed that the law presumes that it is good.

(February 25, 1913.)

Note. — Presumption as to good character of defendant in criminal case.

It is not infrequently said by the courts that there is a presumption that the character of the defendant in a criminal case is good. *Bennett v. State*, 86 Ga. 401, 12 L.R.A. 449, 22 Am. St. Rep. 465, 12 S. E. 806; *Cluck v. State*, 40 Ind. 263 (but see *Knight v. State*, infra); *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Howard v. Com.* 114 Ky. 372, 70 S. W. 1055; *Biester v. State*, 65 Neb. 276, 91 N. W. 416; *Brown v. State*, 32 Ohio C. C. 93; *Hays v. Territory*, — Okla. —, 52 Pac. 950; *United States v. Neverson*, 1 Mackey, 152; *McKnight v. United States*, 38 C. C. A. 115, 97 Fed. 208; *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892; *Lowdon v. United States*, 79 C. C. A. 361, 149 Fed. 673; *United States v. Guthrie*, 171 Fed. 528.

When, however, the connection in which the declaration was made in these cases—

A PPEAL by defendant from a judgment of the Court of General Sessions for New York County, convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. James D. McClelland and Charles Sullivan for appellant.

Mr. Robert C. Taylor, with Mr. Charles S. Whitman for respondents.

Willard Bartlett, J., delivered the opinion of the court:

The victim of the homicide of which the appellant has been found guilty was one Patrick Burns, the keeper of a liquor saloon in the borough of the Bronx, who was shot to death in his barroom in the nighttime of February 10-11, 1912. Two strangers,

a large man and a small man, visited the saloon for purposes of robbery; and while engaged in the commission of that crime, in which both actively participated, one of them killed Burns. No evidence was introduced in behalf of the defense; and the proof for the people amply justified the jury in finding that the perpetrators of the robbery were guilty of murder in the first degree on the ground that while engaged in committing or attempting to commit a felony, they had killed a human being.

It was essential to the people's case, of course, to identify the defendant as one of the two strangers; and the principal point made in his behalf on this appeal, so far as the facts are concerned, is that the identification was insufficient to support the ver-

shown in the subsequent parts of the note, where they are set out—is considered, it appears that, with the exception of *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892, holding that the defendant is entitled to an instruction that his character is presumed to be good, no practical effect was given to the declaration, and it was at most a mere abstract proposition which served no practical purpose that could not have been equally well served by a declaration that there is no presumption that the character of the defendant is bad. As stated in the *Mullen* Case, if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury thereof. The true view seems to be that there is no presumption that the defendant's character is good or that it is bad, his character not being an issue in the case unless and until he introduces evidence in support of it, and the prosecution introduces rebutting evidence; in which case the issue is to be determined upon the evidence without the aid of any presumption as to character.

This view gives defendant full benefit of the presumption of innocence and every other safeguard belonging to the accused whereby he is protected against prejudice resulting from the accusation, since it permits no unfavorable deduction to be made from the failure to offer testimony. As pointed out in *Wigmore on Evidence*, § 290, note 2, cited in *PEOPLE v. LINGLEY*, it would be illogical to presume the defendant's character good, since to do so would be to give him the benefit of evidence that he could probably not have produced, and that without the risk of the counter evidence by the prosecution. Under such a view a defendant would always be in a better position to rely on the presumption than to offer evidence.

This view is expressly sustained by many of the cases, and, as above intimated, with a very few exceptions the cases that appear to be opposed to it may, considered from a practical point of view, at least, be reconciled with it.

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Right of accused to an instruction that his character is good—where character has not been put in issue by the evidence.

In accord with *PEOPLE v. LINGLEY*, it is held in the following cases that there is no presumption at all as to whether the character of one accused of crime is good or bad, and that therefore an instruction as to the presumption of his good character is properly denied where no evidence has been offered on the subject. *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Little v. State*, 58 Ala. 265; *Dryman v. State*, 102 Ala. 130, 15 So. 433; *Gater v. State*, 141 Ala. 10, 37 So. 692; *Griffin v. State*, 165 Ala. 29, 50 So. 962; *Fields v. United States*, 27 App. D. C. 433, certiorari refused without discussion on this point in 205 U. S. 292, 51 L. ed. 807, 27 Sup. Ct. Rep. 543; *McDuffee v. State*, 55 Fla. 125, 46 So. 721; *Addison v. People*, 193 Ill. 405, 62 N. E. 235; *People v. Kemmis*, 153 Mich. 117, 116 N. W. 554.

In *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662, it was said: "While it is true that the law presumes everyone to be innocent until the contrary appears by evidence, it does not presume everyone to have a good character. It presumes nothing in respect to a defendant's general reputation. In the absence of all proof on the subject, his character is not to be taken as either good or bad; and the jury are not authorized, by assuming that it is one or the other, to let it have weight in inclining them toward either his acquittal or his conviction. In such a case, their verdict should be founded entirely on the evidence legally introduced, and not on any idea unsupported by direct testimony concerning his general character."

And in *McDuffee v. State*, 55 Fla. 125, 46 So. 721, it was said in this connection: "It would be wholly illogical to say that the defense may, by keeping silent, obtain the benefits that come from good character. and yet by that same silence prevent the prosecution inquiring into it. There are authorities, especially Federal cases, holding the converse; but we think the true

dict. I think otherwise. The bartender, who was present on the occasion of the robbery and shooting, testified positively that the larger of the two strangers was the defendant. He was also emphatically identified by an employee of the Edison Electric Company, who saw the two strangers on the premises and left them there a short time before the homicide occurred. It is true that a companion of this witness, who was there and went out with him, was not able to say positively whether either of the two strangers whom he saw and left in the saloon was present in court at the trial; but his inability thus to identify the defendant is not very significant as against the explicit identification by the other witnesses who have been mentioned, and the

strong confirmation afforded by the voluntary confessions of the defendant himself. The settled principles which regulate the exercise of our jurisdiction to review the facts on an appeal from a judgment of death forbid us from interfering with this verdict on the ground that it was against the evidence or the weight of evidence, or without sufficient support in the evidence.

There is only one question of law in the case which requires notice, and that arises on an exception to the refusal of the learned trial judge to charge the following request: "Mr. McClelland [counsel for defendant]: I ask your honor to charge that the law presumes the character of the defendant is good." If this request embodies a correct statement of the law, it might well be urged

rule is that laid down in *State v. O'Neal*, 29 N. C. (7 Ired. L.) 251, that 'no deduction results in law unfavorable or favorable to the character of an individual charged by an indictment, from the fact that he has introduced no evidence to show he is a person of good character. The character, not appearing either good or bad, necessarily stands indifferent.'

To the same effect is *Addison v. People*, 193 Ill. 405, 62 N. E. 235, wherein the court said: "Defendant did not choose to put his reputation in issue or prove that it was good, but sought by the instruction all the benefit of an affirmative finding of such fact, without proof or an opportunity to combat the claim or prove the negative. If the instruction were the law, a defendant need never prove good reputation, but could take the benefit of proof which perhaps he could not make. The court was right in the refusal."

And in *Fields v. United States*, 27 App. D. C. 433, it was said: "If such an instruction is required to be given when demanded, there would be no occasion to introduce evidence of good character in any case. We are of the opinion, however, that the court is not required to give an instruction on anything that has not been put in issue."

And so in the following cases in which the court apparently recognizes the existence of a presumption of good character in favor of one accused of crime, it is nevertheless held that an instruction to that effect is properly denied where character has not been put in issue by the evidence. *People v. Johnson*, 61 Cal. 142; *People v. Griffith*, 146 Cal. 339, 80 Pac. 68; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969; *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457; *Mixon v. State*, 123 Ga. 581, 107 Am. St. Rep. 149, 51 S. E. 580; *State v. Gruber*, 19 Idaho, 692, 115 Pac. 1; *Howard v. Com.* 114 Ky. 372, 70 S. W. 1055; *People v. Pekarz*, 185 N. Y. 470, 78 N. E. 294; *People v. Langley*, 114 App. Div. 427, 100 N. Y. Supp. 123; *Ackley v. People*, 9 Barb. 609; *People v. Bodine*, 1 Denio, 281 (it should be observed that these New York 46 L.R.A. (N.S.)

cases are in effect overruled by *PEOPLE v. LINGLEY* in so far as they recognize the existence of a legal presumption of good character in favor of one accused of crime.

And in *State v. Smith*, 50 Kan. 69, 31 Pac. 784, it was held that the refusal to instruct the jury as to the good character of accused was not error, where no evidence had been introduced with regard to his character.

It was further held that a request for instruction to the effect that the character of every defendant in a criminal case is conclusively presumed to be good was properly denied as being too strong. *Ibid.*

In *People v. Johnson*, 61 Cal. 142, McKinstry, J., said: "If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given, since the prosecution would be debarred from introducing evidence to overcome the presumption."

In *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969, it was said that the presumption that the accused has a fair character amounts to nothing more than that his character or reputation is not bad; and that if any inference may be drawn from the fact thus presumed, it is contained in the legal presumption of defendant's innocence until evidence to the contrary may appear, and does not justify the assumption that the defendant was of such character as to justify a higher probability of his innocence of the crime than would result from the general presumption of innocence, as this fact can only appear by evidence, which the prosecution will, upon its admission, be allowed to contradict.

In *Howard v. Com.* 114 Ky. 372, 70 S. W. 1055, it was held that a request for an instruction that the law presumes the accused to be a person of at least ordinarily good character, and that this presumption continues throughout the case, was properly refused, though correctly stated as an abstract proposition of law. The court

upon us that the refusal so to instruct the jury was an error seriously prejudicial to the defendant.

In the case of *People v. Pekarz*, 185 N. Y. 470, 483, 78 N. E. 294, 298, the trial judge was asked to charge that, "in the absence of any testimony on the subject of the character of the defendant, the presumption is that the defendant's character was good, prior to this offense," to which the judge responded: "Oh, there is no evidence against it at all. I have said that to the jury already." Counsel for defendant then explained that he meant that the presumption that the defendant's character was good must be considered by the jury. The court declined to charge further on the subject, and defendant's counsel excepted; but

the court added: "There is no presumption against him at all. The presumptions are all in his favor on that head." This court held that there was no error to the prejudice of the defendant, saying that when no evidence had been given on the subject in his behalf, his character was not in issue, and he was not entitled to the instruction that the presumption that his character is good must be considered by the jury." In the *Pekarz* Case, however, the remark of the trial judge to the effect that the presumptions were all in favor of the defendant on that head, i. e., the subject of good character, was not quite equivalent to the absolute refusal to charge the request in the present case; and, although that decision is to be deemed an authoritative expres-

distinguished the *Mullen* Case upon the ground that the Federal courts follow the English practice as to charging the jury, saying that the judges comment at length upon the testimony, and advise the jury specifically as to the weight and credit which should be given to particular parts of it, and that while it might be eminently proper, under that system of charging the jury, to say to them that the accused was presumed to be a person of at least ordinarily good character, and that this presumption continues throughout the trial of the case, such a procedure is unheard of under the system in that jurisdiction.

In *People v. Bodine*, 1 Denio. 314, it was said that where no proof of general character is given, the law assumes that it is ordinary fairness and respectability; but under such circumstances the general character of the accused is not a subject to be considered by the jury at all,—that they should determine the guilt or innocence of the accused upon the evidence before them, wholly irrespective of the question of character.

In *Davidson v. State*, 135 Ind. 254, 34 N. E. 972, the court instructed the jury at the request of the accused that the law presumed his character to be good, until the contrary appeared from the evidence. and that he was under no obligation to prove a good character, but refused to instruct the jury in addition to the above, that the law presumed he had a good character and reputation as a peaceable and humane man, until the contrary was shown by the evidence in the case, and it was held that there was no error in this ruling. The court said: "No evidence was introduced on the trial of the case touching the character of the appellant, and, for that reason, his character formed no element in the case."

But, in *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892, it was held that an accused is entitled to have the jury instructed that his character is presumed to be good though there is no testimony upon the subject. The court, after observing that there were cases that held the contrary, 46 L.R.A. (N.S.)

said: "But, if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

In *United States v. Guthrie*, 171 Fed. 528, the court charged the jury that the accused is presumed to have a good character; that this presumption runs in his favor throughout the case until removed beyond a reasonable doubt; and that he is not required to call any witnesses as to his general good character, and his failure to do so raises no presumption or inference that it was bad. The report contains only the charge of the court, and it does not appear whether any evidence had been offered to support or impeach the character of accused.

In *Stephens v. State*, 20 Tex. App. 255, it was held that as counsel for the state improperly discussed the character of the defendant, which was not put in issue, the trial court should have given the jury a special charge as to the presumption of good character, in order to prevent, as far as possible, any prejudice to the defendant by reason of the improper remarks.

In *Hays v. Territory*, — Okla. —, 52 Pac. 950, it was held that while the trial court should not give an instruction on the defendant's character when there is no evidence given to support or impeach it, it is not reversible error to charge that the defendant's character is presumed good until the contrary is proved, and that the defendant's character cannot be attacked until he first introduces evidence in support of it, and that no such evidence has been offered.

In *Brown v. State*, 32 Ohio C. C. 93, it was held that an instruction which seemed to imply that if accused did not produce

sion of opinion upon the question under consideration, it must be conceded that there is highly reputable authority in other jurisdictions to the effect that, in the absence of any evidence on the subject, the law presumes the character of a defendant in a criminal case to be good. As these cases were not brought to our attention in the Pekarz Case, it is due to the defendant to consider them here.

The most carefully considered decision in support of this doctrine is *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892, in the United States circuit court of appeals for the sixth circuit in 1901. The plaintiffs in error were indicted for a violation of the election laws of the United States. At the conclusion of the charge their counsel called the attention of the court to an instruction which they had requested to the effect that the defendants were presumed to be persons of good character, and that that presumption prevailed during the progress of the case. To this the court responded: "I do not think that the jury should be told that the defendants are pre-

sumed to be persons of good character, but they are presumed, as the court had told the jury, whether of good character or bad character, to be innocent until their guilt has been established to the exclusion of a reasonable doubt by testimony." An exception was taken to this ruling, and before the jury retired the defendants asked for the following further instruction, which was refused: "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of the guilt or innocence of them or any of them." The defendants excepted to the refusal of the court to charge this request. The circuit court of appeals, consisting of Judges Lurton, Day, and Severns, reversed the judgment and granted a new trial on the ground, among others, that it was error for the trial court to refuse to charge as requested upon the subject of character. The opinion was written by Judge Day, who began by stating that the exceptions "raise the question whether, in a criminal trial in a court of

evidence as to his good character and good reputation, he thereby did not claim to be of good character, or to have a good reputation, was prejudicial, for it was said the presumption is in favor of the good character and the good reputation of the accused, and these cannot be attacked until he himself has offered evidence of the same.

—where character has been put in issue by the evidence.

It has been held that even where the character of the accused has been made an issue in the case by the evidence, he is not entitled to an instruction that the law presumes his character to be good.

Thus, in *Knight v. State*, 70 Ind. 375, where it appeared that evidence had been introduced touching the general character of the accused for peace and quiet, it was objected that the instruction on this evidence failed to tell the jury that the character of the accused for peace and quiet was presumed to be good until the contrary was shown, and in overruling this objection the court said: "In a criminal cause, the defendant's character is not taken into consideration, unless the defendant first introduces evidence in support of it. In that event, the question of character has to be decided upon the evidence, in the same manner as any other question in the cause."

And in *McQueen v. State*, 82 Ind. 72, it was held that the trial court properly refused an instruction to the effect that, in addition to the evidence upon the subject of character, the law presumes that the character of the defendants for honesty is good. The court said: "Character is to be determined from the evidence pre- 46 L.R.A.(N.S.)

sent to the jury. It is a question of fact, depending for its solution upon the evidence. If the defendant offers no testimony upon that subject, then it forms no element of the case; if he does, then it must be determined upon that testimony, considered in connection with all the other evidence in the case."

In *United States v. Neverson*, 1 Mackey, 152, where the character of the defendants was put in issue by the evidence, the following charge to the jury was apparently approved on appeal: "As to presumption of good character, the prisoners are entitled to the presumption of having sustained good character up to the time of the alleged murder, and this presumption remains in their favor unless the jury shall believe from the evidence that they in fact were not entitled to such reputation;" though there is no discussion on this point.

Miscellaneous cases.

In a number of cases in which the court was not called upon for an instruction, it was said that the law presumes good character in favor of one accused of crime.

Thus, it has been held that as the law presumes the general character of the accused to be good, it is error for the prosecuting attorney to urge in argument the failure of accused to offer evidence of his good character, as furnishing a basis of inference against the general good character of accused, upon the ground that until accused offers evidence of his character, he is entitled to the benefit of the presumption, and to have the jury infer that his character is unimpeached. *McKnight v. United States*, 38 C. C. A. 115, 97 Fed.

the United States, where no testimony has been offered as to the previous good character of the accused, a presumption of such good character exists in favor of the accused, of which, upon a request to that effect, the jury should be instructed." Circuit Judge Day went on to say that he found no difference of opinion in the well-recognized text writers upon the question whether such a presumption exists. "All assert that a presumption exists in favor of the accused in the absence of testimony, that he had a good character previous to the time of the alleged commission of the offense in question. It is true that the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he sees fit, rest upon the presumption raised by the law." The judge then quotes from 1 Bishop, New Crim. Proc. 4th ed. § 1112, ¶ 2, and from Underhill, Crim. Ev. § 76. The opinion of Judge Day continues as follows: "It is true that there are cases which hold that, where there is no testimony upon the

subject, the court is not obliged to say anything to the jury, either one way or the other. But if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

The statements of the text writers to which Judge Day referred are as follows: "The doctrine is that the defendant is presumed to be innocent, and his character to be at least of ordinary goodness." 1 Bishop, New Crim. Proc. 4th ed. § 1112, ¶ 2. "The character of the accused means his reputation; i. e., the general consensus of opinion regarding him, based on his deportment and conduct, which is held by his neighbors, friends, and acquaintances. The accused may always prove his good character. If,

208; *Lowdon v. United States*, 79 C. C. A. 361, 149 Fed. 673; *State v. Upham*, 38 Me. 261; *Bennett v. State*, 86 Ga. 401, 12 L.R.A. 449, 22 Am. St. Rep. 465, 12 S. E. 806.

So, in *Cluck v. State*, 40 Ind. 263, it was said that the law presumes every man has a good character, and that it is competent for counsel of an accused to comment, in argument, on such presumption, but that counsel have no right to discuss the character of the accused where no evidence has been offered as to such character, as was attempted in that case.

In *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673, it was said that the law invests every person accused of crime with a presumption in favor of good character, and that this presumption continues and must be indulged as long as the accused rests upon such presumption; and that the mere fact that the accused becomes a witness in his own behalf does not entitle the state to impeach his general moral character, where he has not put his general character in issue by offering evidence in support of it, though after he has become a witness, the prosecution may show that his reputation for truth and veracity is bad.

And in *People v. Fair*, 43 Cal. 137, it was held that it was error for the prosecution to impeach the character of the accused before he had directly put his character in issue by the introduction of evidence on the subject, as the accused was entitled to rely upon the presumption of law that his character was of ordinary fairness.

And in *People v. Gleason*, 122 Cal. 370, 55 Pac. 123, it was said that the law assumes that the accused has a fair char-

acter, and where no evidence has been offered as to his character, he has a right to have the jury assume that his character is unimpeached, and that therefore it was error to instruct the jury that the prosecution is not permitted to assail the character of a defendant on trial in a criminal case until the defendant has himself put his character in issue by calling witnesses and offering evidence in its support, as the effect of it was to suggest to the jury that if the prosecution had had an opportunity to do so, they might possibly have shown that the defendant was not a man of good character; that though it was a correct proposition of law by which a court is to be governed in determining the admissibility of evidence, it was not for the guidance of the jury, and being an abstract rule of law that had no application to the evidence before the jury, it tended to confuse and mislead them.

In *Biester v. State*, 65 Neb. 276, 91 N. W. 416, the question before the court was whether the costs and fees of witnesses summoned to impeach the character of the accused could be taxed against him, especially when the witnesses had not been called upon to testify, as the emergency in which they would be available did not arise. The court said that the character of the accused was not necessarily involved in the issue; it was presumed to be good, but he was not required to rely on the presumption, and was at liberty to establish it by evidence, and such evidence the state had a right to contradict; and it was held that fees for a reasonable number of witnesses could properly be taxed as costs in the case, which the defendant would be compelled to pay.

however, he offers no evidence on this point, the law presumes he has a fair and respectable, if not, indeed, an excellent, character; and does not permit any presumption of guilt to arise from his silence, or from his failure to offer evidence on this point. That his character is bad can never be presumed, nor should the prosecution be permitted to comment unfavorably upon this omission." Underhill, Crim. Ev. § 76.

To these may be added a subrule laid down by Mr. Lawson in his well-known treatise on the Law of Presumptive Evidence, under the general rule that the law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt. "And good character is presumed." Lawson, Presumptive Ev. 2d ed. p. 520. The only authority cited by Mr. Lawson in support of this subrule is *People v. Johnson*, 61 Cal. 142. This was a murder case in which the defendant asked the court to instruct the jury that, "where no evidence of the character of the defendant is introduced, his character is presumed to be of ordinary fairness in the traits involved in the crime with which . . . [defendant] is charged, and that it is a fact to be considered by them in arriving at their verdict in connection with all the other facts in the case." Two of the three judges who heard the appeal held that there was no error in refusing to give this instruction because the substantial point covered thereby was fully embraced in other instructions given. The third member of the court, McKinstry, J., however, said: "And the instruction as to character was properly rejected. The prosecution cannot attack the character of a defendant until the defense has introduced evidence to establish his good character. When a defendant charged with a criminal homicide, has been shown to be a quiet and peaceable man, his character is to be considered by the jury in connection with the evidence, and may weigh in the balance so as to create a reasonable doubt of his guilt. If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given, since the prosecution would be debarred from introducing evidence to overcome the presumption." I may remark here in passing that this dissenting opinion of Mr. Justice McKinstry is a correct statement of the law, according to the weight of authority, as I view it.

Another California case to the same effect is *People v. Fair*, 43 Cal. 137, 149, where it was said in the opinion of the court that 46 L.R.A. (N.S.)

the law assumes the prisoner to possess a good character—good in the sense of not being bad in cases in which no evidence upon the subject of general character is offered. "The presumption of a character of ordinary fairness, with which the law clothed her [the defendant] for the purposes of the case, was one to the benefit of which she was entitled, and which could not be put in peril unless, discarding the presumption thus afforded her, she had elected to put it distinctly in issue, and so constituted it a fact to be determined by the jury as other facts in issue were to be determined. . . . Until the prisoner thus initiates the inquiry, the prosecution are bound to assume it to be, as the law presumes it, ordinarily fair, and must establish her guilt, if at all, in the face of this presumption, and despite the benefit it affords her."

An *obiter dictum* in *Ackley v. People*, 9 Barb. 609, is also sometimes relied upon to support the presumption of good character. In that case it was correctly decided that the failure of the defendant in a criminal case to introduce proof of his good character can never be taken into account against him; but the general term went further and said that "the more recent cases hold that, where no proof of general character is given, the law assumes that it is of ordinary fairness."

On the other hand, we are not without text-book and judicial authority in denial of the doctrine. No recent American law writer has achieved more distinction than Prof. John H. Wigmore of the Northwestern University, whose elaborate treatise on the Law of Evidence is a worthy successor to the classic work of Greenleaf. This learned author expressly denies the correctness of the decision in *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892, to the effect that the good character of the accused is presumed. "This inconsistently gives him the untrammelled benefit of evidence which if he had introduced might have been disputed. What really happens, or ought to, is that the defendant's character is simply a nonexistent quantity in the evidence." 1 Wigmore, Ev. § 290, note. Two cases are cited to sustain this proposition. In *Addison v. People*, 193 Ill. 405, 419, 62 N. E. 235, 239, which was an indictment for assault with intent to commit rape, the judge was requested to instruct the jury that the law "presumes that the defendant has a good character and reputation as a law-abiding, peaceable citizen until the contrary is shown by the evidence, and it is not necessary for the defendant to prove his reputation in that respect. . . . The jury . . . must presume that he is a

man of good character and reputation in that respect,—and that, without any proof on the subject,—and should take the good character of defendant into consideration in making up their verdict.” This instruction was refused, and the supreme court of Illinois held that the trial court was right in the refusal, saying: “Defendant had a right to put his reputation as a law-abiding citizen in issue if he saw fit. In such a case it would be a proper subject for evidence on each side. . . . Defendant did not choose to put his reputation in issue or prove that it was good, but sought by the instruction all the benefit of an affirmative finding of such fact without proof or an opportunity to combat the claim or prove the negative. If the instruction were the law, a defendant need never prove good reputation, but could take the benefit of proof which perhaps he could not make.” In *Knight v. State*, 70 Ind. 375, which was a prosecution for assault with intent to murder, complaint was made by the appellant of the failure of the trial court to tell the jury that the character of the defendant for peace and quiet was presumed to be good until the contrary was shown. As to this, the supreme court of Indiana said: “In a criminal cause the defendant’s character is not taken into consideration unless the defendant first introduces evidence in support of it. In that event the question of character has to be decided upon the evidence, in the same manner as any other question in the cause.” It was accordingly held that there was no error in omitting to give the instruction asked.

Most of the text writers and judges who have asserted the existence of the presumption of good character in favor of the accused have contented themselves with a dogmatic declaration that such is the law. Where it is attempted to support the proposition by argument, the theory usually advanced is that the alleged presumption forms a part of the presumption of innocence and is necessarily involved therein. That this cannot be so is manifest when we consider the contention in the light of the universally recognized rule that the prosecution may never introduce evidence assailing the general character of the accused unless he has first offered proof that his general character is good. *People v. Hinkman*, 192 N. Y. 421, 85 N. E. 676. The presumption of innocence in behalf of the defendant in a criminal case is always open to attack on the part of the prosecution. Indeed, throughout the trial, the case for the prosecution is aimed at the destruction of that presumption, directly or indirectly. If the presumption of a good character were a part of the presumption of innocence, the prosecution would be at liberty to assail that

presumption also, irrespective of the introduction of any evidence on the subject by the defendant; yet this the prosecution is not permitted to do anywhere. The rule “firmly and universally established in policy and tradition is that the prosecution may not initially attack the defendant’s character.” 1 Wigmore, Ev. § 57.

This prohibition against any attempt to blacken the general character of the accused unless he opens the door by seeking to establish the excellence of that character is tantamount to a rule that the general character of the defendant in a criminal case, although relevant, may not be made an issue unless the defendant chooses to make it so. If, in addition to this adequate protection against the possibility of undue prejudice, the defendant is also shielded by an unassailable presumption of general good character, the prosecution may be placed in a position of unwarrantable disadvantage. The defendant in every criminal trial will be entitled to have the jury instructed that the law presumes his general character to be good; while the prosecution cannot appeal to any evidence to overcome this presumption if the defendant has introduced none to support it. In other words, the accused may always have the benefit of a very influential presumption which he can invariably prevent the prosecution from rebutting at his own will. To hold that this alleged presumption of general good character exists would be to give an unfair advantage to the defendant, uncalled for by any considerations of justice or even extreme solicitude on account of the difficulties which sometimes beset an accused person in establishing his defense.

The true doctrine, as it seems to me, is that there is no presumption, one way or the other, upon the question whether the general character of the accused is good or bad. As is well said by Prof. Wigmore, *supra*, “the defendant’s character is simply a non-existent quantity in the evidence.” While nothing is to be taken against the defendant by reason of the nonintroduction of evidence on his part to establish his good character, there is no rule, such as the presumption contended for would create, which compels the jury to conclude that his character is good in the absence of any proof on the subject. Under such circumstances the law does not presume anything about it.

I think that in accordance with the views expressed in the case of *People v. Pekarz*, 185 N. Y. 470, 483, 78 N. E. 294, 298, the learned trial judge properly refused to give the instruction prayed for to the effect that the law presumed the character of the defendant to be good. There is no other ques-

tion in the case demanding discussion, and I therefore advise an affirmance of the judgment.

Cullen, Ch. J., and Gray, Chase, Cuddeback, Hogan, and Miller, JJ., concur.

Motion for rehearing denied.

OKLAHOMA SUPREME COURT. (Division No. 2.)

ANNA CALLAHAN, Impleaded, etc., Plff.
in Err.,
v.

DAVID GRAVES.

(— Okla. —, 132 Pac. 474.)

Joint debtor — principal and agent — effect of judgment for agent.

Where, in an action against an agent and his principal for damages caused by an act of the agent, done without the direction or knowledge of the principal, there is a judgment for the agent defendant on the merits, a judgment against the principal must be reversed.

(May 20, 1913.)

ERROR to the District Court for Pottawatomie County to review a judgment in plaintiff's favor against one defendant in an action brought to recover damages for injuries to plaintiff's property through the alleged negligence of defendants. Reversed.

The facts are stated in the commissioner's opinion.

Messrs. B. B. Blakeney, J. H. Maxey, and J. H. Milley, for plaintiff in error:

The principal is only liable for the torts of the agent resulting from acts committed in the course of his employment.

31 Cyc. 1584.

The action on contract against the landlord could not be joined with a trespass committed exclusively and entirely by a third person.

Hart v. Metropolitan Elev. R. Co. 15 Daly, 391, 7 N. Y. Supp. 753; Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E.

Headnote by Rosser, C.

Note. — Generally as to judgment in favor of employee as bar to recovery against employer for employee's act or default, see note to Doremus v. Root, 54 L.R.A. 649.

As to effect of verdict for servant in an action against master and servant for servant's negligence or misfeasance, see notes to McGinnis v. Chicago, R. I. & P. R. Co. 9 L.R.A.(N.S.) 880, and Southern R. Co. v. Harbin, 30 L.R.A.(N.S.) 404. And 46 L.R.A.(N.S.)

1011; Childress v. McCullough, 5 Port. (Ala.) 54, 30 Am. Dec. 549; Harris v. Campbell, 4 Dana, 586; Bonte v. Postel, 109 Ky. 64, 51 L.R.A. 187, 58 S. W. 536; Sadler v. Great Western R. Co. 65 L. J. Q. B. N. S. 402 [1896] A. C. 450, 74 L. T. N. S. 561, 45 Week. Rep. 51; Ederlin v. Judge, 36 Mo. 350; Weeks v. Keteltas, 13 Daly, 559, 10 N. Y. Civ. Proc. Rep. 43.

Callahan is sued for the negligent and careless acts of Wheeler in cutting a crevice in the wall of the building. These are each separate acts in which the other is not charged to have to any extent assisted.

23 Cyc. 426; Benson v. Battey, 70 Kan. 288, 78 Pac. 844, 3 Ann. Cas. 283.

In trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same acts, has been adjudged not culpable, no recovery can be had against the principal.

Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 168 Fed. 63; Doremus v. Root, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572; Hayes v. Chicago Teleph. Co. 218 Ill. 414, 2 L.R.A.(N.S.) 764, 75 N. E. 1003; Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co. 165 Ind. 361, 75 N. E. 649; Friend v. Ralston, 35 Wash. 422, 77 Pac. 794; Stevick v. Northern P. R. Co. 39 Wash. 501, 81 Pac. 999, 18 Am. Neg. Rep. 667; Morris v. Northwestern Improv. Co. 53 Wash. 451, 102 Pac. 402; Bradley v. Rosenthal, 154 Cal. 420, 129 Am. St. Rep. 171, 97 Pac. 875; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 19, 35 L. ed. 920, 12 Sup. Ct. Rep. 109; McCoy v. Louisville & N. R. Co. 146 Ala. 333, 40 So. 106; Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Featherston v. Newburgh & C. Turnp. Road, 71 Hun, 109, 24 N. Y. Supp. 603; Anderson v. Fleming, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 442; Anderson v. West Chicago Street R. Co. 200 Ill. 329, 65 N. E. 717; Muntz v. Algiers & G. Street R. Co. 116 La. 236, 40 So. 688; McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Chicago, St. P. M. & O. R. Co. v. McManigal, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243.

see also St. Louis & S. F. R. Co. v. Sander-son, post, 352.

Upon the general question whether a judgment in favor of one who was the immediate debtor in an alleged wrong as an estoppel in favor of another whose wrong, if any, was derivative, see opinion in Portland Gold Min. Co. v. Stratton's Independence, 16 L.R.A.(N.S.) 677, and comment in footnote.

Rosser, C., filed the following opinion:

This was an action by David Graves against E. B. Putman, Link Cowan, Anna Callahan, and L. Wheeler. Plaintiff's amended petition alleged that about the 15th of June, 1909, plaintiff was occupying, under an oral lease, a certain one-story brick building in Shawnee, which was then owned by Anna Callahan and leased to plaintiff by her authorized agent, L. Wheeler; that plaintiff used the building as a barber shop; that the west side of the building was a solid brick wall, supported by foundation of stone and cement filled in a well trench about 2 feet below the surface of the ground; that Putman and Cowan contracted with the owner of the adjoining lot to erect a two-story brick building; that, as plaintiff believed, they were acting as independent contractors; that pursuant to their contract Putman and Cowan dug a trench for the foundation of the east wall of the building they were to erect, immediately adjoining the west wall of the barber shop; that the trench was about 18 inches wide and about 15 inches below the foundation of the wall of the barber shop; that the defendants Putman and Cowan were careless and negligent in the digging of the trench; that on account of their carelessness and negligence the wall of the barber shop fell, causing injury to plaintiff's property. The second and third paragraphs of their petition are as follows:

"For a further cause of action against defendant, Anna Callahan and L. Wheeler, plaintiff alleges and says: (1) That (including all the allegations in paragraph 1, in count 1) at the same time, or just immediately after the negligent, careless, and unskilful acts on the part of the said E. B. Putman and Link Cowan as aforesaid, defendant L. Wheeler, duly authorized agent and manager of the property of the said Anna Callahan, began and completed the cutting of a crevice in the west side of the west wall of said barber shop as aforesaid; that said crevice was cut for the purpose of laying a rain spout therein and thus enable said contractors, E. B. Putman and Link Cowan, to build the east wall of said building to be erected on lot 12 as aforesaid immediately adjacent to said wall of said barber shop; that said trench was about 7 inches in depth and 6 inches in width, and extending the entire length of said wall diagonally with the same and in the middle thereof from its base and the roof of said barber shop; that in cutting said crevice as aforesaid the said Anna Callahan and L. Wheeler were careless, negligent, and unskilful, and failed to exercise due care and reasonable precaution, whereby said wall was caused to fall and crumble down upon

plaintiff's barber equipments and property within said barber shop, and totally destroying the same, to his damage as per Exhibit A; that said negligent and careless acts on the part of the said Anna Callahan and L. Wheeler as aforesaid were the concurring causes with the negligent and careless acts on the part of the said defendants E. B. Putman and Link Cowan as aforesaid in causing said damage and injuries to plaintiff's property as aforesaid.

"III. For a further cause of action against said defendants, E. B. Putman, Link Cowan, Anna Callahan, and L. Wheeler (including paragraphs 1 and 2 in count 1 and paragraph 1 in count 11 herein), plaintiff alleges and says: (1) That the injuries to plaintiff's property, resulting in his damage in the sum of \$750, was the result of, and directly due to, the concurrent, negligent, careless, and unskilful acts of said defendants as aforesaid.

"Wherefore plaintiff prays judgment against said defendants, and each of them, in the sum of \$750, for the costs of this action, and for all other relief justified in the premises."

At the close of the evidence the court instructed the jury to find for the defendants Putman and Cowan and Wheeler, but submitted the question of Anna Callahan's liability to the jury. The evidence shows that a crevice was cut the length of the wall for the purpose of putting in a pipe, and that it was completed a short time before the crevice for the adjoining building was completed. Wheeler ordered the trench to be cut in the wall. He was Mrs. Callahan's agent to collect rents and make repairs. Mrs. Callahan was living in Omaha, Nebraska, and had not been in Shawnee at any recent time before the crevice was cut. Her agent had not notified her that another building was going to be erected on the adjoining lot. Wheeler was having the pipe put in the wall to carry off the water, for the reason that on account of the erection of the building on the adjoining lot there would not be room for the pipe on the outside.

The brief of plaintiff in error contains numerous assignments of error. The principal one is that the court erred in refusing to instruct the jury to find a verdict for the defendant Callahan. It is the contention of plaintiff in error that, when the court found that Wheeler was not liable, it was its duty to make the same finding as to Mrs. Callahan. In other words, she contends that if her agent was not liable she was not liable. This contention is correct. Wheeler was the person who had the work done. Unless he was liable his principal was not liable. When a tort has been com-

mitted the person who actually commits it is liable if anyone is. If he is not liable then his principal cannot be held liable. If he acts as the agent of another, the other is responsible by reason of the doctrine of *respondent superior*, and not because he has himself done a wrong.

In the case of *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, Mr. Justice Brewer said: "It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity. . . . But here the defense is that the act of the conductor was lawful. If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? . . . If an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor." This opinion was followed by the circuit court of appeals for the eighth circuit in *Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A.(N.S.) 677, 85 C. C. A. 393, 158 Fed. 63, in an opinion by Mr. Justice Van Devanter, now of the Supreme Court of the United States.

In *McGinnis v. Chicago, R. I. & P. R. Co.* 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656, the third paragraph of the syllabus is as follows: "Where the servant is charged with misfeasance, and he and the master are joined as defendants, and the petition imputes the negligence of the servant to the master, a verdict of the jury finding the servant not guilty of negligence discharges the master also, although the verdict is against the master." The same doctrine is announced in *Hayes v. Chicago Teleph. Co.* 218 Ill. 414, 2 L.R.A.(N.S.) 764, 75 N. E. 1003; *Featherstone v. Newburgh & C. Turnp. Road*, 71 Hun, 109, 24 N. Y. Supp. 603; *Doremus v. Root*, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572; *Indiana Nitro-glycerine & Torpedo Co. v. Lippincott Glass Co.* 165 Ind. 361, 75 N. E. 649; *Stevick v. Northern P. R. Co.* 39 Wash. 501, 81 Pac. 969, 18 Am. Neg. Rep. 667; *Morris v. Northwestern Improv. Co.* 53 Wash. 451, 102 Pac. 402; *Bradley v. Rosenthal*, 154 Cal. 420, 129 Am. St. Rep. 171, 97 Pac. 875; *Hill v. Bain*, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; *Chicago, St. P. M. & O. R. Co. v. McManigal*, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243.

The defendant Wheeler was not acting under the direct instructions of his principal, but was acting under a general

agency, without specific instructions from his principal to do this particular act. If he is not responsible there is no liability anywhere.

The defendant in error has not filed a brief in the case. It would appear from some statements of the brief of plaintiff in error that the court permitted the case to go to the jury for a breach of covenant of quiet enjoyment of the premises, but the petition was not framed upon that theory, and the measure of damages submitted to the jury was not based upon that theory, and the instructions to the jury upon the measure of damages would not be proper if the action were one for breach of covenant for quiet enjoyment. Therefore it will not be presumed that it was upon that theory that the case was decided as it was.

As the judgment of the lower court in favor of Wheeler has become final, the judgment against Mrs. Callahan should be reversed and here rendered in her favor.

Per Curiam:

Adopted in whole.

MISSISSIPPI SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAIL-ROAD COMPANY

v.

IDA A. SANDERSON et al.

(99 Miss. 148, 54 So. 885.)

Trial — absence of finding for or against codefendant — right to judgment.

1. A failure of the jury to find either for or against one of two codefendants in an action to recover damages for negligent injuries, when finding against the other, justifies the entering of a judgment in his favor.

Carriers — passenger — intention to pay fare.

2. One who boards a train to ride a short

Note. — As to effect of verdict for servant in an action against master and servant for servant's negligence or misfeasance, see footnote to *Callahan v. Graves*, ante, 350.

Generally as to liability of carrier for wilful torts of servants to passengers, see note to *Gassenheimer v. Western R. Co.* 40 L.R.A.(N.S.) 999.

As to liability of carrier for assault by employee on passenger outside of car or train, see note to *Blomness v. Puget Sound Electric R. Co.* 17 L.R.A.(N.S.) 764. As to assault by servant on passenger while on train, see note to *Houston & T. C. R. Co. v. Bush*, 32 L.R.A.(N.S.) 1201.

distance, with intention to pay his fare if he is asked for it, may be found to be a passenger, although he remains on the platform and has not been approached by the conductor for fare.

Same — killing of passenger by conductor — liability.

3. A railroad company is liable for the killing of a passenger by a bullet fired by the conductor from a pistol borrowed from another passenger while they were standing beside the train, without intention of doing injury, upon the theory that it is the carrier's duty to protect passengers, although the conductor was acting entirely outside the line of his duty.

Appeal — codefendant — right of one to advantage of error against another.

4. A railroad company jointly sued with its conductor for injury to a passenger inflicted by him cannot complain of the exoneration of the conductor when judgment was entered against itself, if the statute provides that one of several appellants shall not be entitled to reversal because of error in the judgment against another not affecting his rights in the case.

(March 13, 1911.)

CROSS APPEALS from a judgment of the Circuit Court for Monroe County in an action brought to recover compensation for the alleged wrongful killing of plaintiff's husband and father; defendant railroad company appealing from so much of the decree as held it liable for the death and plaintiffs appealing from so much as refused to hold the conductor of the train also liable. Affirmed.

Statement by Whitfield, C.:

This is a suit by the appellees, the widow and children of one J. P. Sanderson, for damages for killing of Sanderson, by the conductor, Willis, in charge of a passenger train of the appellant railroad company. The record discloses the fact that Sanderson, in company with a young man named Pennington, got upon the platform of a passenger train of appellant about 10 o'clock at night, intending to ride from Amory to Aberdeen junction, a distance of 1 mile. The fare was 5 cents. The conductor did not see these two parties on the platform, nor did they offer to pay fares, though Pennington says that they were ready and willing to pay same and expected to do so when the conductor should ask them. The conductor testified that he did not, as a rule, work the train between these two points, but that he occasionally collected fares from persons traveling that distance, and that he did not see the deceased and his companion, nor did he know that they were on the train that night. 46 L.R.A. (N.S.)

When the train reached Aberdeen junction, deceased and his companion got off on the side of the car, and the conductor and two of the passengers stepped off, when the conductor borrowed a pistol from one of the passengers and fired, killing Sanderson. The defense is that he did not shoot at Sanderson, and did not know that he was in that direction, and that the killing was purely accidental. This question however, was submitted to the jury; it being the theory of the appellees that the killing was not an accident, or that at least the conductor was guilty of gross, wanton negligence in firing the pistol. Suit was brought against the railroad company and the conductor, and the jury returned a verdict for \$10,000 against the railroad company, from which this appeal comes.

Mr. E. O. Sykes, Jr., for defendant:

If a passenger elects to ride upon the platform of a steam railway car, without any necessity, real or apparent, for taking that position, and while so riding is injured under such circumstances that he would not have been injured if he had not taken that position . . . he cannot recover damages from the company.

Dougherty v. Yazoo & M. Valley R. Co. 84 Miss. 502, 36 So. 699; *Yazoo & M. Valley R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286; 3 *Thomp. Neg.* ¶ 2947, p. 409.

The conduct of Sanderson and Pennington both show that it was never their intention to come under the care or control of the appellant during the ride.

Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Collins v. Southern R. Co.* 89 Miss. 375, 42 So. 167; *Jones v. Boston & M. R. Co.* 163 Mass. 245, 39 N. E. 1019; *Andrews v. Yazoo & M. Valley R. Co.* 86 Miss. 129, 38 So. 773, 18 Am. Neg. Rep. 525; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; *Bricker v. Philadelphia & R. R. Co.* 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983, 10 Am. Neg. Cas. 207; *Missouri, K. & T. R. Co. v. Williams*, 91 Tex. 255, 40 S. W. 350, 42 S. W. 855; *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818; *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, 4 Am. Neg. Rep. 48; *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799, 5 Am. Neg. Rep. 562; 3 *Thomp. Neg.* §§ 2633, 2670; 4 *Elliott, Railroads*, §§ 1578, 1581; *Alabama City, G. & A. R. Co. v. Bates*, 149 Ala. 487, 43 So. 98; *Fremont, E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 773, 4 L.R.A. (N.S.) 254, 101 N. W. 1033, -106 N. W. 1041, 9 Ann. Cas. 1096; *Toledo, W.*

& *W. R. Co. v. Brooks*, 81 Ill. 245; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 16 L.R.A. 631, 32 Am. St. Rep. 17, 11 So. 510.

Even if deceased had been a passenger on this train he severed the relation by voluntarily getting off before passengers were invited to do so.

Glenn v. Lake Erie & W. R. Co. 165 Ind. 659, 2 L.R.A. (N.S.) 872, 112 Am. St. Rep. 255, 75 N. E. 282, 6 Ann. Cas. 1032; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; *St. Louis, I. M. & S. R. Co. v. Beecher*, 65 Ark. 64, 44 S. W. 715.

If Sanderson were not a passenger at the time he was shot, then the appellant cannot be liable in this case.

Alabama & V. R. Co. v. Harz, 88 Miss. 681, 42 So. 201; *Andrews v. Yazoo & M. Valley R. Co.* 86 Miss. 129, 38 So. 773, 18 Am. Neg. Rep. 525; *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594; *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 84 Am. St. Rep. 620, 28 So. 823; *Yazoo & M. Valley R. Co. v. Anderson*, 77 Miss. 28, 25 So. 865; *Illinois C. R. Co. v. Latham*, 72 Miss. 32, 16 So. 757; *Alabama & V. R. Co. v. McAfee*, 71 Miss. 70, 14 So. 260; *Birmingham R. & Electric Co. v. Baird*, 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Turley v. Boston & M. R. Co.* 70 N. H. 348, 47 Atl. 261, 8 Am. Neg. Rep. 484; *Birmingham R. & Electric Co. v. Mason*, 137 Ala. 342, 34 So. 207.

The finding in favor of Willis exonerates the company.

Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744; *Westfield Gas & Mill. Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *Doremus v. Root*, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572; *Illinois C. R. Co. v. Clarke*, 85 Miss. 691, 38 So. 97; *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 109; *Hayes v. Chicago Teleph. Co.* 218 Ill. 414, 2 L.R.A. (N.S.) 764, 75 N. E. 1693; *Stevick v. Northern P. R. Co.* 39 Wash. 506, 81 Pac. 1001, 18 Am. Neg. Cas. 667; *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.* 165 Ind. 361, 75 N. E. 649.

Messrs. Leftwich & Tubb, for plaintiffs:

Whether Sanderson was a passenger or a trespasser was a question of fact for the jury.

3 Thomp. Neg. §§ 2635, 2638, 2640; *Creed v. Pennsylvania R. Co.* 86 Pa. 139, 27 Am. Rep. 693; *Illinois C. R. Co. v. O'Keefe*, 61 Am. St. Rep. 103, note; *Perkins v. New York C. R. Co.* 82 Am. Dec. 293, note; 4 *Elliott, Railroads*, §§ 1578, 1579; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 220; 2 *Wood, Railway Law*, § 1037; 6 46 L.R.A. (N.S.)

Cyc. 536-539; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; *Alabama & V. R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660, 30 So. 660; *Arnold v. Pennsylvania R. Co.* 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213; *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Gardner v. Waycross Air-Line R. Co.* 97 Ga. 482, 54 Am. St. Rep. 435, 25 S. E. 334.

One who enters a railroad car, intending in good faith to become a passenger, is such in fact.

Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 82, 48 N. E. 294, 4 Am. Neg. Rep. 48.

Payment of fare is not necessary.

Alabama & V. R. Co. v. Beardsley, 79 Miss. 417, 89 Am. St. Rep. 660, 30 So. 660; *Hurt v. Southern R. Co.* 40 Miss. 391; *Illinois C. R. Co. v. O'Keefe*, 61 Am. St. Rep. 85, note; 3 *Thomp. Neg.* §§ 2634-2642.

The opportunity of the conductor and the servants of the train to see who gets on and off of the train binds them as well as actual sight or observation.

Birmingham R. Light & P. Co. v. Jung, 161 Ala. 461, 49 So. 434, 18 Ann. Cas. 557; *Highland Ave. & Belt R. Co. v. Burt*, 92 Ala. 291, 13 L.R.A. 95, 9 So. 410, 2 Am. Neg. Cas. 73.

A passenger must not only have a chance to safely board the train, but he must have a chance to safely leave it.

Com. v. Boston & M. R. Co. 129 Mass. 500, 37 Am. Rep. 382, 3 Am. Neg. Cas. 795; *Warner v. People's Street R. Co.* 141 Pa. 615, 21 Atl. 737.

The carrier is liable for the ill treatment of its passengers by its servants, whether they are acting in line of duty or not.

3 *Thomp. Neg.* §§ 3187, 3084; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554, *Fed. Cas. No. 4,873*; *Ferry Cos. v. White*, 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279.

It cannot be tolerated that a passenger conductor in charge of a train of passengers can be playing with a pistol in the presence of his passengers while the train is in motion, and while the passengers are alighting, and kill one of them or even a bystander, and then be allowed to set up that the killing was an accident.

New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; *Coleman v. Yazoo & M. Valley R. Co.* 90 Miss. 629, 43 So. 473; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554, *Fed. Cas. No. 4,873*; *Ferry Cos. v. White*, 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279; *Brunswick & W. R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000, 3 Am. Neg. Rep. 779; *Birmingham R. & Electric Co. v.*

Baird, 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; Code of 1906, §§ 1356, 1357.

Whitfield, C., filed the following opinion:

On the trial of this case, which was an action against the St. Louis & San Francisco Railroad Company and T. P. Willis, the conductor, the jury returned a verdict in favor of the plaintiffs against the railroad company for \$10,000 damages. But the verdict was silent as to the codefendant, Willis, the conductor. We think, on the authorities, that this amounted to a verdict exonerating Willis, to the same extent as if they had found a verdict for Willis. After the verdict, Willis made a motion, based on this theory, and the court sustained the motion, and entered a judgment discharging Willis from liability. The cross appeal is prosecuted from this. We think the action of the court was correct on the matter involved in the cross appeal.

The defendant company later made a motion in arrest of the judgment against it. The railroad company presents four defenses: First, that the firing of the pistol by the conductor, Willis, and the killing of the deceased, Sanderson, the husband and father of the plaintiffs, was an accident pure and simple, and hence that the company was not liable; second, that the firing of the pistol and the killing of the deceased by the conductor, Willis, if intentional, was a thing not done in the line of his duty while engaged in the service of his master, and hence, being a thing outside the scope of his employment, and not in the line of his duty, the company was not liable; third, that the deceased was not a passenger, and hence the company was not liable; and, fourth, that the verdict and judgment exonerating Willis, the conductor, necessarily operated logically as an exoneration also of the master, and that the verdict for Willis and against the company was an inconsistent, irregular, and illogical verdict, and that the motion in arrest of the judgment, therefore, should have been sustained.

As to the first, the verdict of the jury must be taken as having established the fact that the act was not accidental.

As to the third defense, that the deceased was not a passenger, we think, also, that the evidence as to whether he was a passenger, under all the peculiar circumstances of this particular case as shown by the evidence, was a question of fact for the jury to determine, on proper instructions from the court. The defendant company got the benefit of instructions which told them, in

varying forms, that if they believed from the evidence that the deceased was concealing himself so as to evade the payment of his fare, that he did not have the bona fide intention when he boarded the train of paying his fare, but was stealing a ride and attempting to evade his fare, they should find for the defendant company. Under these full instructions on the testimony in the case, the time of the ride being only about 5 minutes, we think the fact that he was a passenger was properly submitted to the jury for their determination, and that the verdict consequently establishes the fact that he was a passenger. The authorities on this subject have been admirably collected by the counsel on both sides, whose briefs are able and exhaustive, and we refer to them without further comment.

As to the second proposition, if it should be conceded that the act was not one in the line of the conductor's duty, but was one wholly outside of the scope of his employment and the line of his duty, it is thoroughly well settled that this beneficent principle, applicable in proper cases, that the master is not responsible for the acts done by the servant outside the line of his duty, and not in the service of the master, has no application whatever to a case where the conductor, the *alter ego* of the company, himself inflicts the injury on the passenger. In Thompson on Negligence, vol. 3, § 3187, it is said: "This calls up a plain distinction between the liability of a carrier of passengers for assaults or insults committed by his own servants upon his passengers and for similar wrongs committed by them upon trespassers or third persons. For such wrongs committed upon his passengers he will be liable in any event, whether in doing them his servant was acting within the scope of his employment or not, since they are a breach of his contract to carry his passenger in safety and with good treatment." And in a masterly opinion by McClellan, Ch. J., Birmingham Ry. & Electric Co. v. Baird, reported in 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, this doctrine is elaborately discussed and thoroughly vindicated, citing and reviewing a large number of authorities. Judge McClellan, speaking for the supreme court of Alabama in that case, says: "And it is of no consequence, when the wrong is committed by the carrier's own servant, even that servant particularly charged with the duty of conserving the passenger's well-being, *en route*, that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty, but is utterly violative of all

duty, and apart and away from the scope of employment, as that term is understood in the class of cases first above referred to. The carrier is liable in such cases, because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice toward the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine on principle, and while, as indicated above, there are adjudications against it, the great weight of authority supports it."

He quotes in that opinion the following from Chief Justice Ryan in the case of *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665: "But we need not pursue the subject; for, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent, the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it." And he also quotes the following from *Elliott on Railroads*: "There is much apparent conflict among the authorities upon this subject; but we think some of it is due to the use of the term 'scope of employment,' or 'line of duty' in a different sense in different cases, or to a failure to place the decision upon the correct ground. 46 L.R.A.(N.S.)

It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not. . . . Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, Railroads, § 1638.

We approve this as the true rule in this character of cases. The supreme and paramount duty of the conductor, who is the master in such cases, is to protect the passengers from injury; and the absolute character of this duty excludes entirely the operation of the other principle, applicable in proper cases, that the master is not liable for the servant's act, where that act is clearly not in the line of his duty and done outside the scope of his employment. It seems to us a perfectly sound rule, founded in the highest and most beneficent public policy.

The only remaining defense is the technical one, founded in the rules of pleading and practice; to wit, that the verdict and judgment exonerating the conductor necessarily and logically resulted inevitably in the exoneration also of the master. The reasoning is that the master can only be responsible in a case like this, because the servant is, on the doctrine of *respondet superior*. It is said with great ingenuity and ability that the master can only be derivatively liable; that is, he is liable, if at all, only because of the act of the servant, when that act makes the servant liable; and a verdict, as in this case, for the conductor, and against the defendant, is inconsistent, irregular, and illogical. The Texas supreme court, in *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744, which was a case exactly like this, admitted that the verdict was apparently inconsistent, yet nevertheless said it presented no ground on that account for a reversal of a judgment against the company.

In the case of *Illinois C. R. Co. v. Clarke*, 85 Miss. 697, 38 So. 97, this court followed the Texas supreme court, and rested its

judgment on two grounds: First, that if it were assumed in such case that the company and its servant were jointly liable, nevertheless the right of action which the plaintiff had was both joint and several, and that, though both were equally liable, the liability was based on distinct and different legal principles,—the servant because of his personal trespass, and the company because of its failure to discharge its nondelegable duty towards the public regarding its custody and management of its dangerous instrumentalities, or, as here, in not having a competent conductor. And the court rests its judgment in the second place on our statute (§ 4944 of the Code of 1906; § 4378 of the Code of 1892), which is in the following words: "In all cases, civil or criminal, a judgment or decree appealed from may be affirmed as to some of the appellants and be reversed as to others; and one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case. And when a judgment or decree shall be affirmed as to some of the appellants and be reversed as to others, the case shall thereafter be proceeded with, so far as necessary, as if separate suits had been begun and prosecuted; and execution of the judgment of affirmance may be had accordingly. Costs may be adjudged in such cases as the supreme court shall deem proper." This statute was construed in the case of *Weis v. Aaron*, 75 Miss. 138, 65 Am. St. Rep. 594, 21 So. 763. We there said: "When the action of the court below results in merely reversible error as to one of the parties, the other cannot assign here that error."

We think this statute, with this construction placed upon it, is a perfect answer to the argument of learned counsel for appellant on the motion in arrest of judgment. The error assigned by the railroad company, that the verdict exonerating Willis, the conductor, was wrong, at the same time a verdict against the company was rendered, under our statute, and the construction referred to here, is at most merely a reversible error as to Willis, not affecting the validity of the judgment against the railroad company. Besides all of which, it is further to be said that we have recently reviewed, on full consideration, the case of *Illinois C. R. Co. v. Clarke*, in the case of *Nelson v. Illinois C. R. Co.* 98 Miss. 295, 31 L.R.A.(N.S.) 689, 53 So. 619, and approved and reaffirmed the doctrine of the *Clarke Case* on this point, and we remain satisfied of the correctness of our conclusion on the grounds indicated. There are cases to the contrary, which are pointed out

by the learned counsel for appellant; but those cases were decided in the absence, so far as they show, of any statute like ours on this subject. Our statute was manifestly intended to do away with the opposite rule, as one which would in many cases sacrifice the substantial rights of parties to a mere rule of procedure, founded on too refined a basis for the practical administration of justice. In the case of *Sellards v. Zomes*, 5 Bush. 90, cited in *Louisville & E. Mail Co. v. Barnes*, 79 S. W. 261, 64 L.R.A. 574, 111 Am. St. Rep. 273, 117 Ky. 860, the court said: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong."

Consequently, since our statute of 1836, authorizing several judgments, a dismissal or release of one or more who are sued, cannot *per se* release the others. This construction of the Kentucky statute is exactly our construction of our statute. See, also the elaborate notes to *Louisville & E. Mail Co. v. Barnes*, *supra*, and the note to *Abb v. Northern P. R. Co.* 92 Am. St. Rep. 872. And see the opinion of this court in *Bailey v. Delta Electric Light, Power & Mfg. Co.* 86 Miss. 634, 38 So. 354, where, in concluding the opinion, it was said: "This is more in accord with justice and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reasoning."

Per Curiam:

The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment of the court below is affirmed, both on the appeal and cross appeal.

OKLAHOMA SUPREME COURT. (Division No. 1.)

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,

v.
W. T. LEE.

(— Okla. —, 132 Pac. 1072.)

Carrier — entering car to assist passenger — duty.

1. One who goes upon a train to render

Headnotes by ROBERTSON, C.

Note. — Duty of carrier to one who goes upon a train to assist a passenger.

The earlier cases on this question are presented in notes in 3 L.R.A.(N.S.) 432; 22 L.R.A.(N.S.) 910; and 28 L.R.A.(N.S.) 773.

assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train, and the carrier, in permitting him to enter, with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. If he is injured by reason of the sudden starting of the train or the omission to give the customary signals, the carrier will be liable.

Same — duty to assist passenger.

2. As a general rule it is not the duty of a carrier to station an employee at the entrance of a car for the purpose of assisting passengers off and on; the carrier is, however, required to announce the station as the train arrives, to stop the car at the platform, to hold the train a reasonable length of time to enable all persons using reasonable diligence to enter or depart, to furnish a safe and convenient mode of entering or leaving the train, and to give the usual and customary signals before starting the train.

Same — assistance in alighting.

3. It is not the general duty of a car-

As shown in the earlier notes it is generally held that, in the absence of any regulation forbidding persons to enter trains to assist a passenger, a person who enters a train for that purpose does so under an implied permission or license; and if notice of his intention to enter the train and return again to the station and platform is given to the company, it owes him the duty of ordinary care for his protection. To the same effect are: *Southern R. Co. v. Parham*, 10 Ga. App. 531, 73 S. E. 763; *Chicago, R. I. & P. R. Co. v. McAlester*, — Okla. —, 134 Pac. 661; *St. Louis & S. F. R. Co. v. LEE*; *Gulf, C. & S. F. R. Co. v. Guess*, — Tex. Civ. App. —, 154 S. W. 1060.

But, in the absence of any notice, either actual or constructive, it seems that the carrier owes no duty to a person thus entering its train, except not to injure him willfully or wantonly. *Midland Valley R. Co. v. Bailey*, — Okla. —, 124 Pac. 987; *St. Louis & S. F. R. Co. v. LEE*.

In *Midland Valley R. Co. v. Bailey*, — Okla. —, 124 Pac. 987, it was said: "If persons not intending to become passengers desire to assist sick persons to enter the train, they have the right to do so, but, if they desire special service on account of their intention to leave the train after seating the patient, it is only fair that they should notify the railroad company of this desire. The conductor cannot be expected to enter his train and inquire of persons whether they desire to get off, but, when reasonable time has been given and the platform is clear, he has a right to start the train, and, as the plaintiff in this case had not given the conductor or any other employee of the defendant any notice of her intention to leave the train after

rier to assist a passenger to alight from a train, unless some special circumstance imposes such duty. But in the case of a sick, old, or infirm passenger, or one making request for assistance, it undoubtedly is the duty of the company to assist them, and in cases where by the use of ordinary care the conductor, or other employee, sees that such help is needed, it becomes the duty of the company to furnish such assistance.

Negligence — what constitutes.

4. In every case involving actionable negligence there must be a duty on the part of defendant, a failure to perform that duty, and an injury or damage resulting by reason of such failure.

(June 11, 1913.)

ERROR to the District Court for McCurtain County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the commissioner's opinion.

seating her daughter, it was not the duty of the defendant to hold the train indefinitely or make special inquiry concerning her plans."

The mere fact that there was no agent or employee of the carrier at or near the car at the time the person entered thereon, and that therefore no opportunity was given to him to notify the company of his intention to alight after assisting the passenger to a seat, does not serve as an excuse for notice, or impose a duty on defendant to hold the train until he has an opportunity to alight; as it is not the duty of a carrier to station an employee at the entrance of a car for the purpose of assisting passengers off and on, where access to the car is not difficult and the car is stopped at the platform prepared and used by the company for that purpose, in the usual manner, and no special circumstance exists demanding such additional care. *St. Louis & S. F. R. Co. v. LEE*.

In *Gulf, C. & S. F. R. Co. v. Guess*, — Tex. Civ. App. —, 154 S. W. 1061, it was held that it was no part of the duty of the brakeman, who was assisting passengers to get on and off the train, to listen to and understand conversations between parties about to get on the train, so that the occurrence of a conversation, in his hearing, to the effect that the plaintiff should assist the other on the train, did not charge the carrier with the duty of holding the train until he could get off, where it did not appear that the brakeman understood the conversation, and testified that he did not.

But in *Texas C. R. Co. v. Hutchinsons*, — Tex. Civ. App. —, 132 S. W. 509, it is held that one who enters a train to assist a passenger has the right to assume that the train will remain at the station the

Messrs. W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiff in error:

The starting of a train is not negligence, in the absence of any fact tending to charge the defendant with knowledge of the intention of a person on the train to disembark.

Little Rock & Ft. S. R. Co. v. Lawton, 55 Ark. 428, 15 L.R.A. 434, 29 Am. St. Rep. 48, 18 S. W. 543, 2 Am. Neg. Cas. 148; Atchison, T. & S. F. R. Co. v. Cogswell, 23 Okla. 181, 20 L.R.A.(N.S.) 837, 99 Pac. 923; Simmons v. Seaboard Air-Line R. Co. 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777; Hill v. Louisville & N. R. Co. 124 Ga. 243, 3 L.R.A.(N.S.) 432, 52 S. E. 651, 19 Am. Neg. Rep. 111; Louisville & N. R. Co. v. Espenscheid, 17 Ind. App. 558, 47 N. E. 186, 2 Am. Neg. Rep. 706; Lucas v. New Bedford & T. R. Co. 6 Gray, 70, 66 Am. Dec. 406, 3 Am. Neg. Cas. 735; Griswold v. Chicago & N. W. R. Co. 64 Wis. 662, 26 N. W. 101, 7 Am. Neg. Cas. 230; Dillingham v. Pierce, — Tex. Civ. App. —, 31 S. W. 203, 6 Am. Neg. Cas. 708; Oxsher v. Houston, E.

& W. T. R. Co. 29 Tex. Civ. App. 420, 67 S. W. 550.

Messrs. Stewart & McDonald and Nelson & Steele, for defendant in error:

A carrier owes a duty to persons who come upon a train accompanying passengers, with the intention of getting off before the train starts or for the purpose of meeting passengers who are about to alight.

Louisville & N. R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31, 3 Am. Neg. Cas. 229; Galloway v. Chicago, R. I. & P. R. Co. 87 Iowa, 458, 54 N. W. 447, 3 Am. Neg. Cas. 395; Doas v. Missouri, K. & T. R. Co. 59 Mo. 27, 21 Am. Rep. 371, 4 Am. Neg. Cas. 490; Rott v. Forty-Second & G. Street R. Co. 24 Jones & S. 151, 1 N. Y. Supp. 518; Johnson v. Southern R. Co. 53 S. C. 203, 69 Am. St. Rep. 849, 31 S. E. 212; Gulf, C. & S. F. R. Co. v. Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Little Rock & Ft. S. R. Co. v. Lawton, 55 Ark. 428, 15 L.R.A. 434, 29 Am. St. Rep. 48, 18 S. W. 543, 2 Am. Neg. Cas. 148; Macon, D. & S. R. Co. v. Moore, 108 Ga. 84, 33 S. E. 889, 6 Am. Neg. Rep. 451; Atchison, T. & S. F.

usual and customary time, and long enough to permit the passengers desiring to do so to disembark, and is entitled to recover for injuries sustained while attempting to alight after the train was in motion where he was compelled to do so because of the carrier's failure to remain the customary period and permit all the passengers desiring to do so to disembark, notwithstanding the fact that the company had no notice of his intention to alight, where it is shown that the company and its employees in charge of the train were familiar with and acquiesced in the custom of persons to board the trains to assist passengers, and then get off before the train started.

In *Otto v. Milwaukee Northern R. Co.* 148 Wis. 54, 134 N. W. 157, where the question of notice to the company's servants is not discussed, it was held that one who while assisting passengers to board an electric car stepped upon the lower tread to place some baggage upon the platform was a licensee, and entitled to be treated by those in charge of the car with ordinary care, and was entitled to recover for injuries sustained by being thrown from the car, which was suddenly started with a jerk, without signal being given, though it appeared that the conductor was not present. The court said: "Obviously, it is the business of a railroad company to use reasonable diligence to discover whether a person who has stepped on a car has mounted the platform or stepped to the ground, before starting. It seems there was room in the evidence for the jury to conclude that there was a fatal omission of defendant in that regard."

It cannot be said as a matter of law that the negligence of the railroad company was not the proximate cause of injuries sustained by plaintiff in alighting from a moving train in the darkness, where it appeared the plaintiff, without having had much experience in getting on and off trains, boarded the train for the purpose of assisting his wife and four children, who were passengers, with assurance of the conductor that he would have time to do so and return in safety, that the train was held less than a minute, and not near as long as usual, and started before he was able to get off, and that he was prevented from alighting by the act of the brakeman in closing the doors at which he had entered; and that, upon requesting the brakeman to stop the train, he was directed to go to the next vestibule door and get off, and in accord with such direction he was compelled to alight in the darkness about 200 yards from the station.

So, in *Southern R. Co. v. Parham*, 10 Ga. App. 531, 73 S. E. 763, it was held that the question of contributory negligence in attempting to alight from a moving train in the darkness was for the jury, where it appeared plaintiff did so at the direction of the conductor.

See also in this connection the note in 20 L.R.A.(N.S.) 833, upon the duty of a carrier to persons who accompany passengers to, or wait for them at station.

For a discussion of the duty of carrier to person at station for business consultation with individual passenger, see *Cogswell v. Atchison, T. & S. F. R. Co.* 20 L.R.A.(N.S.) 837, and note thereto.

As to duty of carrier to one who enters its cars upon his own business, see note in 34 L.R.A.(N.S.) 716, and references therein to other similar notes.

A. L. R.

R. Co. v. Cogswell, 23 Okla. 181, 20 L.R.A. (N.S.) 837, 99 Pac. 923.

None of the defendant's employees were present to render assistance to Mrs. Cabbler, and, in the absence of offering her any assistance, plaintiff had a right to render it.

Allender v. Chicago, R. I. & P. R. Co. 43 Iowa, 276, 3 Am. Neg. Cas. 342; 2 White, Personal Injuries, 870, 1056; Shanahan v. St. Louis Transit Co. 109 Mo. App. 228, 83 S. W. 783.

The company owed to Mr. Lee the same duty that it would have owed him had he been a passenger.

Flint & P. M. R. Co. v. Stark, 38 Mich. 714, 4 Am. Neg. Cas. 19; Paulitsch v. New York C. & H. R. R. Co. 102 N. Y. 280, 6 N. E. 577, 5 Am. Neg. Cas. 256; Poole v. Georgia R. & Bkg. Co. 89 Ga. 320, 15 S. E. 321; 6 Cyc. 612; Keokuk Packet Co. v. Henry, 50 Ill. 268, 2 Am. Neg. Cas. 569; Choctaw, O. & G. R. Co. v. Burgess, 21 Okla. 653, 97 Pac. 272; Cole v. Missouri, K. & O. R. Co. 20 Okla. 227, 15 L.R.A. (N.S.) 268, 94 Pac. 540; Ziska v. Ziska, 20 Okla. 634, 23 L.R.A. (N.S.) 1, 95 Pac. 254; Covington v. Fisher, 22 Okla. 207, 97 Pac. 615; Chicago, R. I. & P. R. Co. v. Mitchell, 19 Okla. 579, 101 Pac. 850; Loeb v. Loeb, 24 Okla. 384, 103 Pac. 570; Bird v. Webber, 23 Okla. 583, 101 Pac. 1052; Chicago, R. I. & P. R. Co. v. Broe, 23 Okla. 396, 100 Pac. 523.

Robertson, C., filed the following opinion:

On July 28, 1908, the plaintiff below, W. T. Lee, accompanied his mother-in-law, Mrs. A. C. Cabbler, an aged and infirm lady, to defendant's depot at Haworth, Oklahoma, for the purpose of assisting her to take the train to Hugo, Oklahoma; he purchased her ticket, and when the train arrived, assisted her in entering the car, and entered thereon himself, carrying two pieces of hand baggage. After having secured a seat for Mrs. Cabbler and deposited her baggage, he started to leave the train, which by that time had started; he claims that as he was in the act of getting off the train some person was attempting to get on and struck his foot and caused him to fall headlong on the platform, whereby he was seriously and permanently injured. The conductor testified positively that he, as was his usual custom, stood by the steps of the car and assisted passengers off and on; that he had no knowledge of plaintiff's intentions to get off the train, but supposed he was a regular passenger. In his original petition plaintiff alleges "that the defendant expressly agreed and promised that it would stop its locomotive engine and cars at said station a sufficient length of 46 L.R.A. (N.S.)

time, not only to permit the said Mrs. Cabbler to be assisted aboard the said cars by the plaintiff, but also a sufficient time for plaintiff to leave the cars in safety." There being a failure of proof on this issue, the trial court, over the objections of defendant, permitted plaintiff, after he had rested his case, to amend his petition so as to charge that none of the defendant's employees or agents were present at the time he entered the car, and that therefore he could not notify them, or any of them, of his intention to alight after finding a seat for Mrs. Cabbler, and contends that the train made a shorter stop that day than it ordinarily did, and that it started without notice to him and before he could get off. The testimony on this point is conflicting.

The only question in this case is: Did the company, in the absence of knowledge of Mr. Lee's intent to leave the train, owe him the duty of holding the train until he had an opportunity to alight?

This question is practically disposed of by the case of Midland Valley R. Co. v. Bailey, — Okla. —, 124 Pac. 987. In that case plaintiff's daughter was sick and was taken to defendant's train by a physician and one or two others, for the purpose of being carried as a passenger. The physician notified the conductor that he had a sick patient whom he desired to put on the train, and asked for time to put her on the car. The physician was intending to remain on the train in order to accompany the patient, and said nothing to the conductor about getting off the train; plaintiff also went aboard the train. After the usual business had been transacted the train started, and plaintiff, after the train had gone a short distance, stepped off, fell, and was injured. She sued the company and recovered a judgment. On appeal the case was reversed on the ground that the company owed her no duty in the absence of notice that she intended to alight. In the body of that opinion it is said: "The principal question in the case is whether or not the conductor of a train who is not informed that a person assisting a sick passenger desires to leave the train after the passenger has been seated, and who does not know that such person desires to leave the train, is bound to ascertain that fact before starting his train. To state the question is practically to answer it. In this case the petition did not allege that the defendant company had any knowledge that it was the purpose of the plaintiff to leave the train. It did not allege that there were any facts or circumstances which charged the defendant with notice that it was her intention to leave the train, and the evidence was in perfect har-

mony with the petition; there being no evidence of any kind whatsoever tending to show such knowledge on the part of the defendant company, or any circumstances tending to charge the company with notice. A demurrer was filed to the petition, which was overruled. Objection to the introduction of evidence was made and overruled. A demurrer to the plaintiff's evidence was interposed and overruled, and a request for a peremptory instruction was presented and denied, so that the point was saved at every step in the proceeding. There is no controversy but that it is the duty of a railroad company to stop at stations a sufficient length of time to permit reasonably careful persons to leave and enter the train and transact their business with the company. If the railroad company receives sick passengers, it is its duty to stop a sufficient length of time to enable these passengers, in the exercise of reasonable care, to enter the train. If persons not intending to become passengers desire to assist sick persons to enter the train, they have the right to do so; but, if they desire special service on account of their intention to leave the train after seating the patient, it is only fair that they should notify the railroad company of this desire. The conductor cannot be expected to enter his train and inquire of persons whether they desire to get off; but, when reasonable time has been given and the platform is clear, he has a right to start the train, and, as the plaintiff in this case had not given the conductor, or any other employee of the defendant, any notice of her intention to leave the train after seating her daughter, it was not the duty of the defendant to hold the train indefinitely or make special inquiry concerning her plans. The doctor did speak about putting his patient on the train, but said nothing about wanting time to get off, and in fact, did not get off, as it was his purpose to, and he did, become a passenger. going with the patient to her destination. It would have been entirely convenient in that same conversation to have cautioned the conductor that the plaintiff desired to leave the train, but he did not do so, and therefore no special duty devolved upon the defendant to do more than give reasonable time for reasonable people to enter the train with the patient. These principles are so simple and seem so clear and just that it is not surprising that the authorities are in substantial harmony in laying down the rule. In *Hutchinson on Carriers* 3d ed. § 991, the rule is stated as follows: 'A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, 46 L.R.A. (N.S.)

as he comes with at least the tacit invitation of the carrier. While so engaged, he does not stand in the relation to the carrier of a bare licensee, but is deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier therefore owes to him the duty of exercising at least ordinary care to see that he is not injured by reason of defective station facilities or approaches thereto. So, one who goes upon a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. If he is injured by reason of the sudden starting of the train or the omission to give the customary signals, the carrier will be liable.' This rule is supported by numerous authorities, amongst which are the following, to which our attention is called by the plaintiff in error: *Little Rock & Ft. S. R. Co. v. Lawton*, 55 Ark. 428, 15 L.R.A. 434, 29 Am. St. Rep. 483, 18 S. W. 543, 2 Am. Neg. Cas. 148; *Seaboard Air Line R. Co. v. Bradley*, 125 Ga. 193, 114 Am. St. Rep. 196, 54 S. E. 69; *Hill v. Louisville & N. R. Co.* 124 Ga. 243, 3 L.R.A. (N.S.) 432, 52 S. E. 651, 19 Am. Neg. Cas. 111; *Atlantic & B. R. Co. v. Owens*, 123 Ga. 393, 61 S. E. 404; *Coleman v. Georgia R. & Bkg. Co.* 84 Ga. 1, 10 S. E. 498, 2 Am. Neg. Cas. 420; *Cole v. Chesapeake & O. R. Co.* — Ky. —, 113 S. W. 822; *Berry v. Louisville & N. R. Co.* 109 Ky. 727, 60 S. W. 699, 9 Am. Neg. Rep. 274; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64, 66 Am. Dec. 406, 3 Am. Neg. Cas. 735; *Flaherty v. Boston & M. R. Co.* 136 Mass. 567, 72 N. E. 66, 17 Am. Neg. Rep. 246; *Saxton v. Missouri P. R. Co.* 98 Mo. App. 494, 72 S. W. 717; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L.R.A. 599, 21 S. W. 1, 14 Am. Neg. Cas. 714; *Dunne v. New York, N. H. & H. R. Co.* 99 App. Div. 571, 91 N. Y. Supp. 145; *Izlar v. Manchester & A. R. Co.* 57 S. C. 332, 35 S. E. 583; *Oxsher v. Houston, E. & W. T. R. Co.* 29 Tex. Civ. App. 420, 67 S. W. 550; *Bullock v. Houston, E. & W. T. R. Co.* — Tex. Civ. App. —, 55 S. W. 184; *International & G. N. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401; *Dillingham v. Pierce*, — Tex. Civ. App. —, 31 S. W. 203, 6 Am. Neg. Cas. 708; *Griswold v. Chicago & N. W. R. Co.* 64 Wis. 652, 26 N. W. 101, 7 Am. Neg. Cas. 230; *Chesapeake & O. R. Co. v. Paris*, 107 Va. 408, 59 S. E. 398. The only case cited

by the plaintiff which in any way conflicts with this general rule is *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31, 3 Am. Neg. Cas. 229, but this case appears never to have been followed in the state of Indiana, and it has been expressly criticized in the case of *Little Rock & Ft. S. R. Co. v. Lawton*, supra, by the annotator of the *American State Reports* at page 55 of 29 Am. St. Rep., in connection with the report of *Little Rock & Ft. S. R. Co. v. Lawton*; by the supreme court of Texas in *Houston & T. C. R. Co. v. Phillio*, 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994, 12 Am. Neg. Rep. 637; and Indiana itself apparently criticizes the rule therein laid down in the case of *Louisville & N. R. Co. v. Espenscheid*, 17 Ind. App. 558, 47 N. E. 186, 2 Am. Neg. Rep. 706. Other authorities supporting the rule we announce are collected in notes in 15 L.R.A. 434, and 3 L.R.A. (N.S.) 433."

In 2 *Hutchinson on Carriers*, § 991, it is said: "But the duty of the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train; for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after giving him a reasonable time to get aboard. He should, accordingly, notify someone in the management of the train of his presence, business, or purpose, so as to create some relation to the carrier and thus make it its duty to care for him. And where the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train is started."

It might be urged, however, that the above authorities are not controlling in the instant case, for that it is in the petition (as amended) charged that none of defendant's agents or employees were present at the car at the time plaintiff entered upon it, and that therefore he could not give notice to them.

Admitting that there was no agent or employee of defendant at or near the car at the time plaintiff entered thereon (although there is strong evidence in the record to the contrary), and that therefore no opportunity was given him to notify the company of his intention to alight after assisting Mrs. Cabbler to a seat, would that fact serve as an excuse for notice, and did it impose a duty on defendant to hold the train until plaintiff had an opportunity to alight? 46 L.R.A. (N.S.).

The negligent act of which plaintiff complains is the starting of the train. By the authorities herein above cited it appears that the defendant may start its train at any time without liability to one who may be intending to leave it, in the absence of knowledge of his intention to so leave. Can a person entering a train, like a regular passenger, without notice to anyone of his intention to alight, insist that the company owes him a duty to keep the train standing until he has alighted? Certainly not, unless the absence of the conductor from his post can be said to be the proximate cause of plaintiff's injury.

This necessity raises the question: Is it the duty of a carrier to station an employee at the entrance of a car or train for the purpose of assisting passengers off and on? As a general proposition no such duty rests on the carrier, and in the instant case, where access to the car was not difficult, and the car was stopped at the platform prepared and used by the company for that purpose, and in the usual and customary manner, and where no special circumstance existed demanding such additional care, it is obvious that no such duty was imposed on the carrier. We do not desire to be understood as saying that under no circumstance or condition such duty would not exist, but in the case under consideration we say it did not exist.

Defendant in error was not a passenger on the train, neither was he a trespasser. He was there by implied invitation, and the company owed him only ordinary care. It did not owe him that high degree of care it owed a passenger. Yet from the adjudicated cases it would seem that, even though he had been a passenger, all the duty the company would owe was to announce the station as the train arrived, to stop the train a reasonable length of time to enable all persons using reasonable diligence to enter or depart, and to furnish a safe and convenient mode of entering or leaving the train, and to give the usual and customary signals before starting the train. From the undisputed facts in this case all these things were done. It is not the duty of the company to assist a passenger in alighting from a train, unless some special circumstance imposes such duty. Thus, in the case of a sick, old, or infirm passenger, or one making request for assistance, it undoubtedly is the duty of the company to assist them, and in cases where, by the use of ordinary care, the conductor or other train employees sees that such help is needed it becomes the duty of the company to furnish such assistance. But in the instant case no such assistance was required,

nor was it requested, and, above all, the company had no knowledge of the plaintiff's intent to alight, and inasmuch as the company owed him no duty, except ordinary care which was given, there can be no liability. *Raben v. Central Iowa R. Co.* 73 Iowa, 579, 5 Am. St. Rep. 708, 35 N. W. 645, 3 Am. Neg. Cas. 379; *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1, 4 Am. Neg. Cas. 584; *Illinois C. R. Co. v. Slatton*, 54 Ill. 133, 5 Am. Rep. 109, 2 Am. Neg. Cas. 583.

If there was no duty there could be no liability; for in every case involving actionable negligence there must have been a duty on the part of defendant, a failure to perform that duty, and an injury or damage resulting by reason of such failure. *Faurot v. Oklahoma Wholesale Grocery Co.* 21 Okla. 104, 17 L.R.A.(N.S.) 136, 95 Pac. 463; *Rogers v. Chicago, R. I. & P. R. Co.* 32 Okla. 109, 120 Pac. 1093.

Without doubt the subject is one of regulation, and such additional duty might, by law, be imposed upon a carrier. But that is without the case, and speculation thereon at this time would be useless.

Entertaining the views hereinabove expressed, it necessarily follows that the judgment should be reversed.

Thacker, C., not participating.

Per Curiam:

Adopted in whole.

OREGON SUPREME COURT.

PACIFIC MILLING & ELEVATOR COMPANY, Resp't.,

v.

CITY OF PORTLAND et al., Appts.

STATE OF OREGON, Intervener, Appt.

(— Or. —, 133 Pac. 72.)

Statute — title — sufficiency — coast — tidal river.

1. A title "An Act to Provide for the Sale of Tide and Overflowed Land on the Seashore and Coast" is sufficient to support legislation disposing of land on a tidal river which flows into the sea, without any money consideration.

Same — curing defect.

2. An amendatory statute cannot be declared invalid because not supported by the title to the original act, if a subsequent amendment recognizes it under a title sufficiently broad to cover its provisions, and

Note. — For right of state to grant tide lands, see note to *State ex rel. Ellis v. Gerbing*, 22 L.R.A.(N.S.) 337. 46 L.R.A.(N.S.)

it has been acted upon by the people generally for many years.

Same — repeal — implications.

3. Charter authority to provide for the construction and maintenance of docks does not by implication repeal a statute authorizing riparian owners to construct wharves.

Riparian rights — conveyance by plat — severance from upland.

4. The conveyance of riparian property by reference to plats and maps attaches the riparian right to the outermost lot.

Water — tide land — right of state to grant.

5. A state may grant its title to tidelands between high and low water mark into private ownership, subject to the paramount, public right of navigation and such reasonable regulation as the state may prescribe.

Same — wharf right — implied reservation in state.

6. The grant by the state to a riparian owner of the land between high and low water mark, together with the right to wharf out to the line of navigability, is subject to no implied right on the part of the state or its agencies to use the *locus in quo* for the making of dock, wharves, or other improvements in aid of navigation.

(June 24, 1913.)

APPEAL by defendants and intervener from a decree of the Circuit Court for Multnomah County in plaintiff's favor in a suit to enjoin defendants from erecting a wharf on and in front of plaintiff's premises. Affirmed.

Statement by Bean, J.:

This is a suit to restrain the defendants from erecting a wharf on and in front of plaintiff's premises below the line of ordinary high water in the Willamette river. The defendants appeal from a decree of the circuit court adjudging plaintiff to be the owner of the premises and of the wharfage rights in front thereof.

Plaintiff avers that it is the owner and in the actual possession of the following described real estate, water frontage, and wharfage rights situated within the corporate limits of the city of Portland, to wit: The northerly 55 feet of the lot 17, all of lots 18, 19, and 20 of Watson's addition to the city of Portland, and the southerly 40 feet of lot 21 of Doscher's addition to the above city; that the lots are 200 by 100 feet, extending from Front street at a point above and westerly of the line of ordinary high water in the left bank of the Willamette river, easterly to the established harbor line; that plaintiff is entitled and desires to construct a wharf on and in front of the premises, and has applied to the defendant city of Portland for a permit to do so, but has been refused the same on the ground

that the city asserts that it has the exclusive right of constructing a wharf on all that part of the premises below the line of ordinary high water; and that, pursuant to such claim, the dock commissioners of the defendant city have selected the premises for a wharf site, have entered upon such river frontage, have engaged in driving spiles therein preparatory to the construction of a wharf and dock, and threaten to occupy such premises permanently, and to exclude plaintiff therefrom. The defendant city and its officers deny plaintiff's title, and allege, among other things, that the property described in plaintiff's complaint has never been in the actual possession of anyone; that the whole thereof, including all of North Front street adjacent thereto, has at all times been below the ordinary high-water line of the Willamette river, and that the same accrued and became vested in the state of Oregon at the time the state was admitted into the United States, and that it has never sold or conveyed the same to any one; that the state of Oregon, by its constitution and through the charter of the city of Portland adopted in 1903, and a certain amendment thereto, establishing a department of public docks and making provisions with reference thereto, adopted by the people of the city of Portland, November 8 1910, pursuant to the Constitution granted unto the city the right, power, and authority to construct and maintain wharves, docks, and all appurtenances there-to upon the property of the state of Oregon lying below the ordinary high-water line of the Willamette river, particularly upon such portions thereof as a commission of the department of public docks of the city might select; that the commission has duly selected the property described in the complaint for that purpose, and intends to erect thereon a large dock extending from ordinary high-water line out to the harbor line, and to take possession of the whole of such frontage and premises without paying plaintiff any compensation therefor. The plaintiff asks that its title to the premises be quieted, and that defendants be enjoined from erecting or maintaining any structure thereon.

The state intervened, and alleges, in substance, in addition to the facts stated by the defendant city of Portland, that it is the owner of all the land between the ordinary high-water mark and the harbor line in front of and on the river side of such lands; that the city of Portland and its dock commission are fully authorized by the grant in its charter to enter upon and construct below high-water mark a public dock and wharf for the purpose of aiding and promoting the commerce and navigation of the

Willamette river; that in attempting to construct a public dock, the city of Portland is acting by virtue of such authority; that the plaintiff has no franchise or license to construct wharves or docks in front of such lands below ordinary high-water mark; that such license or franchise has been forfeited, abandoned, and lost for more than ten years prior to the commencement of this suit; and that plaintiff and its predecessors have in no wise attempted to use the same during such time. The state prays that it be declared to be the exclusive owner of the property, except as to the city of Portland, and that plaintiff be enjoined from driving piles in or building any structure upon the land below high-water mark, or from asserting any claim to the land adverse to the intervenor.

The following matters are agreed to: (1) That Watson's addition to the city of Portland was platted March 7, 1871, by A. J. Watson, the owner of all the land included within its boundaries above the line of ordinary high water. (2) That Doscher's addition to said city was platted April 11, 1871, by John C. and Ann L. Doscher, the owners of all the land within its boundaries above ordinary high-water line. (3) That both of said additions were platted on a part of the donation land claim of Wm. Blockinestone, and that the easterly boundary of said claim was the Willamette river, which is navigable. That said plats are contiguous, Doscher's addition joining Watson's addition on the north, and being a continuation thereof, so far as "river block" in the latter addition is concerned; "river block No. 2" of Doscher addition being a continuation of "river block" in Watson's addition, and both of said additions being bounded on the west by Front street. (4) That the plat of Watson's addition shows the left boundary line of the Willamette river extending northerly and southerly practically through the middle of said "river block." (5) That, according to the field notes of the survey of the donation land claim, the meander line of said claim is located about 40 feet easterly of and practically parallel with Front street. (6) That plaintiff has succeeded by mesne conveyances to whatever title Watson and the Doschers had to lots 18, 19, and 20, and the northerly 55 feet of lot 17 of said "river block," and the southerly 40 of the lot 21 of said "river block No. 2" and, if the lots are entirely below the ordinary high-water line of the river, plaintiff has nevertheless acquired and owns all the rights of the bank or upland property to such lots and parts of lots and the frontage thereof. (7) That all such title and right as the owner of the land adjacent to

the line of ordinary high water in the Willamette river might have under the law is vested in the plaintiff so far as concerns the premises in front of lots 26, 27, and 28 of terminal block in Watson's addition.

The evidence shows that there is a large area of similar land in the city, much of it occupied as private property, and all held in private ownership. D. B. Sigler, for about fourteen years county assessor, testified that the land between ordinary high and low water marks has always been assessed; that there is \$25,000,000 or \$30,000,000 invested in such lands and structures thereon. It appears that the plaintiff paid \$137,000 for the lots five years ago. Since 1909 the assessed valuation has been from \$74,750 to \$91,250. In 1910 the taxes amounted to \$2,007.50. The land in question, in its original state, consisted of a low flat, broken by a spring branch or creek, and for the last twenty-five years has been gradually filling up, so that much of it is now 15 feet higher than it was formerly. The lots immediately to the south, which are in the same class of property as the land in question, are occupied by a horse barn, blacksmith shop, engine house, a bridge company's plant, comprising an investment of several thousand dollars, and other buildings. The city first commenced an action to condemn the right to construct a wharf on the premises, which action was dismissed.

Mr. Fred W. Mulkey, with Messrs. **Frank S. Grant** and **Lyman E. Latourrette**, for appellants:

The state of Oregon, upon its admission into the Union, became owner of the bed and banks of the Willamette river up to the line of ordinary high water, subject only to the paramount right of navigation and the right of Congress to regulate commerce between the states.

8 Enc. U. S. Sup. Ct. Rep. 840, 841; 1 Dill. Mun. Corp. 5th ed. § 264; 1 Lewis, Em. Dom. 3d ed. §§ 94, 95; Hinman v. Warren, 6 Or. 409; Parker v. Taylor, 7 Or. 436; Parker v. Rogers, 8 Or. 184; Shively v. Parker, 9 Or. 500; De Force v. Welch, 10 Or. 507; Wilson v. Shiveley, 11 Or. 215, 4 Pac. 324; Wilson v. Welch, 12 Or. 353, 7 Pac. 341; Andrus v. Knott, 12 Or. 501, 8 Pac. 763; Johnson v. Knott, 13 Or. 308, 10 Pac. 418; McCann v. Oregon R. & Nav. Co. 13 Or. 455, 11 Pac. 236; Parker v. West Coast Packing Co. 17 Or. 510, 5 L.R.A. 61, 21 Pac. 822; Bowlby v. Shively, 22 Or. 410, 30 Pac. 154, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 543; Lewis v. Portland, 25 Or. 133, 22 L.R.A. 736, 35 Pac. 256; Montgomery v. Shaver, 40 Or. 244, 66 Pac. 923; Johnson v. Tomlinson, 46 L.R.A. (N.S.)

41 Or. 198, 68 Pac. 406; Muckle v. Good, 45 Or. 230, 77 Pac. 743; State v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, 98 Pac. 160; Switzler v. Earnheart, 59 Or. 344, 117 Pac. 297; Sun Dial Ranch v. May Land Co. 61 Or. 205, 119 Pac. 758; Micelli v. Andrus, 61 Or. 78, 120 Pac. 737; Frost v. Washington County R. Co. 96 Me. 76, 59 L.R.A. 68, 51 Atl. 806; Scott v. Lattig, 227 U. S. 229, 57 L. ed. 490, 33 Sup. Ct. Rep. 242.

Artificial filling did not operate to transfer the title of the state either to plaintiff or to the adjacent upland owner, it appearing that the property in its natural state was wholly below the ordinary high-water line.

Lewis, Em. Dom. 3d ed. § 86, p. 105; Diedrich v. Northwestern Union R. Co. 42 Wis. 248, 24 Am. Rep. 399; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Sweeney v. Shakespeare, 42 La. Ann. 614, 21 Am. St. Rep. 400, 7 So. 729; People ex rel. Blakslee v. Land Office Comrs. 135 N. Y. 447, 32 N. E. 139; Com. ex rel. Hensel v. Young Men's Christian Asso. 169 Pa. 24, 32 Atl. 121; 1 Farnham, Waters, 1st ed. § 75a, p. 339; Saunders v. New York C. & H. R. R. Co. 144 N. Y. 75, 26 L.R.A. 383, 43 Am. St. Rep. 737, 33 N. E. 995; Park Comrs. v. Taylor, 138 Iowa, 453, 108 N. W. 927; Sage v. New York, 154 N. Y. 61, 38 L.R.A. 614, 61 Am. St. Rep. 592, 47 N. E. 1096; People v. Delaware & H. Co. 75 Misc. 322, 135 N. Y. Supp. 339; De Lancey v. Hawkins, 23 App. Div. 8, 49 N. Y. Supp. 469, affirmed in 103 N. Y. 587, 57 N. E. 1108.

The *locus in quo* is river shore,—not “tide or overflowed lands,” within the meaning of the statute making grants to riparian owners. The state, therefore, was not divested of its title by this legislation.

Andrus v. Knott, 12 Or. 501, 8 Pac. 763; Johnson v. Knott, 13 Or. 312, 10 Pac. 418; Oregon v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, 98 Pac. 160; Van Dusen Invest. Co. v. Western Fishing Co. 63 Or. 7, 124 Pac. 681, 126 Pac. 604.

The title of the act is not sufficient to support the grant.

State v. Shaw, 22 Or. 287, 29 Pac. 1028; Hearn v. Louttit, 42 Or. 572, 72 Pac. 132; Eaton v. Walker, 76 Mich. 579, 6 L.R.A. 102, 43 N. W. 638; State ex rel. Graham v. Tibbets, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 998; State ex rel. Norcross v. Washoe County, 22 Nev. 399, 41 Pac. 145; People v. Gadway, 61 Mich. 285, 1 Am. St. Rep. 578, 28 N. W. 101; Hyman v. State, 87 Tenn. 109, 1 L.R.A. 497, 9 S. W. 372; Case v. Loftus, 43 Fed. 839; State v. Fulks, 207 Mo. 26, 15 L.R.A. (N.S.) 430, 105 S. W. 733,

13 Ann. Cas. 732; Monographic Note to *Bobel v. People*, 64 Am. St. Rep. 76.

Where an existing act is amended, nothing can be incorporated in the amendatory act which is not embraced in the title of the original act.

Ex parte Howe, 26 Or. 181, 37 Pac. 536; *Yellow River Improv. Co. v. Arnold*, 46 Wis. 214, 49 N. W. 971; *Hatfield v. Com.* 120 Pa. 395, 14 Atl. 151; Monographic Note to *Bobel v. People*, 64 Am. St. Rep. 78.

The state's ownership of the bed and shores of navigable rivers is not subject to an easement of access to and from the river, in favor of the adjacent upland.

Bowlby v. Shively, 22 Or. 410, 30 Pac. 154, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539; *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 269; *Lownsdale v. Grays Harbor Boom Co.* 54 Wash. 542, 103 Pac. 833; *Bilger v. State*, 63 Wash. 457, 116 Pac. 22; *Galveston v. Menard*, 23 Tex. 349.

The wharf act created only a permit or license to the upland owner to wharf out, but plaintiff, not having accepted such permit or license, and having constructed no wharf, has acquired no vested right for which compensation need be made.

Bowlby v. Shively, 22 Or. 410, 30 Pac. 154; *Lewis v. Portland*, 25 Or. 160, 42 Am. St. Rep. 772, 22 L.R.A. 736, 35 Pac. 256; *Montgomery v. Shaver*, 40 Or. 244, 66 Pac. 923; *Stockton v. American Lucol Co.* — N. J. Eq. —, 36 Atl. 572.

The act authorizing the city to construct public docks, by necessary implication, authorizes the city to use so much of the state's property as may be reasonably necessary therefor.

Williams v. New York, 105 N. Y. 419, 11 N. E. 829; *Langdon v. New York*, 93 N. Y. 129; *Re New York*, 113 App. Div. 84, 98 N. Y. Supp. 1063; *Jeffery v. Smith*, 63 Or. 514, 128 Pac. 822; 30 Am. & Eng. Enc. Law, 2d ed. 480.

Even if the plaintiff were considered as having a vested riparian right, or wharf right, such right is subject to the implied reservation on the part of the state and its agencies to use the *locus in quo* for the purpose of constructing public docks, wharves, and other improvements in aid of navigation and commerce.

Sage v. New York, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89; *Furman v. New York*, 5 Sandf. 16, 10 N. Y. 567; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Seranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 46 L.R.A.(N.S.)

48; *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 198 N. Y. 287, 34 L.R.A.(N.S.) 1084, 91 N. E. 846, 19 Ann. Cas. 694; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 387; *Young v. Morgan City*, 129 La. 339, 56 So. 303; *Lane v. New Haven Harbor*, 70 Conn. 685, 40 Atl. 1058; *Mann v. Des Moines Water Co.* 202 Fed. 862; *Wilson v. Oregon Washington R. & Nav. Co.* 71 Wash. 102, 127 Pac. 847; *Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156; *Ingraham v. Chicago, D. & M. R. Co.* 34 Iowa, 249; *Slingerland v. International Contracting Co.* 169 N. Y. 60, 56 L.R.A. 494, 61 N. E. 995; *Stover v. Jack*, 60 Pa. 339, 100 Am. Dec. 566; *Homochitto River v. Withers*, 29 Miss. 21, 64 Am. Dec. 126; *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Chappell v. Waterworth*, 39 Fed. 77; *Hill v. United States*, 39 Fed. 172; *Pacific Gas Improv. Co. v. Ellert*, 64 Fed. 421; *Symmes v. Prairie Pebble Phosphate Co.* 64 Fla. 480, 60 So. 223; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Decker v. Pacific Coast S. S. Co.* 91 C. C. A. 102, 164 Fed. 974; *Home for Aged Women v. Com.* 202 Mass. 422, 24 L.R.A.(N.S.) 79, 89 N. E. 124; 21 Am. & Eng. Enc. Law, 2d ed. 435; 1 Dill. Mun. Corp. 5th ed. § 265.

Messrs. A. M. Crawford, Attorney General, F. W. Mulkey, and William O. Benbow, for appellant intervenor:

In the state of Oregon, the upland owner has no right, title, or interest in the land under water beyond ordinary high-water mark.

Hinman v. Warren, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435; *Parker v. Rogers*, 8 Or. 183; *Shively v. Parker*, 9 Or. 500; *McCann v. Oregon R. & Nav. Co.* 13 Or. 455, 11 Pac. 236; *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154; *Hume v. Rogue River Packing Co.* 51 Or. 237, 31 L.R.A.(N.S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; *State v. Portland General Electric Co.* 52 Or. 502, 95 Pac. 722, 98 Pac. 160.

If the upland owner has any riparian rights beyond ordinary high-water mark in the public navigable waters of the state of Oregon, such rights are subject at all times to the power of the state to improve navigation by the construction of public docks.

Lewis v. Portland, 25 Or. 133, 22 L.R.A. 736, 42 Am. St. Rep. 772, 35 Pac. 256; *Taylor Sands Fishing Co. v. State Land Board*, 56 Or. 157, 108 Pac. 126; *Case v. Toftus*, 5 L.R.A. 684, 14 Sawy. 213, 39 Fed.

730; Miller v. Mendenhall, 8 L.R.A. 92, note; Bowlby v. Shively, 22 Or. 410, 30 Pac. 154, 152 U. S. 1, 52, 38 L. ed. 331, 350, 14 Sup. Ct. Rep. 548; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340; Lenoir County v. Crabtree, 158 N. C. 357, 39 L.R.A.(N.S.) 1213, 74 S. E. 105; Wilson v. Welch, 12 Or. 353, 7 Pac. 341; Eisenbach v. Hatfield, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539; Sage v. New York, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; Scranton v. Wheeler, 179 U. S. 141, 189, 45 L. ed. 126-147, 21 Sup. Ct. Rep. 48; McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Home for Aged Women v. Com. 202 Mass. 422, 24 L.R.A.(N.S.) 79, 89 N. E. 124; Hume v. Rogue River Packing Co. 51 Or. 237, 31 L.R.A.(N.S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 372, 42 L. ed. 497, 506, 18 Sup. Ct. Rep. 157; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 355, 53 L. ed. 1024, 1028, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

The state has no power to grant away into private ownership its rights to construct public docks upon the land beyond ordinary high-water mark in the navigable waters of the state.

State ex rel. Ellis v. Gerbing, 56 Fla. 603, 22 L.R.A.(N.S.) 337, 47 So. 353; Slingerland v. International Contracting Co. 169 N. Y. 60, 56 L.R.A. 494, 61 N. E. 995; Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 460, 36 L. ed. 1018-1045, 13 Sup. Ct. Rep. 110; Broward v. Mabry, 58 Fla. 398, 50 So. 829; Louisiana Nav. Co. v. Oyster Commission, 125 La. 740, 51 So. 706; Oelsner v. Nassau Light & P. Co. 134 App. Div. 281, 118 N. Y. Supp. 960.

Messrs. Fulton & Bowman, for respondent:

It being conceded that respondent owns and is vested with all the rights of the upland or bank owner in and to the *locus in quo*, and that the same extends below the line of ordinary high water, it is immaterial whether or not any thereof is above that line, for the wharfing right may be severed from the main land granted to another, and by the grantee exercised and enjoyed separately from the upland.

Parker v. West Coast Packing Co. 17 Or. 515, 5 L.R.A. 61, 21 Pac. 822; Montgomery v. Shaver, 40 Or. 250, 66 Pac. 923; McCann v. Oregon R. & Nav. Co. 13 Or. 462, 11 Pac. 236; Welch v. Oregon R. & Nav. Co. 34 Or. 452, 56 Pac. 417.

The practical construction given to a statute by the public officers of the state, and acted upon by the people thereof, is to be 46 L.R.A.(N.S.)

considered, and is generally decisive in cases of doubt.

Clark's Run & S. River Turnp. Road Co. v. Com. 96 Ky. 532, 29 S. W. 361; Sedgw. Stat. & Const. Law, p. 227, note; United States v. Pugh, 99 U. S. 269, 25 L. ed. 323; Collins v. Henderson, 11 Bush, 74; United States v. Missouri, K. & T. R. Co. 37 Fed. 68; Johnson v. Dexter, 37 Vt. 641; Whipple v. Parker, 29 Mich. 379; Malonny v. Mahar, 1 Mich. 26; M'Keen v. Delancy, 5 Cranch, 22, 3 L. ed. 25.

Even though a statute would otherwise be adjudged invalid, if it has been long acquiesced in, has been assumed to be valid by the courts and public officials, and so dealt with, and, relying on its validity, private citizens have invested large sums of money, —the courts, guided by that sense of justice which, after all, should ever exert the most potent influence in shaping judicial decisions, will decline to inquire in the constitutionality of the act.

United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120; Continental Improv. Co. v. Phelps, 47 Mich. 51 Or. 237, 31 L.R.A.(N.S.) 496, 83 Pac. 299, 11 N. W. 167; Scanlan v. Childs, 33 Wis. 663; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Johnson v. Joilet & C. R. Co. 23 Ill. 202; Runyan v. Winstock, 55 Or. 208, 104 Pac. 417, 105 Pac. 895; Rogers v. Goodwin, 2 Mass. 475; Paulson v. Portland, 16 Or. 456, 1 L.R.A. 673, 19 Pac. 450.

Messrs. Carey & Kerr, *amici curiae*:

The act applies to submerged or overflowed lands along the Willamette.

Lewis v. Portland, 25 Or. 133, 22 L.R.A. 736, 42 Am. St. Rep. 772, 35 Pac. 256; Coquille Mill & Mercantile Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132.

The titles are broad enough to include the provisions in question.

The George W. Elder, 159 Fed. 1005, Leake v. Colgan, 125 Cal. 413, 58 Pac. 69; Ft. Street Union Depot Co. v. Railroad Commrs. 118 Mich. 340, 76 N. W. 631; People ex rel. Gere v. Whitlock, 92 N. Y. 191; State v. Shaw, 22 Or. 287, 29 Pac. 1028; Simpson v. Bailey, 3 Or. 516; McWhirter v. Brainard, 5 Or. 429; David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174; State v. Linn County, 25 Or. 503, 36 Pac. 297; Clemmensen v. Peterson, 35 Or. 47, 56 Pac. 1015; Pioneer Irrig. Dist. v. Bradley, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295.

Repeals by implication are not favored.

United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701; Palmer v. State, 2 Or. 66; State v. Benjamin, 2 Or. 125; Booth's Will, 40 Or.

154, 61 Pac. 1135, 66 Pac. 710; Lewis's Sutherland, Stat. Constr. 2d ed. § 267.

A repeal of a statute does not affect vested rights under it.

Society for Propagation of Gospel v. New Haven, 8 Wheat. 494, 5 L. ed. 669.

The right to construct wharves had vested in the owners of land on streams, rights which cannot be destroyed even by direct legislation.

Cooley, Const. Law, 2d ed. 332; Pearsall v. Great Northern R. Co. 161 U. S. 648, 675, 40 L. ed. 838, 848, 16 Sup. Ct. Rep. 705; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Parker v. West Coast Packing Co. 17 Or. 510, 5 L.R.A. 61, 21 Pac. 822; Montgomery v. Shaver, 40 Or. 244, 66 Pac. 923; Parker v. Taylor, 7 Or. 435; McCann v. Oregon R. & Nav. Co. 13 Or. 463, 11 Pac. 236; Welch v. Oregon R. & Nav. Co. 34 Or. 447, 56 Pac. 417; Hackett v. Multnomah R. Co. 12 Or. 124, 53 Am. Rep. 327, 6 Pac. 659.

Messrs. Malarkey, Seabrook, & Dubble and Martin L. Pipes also *amici curiæ*.

Bean, J., delivered the opinion of the court:

The claims of the respective parties may be summarized as follows:

Plaintiff claims:

(1) Title in fee by patent from the government and subsequent conveyances as to the westerly 100 feet, which plaintiff claims has always been above the ordinary high-water line, or is now above such line by reason of accretion.

(2) Title in fee from the state of Oregon, granted by acts of the legislature of 1874 and 1876, known as the tideland acts, and subsequent conveyance to a strip about 100 feet wide east of and adjacent to the above, being between the ordinary high-water line and low-water line as claimed by plaintiff.

(3) Riparian or littoral rights and a wharf right to the portion between low water and the harbor line.

Defendants, in answer to the first claim, maintained that the *locus in quo* belongs to the state of Oregon, because it is entirely below the ordinary high-water line, which is westerly of North Front street, although the apparent line is now near the easterly line of such street. Plaintiff's second claim is based on the tideland act as amended in 1874 and 1876, whereby the state purports to grant to the adjacent upland owners "any tide or overflowed lands upon said Willamette river." In answer to this claim defendants maintain: (1) That the *locus in quo* is river shore, and not "tide or overflowed lands," within the meaning of this act, and (2) that, in any event, this portion of the act is void because not embraced in its title. In answer to plaintiff's third

claim, defendants maintain: (1) That the state's ownership of the bed and shores of a navigable river is absolute, admitting of no easement on the part of the adjacent upland owner; (2) that the wharf act creates only a permit or license to the upland owner to wharf out, but plaintiff, not having constructed a wharf, has acquired no vested right, and his license or permit has been revoked by the act of the city in selecting the *locus in quo* and proceeding to construct a public dock under legislative authority; and (3) that, in any event, littoral or wharf rights are subject to right of the state and its agencies to construct docks and other improvements in aid of navigation and commerce.

It is only fair to say that the learned counsel on both sides, as well as those appearing *amici curiæ* in their several briefs, have shed much light upon the question involved, and have stated their positions with clearness. As a basis for proper understanding, it may be well to observe that, by the common law of England, the title and dominion of the sea and of rivers and arms of the sea where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the Crown of England, are in the King. These waters and the land which they cover are not capable of ordinary occupation, cultivation, and improvement, and their primary uses are public in their nature, for highways of navigation and commerce and for fishing purposes by all the King's subjects. Therefore the title *jus privatum* in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion *jus publicum* is vested in him as the representative of the nation and for the public good. The English possessions in America were held by the King, and the exclusive power to grant them was vested in him in like manner. The English monarchs granted charters for large tracts of land on the Atlantic coast, giving the grantees both the territory described and the powers of government, including the property and dominion of lands under tide waters. With the surrender of the British, all the rights of the Crown and of Parliament became vested in the several states, subject to the rights relinquished to the national government by the Constitution of the United States. In this manner the government of the colonies and the original states became vested with the title to lands under navigable waters. The states admitted to the Union since the adoption of the Constitution have the same rights as the original states had in the tide waters and lands below the high-water mark within their respective jurisdictions. In this country the

same principle applies to the Great Lakes, and in some states it has been extended to navigable rivers. In the early government of the colonies, and later of the states, in order to induce persons to erect wharves for the benefit of navigation and commerce, the owners of land bounding on tide waters were allowed greater rights and privileges in the shore below high-water mark than in England. The nature and degree of the rights and privileges differed in the various states; in some they were regulated by statute and in others by usage only. Each state, according to its own views of policy and justice, has dealt with the lands under the water as it has deemed best for the public interests, reserving its own control over such lands, or granting within its limits rights therein to individuals or corporations, whether owners of the adjoining upland or not. Therefore the title and rights of riparian owners in the soil below high-water mark are governed by the local laws of the several states, subject to the rights granted by the Federal Constitution of the United States for regulating and improving navigation. The holdings have not been uniform in regard to the right of a riparian owner to establish a wharf on his own land extending over the shore between high and low water marks and lands under the water for the purpose of reaching a navigable point. In some states it is held, sometimes because of long usage, sometimes by statute, and sometimes upon the interpretation of the common law adopted by the courts, that, for the purpose of making available the right of a riparian owner to access to navigable waters, he may make a landing, dock, wharf, or pier for his own use or that of the public, for the purpose of reaching the ordinary point of navigation, subject to whatever rules the legislature may enact for the protection of the public, and also subject to the right of the United States to exercise its powers for regulating and improving navigation. The right of a riparian owner to construct a wharf or landing is founded largely upon equitable considerations. Where a wharf has been constructed by a riparian owner, in opposition to no statute, and without the interference of the state, and without detriment to superior public rights, and large and valuable interests have been created, the owner has generally been held to have been justified in constructing such wharf. 1 Dill. Mun. Corp. 5th ed. § 264.

The paramount right of navigation, which is vested in the state, and also in the general government of the United States by virtue of the authority conferred upon it to regulate commerce between the states and with foreign nations, is receiving constant

elucidation by the courts, but no fixed rule can yet be laid down defining the extent to which the Federal government or the state may interfere with the property of riparian and other owners without becoming liable for compensation. Id. § 265.

Let us then consider what policy has been adopted by the state of Oregon, and what has been done in confirmation thereof. In 1862 the legislative assembly, evidently deeming it for the best interests of the state to encourage private parties to construct docks, wharves, etc., for the convenience of and in aid of navigation, without the state, either directly or through its municipalities, engaging in such enterprises, passed what is known as the wharf act (§§ 5201, 5202, L. O. L.). The 1st section provides that "the owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporate town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other live water." The other section confers upon the corporate authorities of the town wherein such wharf is proposed to be constructed the power to regulate the exercise of the privilege or franchise granted, and to prescribe the mode and extent to which the same may be exercised beyond the line of low water, so that the same will not unnecessarily interfere with navigation. The premises in controversy were included within the limits of the city of Portland in 1883. The grant of the privilege mentioned in § 5201, L. O. L. is a continuing grant, and speaks in the present tense as long as the statute continues in force; therefore the act, if it has not been revoked, applies to the land in question.

When a statute is expressed in general terms and in words of the present tense, it will, as a general rule, be construed to apply not only to things and conditions existing at the time of its passage, but will also be given a prospective interpretation by which it will apply to such as come into existence thereafter. 36 Cyc. 1235.

In 1872 the legislature passed an act entitled "An Act to Provide for the Sale of Tide and Overflowed Lands on the Seashore and Coast." Laws 1872, p. 129. This act gave the owners of land fronting upon such tideland the preference right to purchase the tideland belonging to the state in front of the land so owned. By an act approved October 26, 1874 (Laws 1874, p. 76), the following amendment was incorporated into

the tideland act, without changing the title, namely: "That the Willamette river shall not be deemed a river in which the tide ebbs and flows within the meaning of this act, or of the act to which this act is amendatory; and the title of this state to any tide or overflowed lands upon said Willamette river is hereby granted and confirmed to the owners of the adjacent lands, or when any such tide or overflowed lands have been sold, then in that case, to the purchaser or purchasers of such tide or overflowed lands from such owner of such adjacent lands, or some previous owner thereof, as the case may be." This act was further amended in 1876 (see *Laws 1876*, p. 69) so as to include in its provisions the Coquille, Coos, and Umpqua rivers.

The validity of the acts is attacked on the ground that the subject-matter of a grant of land on the Willamette river is not included in the title of the act of 1872, of which the acts in question are amendments. *L. 1872*, p. 129. Therefore the amendments are repugnant to the requirements of art. 4, § 20, of the Constitution of Oregon, providing that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." It is contended on behalf of plaintiff that the title of this act is broad enough to embrace tide and overflowed lands along rivers emptying into the ocean, and that this is established by decisions defining the meaning of the terms used. That "the shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads, and gulfs, and the rivers, although they may not be navigable, . . . their beds, mouths, and the salt marshes." *United Land Assn. v. Knight*, 85 Cal. 448, 482, 23 Pac. 267, 24 Pac. 818. That the word "sea" has been held to mean "not only high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows." *Waring v. Clarke*, 5 How. 441, 462, 12 L. ed. 226, 236. That "tide waters" are waters, "whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt." *Com. v. Vincent*, 108 Mass. 441, 447; *Atty. Gen. v. Woods*, 108 Mass. 436, 439, 11 Am. Rep. 380. That the word "'coast' is defined to be the seaboard of a country." *Ravesies v. United States (D. C.)* 35 Fed. 917, 919. That that portion of the country which drains into the Pacific ocean is frequently spoken of as the "Pacific coast."

It is well settled that every presumption will be indulged in to hold a statute valid, and it is only where an act is purely repugnant to the Constitution that the courts will hold it void. This is especially true 46 L.R.A.(N.S.)

where the act in question has been enacted for many years, and acted upon by the officers of the state and by the people as valid, so that it has become a rule of property. Millions of dollars have been invested upon the strength of the validity of these laws, and the value of lands have been thereby enhanced; therefore the acts should not be overturned unless it is necessary to do so in order to avoid doing violence to the Constitution. Stability of land titles is an object of moment and worth to the people of the state of Oregon.

The subject-matter of the act of 1872, and the amendments of 1874 and 1876, is the disposal of the state's land on the seashore and coast, and any matter germane to or connected with that subject may be embodied in the act. The title does not use the word "disposal," but uses the word "sale." In discussing the question of title to a legislative act, Mr. Justice Bean, in *State v. Shaw*, 22 Or. 287, at page 289, 29 Pac. 1028, said: "The departure (from the title) must be plain and manifest, and all doubts will be resolved in favor of the law. . . . If all the provisions of the law relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional."

The word "sale" used in the act of 1872 does not definitely refer to the matter of granting or confirming title to tide and overflowed lands upon the Willamette and other rivers, and disposing of the same without a money consideration. See vol. 7 *Words & Phrases*, p. 6291. We cannot say, however, that the matter is foreign to the subject expressed in the title.

Be that as it may, and passing to the amendatory act of 1876, the title of this act was the whole of the act of 1874, including the amendments granting and confirming tide and overflowed lands on the Willamette and other rivers, which was referred to in the title of the act of 1876. There could certainly be no mistake in regard to this act. Many authorities support the rule that the title of an amendatory act is sufficient and will uphold any legislation that would have been permissible under the original title, when the law amended or enacted after the amendatory act refers by chapter or by section to the act amended, giving its title. This practice, however, has been criticized. *Fort Street Union Depot Co. v. Railroad Comrs.* 118 Mich. 340, 76 N. W. 631. After the enactment of the amendment of 1874, had there been a "joker" in the act, the members of the legislature and the people of the state would have had two years in which to consider the same and retrace their steps in 1876. In-

stead of so doing, the lawmakers re-enacted the measure. From this, in connection with the fact that the courts and people in general have sanctioned the grant as expressed by the legislature for more than twenty-five years, and have acted thereon, and that the state, county, and city have treated the land as plaintiff's or its grantors, we conclude that the statute is a valid one, and that the grant and confirmation are complete.

In *Lewis v. Portland*, 25 Or. 123, 22 L.R.A. 736, 42 Am. St. Rep. 772, 35 Pac. 256, this court practically settled the question as to the statutes applying to lands between high and low water marks on the Willamette river. At page 162 of 25 Or. of the opinion, Justice Lord said: "This grant conveyed the title to all such lands along these rivers, whether tide or overflowed, to the riparian owners, subject to the public trust. As the Willamette is a fresh-water river, and only slightly affected by the tides a short distance from its mouth, there is no tideland at Portland, as held in *Andrus v. Knott*, 12 Or. 501, 8 Pac. 763, and therefore it results that if the submerged or overflowed lands described in the act include such as are not affected by the tides, and lie between the upland and navigable water, they belong to such owners, subject to the paramount right of navigation and commerce." See *Coquille Mill & Mercantile Co. v. Johnson*, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132.

The charter of the city of Portland, § 216, provides that all the wharves, water front, and harbor within the city of Portland shall be under the management and control of the executive board, subject to ordinance. And subdiv. 78 of § 73 provides that the council shall have power and authority to provide for the construction and maintenance of wharves, docks, and levees, and all such other work as may be required for the accommodation of commerce. The people of Portland, by the popular vote in 1910, adopted an amendment to § 118 of the charter, whereby the department of public docks was created, with authority *inter alia* to exercise the powers above granted to the executive board and council. On August 29, 1912, this commission made a selection of a site for a public dock embracing the *locus in quo*, and it is contended on behalf of the city that the authorization of the municipality to construct public docks necessarily authorized it to use such portion of the state's property as might be reasonably necessary therefor. To this contention we are unwilling to accede. It is not contended that the charter of 1903 in terms repealed the wharf act of 1862.

The rule that repeals by implication are not favored, and will not be held to exist 46 L.R.A. (N.S.)

if there is any other reasonable construction, is well settled. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new and the old that they cannot stand together or be harmonized. *Sutherland, Stat. Constr.* 2d. ed. 267; *Palmer v. State*, 2 Or. 66; *State v. Benjamin*, 2 Or. 125; *Booth's Will*, 40 Or. 154, 156, 61 Pac. 1135, 66 Pac. 710; *United States v. Greathouse*, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701.

The authority of the city to provide for public landing places, and to construct docks and wharves, only authorizes such action where the rights of others will not be interfered with thereby. The existence of such rights in private individuals is recognized by the statutory authorization to acquire them by condemnation or otherwise. From the whole tenor of the different statutes, it does not appear that the later act was intended to revoke the provisions of the old acts of 1862, 1874, and 1876. A charter of the city which authorized it to lay out, open, and improve streets would not be held to authorize the city to open such street through a block, the title to which was vested in the state of Oregon. The city can construct docks and wharves on any property which it has previously acquired; therefore the provisions of the charter can be given effect without interfering with the rights conferred by the act granting and confirming title in the tide and overflowed lands to the riparian owners on the banks of the Willamette.

One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed by the latter. Undoubtedly, the two statutes under consideration relate to different subjects. See *United States v. Claflin*, 97 U. S. 552, 24 L. ed. 1085; *United States v. Gillis*, 95 U. S. 407, 416, 24 L. ed. 503, 505.

The case of *San Pedro v. Southern P. R. Co.* 101 Cal. 333, 35 Pac. 993, is a case in point. The state of California had granted the city the right to construct and maintain wharves, piers, etc., on any land bordering on any navigable bay within the corporate limits. The city claimed, as the defendants do in the case at bar, that the state had granted to it the right to construct and maintain wharves. It was held that the power and authority conferred did not convey to the city the state's land, or clothe the city with the absolute right to construct a wharf at any point on its water front which it might select, irrespective of the rights of others, but granted the city

the power to erect docks the same as a natural person.

In regard to the high-water mark the circuit court found as follows: "That the line of ordinary high water in the left bank of the Willamette river at the present time, and at the time of the commencement of this suit, was and is located over and across the said river block in Watson's addition and the said river block No. 2 in Doscher's addition, and easterly of the easterly line of said Front street, which said Front street was continued on its course through said Doscher's addition at the time of the platting thereof."

The line of ordinary high water is the line to which the water rises in the seasons of ordinary high water, or the line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character. *Johnson v. Knott*, 13 Or. 308, 10 Pac. 418; *Sun Dial Ranch v. May Land Co.* 61 Or. 205, 119 Pac. 758. This line should be ascertained by an examination of the bed and banks of the river, and by taking into consideration all the circumstances and all the natural objects connected therewith, and by ascertaining where the presence and action of water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks. The learned judge who tried the case appears to have been acquainted with the *locus in quo* to a certain extent, and, as we understand, examined the same. This would lend great weight to the findings. While we do not deem the question vitally material, from an examination of the evidence upon this point, we think that this finding was correct, and manifestly should not be disturbed.

It is claimed by defendants that, even if plaintiff were considered as having a vested riparian right or wharf right, such right is subject to the implied reservation on the part of the state and its agencies to use the *locus in quo* for the purpose of constructing public docks, wharves, and other improvements in aid of navigation and commerce.

To further notice the trend of the decisions in the different states, we note the following in the case of *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 22 L.R.A. (N.S.) 337, at page 343, 47 So. 353: The rights of the people of the state in the navigable waters and the lands thereunder, including the shores or space between ordinary high and low water marks in the state, are designed for the public welfare, and the state may regulate such rights and the uses of the waters and the lands thereunder for the

benefit of the whole people of the state as circumstances may demand, subject to the right of navigation, the control of which was surrendered to the Federal government by the Constitution. The shores of a navigable river are the spaces between high and low water marks, and the bed of a river includes the shores. Tideland is that daily covered and uncovered by water by the ordinary flux and reflux of normal tides (citing 1 *Farnham, Waters*, 227; *Baer v. Moran Bros. Co.* 153 U. S. 287, 38 L. ed. 718, 14 Sup. Ct. Rep. 823; *Baird v. Campbell*, 67 App. Div. 104, 73 N. Y. Supp. 617). In the above case it was also held that, for the purpose of aiding navigation or commerce, or of encouraging new industries and the development of natural or artificial resources, the state may grant reasonable and limited rights and privileges to individuals, to erect docks, wharves, and slips over shallow waters to reach navigable portions thereof, or to fill in shallow waters adjacent to navigable waters and erect structures thereon, for the purposes of commerce incidental to navigation on the waters; or the state may grant reasonable and limited privileges for planting and propagating oysters or shellfish on land covered by waters of navigable streams; but such privileges should not unreasonably impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law (citing *State v. Black River Phosphate Co.* 32 Fla. 82, 21 L.R.A. 189, 13 So. 640. It was further held in the case of *State ex rel. Ellis v. Gerbing*, supra, which is cited and relied on by the state in the case at bar, that the title to lands under navigable waters, including the shores or space between ordinary high and low water marks, is held by the state, by virtue of its sovereignty, in trust for the people of the state for navigation and other useful purposes afforded by the waters over such lands, and the trustees of the internal improvement fund of the state are not authorized to convey the title to the lands of this character.

In the case of *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, it was held that the trust with which these lands are held by the state is governmental, and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may, by appropriate means, grant to individuals the title to limited portions of the lands, or give individuals limited privileges therein, but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the land and water. In that case the state of

Illinois had granted to the railroad company a right of way 200 feet wide from Cairo to Chicago over the lands and waters of the state, and by consent of the city the right of way was located along the margin of Lake Michigan, and an embankment raised and so protected from the violence of storms on the lake as to make the way safe as a roadbed. From water front lots owned by it adjacent to this levee, the company built docks, extending out to deep water of the lake. Afterwards the legislature of that state passed a law granting to the company the bed of the lake along a mile and a half of the city water front, and extending a mile out into and including most of the outer harbor. This law was repealed by a subsequent legislature. The Supreme Court of the United States held that the repeal was a valid exercise of legislative power, for the reason that the law repealed undertook to invest the railroad company with rights inimical to navigation and commerce, and assumed to grant lands subject to the navigable waters of the lake. The use and enjoyment of its embankment, which occupied part of the original margin of the lake and the water thereof, and the maintenance of its docks by the company, were protected in that case, subject to the condition that they should not extend into the lake beyond the point of practical navigability.

By an act of the legislature, the state of Florida, in aid of commerce, vests in the United States or citizens thereof, owning lands actually bounded by and extending to the low-water mark on navigable streams, bays, and harbors, title to the submerged lands in front of the abutting lands as far to the edge of the channel, for the purpose of filling up from the shore, bank, or beach, and of erecting structures thereon in aid of commerce, not obstructing the channel, but leaving the full space for the requirements of commerce. Gen. Stat. (Fla.) 1906, §§ 643, 644.

In a note to *State ex rel. Ellis v. Gerbing*, 22 L.R.A. (N.S.) 337, it is said: "There seems little doubt of the correctness of the general proposition that the title to tidelands is in the state, and may pass therefrom by grant. Such, indeed, was the specific conclusion reached in the following cases: *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 563; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. ed. 756; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643,"—and a long list of other cases.

In *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375, it was said that there could be no question but that the state owned the beds of all rivers within its jurisdiction, and that it had an absolute control over such lands as it had over any other property it might

own, with the same power to grant, sell, or lease it, or any portion thereof, to any of its citizens, upon terms or conditions which its legislature might prescribe, to the same extent that it would have the right to dispose of its wild or other lands. This proposition, sometimes laid down in broad and unrestricted terms, must be understood with the qualifications that the right of a state to grant tidelands is subject to those provisions of the national Constitution giving Congress control of the waters upon which foreign and interstate navigation is conducted. *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *United States v. Mission Rock Co.* 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606; *Richardson v. United States (C. C.)* 100 Fed. 714; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 64 L.R.A. 333; 86 Am. St. Rep. 143, 30 So. 645, affirmed in 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170.

In *Weber v. State Harbor Comrs.* 18 Wall. 57, 65, 21 L. ed. 798, 801, it was held that, upon the admission of a state into the Union upon equal footing with original states, absolute property in, and dominion and sovereignty over, all soil under tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of the soil in such manner as she might deem proper, subject only to the paramount right of navigation of the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.

In *Eisenbach v. Hatfield*, 2 Wash. 236, 244, 12 L.R.A. 632, 26 Pac. 539, it was said that there was no doubt whatever but that tidelands belonged to the state in actual propriety, and that the state had full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the Constitution of the state and by the Constitution of the United States. In a few earlier cases the courts attempted to impose a trust in favor of the public upon the state's title to tidelands, thereby, to some extent at least, restricting the right of the state to grant the same.

Thus, in *Ward v. Mulford*, 32 Cal. 365, it was held that, while tidelands belong to the state by virtue of her sovereignty, yet the state held the same for the benefit of the people, and theoretically, at least, could make no disposal of such lands prejudicial to the rights of the public to use them for the purposes of navigation and fishery. This conclusion was quoted with approval in *People ex rel. Harbor Comrs. v. Kerber*, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878.

It has been said that the true limit of this trust doctrine has been best set forth in the New York decisions. In *People v. New York & S. I. Ferry Co.* 68 N. Y. 71, the court said: "The title to lands under tide waters in this country, which before the Revolution was vested in the King, became, upon the separation of the colonies, vested in the states within which they were situated. The people of the state in their right of sovereignty succeeded to the royal title, and through the legislature 'may exercise the same powers which, previous to the Revolution, could have been exercised by the King alone, or by him in conjunction with Parliament, subject only to those restrictions which have been imposed by the Constitution of the state and of the United States.' Chancellor in *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89. The public right in navigable waters was in no way affected or impaired by the change of title. The state, in place of the Crown, holds the title as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide waters, or authorize a use inconsistent with the public right, subject to the paramount control of Congress."

Coming back to our own state in *Hume v. Rogue River Packing Co.* 51 Or. 237, 31 L.R.A. (N.S.) 398, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, it was held that the state, by its admission into the Union by virtue of its sovereignty, became vested with the title to all tidelands, subject, however, to the public right of navigation and the common rights of the citizens of the state to fish therein.

In the early case of *Hinman v. Warren*, 6 Or. 408, 411, tideland on the Columbia river was involved, and was described in a patent from the United States to John McClure and wife. The plaintiff claimed title to it by a chain of conveyances from the McClures, and the defendant by deed from the state. Mr. Justice McArthur said, in substance, that the tidelands which are covered and uncovered by the ebb and flow of the sea belong to the state of Oregon by virtue of its sovereignty, and, adopting the principle common in cases from *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, said: "As the state became the owner of the tidelands, it had the power, under the provisions of the act providing for the sale of such lands, . . . to sell the same. It has, however, no authority to dispose of its tidelands in such a manner as may interfere with the free and untrammelled navigation of its rivers, bays, inlets, and the like. The grantees of the state took the 46 L.R.A. (N.S.)

land subject to every easement growing out of the right of navigation inherent in the public." This was quoted and approved in the leading case of *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154; *Shively v. Bowlby*, 152 U. S. 1, 54, 38 L. ed. 331, 351, 14 Sup. Ct. Rep. 548. Mr. Justice Lord, at page 417 of 22 Or. of the opinion, said: "Some contention is made that the phrase which describes the ownership of the state as being 'by virtue of its sovereignty' indicates that the title held by the state to such lands is as trustee for the public, and not as absolute owner, capable of conveying private rights therein, subject only to the paramount right of navigation. But the use of this phrase in that case was not designed to convey that meaning, when considered with reference to the whole decision. The contention was that the title of the tidelands, before the admission of the state into the Union, was in the United States and subject to its disposal; and, as it had granted away by its patent the tidelands in question before the state was admitted, no rights of the state ever attached to them. The court refused to accede to this view, but, adopting the reasoning of *Pollard v. Hagan*, supra, held that the state, upon its admission into the Union, became the owner of the tidelands, not as a grantee of the United States, but by virtue of its sovereignty; that the state had the right to dispose of such tidelands under the provisions of the statute referred to providing for their sale, and that its grantees took them subject only to the paramount right of navigation existing in favor of the public." In the same case it is declared that the prior adjudged cases in this state regarding the nature of the state's title to lands between high and low water marks are the foundation of the doctrine that the state may sell and convey its tidelands, and that its grantees take them free from any right therein by the upland owner, and subject only to the paramount right of navigation inherent in the public.

Mr. Justice Boise, in *Parker v. Taylor*, 7 Or. 435, at page 446, said: "As has been before stated, the patent from the United States conferred on the patentee no right to the tidelands lying between high and low water. These were the property of the state and absolutely at its disposal. Its deed gives to them the same fee simple title as the patent from the United States gave to the land above high tide. . . . Land situated as this is, covered with shoal water, may, under proper regulations by the state and municipal authorities, be reclaimed from the sea by filling in or by driving piles and building on them, and becomes private property and the subject of sale the same as any other property."

The view that the state is the absolute owner of the tidelands, subject only to the paramount right of navigation, is further illustrated in the case of *Parker v. Rogers*, 8 Or. 183. At page 189 of 8 Or. of the opinion, Mr. Justice Boise, speaking for the court, said: "We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tideland, and it is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it."

In *Corvallis & E. R. Co. v. Benson*, 61 Or. 359, 121 Pac. 418, Mr. Justice Burnett, speaking for the court, after an examination of many authorities, held that the title to the tidelands between high and low water marks acquired by the state consisted of two elements: *Jus privatum*, or private right, and the *jus publicum*, or public right,—the *jus privatum* being a species of private property which the state held the same as a private owner and might grant to anyone, in any manner, or for any purpose not forbidden by the Constitution, the grantee thereby taking the title as absolutely as under a private conveyance; but the *jus publicum*, being the dominion of sovereignty in the state, by which it prevents any use of lands bordering on navigable waters which would materially interfere with navigation and commerce thereon, cannot be abdicated or granted.

Much reliance is placed by the defendants on the opinion in the case of *Sage v. New York*, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, wherein it was held that the absolute power to improve a water front for the benefit of navigation exists in the state or in its municipal grantee as a trustee for the public, free from any interference by riparian owner, whose sole right as against such authority was the statutory right of pre-emption in case of a sale; the riparian owner never having exercised such right of pre-emption, and having no title or interest in the land under water in front of his premises.

In *Lewis v. Portland*, supra, 25 Or. at page 167, in discussing the wharfage act, it was said: "It is doubtless true that, if the statute should be repealed or the adjacent tidelands disposed of, the privilege given the upland owner to build a wharf across the tidelands into deep water, unless acted upon or availed of, would be revoked."

In the case at bar the adjacent overflowed land has been conveyed by the state to the upland owner. However, an upland owner of land bordering on a navigable stream

owns only to the high-water line, and the stream and the river and its banks and bed belong to the state. *State v. Portland General Electric Co.* 52 Or. 502, 95 Pac. 722, 98 Pac. 160.

In *Coquille Mill & Mercantile Co. v. Johnson*, 52 Or. 547, at page 549, 132 Am. St. Rep. 716, 98 Pac. 132, it is held that, as the land abutted upon the Coquille river, which is navigable at the point in question, by virtue of the act of October 21, 1876, of the legislative assembly of this state (Sess. Laws 1876, p. 69), Gilman's title was extended to low-water mark. At page 551 of 52 Or., the following is quoted with approval: "Riparian owners upon navigable fresh rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms, in aid of, and not obstructing, navigation,"—citing 2 Gould, Waters, 2d ed. § 179; *Montgomery v. Shaver*, 40 Or. 244, 66 Pac. 923; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

In regard to tideland, in *Grant v. Oregon R. & Nav. Co.* 49 Or. 324, at page 328, 90 Pac. 179, Mr. Justice Eakin said: "By the legislative acts of 1872 (Laws 1872, pp. 129, 130) and 1874 (Laws 1874, pp. 76, 77), the upland owner was given the preference right to purchase the tideland, and upon such purchase, if not already vested in another under § 4042, *Bellinger & C. Anno. Codes & Statutes*, he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tideland, and the right to fill up the shallows or flats, so long as he does not impede navigation or interfere with commerce over the same,"—citing *Miller v. Mendenhall*, 43 Minn. 95, 8 L.R.A. 89, 19 Am. St. Rep. 219, 44 N. W. 1141.

In *Montgomery v. Shaver*, 40 Or. 244, at page 248, 66 Pac. 923, at page 924, Mr. Justice Wolverton, referring to the wharf act, said: "The statute is, however, declarative of the right or privilege which existed at common law, the exercise of which might be regulated by statute; but so long as it was not prohibited, it existed as a private right derived from the passive or implied license by the public. Gould, Waters, § 176. So that the enactment of § 4227 [*Bellinger & C. Anno. Codes & Statutes*] gave positive authority where it previously existed passively and by implication."

In many states lands totally or partially submerged are made the subject of grant by the sovereign, in order that they may be reclaimed for useful purposes. *Taylor Sands Fishing Co. v. State Land Board*, 56 Or. 157, 161, 108 Pac. 126; *Fowler v. Wood*, 73

Kan. 511, 549, 6 L.R.A. (N.S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763.

A grant by the sovereign of land bounded by a navigable river limits the land conveyed to high-water mark, and gives the grantee no private or exclusive right below that. In such case the grant is exclusively a grant of dry land, and is to be construed without reference to the water just as if it were bounded on all sides by dry land. But when the sovereign state grants land under water, which cannot, in its natural state, be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose. Such a grant may be made to enable the grantee to fill up the land for wharves, docks, or other buildings. If the purpose be not plainly expressed in the grant, then the intent of the parties must be ascertained from the nature and situation of the land granted and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent. *Langdon v. New York*, 93 N. Y. 129, 144.

In the light of the authorities, and upon principle, we conclude that the state of Oregon, upon its admission into the Union, became the owner of the bed and banks of the Willamette river up to the line of ordinary high water, subject only to the paramount right of navigation and the right of Congress to regulate commerce between the states.

By the platting and dedication of Watson's and Doscher's additions by the former owners, thereby laying out the property in blocks and lots constituting definite metes and bounds, as shown on the maps, and by the conveyances of lots with reference to the maps, the wharf rights were severed and disassociated from all the inside lots, and attached to the outermost ones. *Grant v. Oregon R. & Nav. Co.* 49 Or. 330, 90 Pac. 178, 1099.

The act of 1862 (§ 5201, L. O. L.) grants the right of wharfage across the state's land out to the harbor line fixed by state authority, to the riparian owner. This license has never been revoked by the state, but has been reaffirmed by the lawmakers and upheld by the courts. The contemplated use of the land is not inimical to navigation. On the other hand, it is plain to anyone that the industries of commerce and manufacture with which the shore of the Willamette in our metropolis teems, and the storing of the articles and products, as well as the construction of docks and wharves, are an acceleration to navigation. The legislature, considering that the lands adjacent to the Willamette, Couquille, Coos, 46 L.R.A. (N.S.)

and Umpqua rivers were subject to erosion and inundation, deemed it wise and just to recognize rights in the riparian owners on such streams, and grant and confirm to them all the title of the state to any tide and overflowed lands upon said rivers. This, no doubt, among other reasons, in order that the owners of land adjacent to such rivers might be encouraged and protected in building structures thereon, and riprapping and conserving the banks of the rivers for the purpose of saving their lands from loss or destruction.

The acts of 1874 and 1876 were a valid exercise of the legislative will, and granted and confirmed the title of the state to the tide and overflowed land upon said rivers to the upland owners. Plaintiff has succeeded to the title which the state formerly had in the lots described. Its title is subject to the paramount right of navigation existing in the public, and subject to such reasonable regulation as the state through its municipality may prescribe.

To allow this property to be taken for public use without just compensation would work a great injustice, and do violence to the Constitution of Oregon.

The restrictions upon the state conveying land subjacent to the waters of navigable rivers should, we think, generally speaking, apply to lands under navigable waters, or below ordinary low-water mark, or the bed proper of a river as distinguished from its bank or shore as in the *Chicago Water Front Case*.

These considerations lead to an affirmance of the decree of the lower court, and the decree is therefore affirmed.

SOUTH DAKOTA SUPREME COURT.

STATE OF SOUTH DAKOTA, Resp.,
v.
CARL HOLTER, Appt.

(— S. D. —, 142 N. W. 657.)

Seduction — prior chastity — necessity of proof.

1. Under a statute making seduction of woman of previous chaste character punishable, prior chastity must be proved, and cannot be presumed; at least, where such was the judicial interpretation of the statute in the state from which it was adopted.

Appeal — error in instructions — existence of evidence.

2. Error in instructing the jury in a

Note. — For presumption and burden of proof as to chastity where it is an ingredient of the offense or a condition of conviction, see the note to *State v. Kelly*, 43 L.R.A. (N.S.) 476.

prosecution for seduction that prosecutrix is presumed to have been chaste until the contrary is shown is not corrected by the fact that there was evidence sufficient to have supported a finding of chastity by the jury.

Witness — impeaching — contradicting answer on cross-examination.

3. Prosecutrix in a proceeding for seduction, who has testified on cross-examination that during the time when the alleged illicit relations existed she was not receiving attentions from other men, may be impeached by evidence that she was receiving such attentions at the time; at least if such evidence also tends to weaken the corroboration of prosecutrix found in evidence of attentions by accused.

Criminal law — seduction — instruction — corroboration.

4. The court must, in a prosecution for seduction, explain to the jury the particular elements of the offense in regard to which the testimony of prosecutrix must be corroborated, and what facts and circumstances are to be considered as corroborative.

Same — evidence — competence — sufficiency.

5. The use of the word "sufficient," instead of "competent," in an instruction in a prosecution for seduction that the fact that accused and prosecutrix acted "as lovers usually do, and other like circumstances," if shown, are "sufficient to constitute corroborative evidence," is error.

(Smith, J., dissents.)

(June 3, 1913.)

A PPEAL by defendant from a judgment of the Circuit Court for Charles Mix County convicting him of seduction. Reversed.

A decision was reached and an opinion handed down on December 3, 1912, affirming the conviction. The facts were stated by Corson, J., in rendering the opinion as follows:

Upon an information duly filed by the state's attorney of Charles Mix county the defendant was tried and convicted of the crime of seduction under a promise of marriage, and, from the judgment of conviction and order denying a new trial, the defendant has appealed to this court.

It is disclosed by the evidence that the prosecutrix was a young lady twenty-two years of age, and that the defendant was a young man residing in the vicinity of the family of the prosecutrix. It is claimed by the prosecutrix that on the evening of June 18, 1911, she was seduced by the defendant under a promise of marriage. There was evidence tending to prove that the defendant took the prosecutrix out riding occasionally, visited her at the home of her parents prior to the date of the alleged seduction, and that, after the alleged seduction, de- 46 L.R.A. (N.S.)

fendant continued his attentions, and that there were other acts of illicit intercourse between the defendant and the prosecutrix in July and August, and that by reason of her seduction she became *enccinte*.

Subsequently a petition for rehearing was filed and granted, after which a decision was reached, reversing the conviction, which renders the former opinion immaterial.

Messrs. Charles P. Bates, Charles H. Bartelt, and Perrett F. Gault, for appellant:

Evidence tending to prove acts of sexual intercourse, under promise of marriage, between defendant and the prosecuting witness, subsequent to the act charged in the information and testified to by the prosecuting witness, is inadmissible.

People v. Clark, 33 Mich. 112, 1 Am. Crim. Rep. 660; People v. Payne, 131 Mich. 474, 91 N. W. 739; Pope v. State, 137 Ala. 56, 34 So. 840; People v. Brown, 142 Mich. 622, 106 N. W. 149; People v. Williams, 133 Cal. 165, 65 Pac. 323; Cecil v. Territory, 16 Okla. 197, 82 Pac. 654, 8 Ann. Cas. 457; State v. Hilberg, 22 Utah, 27, 61 Pac. 215; State v. Palmberg, 199 Mo. 233, 116 Am. St. Rep. 476, 97 S. W. 566; Smith v. State, — Tex. Crim. Rep. —, 73 S. W. 401; Henard v. State, 46 Tex. Crim. Rep. 90, 79 S. W. 810; State v. Riggs, 25 S. D. 275, 126 N. W. 509.

In a criminal prosecution for seduction, it cannot be presumed that the prosecuting witness was of previous chaste character.

People v. O'Brien, 130 Cal. 1, 62 Pac. 297; People v. Krusick, 93 Cal. 74, 28 Pac. 794; People v. Wallace, 109 Cal. 611, 42 Pac. 159; West v. State, 1 Wis. 209; State v. Wenz, 41 Minn. 196, 42 N. W. 933; State v. Lockerby, 50 Minn. 363, 52 N. W. 958; State v. Preuss, 112 Minn. 108, 127 N. W. 438; Harvey v. Territory, 11 Okla. 156, 65 Pac. 837; Com. v. Whittaker, 131 Mass. 224; Walton v. State, 71 Ark. 398, 75 S. W. 1; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; Zabriskie v. State, 43 N. J. L. 640, 39 Am. Rep. 610; Oliver v. Com. 101 Pa. 215, 47 Am. Rep. 704; 25 Am. & Eng. Enc. Law, 240.

A conviction cannot be had unless the evidence of the prosecuting witness is corroborated both as to the illicit intercourse and the promise of marriage.

Harvey v. Territory, 11 Okla. 156, 65 Pac. 837; Woolley v. State, 50 Tex. Crim. Rep. 214, 96 S. W. 27; McCullar v. State, 36 Tex. Crim. Rep. 213, 61 Am. St. Rep. 847, 36 S. W. 585; State v. Bauerkemper, 95 Iowa, 562, 64 N. W. 609.

It was for the jury, and not the court, to determine as to the sufficiency of the corroborating evidence tending to connect the

defendant with the commission of the offense.

State v. Beas, 109 Iowa, 675, 81 N. W. 152; *State v. Kissock*, 111 Iowa, 690, 83 N. W. 724; *State v. Smith*, 124 Iowa, 334, 100 N. W. 40; *State v. Waterman*, 75 Kan. 253, 88 Pac. 1074; *Tedford v. United States*, 7 Ind. Terr. 254, 104 S. W. 608; *Allen v. State*, 162 Ala. 74, 50 So. 279, 19 Ann. Cas. 867; 25 Am. & Eng. Enc. Law, 2d ed. 247.

Before a defendant can be convicted of seduction, it must be proven beyond a reasonable doubt that the person seduced consented to sexual intercourse with the defendant upon the sole consideration of his promise to marry her.

Nolen v. State, 48 Tex. Crim. Rep. 436, 88 S. W. 242; *People v. Krusick*, 93 Cal. 74, 28 Pac. 794; *People v. Clark*, 33 Mich. 112, 1 Am. Crim. Rep. 660; *People v. De Fore*, 64 Mich. 693, 9 Am. St. Rep. 863, 31 N. W. 585; *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592, 46 N. E. 1040; *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574.

Messrs. Royal C. Johnson, Attorney General, M. Harry O'Brien, Assistant Attorney General, Ambrose B. Beck, French & Orvis, J. E. Tipton, and G. M. Caster, for respondent:

The relation of the parties, complaining witness and defendant, both before and after the alleged seduction, are admissible in corroboration of the testimony of the complaining witness.

Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; *People v. Goodwin*, 132 Cal. 368, 64 Pac. 561; *State v. Robertson*, 121 N. C. 551, 28 S. E. 59; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *State v. Stone*, 74 Kan. 189, 85 Pac. 808; *People v. Hendrickson*, 53 Mich. 525, 19 N. W. 169; *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463; 1 Wigmore, Ev. §§ 216, 398-400.

Complaining witness was competent to testify as to what influence and what conduct on the part of the appellant impelled her to consent to the first act of illicit intercourse.

35 Cyc. 1351, note 24; *Washington v. State*, 124 Ga. 423, 52 S. W. 901; *State v. Bennett*, 137 Iowa, 427, 110 N. W. 150; *People v. Jensen*, 66 Mich. 711, 33 N. W. 811; *Armstrong v. People*, 70 N. Y. 38; 1 Wigmore, Ev. § 581; 5 Wigmore, Ev. Supp. § 1963, note 4.

The previous chastity of the prosecutrix will be presumed until evidence to the contrary appears, and the burden of proving unchastity is upon the defendant if he would avail himself of that defense.

Kerr v. United States, 7 Ind. Terr. 486, 104 S. W. 809; *Crozier v. People*, 1 Park. 46 L.R.A. (N.S.)

Crim. Rep. 457; *Kenyon v. People*, 26 N. Y. 204, 84 Am. Dec. 177; *McTyer v. State*, 91 Ga. 254, 18 S. E. 140; *State v. Drake*, 128 Iowa, 539, 105 N. W. 54; *Barker v. Com.* 90 Va. 820, 20 S. E. 776, 9 Am. Crim. Rep. 614; *State v. Hemm*, 82 Iowa, 609, 48 N. W. 971; *State v. Brown*, 86 Iowa, 121, 53 N. W. 92; *Leedom v. State*, 81 Neb. 585, 116 N. W. 496; *Com. v. Allen*, 135 Pa. 483, 19 Atl. 157; *Smith v. State*, 118 Ala. 117, 24 So. 55; *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573; *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; *State v. Thornton*, 108 Mo. 640, 18 S. W. 841; *State v. Kelley*, 191 Mo. 680, 90 S. W. 834; *People v. Clark*, 33 Mich. 112, 1 Am. Crim. Rep. 660; *People v. Brewer*, 27 Mich. 134; *State v. Wells*, 48 Iowa, 671; *Bishop*, Stat. Crimes, 3d ed. §§ 648, 649.

If the whole charge clearly states the law so that the jury as men of ordinary intelligence can understand what is meant and apply it to the facts, no prejudice is suffered by the defendant.

People v. Akey, 163 Cal. 54, 124 Pac. 718; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Argentos*, 156 Cal. 720, 106 Pac. 65.

Polley, J., delivered the opinion of the court:

This case is before the court on rehearing. The former opinion is reported in — S. D. —, 138 N. W. 953, where a statement of facts will be found. In his petition for a rehearing the appellant contends that a number of his assignments that were argued in his brief were either passed over, and not considered by the court, or were not given the consideration to which they were entitled. These assignments are errors that are alleged to have been committed by the court, both in its instructions to the jury and in refusing to admit certain testimony offered on behalf of the defendant at the trial. On a re-examination of the record the court is of the opinion that the appellant is right in his contention, and we shall give our attention to a review of the alleged errors.

The first matter complained of by the appellant, is an instruction by the court, which is as follows: "With reference to this provision of the law in regard to previous chaste character, the court charges that the law presumes a woman to be of chaste character until the contrary is shown; but, if there is a reasonable doubt, as I will hereinafter define it, of her chastity, under all of the evidence, he would be entitled to the benefit of that doubt." The question presented by this assignment is

one relating to the material rights of the defendant. The question of law laid down by the court by the instruction, to wit, "the law presumes a woman to be of chaste character until the contrary is shown," assumes the existence of one of the material elements of the offense, and dispenses with any proof thereof on the part of the prosecution. But it even goes further than that; for, by using the words, "but if there is a reasonable doubt, as I shall hereinafter define it, of her chastity, under all of the evidence, he would be entitled to the benefit of that doubt," the court, by implication at least, cast upon the defendant the burden of proving the negative of one of the material allegations in the information, or to that extent it required him to prove his innocence; for, if the prosecutrix is to be presumed to be of chaste character until the contrary is shown, then that is an existing fact, and is free from any doubt whatever. The prosecution is not required to furnish any proof of that allegation, and therefore any doubt to be raised thereon must be the result of proof furnished by the defendant. This, of course, would be an invasion of defendant's constitutional rights; and, after a careful consideration of the question, we are of the opinion that the court erred in this instruction to the jury, and that the defendant's rights were prejudiced thereby.

We are not unmindful of the presumption of the chastity of every woman until the contrary is shown, and that it ought to be recognized wherever it can legally be done. In fact this presumption of chastity and virtue of womanhood is the very foundation of our social fabric. Chastity is the rule, and we believe that we might say it is the fact in the case of every woman until her chastity has been lost or debauched by the false promises, cajolery, or other deceitful wiles practised upon her by some member of the opposite sex. But, conceding all this to be true, this presumption of chastity has no place, and cannot be indulged in a prosecution for seduction under our statute. The offense is purely statutory, and as defined by the statute it consists of four concurrent, essential elements, the existence of each of which is necessary to constitute the crime. These elements are: First, under promise of marriage; second, to have illicit connection; third, with an unmarried female; fourth, of previous chaste character. So far as the statute is concerned, these elements are all of equal importance; each is an allegation of an independent fact, and it is necessary that each be alleged in the indictment or information. To warrant a conviction, the jury must be satisfied, and that beyond a reasonable doubt, of the truth of each. Evidence may be at hand to prove, to an ab-

solute certainty, the existence of either three of the elements of the offense, but, without the existence of the other no conviction can be had or sustained. This being the case, how can it be said that proof of either of these allegations can be dispensed with; or, if proof of one could be dispensed with, why not of another, or two for that matter? If a court could hold that a woman is to be presumed to be chaste until the contrary is shown, and thereby dispense with proof of her chastity, why could he not also presume that a chaste female would not submit to illicit intercourse except under promise of marriage, and thereby dispense with the necessity of proving the promise to marry? Or he might hold that a promise to marry, being a mutual agreement, implies that the parties are capable of entering into a valid marriage; and therefore the female would be presumed to be unmarried, and thus dispense with evidence to prove that she is unmarried. Of course any of these propositions would be absurd, but one is not more absurd than the other, for the indulgence of any of these presumptions would overcome the defendant's presumption of innocence until his guilt be shown, and relieve the state of the burden of establishing his guilt by evidence on the trial, as is required by law.

There is a conflict of authority in the decisions of the various states upon the question involved in this instruction, but an examination of the cases and the statutes under which they were rendered will show that the conflict is more apparent than real. While many, if not most, of the states have statutes defining and making seduction a criminal offense, there is considerable difference in the wording of the various statutes, and most of the decisions are based upon the wording of the particular statute under which the prosecution is had. Our statute on this subject was originally adopted from the laws of Wisconsin. The statute of that state was adopted there in 1849, and is as follows: "Any unmarried man who, under promise of marriage, or any married man, who shall seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, and upon conviction shall be punished," etc. Rev. Stat. 1849, chap. 139, § 6.

Very soon thereafter, in *West v. State*, 1 Wis. 209, the question involved in this case came squarely before the supreme court of that state. The indictment alleged, and there was evidence to prove, that the prosecutrix was a female of previous chaste character, but the trial court instructed the jury that the law presumes that the prosecutrix was a chaste female previous to the com-

mission of the offense alleged against the defendant. In considering this instruction, the court said: "The previous chaste character of the female is one of the most essential elements of the offense; made so by the express words of the statute, in conformity with the suggestions of sound reason. A prostitute may be the subject of rape, but not of seduction. It is the chastity of the female which the statute is designed to protect. The pre-existence of that chastity is a *sine qua* [quo] *non* to the commission of the crime. That is the subject of legal guardianship, provided by this section. It is a substantive matter necessary to be averred and proved."

With this interpretation of the statute in full force, the legislature of Dakota territory, by § 6, of chapter 10, of the Laws of Dakota, 1862-63, adopted the Wisconsin law verbatim, and by the well-recognized rule of statutory construction the adoption of this statute by the territorial legislature was an adoption of the construction already put upon it by the supreme court of the state from which it was adopted. So there can be no question about the meaning of that statute, from the time it became a part of the territorial law, nor that the construction put upon it there was adopted as much as the law itself.

Our statute remained in its original form until 1865, when the present statute (§ 336, Rev. Penal Code) was adopted from the laws of the state of New York, where it was enacted in 1848, and later on incorporated into the Penal Code, prepared by the Field Code Commission. While the Field Code was not adopted in New York until 1882, it was adopted in its entirety by the legislature of Dakota territory, by an act approved January 11, 1865, and our present statute appears as § 330 of chapter 17, Session Laws of 1864-65. It is different in one respect from the Wisconsin statute, but the portion of it involved in this case was not changed, and there is nothing to indicate that a new construction should be put upon the unchanged portion.

Our attention has not been called to any case decided by the court of appeals of New York that turned upon the precise question involved in this case. *Kenyon v. People*, 26 N. Y. 204, 84 Am. Dec. 177, cited by the state, does not support the contention of respondent. It appears from an examination of the opinion of the court in that case that the prosecutrix testified to her being of previous chaste character, and Balcom, J., in his concurring opinion said it was proper for the state to show this fact.

The case of *People v. Brewer*, 27 Mich. 134, cited and relied upon by the respondent, is easily distinguished from the case at 46 L.R.A. (N.S.)

bar because of the lack of similarity between the statutes of Wisconsin and the one in force in this state and the Michigan statute. Judge Cooley, who wrote the opinion in the Michigan case, noted this difference in the following very clear language: "The case of *West v. State*, 1 Wis. 217, which seems to hold otherwise, was decided upon the phraseology of the Wisconsin statute, which was thought to make the 'previous chaste character' of the person seduced an ingredient in the offense, to be made out by proofs. Our statute is very simple, and merely provides that 'if any man shall seduce and debauch any unmarried woman he shall be punished,' etc."

The statutes of Oklahoma and California are both similar to ours, and in both of those states the statute has been given the construction contended for by the appellant in this case. *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837; *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159. And other cases to the same effect are: *State v. Meister*, 60 Or. 469, 120 Pac. 406; *Knight v. State*, — Tex. Crim. Rep. —, 144 S. W. 967; *Hay v. State*, — Ind. —, 98 N. E. 712; *State v. Lockerby*, 50 Minn. 363, 36 Am. St. Rep. 656, 52 N. W. 958, 9 Am. Crim. Rep. 617; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Oliver v. Com.* 101 Pa. 215, 47 Am. Rep. 704; *Com. v. Whittaker*, 131 Mass. 224. Numerous decisions on this question will be found cited under § 2104, *Wharton Crim. Law*, 11th ed., and it is unnecessary to cite them all here. The great weight of authority, and certainly the better reason, seems to support the contention of the appellant. We believe the rule announced in *West v. State*, supra, to be grounded in reason and to be the sounder doctrine, and comes nearer to affording a fair trial to the defendant.

The clause "of previous chaste character" does not mean purity of mind, nor purity of heart, but merely purity of body; i. e., that the prosecutrix has never sustained illicit relations with anyone prior to the alleged offense of the defendant. The law makes her a competent witness on that point; and, if she is a woman of previous chaste character, it inflicts no hardship upon her to say so; and if she is not, the offense has not been committed, and the defendant, of course, is not guilty. While, under the rule followed in the Iowa cases it is altogether possible that the prosecutrix may have sustained illicit relations with one, or even two or more men, other than the defendant, and still, by reason of the invariable secrecy observed in the commission of this offense, the defendant might

be wholly unable to prove a lack of chastity on her part.

The general rule is that where a criminal act consists of separate and distinct elements, as this does, the existence of all of the necessary elements must be alleged and proved, and this rule applies to prosecution for seduction. Wharton Crim. Ev. 9th ed. § 329.

It is true that the supreme court of Iowa, under a statute similar to ours, in *State v. Bauerkemper*, 95 Iowa, 562, 64 N. W. 609, approved an instruction to the jury that "chastity was the general rule, and the want of it the exception, and that the law presumes the woman to be chaste until the contrary is shown, and that, in the absence of evidence attacking the character of the prosecuting witness" whether or not "in that respect, the state is not called upon to offer evidence in support of her character for chastity." But the court adds this qualifying remark: "This statement of the law is not questioned, but it is argued," etc. The question involved in the case at bar was not before the court for decision in the *Bauerkemper* Case, and therefore the apparent rule above stated is not binding even upon that court. *State v. McClintic*, 73 Iowa, 663, 35 N. W. 696, is more nearly in point, though in that case the trial court instructed the jury that, "to warrant a conviction, the state must prove each and all of the allegations charged in the indictment beyond a reasonable doubt," but did not charge the jury that any presumption of chastity existed in favor of the prosecutrix. But in *State v. Drake*, 128 Iowa, 539, 105 N. W. 54, the court does announce the rule that "the burden was upon the appellant to overcome the legal presumption of her [meaning prosecutrix] prior chastity."

In this case, it is contended by the prosecution that there was sufficient evidence to warrant the jury in finding the prosecutrix was of previous chaste character, and that therefore the error committed by the court, if error it was, in instructing the jury that the prosecutrix was presumed to be of previous chaste character was without prejudice to the appellant. It is true there was evidence introduced at the trial tending to prove her previous chaste character, and, in connection with the other evidence, sufficient to warrant the jury, if they believed her, in finding her to be of previous chaste character; but that does not answer the question. Under the instruction as given by the court the jury would have been warranted in finding the prosecutrix to be of previous chaste character as a matter of fact, and still not have believed a word of her testimony on that point. In other words, the instruction dispensed with any

evidence whatever on that subject. This we do not believe the court was warranted in doing. As well might the court hold in a prosecution, say for receiving stolen property, "knowing the same to have been stolen," that if the property was shown to have been stolen and thereafter found in the possession of the defendant, he would be presumed to have received it with guilty knowledge, although he may have purchased it for full value, and without any suspicion that it had been stolen. In the one case the gravamen of the offense is the guilty knowledge; in the other it is the debauching of a previously chaste woman. The presumption goes to the very substance of the offense in both cases, and proof of the fact can no more be dispensed with in the one case than in the other.

On the trial the state, for the purpose of corroborating the testimony of the prosecutrix relative to her illicit connection with the defendant, showed by the testimony of certain witnesses that, during the period of time within which these relations were claimed to have existed, the defendant was visiting the prosecutrix at her home, taking her out riding, to entertainments, being out with her alone at night, and otherwise "keeping company" with her. On her cross-examination she was asked by defendant's counsel if, during this same period of time, she had not received similar attentions from another young man in the neighborhood; if she had not been out alone with him, attended entertainments with him, and if she had not, on the 13th of August, 1911, asked him to take her to a dance on the next Saturday night, and had not also asked him to take her to another dance on the succeeding Saturday night. She was permitted to answer these questions, over the objection by the state that the testimony was irrelevant, incompetent, and immaterial, and not proper impeaching testimony. She answered the questions in the negative. To rebut this testimony defendant, on his own behalf, offered to prove by a certain witness that, during the period of time covered by the illicit relations of defendant and prosecutrix, she was on similar terms with another young man; that he also visited her at her father's house, took her to entertainments, was out with her alone, and that on the 13th day of August, 1911, she had asked this party to take her to a dance on the following Saturday evening, and that she had also asked him to take her to another dance on the succeeding Saturday night. To these questions the state interposed the objection that the testimony was irrelevant, incompetent, and immaterial, and that it was an attempt to impeach the testimony of the prosecutrix upon a collat-

eral matter brought out on cross-examination. The objection was sustained, and the defendant contends that this was error on the part of the court.

We are inclined to take the view that the defendant is right in this contention. The undisputed evidence showed that, at the time of the trial, the prosecutrix was several months advanced in pregnancy. This, of course, removed all doubt as to her having had sexual intercourse with someone previous to that time. It was the theory of the state that it was the defendant with whom this intercourse had taken place. The prosecutrix testified to such fact, and it was for the purpose of corroborating her testimony and the theory of the state that the prosecution had proved that prosecutrix and defendant had shown a mutual fondness for each other, that they had been in each other's company to a considerable extent, and that the opportunity for sexual intercourse had existed. On the other hand, it was the theory of the defense that some person other than the defendant was responsible for the condition of the prosecutrix, and it was for the purpose of corroborating this theory that the defense offered to show a similar fondness existing between the prosecutrix and the other young man in question, and that an equal opportunity existed for sexual intercourse with him. This testimony was offered on the theory that it would tend to weaken the claim of the prosecutrix, that the defendant was under promise to marry, and that it was under this promise of marriage that the illicit intercourse was had. This testimony, if admitted, would have tended directly to rebut the testimony of the prosecutrix, and, if believed by the jury, would, to some extent at least, have impeached and discredited her. *State v. Brown*, 86 Iowa, 121, 53 N. W. 92; *State v. Baldoser*, 88 Iowa, 55, 55 N. W. 97; *Stinehouse v. State*, 47 Ind. 17.

In *State v. Brown*, *supra*, the Iowa court, in considering a similar question said: "The corroboration in this case was largely evidence that the defendant visited the prosecutrix at her home, accompanied her to church, and otherwise conducted himself as her suitor, but the effect of such evidence might well have been lessened, if not wholly destroyed, by showing that during the time the defendant was so visiting her she was accepting similar attentions from another, who had opportunities for sexual intercourse with her."

In *Stinehouse v. State*, *supra*, the defense undertook to show on cross-examination, by the witnesses who had testified to the relations existing between the defendant and prosecutrix, that at the same time she was

receiving attentions from the defendant she was receiving similar attentions from others. The court held that the evidence should have been admitted, and in passing on the question used this language: "The facts stated by the witnesses in their direct examination were introduced to corroborate the testimony of the girl and as tending to show that a promise of marriage had been made by the appellant. The object of the cross-examination was to overthrow or weaken the effect of the evidence. For that purpose it was proper, and the court erred in refusing to allow it. We cannot tell how much weight it would have had with the jury, but we can see that it might have had some, and as we understand the evidence, after a pretty careful examination of it, very little would have satisfied the jury that the appellant was entitled to an acquittal."

It is true that some of the occurrences attempted to be shown by the defendant happened after the first act of sexual intercourse is alleged, by prosecutrix, to have taken place; but it must be remembered that the prosecutrix had testified that the acts of sexual intercourse between herself and the defendant took place on the 18th of June, the 29th of July, and the 12th and 23d days of August, 1911, and that the trial court charged the jury that the time of the commission of the offense was immaterial, so long as it was shown to have taken place within three years prior to the filing of the information. Under this instruction, the jury may have found, and properly so, that the seduction occurred on either one of the above dates. The prosecutrix also testified that, during all of this time and up until some time as late as the month of November, 1911, she was in love with the defendant, expected to marry him, and was regarding him as her future husband. It will be noted that one of the dates on which sexual intercourse was alleged to have taken place was August 12th. Defendant undertook to show that on the very next day, August 13th, the prosecutrix was soliciting the attentions of another young man. If it be a fact that she did solicit such attentions from the other party, was not evidence of such conduct material as tending to disprove the marriage engagement with the defendant, and as tending to weaken the effect of the corroborative evidence from which the promise of marriage was to be inferred? Would not such evidence also tend to impeach her credibility? We believe that it would, and that in the exclusion of such testimony the trial court committed prejudicial error.

It is true, that in the case of *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904, cited and

relied upon by respondent, the rule was announced by the court that "whether the prosecutrix had any other young man come to see her subsequent to the alleged seduction . . . was entirely immaterial," but in that case it does not appear that there ever was but a single act of sexual intercourse between defendant and the respondent, nor does it appear that they ever had anything to do with, or even saw, each other after that occurrence; so that the above rule is not applicable to the facts in this case. In the other case cited by respondent (*State v. Abegglen*, 103 Iowa, 50, 72 N. W. 305), there was only one act of intercourse proven, and the evidence showed that, immediately thereafter, the defendant abandoned the prosecutrix and paid her no further attention. In that case it was also held, and properly so, that evidence of subsequent relations with other men was immaterial.

Another of appellant's assignments questions the correctness of the following instruction given to the jury by the court: "That . . . [she] was an unmarried female of previous chastity, and that there was an act of sexual intercourse under a promise of marriage, are facts which may be found from her evidence alone." If you believe, beyond a reasonable doubt, that to which she has testified on these subjects, but you cannot find that he is the guilty party unless, as stated, there is evidence other than that of [prosecutrix] tending to prove that fact. The language of this instruction is taken verbatim from the opinion of this court in *State v. King*, 9 S. D. 628, 70 N. W. 1046. It is conceded that it has stood unchallenged as the law of this state upon this subject for more than fifteen years; but, notwithstanding this fact, the defendant contends that the court erred in giving the instruction in this case, and that he was prejudiced thereby. Whether or not the instruction is wrong depends upon the explanation and qualification of the same as given by the court to the jury therewith. In the *King Case*, supra, the instruction applied to the evidence in that case, and, in connection with the other instructions in the case, there is no question of its correctness. In this case the only instruction given to the jury in explanation of the matter complained of is as follows: "If you find from the evidence that these young people . . . (prosecutrix and defendant) kept company with each other, and acted as lovers usually do, and other like circumstances, if you find any disclosed by the evidence, are sufficient to constitute corroborating evidence to connect the defendant with the offense within the meaning of this law." [— S. D. —, 138 N. W. 956.] This, in our opinion, does not sufficiently

explain to the jury what acts and conduct of the parties are to be considered as corroborative of the testimony of the prosecutrix, and left it almost wholly for the jury to decide for themselves what acts and circumstances of the parties would constitute corroborating evidence under this statute.

It is true, as stated in the instruction complained of, that the four elements of which this offense is composed may be shown to exist by the testimony of the prosecutrix alone. The statute does not require corroboration of those facts in themselves. All that is required to be corroborated is the testimony of the prosecutrix showing the connection of the defendant with the commission of the offense. The only elements of the offense with which he has, or can have, any connection are the promise of marriage and the illicit intercourse. With the other two elements of the offense, to wit, that the prosecutrix is unmarried and of previous chaste character, the defendant has nothing whatever to do. They relate wholly to the condition of the prosecutrix, or, in other words, are mere necessary qualifications that she must possess in order that the offense can be committed at all.

The question then is, What facts or circumstances are to be considered as corroborating evidence? Owing to the secrecy of the offense, it is very rarely that direct testimony, other than that of the prosecutrix, can be had. Where the defendant has made admissions or written letters of an incriminating character, they are corroborative in their nature, and are usually sufficient. But where this class of evidence is not available, the prosecution has been allowed to supply their place by showing the conduct and circumstances of the parties to the transaction. This question has presented considerable difficulty, but the rule now seems to be fairly well established that evidence showing that the prosecutrix and defendant, at about the time of the alleged offense, associated themselves together and conducted themselves as accepted lovers ordinarily do, is corroborative evidence connecting the defendant with the commission of the offense. This rule, however, is unsatisfactory, and subject to the criticism that it implies that the mere fact of two young persons of opposite sex, conducting themselves as accepted lovers would properly conduct themselves, is, in itself, evidence that they have indulged in illicit intercourse. This, of course, would not be correct, and no such inference can be drawn from such conduct, and no court would intentionally lay down any such rule. Such conduct, however, would corroborate the prosecutrix in her testimony that a promise of marriage existed between herself and the defendant; and, this fact and the illicit

intercourse being conceded, it might be reasoned that the prosecutrix would be more likely to have indulged in sexual intercourse with the man she was expecting to marry than with anyone else. To this extent and in this indirect manner, the conduct of accepted lovers might tend to connect the defendant with the commission of the offense; but the relationship shown between them would have to be something more than that of mere friendship, and the evidence would have to show that the conduct of each toward the other was different from the conduct of either toward any other party. This, of course, would require the court to admit evidence showing the relationship existing between both the prosecutrix and defendant with other persons during the time the marriage engagement is claimed to have been in existence; and this, as we have already seen, is the proper rule to be followed. These are all facts and circumstances that should be taken into consideration by the jury in considering the probative force of the corroborating evidence. The instruction complained of, while it correctly stated the law, so far as it went, should have proceeded and explained to the jury the particular elements of the offense in regard to which the testimony of the prosecutrix must be corroborated, and should have explained to the jury what facts and circumstances were to be considered as corroborative; and, for its failure to do this, prejudicial error was committed.

The only other assignment that will be considered relates to that portion of the instruction last above quoted, wherein the court told the jury that if the defendant and the prosecutrix had "acted as lovers usually do, and other like circumstances, if you find any disclosed by the evidence, are sufficient to constitute corroborating evidence to connect the defendant with the offense within the meaning of this law." The appellant contends that the meaning conveyed to the jury by this instruction was that there had been sufficient facts and circumstances shown to connect the defendant with the commission of the offense. While we believe the court had reference to the character, rather than to the quantity or extent, of the corroborating evidence, we believe that, by the use of the word "sufficient," the jury might have been, and in view of the very meager corroboration that was shown probably were, misled. If the court had used the word "competent" in the place of "sufficient," then the sufficiency of the corroboration would have been properly left to the jury. Webster's New International Dictionary defines "sufficient" as "equal to the end proposed; ad-

equate to wants; enough." It relates to quantity rather than quality, and, as this is the general understanding of the word, it is probable that the jury understood the court to say that the corroborating evidence was sufficient in quantity to corroborate the testimony of the prosecutrix in connecting the defendant with the commission of the offense.

For the reasons above stated, the judgment of the trial court is reversed, and a new trial ordered.

Smith, J., dissenting:

I do not concur in the rule of law announced in this case. In *State v. King*, 9 S. D. 628, 70 N. W. 1046, this court, I think, correctly stated the law, when it said: "That" she "was an unmarried female of previous chastity, and that there was an act of sexual intercourse under a promise of marriage, are facts which may be found from her evidence alone;" if you believe beyond a reasonable doubt that to which she has testified on this subject. But you cannot find that he "is the guilty person, unless," as stated, "there is evidence other than that of the prosecutrix tending to prove that fact." This instruction given in the *King Case*, and adopted by the trial court in this case, places the finding of the jury, as to the two facts specified in the instruction, squarely and wholly upon the truthfulness of the testimony of the prosecutrix herself. For this reason I do not believe that the statement in the opinion that the charge of the court dispenses with proof on the part of the prosecution can be maintained. Nor do I believe that the jury could have been misled when the court in its charge also said: "The law presumes a woman to be of chaste character unless the contrary is shown," when taken in connection with the further charge given by the trial court, which said: "But if there is a reasonable doubt, as I shall hereafter define it, of her chastity, under all of the evidence, he will be entitled to the benefit of that doubt." This language of the court again requires the question of chastity of the prosecutrix to be determined "under all of the evidence" beyond a reasonable doubt, and in effect instructs the jury that the guilt or innocence of the accused cannot rest upon any presumption of chastity, but that chastity must be shown by the evidence. The prosecutrix testified to her own previous chastity, and to a first act of intercourse under promise of marriage, which she alleged occurred on the 18th day of June. Either she was seduced on that day, or was not seduced at all. Under the law, no subsequent act of intercourse could amount to seduction. It is true that

the pregnancy shown at the trial could have resulted from any of the various acts of intercourse at later dates, testified to by her, but seduction could occur but once, and that must have been at the time of the first act of intercourse. Hence the statement in the opinion that the seduction could have occurred on July 29th, August 12th, or August 23d cannot be correct. Because of this obvious distinction, much of the reasoning of the opinion as to the improper exclusion of evidence has no application in the case. I am inclined to the view that the extreme refinement of logic and reasoning found in the opinion furnishes convenient avenue of escape through one or the other of the doors designated as "elements of the offense," and practically wipes the crime of seduction under promise of marriage from the statute book. The opinion seeks to distinguish this case from *State v. King*, supra, by suggesting that there are "explanations and qualifications" which should have been given by the court to the jury in this case, not necessary in the *King* Case. This suggestion, it must be remembered, applies only to that part of the court's instructions which relate to the "presumption of chastity." The only "qualifications or explanations" which could have been made by the trial court on that subject in this case are those to which I have referred above, and in what manner appellant could have been prejudiced is not apparent. The whole instructions in this case were framed squarely upon the law as stated in the *King* Case, and, in my judgment, the rule there announced should be adhered to.

UNITED STATES SUPREME COURT.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY et al., Appts.,

v.

INTERSTATE COMMERCE COMMISSION et al.

(230 U. S. 324, 57 L. ed. 1501, 33 Sup. Ct. Rep. 890.)

Statutes — construction — legislative debates.

1. The meaning of the interstate commerce act of February 4, 1887 (24 Stat. at

Note.—Applicability of commerce clause or statutes thereunder to street railways or to interurban roads.

That the transportation of passengers or freight across a state line is interstate commerce within the meaning of the commerce clause, although such traffic is of a local

L. 379, chap. 104), cannot be determined from statements used in the debates in Congress, but must be interpreted by its own terms.

Carriers — Federal regulation — street railroads.

2. Street railroads carrying passengers across a state line are not governed by the provisions of the interstate commerce act of February 4, 1887, which in terms applies to carriers engaged in the transportation of passengers or property by "railroad."

Interstate Commerce Commission — review of order — effect of subsequent legislation.

3. An order of the Interstate Commerce Commission relating to street railways, made prior to the act of June 18, 1910 (36 Stat. at L. 552, chap. 309), amendatory of the act of February 4, 1887, and therefore without lawful authority, cannot be made effective by the courts as of the date of the amendatory act, where there is nothing to show that Congress thereby attempted an express ratification of the Commission's action with respect to street railways, and it is doubtful whether the amendment was intended to confer a jurisdiction not previously given.

(June 9, 1913.)

APPEAL by petitioners from a judgment of the United States Commerce Court, which, reversing a decree of the Circuit Court of the United States for the District of Nebraska, dismissed a bill filed to enjoin the enforcement of an order of the Interstate Commerce Commission reducing street railway rates. Reversed.

The facts are stated in the opinion.

Messrs. John Lee Webster and Frederic D. McKenney, for appellants:

The word "railroad," as used in the Constitutions and statutes of the various states, does not include street railway companies, and street railway corporations are not governed by laws relating to railroads. This distinction between the two kinds of railroads was well known at the time of the passage of the act to regulate commerce.

Cedar Rapids & M. City R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258, 17 Am. Neg. Rep. 617; *Daly v. Milwaukee Electric R. & Light*

character, is not open to doubt; and, furthermore, is exemplified by such decisions as *State ex rel. Bump v. Omaha & C. B. R. & Bridge Co.* 113 Iowa, 30, 52 L.R.A. 315, 86 Am. St. Rep. 357, 84 N. W. 983, which holds that a discrimination in rates in favor of the residents of the city, made by an ordinance as one of the considerations for

Co. 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832, 15 Am. Neg. Rep. 227; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Omaha Street R. Co. v. Boesen, 74 Neb. 765, 4 L.R.A.(N.S.) 122, 105 N. W. 303, 19 Am. Neg. Rep. 358; Kansas City, O. B. & Electric R. Co. v. Railroad Comrs. 72 Kan. 168, 84 Pac. 755; State v. Cain, 69 Kan. 186, 76 Pac. 443; Manhattan Trust Co. v. Sioux City Cable R. Co. 68 Fed. 82; Massillon Bridge Co. v. Cambria Iron Co. 59 Ohio St. 179, 52 N. E. 192; Front Street Cable R. Co. v. Johnson, 2 Wash. 112, 11 L.R.A. 693, 25 Pac. 1084; Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 175; Re New York Dist. R. Co. 107 N. Y. 42, 14 N. E. 187; Railroad Comrs. v. Market Street

R. Co. 132 Cal. 677, 64 Pac. 1065; Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686; State v. Duluth Gas & Water Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; Gyger v. Philadelphia City Pass. R. Co. (Montgomery v. Philadelphia City Pass. R. Co.) 136 Pa. 96, 9 L.R.A. 369, 20 Atl. 399; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247, 35 S. W. 826; State ex rel. Tyrrell v. Lincoln Traction Co. 90 Neb. 535, 134 N. W. 278; Sears v. Marshalltown Street R. Co. 65 Iowa, 742, 23 N. W. 150; Freiday v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L.R.A. 246, 60 N. W. 656; Massachusetts

extending the franchise of a street railway between Council Bluffs and Omaha, rendered the ordinance invalid as in violation of the interstate commerce clause of the Federal Constitution; and Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, which holds that traffic across a bridge connecting two states is interstate commerce.

It does not necessarily follow, however, that every statute enacted in the exercise of the power of Congress to regulate interstate and foreign commerce is applicable to local traffic across a state line, as is demonstrated by OMAHA & C. B. STREET R. Co. v. INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission has heretofore held that it had jurisdiction under the interstate commerce act to investigate a charge of unlawful discrimination by a trolley road between the city of Washington, District of Columbia, and Chevy Chase lake, in Maryland (Willson v. Rock Creek R. Co. 7 Inters. Com. Rep. 83); to establish through routes and joint rates between an interurban electric road and a steam road (Chicago & M. Electric R. Co. v. Illinois C. R. Co. 13 Inters. Com. Rep. 20); to prescribe a fare to be charged by an electric railway engaged in the carriage of passengers and property between Washington, District of Columbia, and Mount Vernon, in Virginia (Beall v. Washington, A. & Mt. V. R. Co. 20 Inters. Com. Rep. 406); and to establish connections and joint rates for the interchange of interstate traffic, upon the complaint of an electric road extending from Norwood, a suburb of Cincinnati, Ohio, to Hillsboro, Ohio (Cincinnati & C. Trac-tion Co. v. Baltimore & O. S. W. R. Co. 20 Inters. Com. Rep. 486).

In Willson v. Rock Creek R. Co. supra, Knapp, C., said referring to street surface roads for interurban and suburban passenger travel: "It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such

roads and their dealings with the public. But the terms of the statute in this regard are broad and general, and it contains no exception indicating a design to exclude from its operation those interstate roads which are constructed upon public highways, to provide the means for local passenger transportation in the streets of towns and cities and their various suburbs. We see no reason to doubt that the authority of this enactment may be invoked for the regulation of carriers like the defendant, if their business is actually interstate, whenever occasion arises for subjecting them to its restraints and requirements."

So, also, in Chicago & M. Electric R. Co. v. Illinois C. R. Co. supra, Harlan, C., said: "The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to make such distinction. Both are subject to the act when engaged in interstate transportation."

It would seem, though the point has not been directly adjudicated, that the Federal employers' liability acts are applicable to trolley roads. In Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463 52 L. ed. 297, 28 Sup. Ct. Rep. 141, Mr. Justice White, in delivering the opinion of the court, said (referring to the act of June 11, 1906): "From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, and express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc." And see South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742, where the Federal employers' liability act of April 22, 1908, was held to govern a case where a motorman on a street car had been killed while making a trip from Newport, Kentucky, across the Ohio river to Cincinnati.

E. S. O.

Loan & T. Co. v. Hamilton, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588.

Under the Constitution and laws of Nebraska, Omaha, and Council Bluffs, a street railway is a street railway, and is not a street railroad.

Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Omaha Street R. Co. v. Boesen, 74 Neb. 764, 4 L.R.A.(N.S.) 122, 105 N. W. 303, 19 Am. Neg. Rep. 358; Lincoln Traction Co. v. Webb, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258, 17 Am. Neg. Rep. 617; State ex rel. Tyrrell v. Lincoln Traction Co. 90 Neb. 535, 134 N. W. 278.

Omaha & Council Bluffs Railway & Bridge Company is incorporated as a street railway company, under the laws of the state of Iowa, which also recognize the well-defined distinction between street railways and railroads.

Sears v. Marshalltown Street R. Co. 65 Iowa, 742, 23 N. W. 150; Freiday v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L.R.A. 246, 60 N. W. 656; Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Manhattan Trust Co. v. Sioux City Cable R. Co. 68 Fed. 82.

The dual functions of a commercial railroad and a street railway cannot be combined in the same corporation.

Gillette v. Aurora R. Co. 228 Ill. 261, 81 N. E. 1005; Chicago & S. Traction Co. v. Flaherty, 222 Ill. 67, 78 N. E. 29; David Bradley Mfg. Co. v. Chicago & S. Traction Co. 229 Ill. 170, 82 N. E. 210.

In deciding whether the act to regulate commerce applies to street railways, it is proper to consider the inconveniences that would result to the public by compelling interchange of freight and cars and passengers between commercial railroads and street railway companies, as well as the fact that there exists no necessity nor public demand for the regulation of street railway companies by the Interstate Commerce Commission.

Michigan C. R. Co. v. Hammond, W. & E. C. Electric R. Co. 42 Ind. App. 66, 83 N. E. 650; Massillon Bridge Co. v. Cambria Iron Co. 59 Ohio St. 179, 52 N. E. 192.

Messrs. Winfred T. Denison, Assistant Attorney General, and Thurlow M. Gordon, Special Assistant to the Attorney General, for appellees:

The bearing of the road in question on interstate commerce is substantial and definite, and if it is not under regulation by the act of Congress, it is under no valid control, in so far as concerns its function as an interstate carrier.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & 46 L.R.A.(N.S.)

C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547.

Legislation is not construed to be so rigid that it cannot be applied to changing conditions.

Weems v. United States, 217 U. S. 349, 373, 54 L. ed. 793, 801, 30 Sup. Ct. Rep. 544; De Lima v. Bidwell, 182 U. S. 1, 197, 45 L. ed. 1041, 1056, 21 Sup. Ct. Rep. 1056; Bishop v. North, 11 Mees. & W. 418, 12 L. J. Exch. N. S. 362, 3 Eng. Ry. & C. Cas. 459, 15 Mor. Min. Rep. 220.

These interurban railroads have been a great many times classified within statutes dealing with "railroads," as distinguished from "street railways."

Cedar Rapids & M. C. R. Co. v. Cummins, 125 Iowa, 430, 101 N. W. 176; Elliott, Railroads, 2d ed. chap. 44; Philadelphia v. Philadelphia Traction Co. 206 Pa. 35, 55 Atl. 762; Cincinnati, L. & A. Electric Street R. Co. v. Lohe, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161, 13 Am. Neg. Rep. 663; Malott v. Collinsville & E. St. L. Electric R. Co. 47 C. C. A. 345, 108 Fed. 313; Riggs v. St. Francois County R. Co. 120 Mo. App. 335, 96 S. W. 707; Montgomery Street R. Co. v. Lewis, 148 Ala. 134, 41 So. 736; Katzenberger v. Lawo, 90 Tenn. 238, 13 L.R.A. 185, 25 Am. St. Rep. 681, 16 S. W. 611; Hestonville, M. & F. Pass. R. Co. v. Philadelphia, 89 Pa. 210; Re Washington Street Asylum R. Co. 115 N. Y. 442, 22 N. E. 356; Central Nat. Bank v. Worcester Horse R. Co. 13 Allen, 105; Egan v. Cheshire Street R. Co. 78 Conn. 291, 61 Atl. 950; Savannah, T. & O. of H. R. Co. v. Williams, 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751; Rafferty v. Central Traction Co. 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; Chicago v. Evans, 24 Ill. 52; Citizens' Pass. R. Co. v. Pittsburgh, 104 Pa. 522; Clinton v. Clinton & L. Horse R. Co. 37 Iowa, 61; Lieberman v. Chicago & S. S. Rapid Transit R. Co. 141 Ill. 140, 30 N. E. 544; Baldwin, Am. Railroad Law, 9; Birmingham Mineral R. Co. v. Jacobs, 92 Ala. 187, 12 L.R.A. 830, 9 So. 320; Diebold v. Kentucky Traction Co. 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445.

The significance attached to particular terms by special local statutes, or by local usage, cannot control the construction of an act of Congress. If it did, Federal statutes would mean one thing in one state and one thing in another.

Liverpool & L. Life & F. Ins. Co. v.

Massachusetts (Liverpool & L. L. & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029.

Of course, the mere use of electric power, rather than steam, does not by itself determine the question whether a carrier is a "railroad."

Malott v. Collinsville, C. & E. St. L. Electric R. Co. 47 C. C. A. 345, 108 Fed. 313; *Diebold v. Kentucky Traction Co.* 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445; *Riggs v. St. Francois County R. Co.* 120 Mo. App. 335, 96 S. W. 707; *Stillwater & M. Street R. Co. v. Boston & M. R. Co.* 171 N. Y. 589, 59 L.R.A. 489, 64 N. E. 511; *McDonald v. Union Freight R. Co.* 190 Mass. 123, 76 N. E. 655.

The administrative construction by the Commission has been long acquiesced in and finally ratified by Congress.

Willson v. Rock Creek R. Co. 7 Inters. Com. Rep. 83; *Chicago & M. Electric R. Co. v. Illinois C. R. Co.* 13 Inters. Com. Rep. 20; *Beall v. Washington, A. & Mt. V. R. Co.* 20 Inters. Com. Rep. 406; *Cincinnati & C. Traction Co. v. Baltimore & O. S. W. R. Co.* 20 Inters. Com. Rep. 486.

Even if the Commission's order was without lawful authority at the time it was made, the amendment of 1910 either ratified it altogether, or at least validated it for the future.

Hamilton v. Dillin, 21 Wall. 73, 88, 95, 22 L. ed. 528, 531, 533; *Mattingly v. District of Columbia*, 97 U. S. 687, 690, 24 L. ed. 1098, 1099; *First Nat. Bank v. Shoemaker*, 97 U. S. 692, note, 24 L. ed. 1100; *United States v. Heinszen*, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

Mr. Charles W. Needham, also for appellees:

The power of Congress to regulate commerce is not confined to any particular agency or instrumentality.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 493, 52 L. ed. 307, 28 Sup. Ct. Rep. 141; *Hopkins v. United States*, 171 U. S. 597, 43 L. ed. 297, 19 Sup. Ct. Rep. 40.

Congress exercises its regulating power by direct legislation and through the Interstate Commerce Commission acting under the powers granted by the act to regulate commerce.

Texas & P. R. Co. v. Interstate Commerce Commission, 182 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 686; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 46 L.R.A. (N.S.)

40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.* 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288.

Congress and the Interstate Commerce Commission have jurisdiction over a common carrier operating cars by electricity, and the fact that it is an electric street railway does not exempt it from such regulating power.

Willson v. Rock Creek R. Co. 7 Inters. Com. Rep. 83; *Chicago & M. Electric R. Co. v. Illinois C. R. Co.* 13 Inters. Com. Rep. 20; *Beall v. Washington, A. & Mt. V. R. Co.* 20 Inters. Com. Rep. 406; *Cincinnati & C. Traction Co. v. Baltimore & O. S. W. R. Co.* 20 Inters. Com. Rep. 486; *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; *Dinsmore v. Racine & M. R. Co.* 12 Wis. 650; *McCleary v. Babcock*, 169 Ind. 228, 82 N. E. 456; *Riggs v. San Francois County R. Co.* 120 Mo. App. 335, 96 S. W. 707; *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210; *Gyger v. Philadelphia City Pass. R. Co. (Montgomery v. Philadelphia City Pass. R. Co.)* 136 Pa. 96, 9 L.R.A. 369, 20 Atl. 399; *Cheetham v. McCormick*, 178 Pa. 186, 35 Atl. 631; *Old Colony Trust Co. v. Allentown & B. Rapid Transit Co.* 192 Pa. 596, 44 Atl. 319; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. 552; *Rafferty v. Central Traction Co.* 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; *Reeves v. Philadelphia Traction Co.* 152 Pa. 153, 25 Atl. 516; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 483, 497, 52 L. ed. 297, 308, 28 Sup. Ct. Rep. 141.

The railroad is an interurban road connecting two cities located respectively in two states, and such transportation and facilities constitute interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts)* 94 U. S. 155, 24 L. ed. 94; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The only power that can regulate the interstate commerce over these lines is the Federal government, acting through its Commission. If this control is not recognized and maintained by the courts, this interstate rail traffic is entirely outside of any governmental regulating power.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

Mr. Justice Lamar delivered the opinion of the court:

The Omaha & Council Bluffs Railway & Bridge Company was chartered as a street railroad company under the laws of Iowa. It owned street car lines in Council Bluffs, and, in 1887, was authorized by Congress to construct a bridge across the Missouri river, and to operate thereon "steam, cable, and street cars." 24 Stat. at L. 501, chap. 356. The Omaha & Council Bluffs Railway, chartered as a street railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee, and Florence. This street railroad had no right of eminent domain, and was not authorized to haul freight, being limited by its charter to carrying passengers only. By lease it acquired the bridge and car lines in Council Bluffs, which thereafter it operated as part of its system. Complaint having been made that certain interstate fares were unreasonable, a hearing was had before the Commerce Commission, which, on November 27, 1909 (17 Inters. Com. Rep. 239), ordered a reduction in the rate between Council Bluffs, Iowa, and points beyond the Loop, in Omaha, Nebraska. The two companies lessor and lessee, thereupon filed a bill in the United States circuit court for the district of Nebraska to enjoin the order. The case was heard before three circuit judges, who (179 Fed. 243) granted a temporary injunction.

The case was transferred to the commerce court, which, on October 5, 1911 (191 Fed. 40), dismissed the bill.

On the argument of the appeal in this court, the sole question discussed was whether the provisions of the commerce act as to the railroads applied to street railroads, the appellant relying, among other things, on the fact that during the discussion in the senate, the author of the bill and chairman of the senate committee to which it had been referred, said (17 Cong. Rec. pt. IV., p. 3472) that "the bill is not intended to affect the stage coach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it

is not deemed necessary or practicable to cover such a multitude of subjects." After quoting § 1† and this statement, and construing it in the light of the broad scope of the act, the commerce court held that the meaning of the statute could not be determined from statements used in debate. We concur in that view. The act must be interpreted by its own terms, and we must look to it as a whole, in order to determine

†Sec. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water, and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one state or territory of the United States or the District of Columbia to any other state or territory . . . or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid.

The term "common carrier," as used in this act, shall include express companies and sleeping car companies. The term "railroad," as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. 24 Stat. at L. 379, chap. 104, [as amended, 34 Stat. at L. 584, chap. 3591], U. S. Comp. Stat. Supp. 1911, p. 1284.

whether it applies to street railroads, carrying passengers between cities divided by a state line.

The statute in terms applies to carriers engaged in the transportation of passengers of property by railroad.

But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the decisions of the state courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve states holding that in a statute the word "railroad" does not mean "street railroad." The defense cite decisions to the contrary from an equal number of states. The present record discloses a similar disagreement in Federal tribunals. For not only did the commerce court and the circuit court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson v. Rock Creek R. Co.* 7 Inters. Com. Rep. 83.

This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word railroad includes street railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that railroad does not include street railroad unless required by the context, since, as tersely put by the court of appeals of Kentucky, "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 175.

But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "railroad" will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are

local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight "between states," "between states and territories," "between the United States and foreign countries." The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in *"every depot, station, or office where passengers or freight are received for transportation."* The railroads referred to in the act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.

Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads, which did not do the business Congress had in contemplation, and had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit. This was recognized in *Willson v. Rock Creek R. Co.* 7 Inters. Com. Rep. 83, where, although it was held that the statute applied to a street railroad between Washington, District of Columbia, and a point in Maryland, the Commission nevertheless said (7 Inters. Com. Rep. 83): "It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads and their dealings with the public."

Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" cannot be construed to include street railroad.

But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as a part of the record. It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear. Indeed, the record does not show that electricity was used as a motive power, though, in the light of modern methods, that may possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight, and is doing only a business appropriate to a street railroad. So that whatever the motive power, or the size or speed of the cars, is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construction of the bridge from Council Bluffs to Omaha (24 Stat. at L. 501, chap. 356). The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs, and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

It is contended, however, that the amendment of June 18, 1910 (36 Stat. at L. 522, chap. 309), shows that Congress considered that street railroads were under the jurisdiction of the Commission, inasmuch as it then provided that "the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in . . . transporting freight . . . and railroads of a different character." It is contended, on the other hand, that in that statute Congress distinctly recognized that a street electric road was "a different character of railroad," and apprehending that the broad language of the amendment of 1910 might be construed to take in street railroads, this provision was inserted out of abundant caution to prevent that result, as in the case of establishing routes wholly by water, which certainly were not within the terms of the original act.

This section of the act of 1910, however, having been passed after the order was 46 L.R.A. (N.S.)

made by the Commission, November 27, 1909, is not before us for construction, and, manifestly, cannot be given a retrospective operation, though the government insists that it should be given a prospective operation, and in its brief contends that "even if the Commission's order was without lawful authority at the time it was made (November 27, 1909), the amendment of 1910 either ratified it altogether, or, at least, validated it for the future," and, therefore, it was contended "that the judgment should be affirmed; or, if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910," on which day the amendment as to electric street passenger cars became effective. *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Lowrey v. Hawaii*, 206 U. S. 206, 51 L. ed. 1026, 27 Sup. Ct. Rep. 622; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, are cited to show that Congress might ratify what had not been originally commanded. The first two decisions relate to transactions of a nature entirely different from that here involved; and, in the *Baltimore Case*, which was more like this on its facts, the parties, pending the suit, stipulated that the order should apply only to the future; and it was said that the "question of the authority of the Commission at the time the order was made has become a moot one" (621). There was no such stipulation here, and there being nothing to show that Congress attempted an express ratification, and it being open whether the amendment was intended to confer a jurisdiction not previously given, the motion of the government to make the order of November 27, 1909, effective from June 18, 1910, cannot prevail.

The decree of the Commerce Court is reversed, and that of the three Circuit Judges made permanent.

Mr. Justice Pitney did not hear the argument and took no part in the decision of this case.

UNITED STATES SUPREME COURT.

JAMES P. McGOVERN, Plff. in Err.,
v.
CITY OF NEW YORK.

(229 U. S. 363, 57 L. ed. 1228, 33 Sup. Ct. Rep. 876.)

Constitutional law — due process of law — award in eminent domain proceedings.

An award to the owner of one of many

parcels of land taken by eminent domain for a site for a reservoir for a municipal water supply cannot be said to deny due process of law, where made without prejudice, in due form, and after full hearing, because the commissioners and courts refuse to take into consideration the value of the land as part of a natural reservoir site.

(Day, J., dissents.)

(June 9, 1913.)

ERROR to the Court of Appeals of New York to review a judgment which affirmed a judgment of the Appellate Division of the Supreme Court, Third Department, which in turn affirmed a final order of a Special Term for Ulster County, con-

firmed a report of commissioners of appraisal in eminent domain proceedings. Affirmed.

The facts are stated in the opinion.

Messrs. Edward A. Alexander, George Gordon Battle, J. J. Darlington, and Jerome H. Buck, for plaintiff in error:

The commissioners of appraisal, and the courts of the state of New York, confiscated the claimant's property in entirety excluding from consideration, as an element of value, its adaptability for use as part of a reservoir site.

Mississippi & R. River Boom Co. v. Paterson, 98 U. S. 403, 25 L. ed. 206; 6 Sedgw. Damages, § 1075; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30

Note. — Special value of property for the purpose of which it is taken, as an element of compensation in condemnation proceedings.

This note is supplemental to a note in 11 L.R.A.(N.S.) 996.

As pointed out in the note referred to, by the weight of authority, the value of property taken by eminent domain proceedings for the special purpose for which it is taken is not the basis on which the owner is entitled to be compensated. Its availability for that purpose, however, is an element to be considered in arriving at its market value, the market value being the true measure of compensation.

This doctrine is sustained by the majority of the later cases on the question. Thus, it has been held that the fact that a railroad company desires property for a railroad right of way does not preclude the owner's recovery of compensation measured by its adaptability for that use, if such adaptability added to its market value generally, although the value of the tract to the plaintiff by reason of its location, considered with reference to the plaintiff's connecting tracks, its established business, and its urgent need, should not be considered by the jury, nor shown by the evidence. Oregon R. Nav. Co. v. Taffe, — Or. —, 134 Pac. 1024, citing note in 11 L.R.A.(N.S.) 996.

And this is the doctrine of the Supreme Court of the United States. See United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667, holding that, although it is not proper to estimate land condemned for public purposes by the public necessities, or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desirable and available for such purpose. Thus, in condemning land for a canal and lock, its value for this purpose generally is properly to be included as an element to establish the market value of the property.

McGOVERN v. NEW YORK does not establish a contrary doctrine, the holding merely 46 L.R.A.(N.S.)

being that the refusal of the state court to include such special value as an element to establish the market value of the property did not, under the evidence as presented, constitute taking property without due process of law. In this case the decision of the New York court, that the measure of compensation is the fair value of the land taken, not its value to the owner or to the person or corporation seeking to acquire it, but the market value of the property, which means the fair value as between one who wants to purchase and one who wants to sell, and that the owner is not entitled to be paid more, merely because the land is peculiarly adapted to the use to which it is intended to be applied, does not in fact establish a measure of compensation contrary to that obtaining in a majority of the states, since it also conceded that the landowner is not limited in compensation to the condition which the property is in at the time, or to the use which he makes of it, but he is entitled to receive its market value for any purpose for which it is adapted to its owner. And where it is shown that it has a market value for some particular use, the availability and adaptability of the property to that use can be taken into account in determining its fair market value. Re Simmons, 130 App. Div. 350, 114 N. Y. Supp. 571, affirmed in 195 N. Y. 573, 88 N. E. 1132, which was affirmed by the Supreme Court of the United States in McGOVERN v. NEW YORK.

That the New York court did not intend in the Simmons Case to assert a general rule of compensation so narrow as not to include, as an element establishing the market value of the property in general, its special value for the use to which it was intended to appropriate it, is borne out by the later decisions of that court on the question. Thus, in Re New York, W. & B. R. Co. 151 App. Div. 50, 135 N. Y. Supp. 234, it is said that compensation is measured by the present market value of the property, and does not include anything for the benefit to the party taking the property as distinguished from the injury to the owner. In determining such market value,

Pac. 720; *Re Staten Island R. Co.* 10 N. Y. S. R. 393; *Russell v. St. Paul, M. & M. R. Co.* 33 Minn. 210, 22 N. W. 379; *Sanitary Dist. v. Loughran*, 160 Ill. 365, 43 N. E. 359; *McGroarty v. Lehigh Valley Coal Co.* 212 Pa. 53, 61 Atl. 570; *Payne v. Kansas & A. Valley R. Co.* 46 Fed. 546; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Harwood v. West Randolph*, 64 Vt. 41, 24 Atl. 97; *Gardner v. Brookline*, 127 Mass. 358; *Conness v. Com.* 184 Mass. 541, 69 N. E. 341; *Gage v. Judson*, 111 Fed. 358; *Hooker v. Montpelier & W. River R. Co.* 62 Vt. 47, 19 Atl. 775; *Re Gilroy*, 85 Hun, 426, 32 N. Y. Supp. 891; *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160, affirmed in 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Cripp, Compensation*, 4th ed. p. 108.

however, any special intrinsic quality of the property taken, rendering it peculiarly adaptable for the purpose for which it is taken, must be taken into consideration.

And in *Re Simmons*, 158 App. Div. 206, 143 N. Y. Supp. 141, it is held that where a sand bank is located upon property which the city is seeking to condemn to be used for a reservoir, the fact that large quantities of sand would be required in constructing the dam which it would be necessary for the city to construct gives this sand bank some value. This added value should be considered in fixing the market value of the property. It is said that "it is clear that if the sand bank had been located immediately outside of the reservoir, the location of the reservoir would have added materially to the value of that bank, if there was not a surplus of sand in the locality. A purchaser desiring such property would necessarily have to pay a value enhanced by the fact that there was soon to be a market for sand in the locality, and that it was the only available supply. The same rule would apply where the sand is located upon property to be condemned."

It is also pointed out in *Re Bensel*, 206 Fed. 369, that the court is not convinced that, had the same testimony been presented in the *Simmons* Case as was presented in the case before the court, the same result would not have been reached in the *Simmons* Case. And reference is made to the fact that it is pointed out by the appellate division in disposing of the latter case, that the owner did not prove or attempt to prove that the value of the property in question, or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of the proceeding.

In *Re Bensel*, supra, an action subsequently presented to the Federal court, involving the measure of compensation for land which was to be used for the same purpose as that involved in the preceding case, and which was also favorably situated for that purpose, the court said that to value the land alone, according to the tons

In ascertaining the value of property taken for a public use, all the capabilities of the property and the uses to which it may be applied, or for which it is adapted, are to be considered, and not merely the condition which it is in at the time and the use to which it is then applied by the owner.

Syracuse v. Stacey, 45 App. Div. 249, 61 N. Y. Supp. 165; *Re Furman Street*, 17 Wend. 649; *College Point v. Dennett*, 5 Thomp. & C. 217; *Re State Reservation*, 37 Hun, 537; *Re Union Elev. R. Co.* 55 Hun, 163, 7 N. Y. Supp. 853; *Re Daly*, 72 App. Div. 396, 76 N. Y. Supp. 28.

The saving accruing to the condemning party by taking the particular land in question in preference to other land of a

of hay or the bushels of potatoes produced, ignores other elements of value, namely that possession thereof was necessary in order that water might be furnished the increasing millions along the banks of the Hudson. In this case it is of interest to note that, prior to the commencement of condemnation proceedings, a resident owner of the land transferred it to a nonresident. This transfer was attacked by the plaintiff on the ground that it was for the purpose of removing the case from the state to the Federal court in order that the owner might secure the benefit of the more liberal rule of damages applied by the Federal court. It is, however, held that, in the absence of fraud or collusion, the transfer could not be questioned, where it was made prior to the commencement of the condemnation proceedings.

In *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, an instruction to the jury was sustained to the effect that "in estimating the value or damage you must not take into consideration the special value to the company by reason of its necessity, but the market value. Nor should you take into consideration the value of defendant's property as a boom site." And this instruction was sustained although the land was being condemned to be used as a boom site. The owner of the land, however, which abutted on a river and slough, had no proprietary rights in any boom site furnished by the channels of these waters, and hence was held not entitled to have the value of such boom site considered in estimating the value of his land. That the court did not intend, by its decision, to hold that the owner of land which was available for the purpose for which it was sought to be condemned was not entitled to have its value for that purpose considered as an element to establish the market value, is made clear by a later decision wherein an instruction to the jury was sustained to the effect that the jury, in making up their verdict, should take into consideration the value of the land as a boom site, although it was being condemned to be used for that purpose. *Columbia &*

similar character, which saving would accrue to any person using the land for the same purposes, must be taken into consideration as competent evidence of the market value of the property.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160, affirmed in 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Re Brookfield*, 176 N. Y. 138, 68 N. E. 138; *Currie v. Waverly & N. Y. Bay R. Co.* 52 N. J. L. 381, 19 Am. St. Rep. 452, 20 Atl. 56; *Re Gough* [1904] 1 K. B. 417, 73 L. J. K. B. N. S. 228, 68 J. P. 229, 52 Week. Rep. 552, 90 L. T. N. S. 43, 20 Times L. R. 179; *Seattle & M. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720.

It is the potentialities of a given piece of property, both developed and undeveloped, which constitute its chief element of value.

Langdon v. New York, 133 N. Y. 628, 31 N. E. 98.

Not only is the property in the case at bar available and adaptable, but it has a present intrinsic value inherent in the property itself and capable of profit.

Gearhart v. Clear Spring Water Co. 202 Pa. 292, 51 Atl. 891.

Market value is not always the true measure of just compensation.

Sargent v. Merrimac, 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970; *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752; *Re New York, L. & W. R. Co.* 27 Hun, 116; *Re Furman Street*, 17 Wend. 649; *Daly v. Smith*, 18 App. Div. 194, 45 N. Y. Supp. 785.

The adaptability of land for use as a reservoir or for water purposes has been taken into consideration as an element of value of such land.

Cripp, Compensation, 4th ed. p. 108; *Re*

Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Re Daly*, 72 App. Div. 396, 76 N. Y. Supp. 28; *Re Gough* [1904] 1 K. B. 417, 73 L. J. K. B. N. S. 228, 68 J. P. 229, 52 Week. Rep. 552, 90 L. T. N. S. 43, 20 Times L. R. 179; *College Point v. Dennett*, 5 Thomp. & C. 217; *Gearhart v. Clear Spring Water Co.* supra.

The fact that the plaintiff in error did not or could not alone use his property as a reservoir site does not deprive that property of its value as a reservoir site or a portion of a reservoir site.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 609; *Hooker v. Montpelier & W. River R. Co.* 62 Vt. 47, 19 Atl. 775; *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491.

The fact that the plaintiff in error was the owner of only a part of the reservoir site does not prevent that element of value being considered. It only goes to the weight that should be given to the evidence and the amount that should be allowed for this element of value.

Re Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891; *Re Tynemouth* 89 L. T. N. S. 559, 67 J. P. 425, 19 Times L. R. 630; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372.

The use to which property can be put, and the value of such use, constitute property, and condemning property without considering, as a part of the compensation to be awarded therefor, such use, or the value of such use, or permitting the owner to give evidence thereof, is depriving the

C. R. Boom & Rafting Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636. In its opinion in the latter case, the court refers to *Grays Harbor Boom Co. v. Lownsdale*, and points out that the two cases are not in conflict. It is said that "the distinction between the cases lies in the fact that in the present case the respondents are the owners of the shore as well as the uplands, and the appurtenant littoral and riparian rights that attach to ownership of shore lands in this state; and, furthermore, for the successful operation of the boom it is necessary to use a part of the uplands. It was not so in the case referred to. There the boom company itself owned the shore lands with the accompanying littoral and riparian rights, and it was not sought to appropriate any part of the uplands further than for a right of way for the passage of its employees, and possible consequent erosion caused by the use of the shore lands in front of the up-
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lands as a booming place for logs. In other words, the use of the claimant's property in that case was not absolutely essential to the successful operation of the boom, but was rather a convenience than a necessity, while in the case at bar the boom cannot be operated at all without making use of the respondents' property."

In *Burger v. State Female Normal School*, — Va. —, 77 S. E. 489, it is said that, in fixing the market value of land in eminent domain proceedings, it is proper to consider the use of the land for all purposes, including the use for which it is sought by the plaintiff.

And this is also in effect the holding of the court in *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 104 Pac. 979, wherein this measure of compensation was applied, although apparently not questioned.
A. G. S.

owner thereof of his property without due process of law.

Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; *People ex rel. Witherbee v. Essex County*, 70 N. Y. 228.

It is not due process of law, where the courts apply a rule of law in absolute disregard of the right to just compensation.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *A. Backus Jr. & Sons v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

Messrs. Louis C. White, William McM. Speer, and Archibald R. Watson, for defendant in error:

The New York courts decided correctly.

Re Simmons, 130 App. Div. 350, 114 N. Y. Supp. 571; *Black River & M. R. Co. v. Barnard*, 9 Hun, 104.

Just compensation to the owner whose property has been taken for public purposes is to be measured by what the owner lost, and not by what the taker has gained. Imaginary uses or speculative values are to be excluded.

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 343, 37 L. ed. 463, 474, 13 Sup. Ct. Rep. 622; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 250, 41 L. ed. 979, 989, 17 Sup. Ct. Rep. 581; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Five Tracts of Land v. United States*, 41 C. C. A. 580, 101 Fed. 661; *United States v. Seufert Bros Co.* 78 Fed. 520.

This court will regard as conclusive the construction placed upon the state statute by the courts of the state of New York.

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; *Maiorano v. Baltimore & O. R. Co.* 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding for the taking of land to be used for a reservoir to secure an additional supply of water for the city of New York. Commissioners were appointed, as provided by the Constitution of the state, to ascertain the compensation to be paid. Land belonging to the plaintiff in error, McGovern, was among the many parcels taken, and the question brought here arises on the refusal of the commissioners to admit certain evidence as to the exceptional value of the land for a reservoir site, 46 L.R.A. (N.S.)

the exclusion of which, it was alleged, had the effect of depriving McGovern of his property without due process of law, contrary to the 14th Amendment of the Constitution of the United States. The offer of proof as first made embraced many facts and covers six octavo pages of the record. This was rejected, the commissioners, as we understand their ruling, considering it only as a unit, and as containing inadmissible elements, which probably it did. The offer then was made "to prove the fair and reasonable market value of this piece of property, taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site;" also "to prove the fair and reasonable value of the Ashokan reservoir site which the city of New York is now condemning," and that the Ashokan reservoir site (as a whole) was the best and most available site for the purpose of obtaining an additional water supply. These offers were enough to raise the question discussed, although the last one was only a reiteration of what was alleged in the original petition for the taking of the land, and stood admitted on the record. The action of the commissioners was affirmed by the courts of New York. 130 App. Div. 350, 356, 114 N. Y. Supp. 571, 575, 195 N. Y. 573, 88 N. E. 1132.

The statute requires the commissioners to determine "the just and equitable compensation which ought to be made." If there has been any wrong done it is due not to the statute, but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought, and that sense is deprived of his property, can come to this court. The result of a judgment in trover, at least, if satisfied (*Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129; *Miller v. Hyde*, 161 Mass. 472, 25 L.R.A. 42, 42 Am. St. Rep. 424, 37 N. E. 760), is to pass property as effectually as condemnation proceedings; yet no one would contend that a plaintiff could come here under the Constitution simply because of an honest mistake to his disadvantage in laying down the rule of damages for conversion. If the plaintiff could bring such a case to this court, one might ask why not the defendant for a mistake in the opposite direction that will deprive him of money that he is entitled to keep?

When property is taken by eminent domain, it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings

for compensation before a party can make out that the state has deprived him of his property unconstitutionally. *A. Backus Jr. & Sons v. Fort Street Union Depot Co.* 169 U. S. 557, 575, 576, 42 L. ed. 853, 861, 18 Sup. Ct. Rep. 445. As it is put in the case most frequently cited in favor of the right to a writ of error, "we are permitted only to require whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation." And again, the final judgment of a state court "ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 246, 247, 41 L. ed. 979, 988, 17 Sup. Ct. Rep. 581; *Appleby v. Buffalo*, 221 U. S. 524, 531, 532, 55 L. ed. 838, 841, 842, 31 Sup. Ct. Rep. 699.

The present case, of course, does not show disregard of McGovern's rights, or that he was prevented from obtaining substantially any compensation. Even if the plaintiff in error is right, it shows only that the commissioners and courts of New York adopted too narrow a view upon a doubtful point in the measure of damages. It hardly even is so strong as that; for the ruling of the commissioners is not to be taken as an abstract universal proposition, but the judgment concerning this particular case, found by men presumably, as the plaintiff in error says, men of experience, who had or were free to acquire outside information concerning the general conditions of the taking and the selected site. The plaintiff in error quotes authority that, probably for this reason, the New York courts will not set aside an award of such commissioners unless so palpably wrong as to shock the sense of justice. It is conceded 'that the owner is not permitted to take advantage of the necessities of the condemning party,' and it would seem that it well might be that the commissioners regarded it as too plain to be shaken by evidence, on the public facts, that the value of the land for a reservoir site could not come into consideration except upon the hypothesis that the city of New York could not get along without it, and that its only means of acquisition was voluntary sale by owners aware of the necessity, and intending to make from it the most they could. It is just this advantage that a taking by eminent domain excludes.

But if the rulings complained of be taken as universal propositions, they present 46 L.R.A. (N.S.)

no element of the arbitrary, even if they should be thought to be wrong. The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 249, 41 L. ed. 979, 989, 17 Sup. Ct. Rep. 581. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195, 54 L. ed. 725, 727, 30 Sup. Ct. Rep. 459. In estimating that probability, the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in *St. Mary's river in United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667, decided last month.

The plaintiff in error relies upon cases like *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, to sustain his position that while the valuation cannot be increased 'by the fact that his land has been taken for a water supply, still it can be by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence and the wide discretion allowed to the trial court are well brought out in *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A. (N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970. Much depends on the circumstances of the particular case. We are satisfied on all the authorities that whether we should have agreed or disagreed with the commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice, in due form, and after full hearing, as a denial by the state of due process of law.

Judgment affirmed.

Mr. Justice Day dissents.

UNITED STATES SUPREME COURT.

PAUL CHARLTON, Next Friend, of Porter
Charlton, Appt.,
v.

JAMES J. KELLY, Sheriff of Hudson County,
New Jersey, et al.

(229 U. S. 447, 57 L. ed. 1274, 33 Sup. Ct.
Rep. 945.)

**Habeas corpus — as substitute for writ
of error.**

1. Relief by habeas corpus will not be granted to inquire into a detention under an extradition warrant if the magistrate issuing such warrant had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of the crime

Note. — Insanity as a ground for refusing extradition.

As to right, in reviewing extradition proceedings, to be heard upon the merits of the charge against accused, see note to Com. ex rel. Flower v. Superintendent of County Prison, 21 L.R.A. (N.S.) 939.

Since a hearing upon an application for extradition is not intended for a trial upon the merits of the charge, but takes the nature only of a preliminary examination to determine whether the evidence establishes prima facie that the crime charged has been committed, and that it was committed by the accused, it is clear, as held in *CHARLTON v. KELLY*, that upon such a hearing the accused does not have the right to introduce all evidence which would be admissible upon a trial under an issue of not guilty, but only such evidence as is appropriate to a hearing having reference only to a commitment for future trial. Accordingly, it was there held that the examining magistrate does not exceed his authority in excluding evidence of insanity, but the court adds that at most the exclusion of such evidence is error not reversible by habeas corpus.

CHARLTON v. KELLY affirms *Ex parte Charlton*, 185 Fed. 880, where the discussion by the circuit court of the point here under annotation took the following form: When a man is put upon trial upon a charge of crime, it is upon the double presumption that he was sane when the act was committed, and that he is sane at the time he is put to his defense. An effort to prove insanity to overcome the latter presumption is not, properly speaking, a defense, but is preliminary to the trial; an effort to prove insanity to overcome the former presumption is a defense. The issue of insanity as a prevention of trial, i. e., to overcome the latter presumption, can be raised only at or immediately before his trial, and only in the forum provided by the jurisdiction which he is alleged to have outraged. Such an inquiry is not proper upon the hearing before the committing magistrate, whose function is merely to

with which he was charged in the complaint, which, according to the local law, would justify his apprehension and commitment for trial if the crime had been committed within the state.

Same — scope of review — evidence.

2. Mere errors in the rejection of evidence in extradition proceedings are not subject to review by a writ of habeas corpus.

Extradition — evidence — insanity of accused.

3. The right to introduce evidence of the insanity of the accused in proceedings for the extradition, conformably with the treaty with Italy of 1868 (15 Stat. at L. 629), of a fugitive from justice, was not given by the act of 1882 (22 Stat. at L. 215, chap. 378), § 3, providing the means, in foreign extradition proceedings, for obtaining the

determine whether a crime has been committed, and whether the evidence indicates that the accused committed it. Therefore, upon extradition proceedings, an inquiry into the present sanity of the accused is improper as premature, and, moreover, a determination thereon would be inconclusive, since, even if he is now pronounced insane, he might be sane when the trial upon the merits shall be ready to be moved. The issue of insanity at the time of the commission of the crime as a matter of defense, i. e., to overcome the former presumption, can be raised only when the accused shall be put to his trial on the merits, and cannot be raised before the committing magistrate, since the proceeding before him is but a hearing, and not a trial. And, therefore, evidence of insanity as a defense to the charge is not a ground for refusing extradition.

Two early cases, although not precisely in point here, since they did not involve insanity as a defense, laid down principles which have since been generally followed, and with which the *CHARLTON CASE* is in harmony.

Thus, in *Re Farez*, 7 Blatchf. 345, 2 Abb. (U. S.) 346, Fed. Cas. No. 4,645, it was said that the evidence before the commissioner upon an application for extradition need not be so full as, in his judgment, if he were sitting on the final trial of the case, to warrant a conviction. The court remarks that the theory on which treaties for extradition are made is that the place where the crime was committed is the proper place in which to try the accused; and nothing is required to warrant extradition except that sufficient evidence of the fact of the commission of the crime by the accused shall be produced to justify his commitment for trial.

And in *Re Wadge*, 15 Fed. 864, it was said that if it should be recognized that the accused has a legal right in extradition proceedings to demand and produce evidence as to matters of defense (alibi in that case), it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the

testimony and for the payment of the fees of witnesses whose evidence is material to the defense, and without which the accused cannot safely go to trial, since Congress cannot be deemed to have intended by this statute to depart from the provision of the first article of the treaty which requires that a surrender shall be made upon such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his arrest and commitment if the crime had been there committed.

Foreign extradition — procedure — formal demand.

4. The requirement in the supplemental extradition treaty of 1884 with Italy, following provisions for arrest upon the exhibition of a certificate from the Secretary of State, attesting that a requisition has been made, and for the remand of the accused to prison until a formal demand for extradition shall be made and supported by evidence, that if "the requisition, together with the documents above provided for," shall not be made within forty days from the date of arrest, the accused shall be set at liberty, cannot be deemed to mean that "formal demand" must be proved in the preliminary proceedings within forty days after arrest, in view of the provisions of U. S. Rev. Stat. § 5270, applicable to a

demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had produced a conviction of the accused upon a full and substantial trial here. This would be a plain contravention of the intent and meaning of extradition treaties. The phrase in the act of 1882, "that he (the accused) cannot safely go to trial without them" witnesses), cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice, viz., such as is appropriate to a hearing having reference only to a commitment for future trial.

But in 1 Moore on Extradition, § 346, it is related that in September, 1879, the British minister complained that one Catlow, charged with murder in a British vessel on the high seas, had been discharged by a commissioner in New York on the ground of his insanity. Upon the hearing, it was admitted that Catlow had committed the homicide in question; and the minister suggested that the commissioner, in admitting evidence of insanity, had exceeded his functions, the question of insanity being a matter of exculpation proper
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foreign extradition proceeding, authorizing the committing magistrate, upon complaint charging one of the crimes named in an extradition treaty, to issue his warrant of arrest, to hear the evidence of criminality, to commit the accused to jail, and to certify his conclusions to the Secretary of State, who, under §§ 5272, 5273, may issue his warrant for the surrender of the accused upon requisition of the proper authorities.

Same — citizens of country of asylum — persons.

5. There is no principle of international law by which citizens of the country of the asylum are excepted out of an extradition convention for the surrender of "persons," where no such exception was made in the treaty itself.

Same.

6. Citizens of the country of asylum are "persons" within the meaning of the extradition treaty of 1868 with Italy, by which the two governments mutually agree to deliver up all persons who, having been convicted of or charged with any of the crimes specified, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other.

Courts — political question — breach of extradition treaty — waiver.

7. Executive recognition of the obligation

to be considered only by the jury on the trial. The rearrest of Catlow with a view to his extradition was requested. The Secretary of State having referred the minister's note to the department of justice, the Solicitor General, with the approval of the Attorney General, advised that, as the evidence as to insanity "did not tend to contradict or impugn the testimony introduced as to the fact of homicide, but only to explain it, so as to show that the consequence otherwise deducible did not in fact follow," such evidence was properly admitted. The Secretary of State accordingly declined to take any steps looking to the rearrest of the fugitive. The author refers for the facts to the case to MSS. Notes, Br. Leg. 16 Ops. Atty. Gen. 642, Phillips, Solic. Gen. 1879, and to a communication from Mr. Evarts, Secretary of State, to Br. Min. Feb. 4, 1880.

And in § 368 of the same work, it is related that the extradition of one Robbins was demanded for an assault committed while he was a passenger upon a British vessel, but that because he was a citizen of Maine, and because the death of the assaulted person occurred in a port of Maine, where the vessel landed, the offender was turned over to the authorities of that state, with the understanding that he should be surrendered to the British authorities in case he was not indicted there. He was indicted, but on trial was found by the jury to be insane, and was committed to an asylum. The British ministry was informed of these facts and the case was dropped. Reference is made to MSS. Notes, Gr. Br. & MSS. Notes, Br. Leg.

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of the United States to surrender its own citizens under the extradition treaty with Italy of 1868, and the supplemental treaty of 1884, notwithstanding the refusal of the Italian government to surrender fugitives of Italian nationality committing crimes in the United States, is a waiver of the breach, if any, and leaves the treaty in force as the supreme law of the land, which must be recognized by the courts.

(June 10, 1913.)

A PPEAL by petitioner from a judgment of the Circuit Court of the United States for the district of New Jersey dismissing his petition for a writ of habeas corpus and remanding him to custody under a warrant for his extradition as a fugitive from justice. Affirmed.

Statement by Mr. Justice Lurton:

This is an appeal from a judgment dismissing a petition for a writ of habeas corpus, and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the Kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian vice consul, charging him with the commission of a murder in Italy. A warrant was duly issued by the Hon. John A. Blair, one of the judges of New Jersey, qualified to sit as a committing magistrate in such a proceeding, under § 5270, Revised Statutes, U. S. Comp. Stat. 1901, p. 3591. At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice, and that he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by § 5270, Revised Statutes, and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time been prevented by the habeas corpus proceedings in the court below and the pendency of this appeal.

The procedure in an extradition proceeding is that found in the treaty under which the extradition is demanded, and the legislation by Congress in aid thereof. Thus, article 1 of the treaty with Italy of 1868 [15 Stat. at L. 629] (vol. 1, Treaties, Conventions, etc., of the United States, 1910, p. 96), reads as follows.

"The government of the United States and the government of Italy mutually agree
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to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other; Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed."

One of the crimes specified in the section following is murder.

By article 5 it is provided that:

"When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases."

That article was amended by the additional treaty of 1884 (vol. 1, Treaties and Conventions, p. 985) by a clause added in these words:

"Any competent judicial magistrate of either of the two countries shall be authorized, after the exhibition of a certificate signed by the Minister of Foreign Affairs [of Italy] or the Secretary of State [of the United States], attesting that a requisition has been made by the government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which, pursuant to this convention, extradition may be granted, and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and sup-

ported by evidence, as above provided; if, however, the requisition, together with the documents above provided for, shall not be made, as required, by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the 'prisoner shall be set at liberty.' [24 Stat. at L. 1002.]

Messrs. R. Floyd Clarke and William D. Edwards, for appellant:

The rules of international law, except as modified by statutes or treaty, are a part of the municipal law of the land.

Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Murray v. The Charming Betsy, 2 Cranch, 64, 2 L. ed. 208; The Nereide, 9 Cranch, 388, 3 L. ed. 769; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; The Habana, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

To justify extradition, there must be a treaty or law imposing an obligation under it to extradite, or containing express words conferring on the executive the power to act.

Ex parte McCabe, 12 L.R.A. 589, 46 Fed. 363.

It is both the province and the duty of the court to construe the treaty, if necessary, in defiance of the diplomatic construction, where the facts are admitted.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. St. Rep. 234, 6 Am. Crim. Rep. 222; Shin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201.

Although the judicial department has no treaty making power or legislative power, it is still the peculiar province of that department to construe treaties and statutes.

Wilson v. Wall, 6 Wall. 83, 89, 18 L. ed. 727, 729; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222.

An admitted breach of a treaty is just as binding on the court, as a fact from which the legal conclusion of the court must flow, as an award of arbitrators determining that a breach has occurred.

Re Cooper, 143 U. S. 472, 499, 36 L. ed. 232, 240, 12 Sup. Ct. Rep. 453; The La Ninfa, 21 C. C. A. 434, 44 U. S. App. 648, 75 Fed. 513.

Evidence for the defense is competent.

1 Moore, Extradition, § 346, p. 526; Wharton, Crim. Pl. & Pr. § 70; Bishop, Crim. Proc. § 233; Ex parte Ross, 2 Bond, 252, Fed. Cas. No. 12,069; Re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

The precedents in the proceedings in the 46 L.R.A. (N.S.)

State Department are to the effect that the defense of insanity is a bar to the application for extradition.

Case of R. 4 Moore, International Law Dig. p. 221; Catlow Case, cited in 1 Moore, Extradition, § 346, p. 528.

Insanity at the time of the hearing is always a matter for the court to take into account.

22 Cyc. 1215; 12 Cyc. 509, 510; State v. Peacock, 50 N. J. L. 34, 11 Atl. 270.

The issue of sanity in criminal cases is one on which the prosecution always has the burden of proof.

Davis v. United States, 160 U. S. 469, 487, 40 L. ed. 499, 505, 16 Sup. Ct. Rep. 353; Brotherton v. People, 75 N. Y. 159, 3 Am. Crim. Rep. 218.

Under the provisions of the Revised Statutes as to interstate extradition, requiring a governor of a state to honor a requisition when accompanied by an affidavit, the governor of a state has no authority under the United States statutes to honor requisitions unless accompanied by an affidavit mentioned in the act.

Compton v. Alabama, 214 U. S. 1, 6, 53 L. ed. 885, 886, 29 Sup. Ct. Rep. 605, 16 Ann. Cas. 1098.

On habeas corpus and writ of certiorari to review the decision of the magistrate in extradition proceedings, the hearing must be on the record below.

Sternman v. Peck, 26 C. C. A. 214, 51 U. S. App. 312, 80 Fed. 883; Selz v. Presburger, 49 N. J. L. 396, 8 Atl. 118; 4 Enc. Pl. & Pr. pp. 277, 280-284, 1058; Re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563; Ex parte Lane, 6 Fed. 34; Knowlton's Case, 5 Crim. L. Mag. 257; 9 Am. & Eng. Enc. Law, 199, 257; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

The writ of habeas corpus is a proper remedy for reviewing proceedings for the deportation of an alien, but only for the purpose of ascertaining whether or not jurisdiction has been exceeded.

21 Cyc. 292; United States v. Jung Ah Lung, 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663.

No rule of international law fastens on any government the obligation to extradite a fugitive from justice from a foreign government seeking refuge on our shores, whether such fugitive be a citizen of the demanding government or of the United States.

4 Moore, International Law Dig. § 580.

In the absence of a statute or treaty to that effect, there is no legal power in the executive department to extradite criminals seeking refuge here, whether citizens of a foreign government or of the United States.

4 Moore, *International Law Dig.* §§ 581, 582, pp. 248, 249; 1 Ops. Atty. Gen. 509, 521; 3 Ops. Atty. Gen. 661; 2 Ops. Atty. Gen. 267; 6 Ops. Atty. Gen. 148; 1 Moore, *Extradition*, §§ 21, 35, 167; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; *Terlinden v. Ames*, 184 U. S. 270, 239, 46 L. ed. 534, 545, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; *Tucker v. Alexandroff*, 183 U. S. 424, 431, 46 L. ed. 264, 268, 22 Sup. Ct. Rep. 195.

On the breach of a treaty by a foreign government, the executive has the power to suspend the operation of the treaty, or refuse to be bound by it, or even to denounce it, and is not bound to wait until Congress has acted in the premises.

1 Willoughby, *Const.* p. 518, § 223; *Kennett v. Chambers*, 14 How. 38, 14 L. ed. 316; *United States v. Trumbull*, 48 Fed. 104; *The Itata*, 5 C. C. A. 608, 15 U. S. App. 1, 56 Fed. 510; *Foster v. Neilson*, 2 Pet. 253, 307, 7 L. ed. 415, 433; *United States v. Arredondo*, 6 Pet. 691, 711, 8 L. ed. 547, 554; *Prize Cases*, 2 Black, 635, 17 L. ed. 459; *Pom. Const. Law*, pp. 669, 670, 672; *Wharton, International Law Dig.* 2d ed. p. 551; *Durand v. Hollins*, 4 Blatchf. 451, *Fed. Cas. No.* 4,186; 22 Ops. Atty. Gen. 13; *Cuba-Cables (1899)* 22 Ops. Atty. Gen. 408, 514; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Garcia v. Lee*, 12 Pet. 511, 9 L. ed. 1176; *Williams v. Suffolk Ins. Co.* 13 Pet. 415, 10 L. ed. 226; *Gelston v. Hoyt*, 3 Wheat. 246, 324, 4 L. ed. 381, 401.

Mr. Pierre P. Garven, for appellees:

In order to ascertain the real intention of the contracting parties, the entire treaty should be examined.

United States v. Texas, 162 U. S. 1, 37, 40 L. ed. 867, 879, 16 Sup. Ct. Rep. 725.

The Italian government passed an act prohibiting the extradition of its citizens, and as a result, it is claimed, whatever obligations rested upon this government have become dissolved. The validity of this so-called legislative release is not a matter for the judiciary, and the question whether this government is justified in recognizing its obligations under the treaty is not for the court to determine.

Chae Chan Ping v. United States, 130 U. S. 581, 602, 32 L. ed. 1068, 1074, 9 Sup. Ct. Rep. 623; *Terlinden v. Ames*, 184 U. S. 270, 287, 46 L. ed. 534, 544, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

The offer of evidence to prove insanity was properly excluded.

Pettit v. Walshe, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657; *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; 2 Bl. Com. Cooley's ed. p. 459.

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All requirements of the treaty relating to the formal demand were strictly complied with.

Castro v. DeUriarte, 16 Fed. 93; *Grin v. Shine*, 187 U. S. 180, 189, 47 L. ed. 130, 135, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:

A writ of habeas corpus cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which, according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that state, his decision may not be reviewed on habeas corpus. *Terlinden v. Ames*, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; *Bryant v. United States*, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; *McNamara v. Kenkel*, 226 U. S. 520, ante, 146, 33 Sup. Ct. Rep. 146.

By a stipulation filed in the case for the purpose of this review, it is agreed that the evidence presented to Judge Blair of the murder with which the accused was charged, and of his criminality, was sufficient to meet the treaty and statutory requirements of the case, and the errors assigned in this court, questioning its legality and competency, as well as those as to the alleged absence of a warrant or deposition upon which such warrant was issued, have been withdrawn. But neither this stipulation, nor the withdrawal of the assignments of error referred to, is to affect any of the matters raised by other objections pointed out in other assignments.

The objections which are relied upon for the purpose of defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.

2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.

3. That appellant is a citizen of the United States, and that the treaty, in providing for the extradition of "persons" accused of crime, does not include persons who are citizens or subjects of the nation upon whom the demand is made.

4. That if the word "person," as used in the treaty, includes citizens of the asylum country, the treaty, in so far as it covers

that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens.

We will consider these objections in their order:

1. Was evidence of insanity improperly excluded?

It must be conceded that impressive evidence of the insanity of the accused was offered by him and excluded. It is now said that this ruling was erroneous. But if so, this is not a writ of error, and mere errors in the rejection of evidence are not subject to review by a writ of habeas corpus. *Benson v. McMahon*, 127 U. S. 457, 461, 32 L. ed. 234, 236, 8 Sup. Ct. Rep. 1240; *Terlinden v. Ames*, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; *McNamara v. Henkel*, 226 U. S. 520, 57 L. ed. 330, 33 Sup. Ct. Rep. 146. In the *McNamara* Case, certain depositions had been received for the prosecution over objection. This court said that there was legal evidence on which to base the action of the commissioner in holding the accused for extradition, irrespective of the depositions objected to.

But it is said that the act of 1882 (22 Stat. at L. 215, § 3, chap. 378, U. S. Comp. Stat. 1901, p. 3594), requires that the defendant's witnesses shall be heard. That section is most inartificially drawn. It reads as follows:

"That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged, setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States."

The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. To this we cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses, and to provide for their fees. In no sense does the statute make relevant, legal, or competent evidence

which would not have been competent before the statute upon such a hearing. True, the statute speaks of evidence "material for his defense, without which he cannot go safely to trial," but we cannot discover that Congress intended to depart from the provisions of the 1st article of the treaty, which requires that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed. The provision is common to many treaties, and Congress, by § 5270, Revised Statutes, has, in aid of such treaties, prescribed the procedure upon such a hearing in these words:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Judge Blair made the certificate in form and substance in conformity with the statute, and upon the receipt of that, a warrant was duly issued for the surrender of the appellant to the agents of the Italian government.

In *Benson v. McMahon*, *supra*, this court said of a similar provision in the treaty with Mexico [12 Stat. at L. 1199], in connection with § 5270, Revised Statutes,—

"Taking this provision of the treaty and that of the Revised Statutes above recited, we are of opinion that the proceeding before

the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.' This prescribes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

"We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him, or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government."

To repeat, the act of 1882 does not prescribe the extent to which evidence thus obtained shall be admitted, and we quite agree with the view expressed by Judge Brown, in *Re Wadge*, 15 Fed. 864, who said:

"The phrase in § 3 of the act of August 3, 1882, 'that he (the accused) cannot safely go to trial without them' (witnesses), cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice; viz., such as is appropriate to a hearing having reference only to a commitment for future trial."

There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses

produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the state makes a prima facie case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error, not reversible by habeas corpus. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the government. This distinction was taken by Mr. Justice Washington in the case of *United States v. White*, 2 Wash. C. C. 29, Fed. Cas. No. 16,685, when he said:

"Generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offense is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution is certainly improper."

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. *Graves*

v. State, 45 N. J. L. 203, 4 Am. Crim. Rep. 386; State v. Maioni, 78 N. J. L. 339, 341, 74 Atl. 526, 20 Ann. Cas. 204; State v. Peacock, 50 N. J. L. 34, 36, 11 Atl. 270. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded. 1 Chitty, Crim. Law, 318; United States v. White, supra; Res publica v. Shaffer, 1 Dall. 236, 1 L. ed. 116; United States v. Palmer, 2 Cranch, C. C. 11, Fed. Cas. No. 15,989; United States v. Terry, 39 Fed. 355, 362.

2. It was next objected that no formal demand for the extradition of the appellant was made within forty days after his arrest, and that he was therefore entitled to be set at liberty. The objection is founded upon the supplemental convention with Italy of 1884, heretofore set out.

A "certificate," such as was indicated by that convention, was undoubtedly "exhibited" to the committing magistrate, and was the basis of his action. The other parts of the provision are not clear. What is referred to by the phrase, "the requisition, together with the documents above provided," etc., which is required to be made within forty days, or the person set at liberty? The "certificate" attesting "that a requisition has been made," etc., was "exhibited" to Judge Blair; and we fail to find in this clause of the treaty any requirement that the subsequent "formal demand" for the extradition shall be filed with the magistrate within forty days after the arrest of the accused, or at any other time. The whole of the convention should be read together and in connection with § 5270, Revised Statutes, which is applicable to all treaties. Under § 5270, any one of the judicial officers named therein may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused. Revised Statutes, §§ 5272, 5273. Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the statute in so far as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy. But, as observed in Grin v. Shine, 187 U. S. 181, 191, 47 L. ed. 130, 136, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366, "Congress

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has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. DeUriarte*, 16 Fed. 93. This appears to have been the object of § 5270, which is applicable to all foreign governments with which we have treaties of extradition." This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." Had there been no law of Congress upon the subject, the method of procedure prescribed by the supplementary treaty of 1884 would necessarily have been the proper one, and the committing magistrate could have proceeded only according to the treaty, for that would have been the only law of the land applicable to the case and the only source of his authority.

It was therefore competent for Judge Blair to act upon the complaint made before him independently of any preliminary mandate or certificate, such as was in fact issued and "exhibited" to him in this case, being plainly authorized so to do by the terms of § 5270. The personal rights of the accused are saved by the provisions of the same section, since he could only have been surrendered upon the warrant of the Secretary of State, based upon the evidence presented upon the hearing, and the conclusion of the sufficiency of the evidence of criminality certified to the Secretary of State, and upon a formal requisition for extradition. *Castro v. DeUriarte*, 16 Fed. 93, 97; *Grin v. Shine*, supra.

Construed in the light of the original and supplementary conventions with Italy, and of § 5270, Revised Statutes, we do not find that it was obligatory that the "formal demand" referred to in the 1884 clause should be proven in the preliminary proceeding within forty days after the arrest. That is a demand made upon the executive authority of the United States by the executive authority of Italy. Its presentation was not necessary to give the examining magistrate jurisdiction. Such a formal demand was in fact made on July 28, 1910, less than forty days after the arrest. That, together with the certificate of the magistrate and the evidence submitted to him, was the authority of law under which the Secretary of State issued his warrant of extradition. Every requirement of the law, whether it appears in the treaty or in the act of Congress, was substantially complied with. This was the construction placed upon the treaty by Mr. Secretary Knox in answer to the same objection made to

him before he issued his warrant, and also of Judge Rellstab, who dismissed the petition for a writ of habeas corpus, and from whose decree this appeal comes.

3. By article 1 of the extradition treaty with Italy, the two governments mutually agree to deliver up all persons who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons," as used in this article, does not include persons who are citizens of the asylum country.

That the word "persons" etymologically includes citizens as well as those who are not can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused by Italy on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b) that a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) that it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting; and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. United States Foreign Relations 1890, p. 555. Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian government, and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. 46 L.R.A. (N.S.)

His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is whether, under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy, and by the thorough consideration of the whole subject by Mr. John Basset Moore, in his treatise on extradition, chap. V., pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the 18th century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may therefore be divided into two classes: those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons," without limitation or qualification, are the following:

With Great Britain, November 10, 1842, [12 Stat. at L. 572], extended July 12, 1889 [26 Stat. at L. 1508], United States Treaties 1910, pp. 650 and 740.

With France, April 13, 1844, id. p. 526 [8 Stat. at L. 580].

With Italy, March 23, 1868, id. p. 966 [15 Stat. at L. 629].

With Venezuela, August 27, 1860, id. p. 1845 [12 Stat. at L. 1143].

With Ecuador, 1872, id. p. 436 [18 Stat. at L. 756].

With Dominican Republic, 1867, id. p. 413 [15 Stat. at L. 473].

The treaty with Japan of 1886, id. p. 1025, contains a qualification in these words:

"Art. 7. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up, if, in their discretion, it be deemed proper to do so." [24 Stat. at L. 1017].

The conclusion we reach is, that there

is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude, will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the government in this very instance. A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on Extradition, vol. 1, p. 170, § 138, where he says:

"Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons,' or 'all persons.' Hence, where no express exception is made, the treaties warrant no distinctions as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: 'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered. Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used."

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain, made as far back as 1843. Inasmuch as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted.

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4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900, which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens.

During a preliminary correspondence between the Department of State, and the Italian *Chargé d'Affaires*, in reference to the provisional arrest and detention of the appellant under articles 1 and 2 of the treaty, as extended by article 2 of the additional convention of 1884, Mr. Knox, the then Secretary of State, inquired "whether or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your government wishes to be understood as surrendering its view heretofore entertained, and as being now willing to adopt as to cases which may hereafter arise between the two governments, the view that the extradition treaties of 1868, 1869 [16 Stat. at L. 767], and 1884, between the United States and Italy, require the surrender by each government, of any and all persons, irrespective of the nationality, who, having been convicted for or charged with, commission of any of the crimes specified in the treaty, within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other; and further and specifically to inquire whether the government of Italy now proposes as to all cases arising in the future, to deliver to the government of the United States, under and in accordance with the treaty provisions, those Italian subjects who, committing crimes in the United States, take refuge in Italy."

The reply to this was as follows:

July 1, 1910.

Mr. Secretary of State:—

By telegram of June 24, last, your Excellency inquired whether, in instituting extradition proceedings in the case of Porter Charlton, who confessed having committed murder at Moltrasio, the King's government intended to depart from the rule, heretofore observed, not to surrender its own subjects, and whether it was to be inferred that Italians guilty of an offense committed on American territory, who should take refuge in Italy, should hereafter be delivered without fail to the American government.

I now have the honor to inform your Excellency that the King's government cannot depart from the principle established

by our law, that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the extradition convention. Indeed, it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the convention itself, be guided by the spirit of its own legislation.

The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try, on the request of a foreign government, their nationals who may have committed offenses on that government's territory.

Contrariwise, the laws of the United States, by not permitting local tribunals to try American citizens for offenses committed abroad, seem to admit of their being extradited. Otherwise an offender would, under theegis of the law itself, escape the punishment he deserves.

I have the honor to inform your Excellency that the requisite extradition papers in the case of Porter Charlton will be forwarded to me without delay, and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention.

On July 28, 1910, the following communication was addressed to the Secretary of State, and was received on July 30, 1910:

Mr. Secretary of State:—

Referring to previous communications, and in accordance with the provisions of article 5 of the extradition convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton, who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in article 2, § 1, of the said convention.

Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last, the preliminary certificate of arrest provided by article 2 of the additional convention of June 11, 1884, with a view to the provisional arrest of the above-named accused.

In support of this request, I have the honor to transmit herewith to your Excellency the record of proceedings conducted by the court of Como in the case of the aforesaid murder. The papers are regularly viséed by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return of the inclosed papers for submission to the competent court, I avail myself of this opportunity to renew to your

Excellency, together with my thanks in advance, the assurance of my highest consideration.

To this the Secretary of State, after the conclusion of the hearing before Judge Blair, and the receipt by the Department of his judgment and the evidence produced before him, replied as follows:

Washington, December 10, 1901.

Excellency:—

In compliance with the request made by your Embassy in its note of July 26 last, and in pursuance of existing treaty stipulations between the United States and Italy, I have the honor to inclose a warrant of surrender in the case of Porter Charlton, charged with murder, committed within the jurisdiction of the Kingdom of Italy, and examined and committed for surrender by the Honorable John A. Blair, judge of the court of common pleas in and for the county of Hudson, in the state of New Jersey.

Accept, Excellency, the renewed assurance of my highest consideration.

The attitude of the Italian government, indicated by proffering this request for extradition "in accordance with article 5 of the treaty of 1868," is, as shown by the communication of July 1st, set out above, substantially this,—

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must therefore go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second. Such was not the case with Italy, since, under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third. That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other presented a situation in which the United States might do either of two things; namely, abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had, as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties

in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which, in its judgment, had occurred, and conform to its own obligation as if there had been no such breach. 1 Kent, Com. p. 175.

Upon this subject Vattel, Nations, *452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements cannot be binding on him with respect to the party who, on his side, pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (bk. 3, chap. 20, ¶ 38):

"It is honorable and laudable to maintain a peace, even after it has been violated by the other party: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

In 5 Moore's International Law Digest, page 366, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of *Re Thomas*, 12 Blatchf. 370, Fed. Cas. No. 13,887, Mr. Justice Blatchford (then district judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in 46 L.R.A. (N.S.)

such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of *Terlinden v. Ames*, 184 U. S. 270, 285, 46 L. ed. 534, 544, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said:

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question, whether this treaty has even been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty, or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect, and has answered the obligations imposed thereby, and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would therefore appear to reduce itself to one of interpretation of the meaning of the treaty, the government of the United States being now for the first time called upon to declare whether it re-

gards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it cannot surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased, that the word 'persons' includes citizens. We are therefore committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the government of Italy for the surrender of Italian subjects under the treaty would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from, the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provisions of her municipal law, be able to surrender its citizens to us."

The Executive Department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land, and as affording authority for the warrant of extradition.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

DAN LOTT, Plff. in Err.,
v.

UNITED STATES OF AMERICA.

(— C. C. A. —, 205 Fed. 28.)

Intoxicating liquor — soliciting sale — offense.

The rule that one is indictable for soliciting or inciting another to commit a felony does not apply to the solicitation by an Indian of a sale of intoxicating liquor to

Note. — Criminal responsibility of purchaser of intoxicating liquors illegally sold.

This note is supplemental to the note to State v. Cullins, 24 L.R.A. 212, where the earlier cases are collected.

For dividing consignment of liquor as 46 L.R.A.(N.S.)

himself, which sale is under the statute a felony.

(May 5, 1913.)

ERROR to the District Court of the United States for the First Division of the Territory of Alaska to review a judgment convicting defendant of inciting the commission of the crime of furnishing liquor to an Indian. Reversed.

Statement by Gilbert, Circuit Judge:

The plaintiff in error was convicted in the commissioner's court in Alaska of the offense of soliciting and inciting another to commit the crime of furnishing liquor to an Indian, in that he solicited and incited the other to sell whisky to him, the said plaintiff in error, he being an Indian. An appeal was taken to the district court, where the matter was brought on *de novo*, and the plaintiff in error was again found guilty. A demurrer was interposed to the complaint, on the ground that the facts set forth therein did not constitute a crime, and a motion in arrest of judgment was made on the same ground. The conviction was had under § 142 of the Alaska Criminal Code (act March 3, 1899, chap. 429, 30 Stat. 1274, as amended by act Feb. 6, 1909, chap. 80, § 9, 35 Stat. at L. 603), which provides as follows: "That if any person shall, without the authority of the United States, or some authorized officer thereof, sell, barter, or give to any Indian or half-breed who lives and associates with Indians, any spirituous, malt, or vinous liquor, or intoxicating extracts, such person shall be fined not less than one hundred nor more than five hundred dollars, or be imprisoned in the penitentiary for a term not to exceed two years."

Argued before Gilbert and Morrow, Circuit Judges, and Wolverton, District Judge.

Messrs. Kazis Krauczunas and William J. Claassen for plaintiff in error.

Mr. Roy V. Nye for the United States.

Gilbert, Circuit Judge, delivered the opinion of the court:

The question which this case presents is whether an Indian who attempts to purchase liquor from another, or solicits another to sell him liquor, solicits or incites the other to commit the offense prohibited

sale, see the note to State v. Johnson, 11 L.R.A.(N.S.) 872.

For effect of participating in purchase and division of quantity of liquor, to render one guilty of unlawful sale, see the note to Strong v. State, 22 L.R.A.(N.S.) 560.

As to whether one who obtains liquor for,

by § 142 of the Alaska Criminal Code, so as to be liable to indictment and punishment therefor. That statute does not differ in its essential features from the ordinary state statutes prohibiting the sale of intoxicating liquors, except in the fact that it provides for punishment in the penitentiary for a term not to exceed two years, and therefore, under § 335 of the new Criminal Code, the offense is made a felony. It is uniformly held that statutes prohibiting the sale of intoxicating liquors are directed against the act of selling only, and that the offense is committed only by the vendor or someone who aids him in selling, and that the purchaser and those who aid him in the purchase are not guilty of aiding or abetting in the commission of the offense.

In *Wakeman v. Chambers*, 69 Iowa, 169, 58 Am. Rep. 218, 28 N. W. 498, the court said: "The sale of intoxicating liquor is lawful at common law, and it becomes unlawful simply because the statute so pro-

vides. Under the statute, the sale, or keeping with intent to sell, is a public offense, because the statute so declares. The statutory crime is bounded by the statute creating it, and the statute operates on, and has force and effect against, the persons therein named, and no others. As the prohibitory statute does not provide that the purchaser is guilty of any crime, it seems to us this fact practically ends the inquiry. If such had been the intent, it would certainly have been so provided in express terms."

In *State v. Baden*, 37 Minn. 212, 34 N. W. 24, the court said that the prosecuting witnesses were not accomplices within the meaning of the statute. "The section of the statute under which this prosecution is brought is directed against the seller, not the purchaser."

In *Com. v. Willard*, 22 Pick. 476, the court held that a purchaser of intoxicating liquors sold in violation of law was not subject to prosecution. The court said:

and delivers it to, another, using the latter's money, is guilty of selling the same, see the notes to *Reed v. State*, 24 L.R.A. (N.S.) 268; and *State v. Lynch*, 28 L.R.A. (N.S.) 334.

As to purchasing or procuring liquor for another as a substantive offense, see note to *Martin v. Com.* 45 L.R.A. (N.S.) 957.

For the general subject of instigating sales for purposes of prosecution, see the notes to *Connor v. People*, 25 L.R.A. 346, and *State v. Smith*, 30 L.R.A. (N.S.) 946.

As pointed out in the earlier note, it is the rule to refuse to recognize any liability on the part of the purchaser at an illegal sale of intoxicating liquor. The quotations from the authorities in the opinion in *Lott v. UNITED STATES* point out the general reasoning of the courts on the subject, to which may be added the statement in *People v. Smith*, 28 Hun, 626, where, the court, in holding that the buyer of liquor was not an accomplice, said: "This witness in no manner participated in the act declared by the statute to be an offense. That was made out by the sale itself without license, and the person making the sale is the only one declared by the law to be criminal. The purchaser has been subjected to no criminal accountability whatsoever, and by the mere purchase he could not be a participant in the performance of the act which the statute has declared to be an offense. That was performed wholly and exclusively by the defendant, for she, unaided by the purchaser, acted alone in making the sale."

The cases other than those concerning the status of witnesses are few.

In *State v. Turner*, 83 Kan. 183, 109 Pac. 983, the court quotes the official head note to *State v. Cullins*, 53 Kan. 100, 24 L.R.A. 212, 36 Pac. 56 (prefixed to the earlier note), to wit: "The purchaser of intoxicating liquor

which is sold in violation of law is not a participant with the seller, and therefore is not guilty as the principal offender;" but in the *Turner* Case the question was whether the accused was an agent for the purchaser, or a seller on his own account.

The purchaser of liquor does not aid, abet, counsel, or procure the sale. *Ex parte Armstrong*, 30 N. B. 423, where the court, in setting aside the purchaser's conviction as an aider, etc., said: "In my opinion a buyer cannot, in respect of a sale made to him, be considered an accessory. He is not, in law, an aider, abettor, counselor, or procurer; but if guilty at all, it must be as a principal in the first degree. Buyer and seller are both principals. It is impossible that there can be a seller without a purchaser, and if the legislature had intended that the buyer should be liable as well as the seller, there would have been words in the Canada temperance act to that effect. I can find no precedent or authority in English or United States cases for such a prosecution."

Of course, buying may be made a substantive offense by statute. See *Reg. v. Southwick*; 21 Ont. Rep. 670.

It may be noted that it has been held that it is not an offense for a person to enter an unlicensed place for the purpose of buying liquors, or to be found therein, where the offense prohibited by the statute is such entry, etc., into licensed places in prohibited hours. *State v. Penner*, 85 Conn. 481, 83 Atl. 625.

Purchaser as witness.

The purchaser's testimony as a witness will not show him guilty of crime. *Ex parte Barker*, 30 N. B. 406, where it was held that the purchaser of liquor was not an aider, abettor, counselor, or procurer of the sale, and consequently could not re-

"The statute imposes a penalty upon any person who shall sell. But every sale implies a purchaser; there must be a purchaser as well as a seller. . . . This must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender."

In *Harrington v. State*, 36 Ala. 236, the indictment was for violating the law prohibiting the sale of liquor to slaves. The court said: "The statutory offense consists in the act of selling, not in that of buying; and neither the purchaser, nor one participating in the purchase, can be deemed an accomplice of the seller."

In *State v. Teahan*, 50 Conn. 92, the

fuse to testify as a witness on the ground that he might criminate himself.

Most of the recent cases on the subject of purchasers as witnesses have related to the question whether they were accomplices.

While the cases are not unanimous, by the weight of authority, a witness who was the purchaser of the liquor is not an accomplice of the seller. *State v. Wright*, 152 Mo. App. 510, 133 S. W. 664.

The same was held in *Gamble v. State*, 4 Ga. App. 845, 62 S. E. 544, apparently on a question of corroboration, where, however, the court pointed out that corroboration was not required.

In *State v. Ryan*, 7 Boyce (Del.) 223, 75 Atl. 869, the court (citing *State v. Fulman*, 7 Penn. (Del.) 123, 74 Atl. 1) considered the purchaser an accomplice, and instructed the jury that, "although a purchaser of spirituous liquor from one who sells it in violation of law participates in the unlawful sale, a jury may convict upon the uncorroborated testimony of such purchaser." But in the *Fulman* Case the person held to be at least an accomplice was either an intermediary or the seller.

In *Steele v. State*, 19 Tex. App. 425, the court was inclined to think that purchasers who were detectives hired by citizens were, as witnesses, accomplices, "they being hired to procure the sale," but the question was not decided. But this decision was soon followed by a statute providing that "the fact that a person purchases intoxicating liquor from anyone who sells it (in violation of the local option laws) shall not constitute such person an accomplice." And the statute has established the character of the purchaser as a witness in such cases. *Walker v. State*, — Tex. Crim. Rep. —, 72 S. W. 401; *Dane v. State*, 36 Tex. Crim. Rep. 84, 35 S. W. 661; *Smith v. State*, — Tex. Crim. Rep. —, 77 S. W. 801; 46 L.R.A. (N.S.)

court said: "The fact that the question has not before been raised in this state is an indication that the almost universal sentiment of the profession is that the purchaser is guilty of no offense."

And referring to the statute which provided that every person who shall aid or abet, etc., another to commit any offense, might be prosecuted and punished as if he were the principal offender, the court said: "But we are satisfied that the purchaser is not an abettor of the offense within the meaning of the statute. . . . The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal,—approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point."

In *State v. Rand*, 51 N. H. 361, 12 Am. Rep. 127, the court approved the language

Terry v. State, 46 Tex. Crim. Rep. 75, 79 S. W. 320; *Marmar v. State*, 47 Tex. Crim. Rep. 424, 84 S. W. 830; *Fox v. State*, 53 Tex. Crim. Rep. 150, 109 S. W. 370; *Moreno v. State*, — Tex. Crim. Rep. —, 143 S. W. 156; *Trinkle v. State*, 59 Tex. Crim. Rep. 257, 127 S. W. 1060; *Ray v. State*, 60 Tex. Crim. Rep. 138, 131 S. W. 542; *Trinkle v. State*, 60 Tex. Crim. Rep. 187, 131 S. W. 583; *Neal v. State*, — Tex. Crim. Rep. —, 157 S. W. 1192; *Creech v. State*, — Tex. Crim. Rep. —, 158 S. W. 277.

Where two bought liquor together from the defendant, each buying a bottle, and one buyer testified as to these facts against the seller, who was charged with selling to the other buyer, it was held that the witness was not an accomplice. *Terry v. State*, 44 Tex. Crim. Rep. 411, 71 S. W. 908.

Irrespective of statute, it would seem that the Texas courts would now consider that the purchaser was not an accomplice. Thus, in *Sears v. State*, 35 Tex. Crim. Rep. 442, 34 S. W. 124, it was held on a charge of selling liquor to a minor, that the purchaser (a witness) was not an accomplice. So, it was held on a charge of giving away liquor on election day, where the recipient of the liquor was a witness, that he was not an accomplice. *Keith v. State*, 38 Tex. Crim. Rep. 678, 44 S. W. 847.

While without the scope of this note, reference may be made to *Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741, where it was urged that the prosecuting witnesses, who were the purchasers, were employed by the state, which could not take advantage of its own wrong. The court said: "A purchase of liquor during prohibited days or hours does not make the purchaser a party to the crime. The law makes the sale charged an unlawful sale, and whatever motive the purchaser may have had in making the purchase, it can be no justification to the seller violating the law."

B. B. B.

of Chief Justice Shaw in *Com. v. Willard*: "That such a prosecution is unprecedented in this state 'shows very strongly what has been understood to be the law upon the subject.'"

Similar decisions are *State v. Miller*, 26 W. Va. 106; *Dale v. State*, 90 Ark. 579. 120 S. W. 389; *Keith v. State*, 38 Tex. Crim. Rep. 678, 44 S. W. 847; *Hiers v. State*, 52 Fla. 25, 41 So. 881; *State v. Cullins*, 53 Kan. 100, 24 L.R.A. 212, 36 Pac. 56; *State v. Turner*, 83 Kan. 183, 109 Pac. 983; *State v. Clark*, 66 Vt. 309, 29 Atl. 461; *State v. Smith*, 135 Iowa, 583, 113 N. W. 336; *Reed v. State*, 3 Okla. Crim. Rep. 16, 24 L.R.A. (N.S.) 268, 103 Pac. 1070. In the case last cited, the court said: "We know of no law that prohibits the purchase of liquor."

But it is urged that the authorities above cited are not applicable here for the reason that the offense is made a felony, and that § 218 of the Penal Code of Alaska adopts the common law of England as adopted and understood in the United States, and provides that it shall be in force in Alaska except as modified by statute, and that at common law it was an indictable offense to incite anyone to the commission of a felony. We do not find that those considerations are conclusive of the question. The fact that the offense of selling liquor to an Indian in Alaska has been made a felony is not in itself alone ground for holding the plaintiff in error indictable for soliciting a sale to himself. The nature of the principal offense, whether a felony or a misdemeanor, makes no difference as to the liability to indictment of one who solicits the commission thereof. At common law, he who solicits another to commit either a felony or a misdemeanor is guilty of the misdemeanor of solicitation, and it was generally held immaterial whether the thing proposed was technically a felony or a misdemeanor. 1 Bishop, *New Crim. Law*, § 768; *Rex v. Higgins*, 2 East, 5, 6 Revised Rep. 358; *Rex v. Phillips*, 6 East, 464, 2 Smith, 550, 8 Revised Rep. 511; *State v. Keyes*, 8 Vt. 67, 30 Am. Dec. 450. It may be conceded that the common law is extended to Alaska, and that Congress is clothed with full legislative power over that territory, and may provide for the punishment therein of those offenses which are punishable at common law, without specifically defining the nature thereof. But the question here is: What was the intention of Congress in enacting the law? Was it intended to make unlawful the act of purchasing intoxicating liquor? If the answer is in the negative, it follows that an Indian who attempts to purchase intoxicating liquor, or solicits another to sell it to him, is guilty of no offense.
46 L.R.A. (N.S.)

The meaning of the act should be found in the light of the anterior legislation on the same subject, legislation not of Congress only, but of the states, and the decisions of the courts, and the general understanding as to the meaning and scope of similar statutes, resulting, in a sense, in a common law of the states on that subject. Section 142 of the Criminal Code of Alaska, as it was originally enacted, made the act of selling intoxicating liquor to Indians a misdemeanor only. In February, 1909 (act Feb. 6, 1909, chap. 80, § 9, 35 Stat. at L. 603), it was so amended as to increase the severity of the punishment. The amendment did not declare the violation of the section to be a felony, but such is the effect of § 335 of the Criminal Code of 1910. Congress must have been aware of the universal ruling of the courts that, under laws prohibiting the sale of intoxicating liquors, the purchaser committed no offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the intention to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt. In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the government in enforcing the law, to leave the Indian who might succeed in purchasing liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing or offering to purchase the same.

The judgment is reversed, and the cause remanded, with instructions to dismiss the complaint.

WASHINGTON SUPREME COURT. (Department No. 2.)

JAMES HENRY, Resp't.,
v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(— Wash. —, 131 Pac. 812.)

Telegraph — altered message — notice of error.

1. A sheep buyer receiving a quotation

Note. — Measure of damages where one purchases goods in reliance upon a misquotation of price in telegram.

The measure of damages in *HENRY v. WESTERN U. TELEG. CO.*, namely, the differ-

of prices by telegram, varying 80 cents per hundredweight between January 1st and February 1st deliveries, is not, as matter of law, chargeable with notice that there is error in the lower price, at least, where he had refused to purchase at the price named in the message tendered for transmission.

Damages — altered telegram — price quotations.

2. A sheep buyer who contracts for sheep on the faith of prices at price quotations in a telegram which was altered during

ence between the price the plaintiff was compelled to pay in consequence of the error and the market price, at least if taken with the qualification that the recovery shall in no case exceed the difference between the price paid and the amount which, in consequence of the error, the plaintiff supposed he was to pay, seems to be clearly correct as applied to a case where there was a resale after learning of the mistake, with a profit or without a loss, and even as applied to a case where the resale was at a loss, if the purchase was made for the purpose of filling a contract for resale previously made by the plaintiff, though in the latter case it is not necessarily the market price at the date of the purchase that is to be regarded.

In *Western U. Teleg. Co. v. Spivey*, 98 Tex. 308, 83 S. W. 364, where the amount which the principal authorized his agent to offer for a stock of goods was raised in transmission, it was held that the measure of damages was the difference between the price paid and the value of the goods purchased, not to exceed the difference between the authorized price and the paid price. It is stated in this case that there was no proof that the stock of goods could have been purchased for less than the amount actually paid for them.

So, in *Jackson v. Western U. Teleg. Co.* — Mo. App. —, 156 S. W. 801, where the price which the plaintiff's agent was authorized to pay for wool was raised in transmission, the court said that it perceived no good reason why the measure of damages should not be the difference between the market value of the thing purchased and the higher price paid because of the error in transmission.

And the rule is not affected by the fact that an actual profit was realized by a resale of the property. *HENRY v. WESTERN U. TELEG. CO.* and *Jackson v. Western U. Teleg. Co. supra.*

In *Western U. Teleg. Co. v. Waxelbaum*, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, 10 Am. Neg. Rep. 254, where the plaintiff purchased eggs in reliance on a telegram which as delivered understated the price, the court said that the record disclosed an entire failure on the part of the plaintiff to prove the amount of his damages, that there was no evidence as to the prices at which the eggs were resold and no evidence that if the telegram had been properly trans-

mission may hold the company liable for the difference between the price which he is compelled to pay under his contract and the market price plus the cost of sending the message, although he is not shown to have ultimately suffered loss in the transaction.

Evidence — market value — how determined.

3. To determine the damages to be paid by a telegraph company for error in transmitting a message quoting prices on sheep, their market value may, where there was

mitted the plaintiff would have received more for the eggs than he did receive.

In *Stewart, M. & Co. v. Postal Telegraph Cable Co.* 131 Ga. 31, 18 L.R.A. (N.S.) 692, 127 Am. St. Rep. 205, 61 S. E. 1045, it is held that the recovery in tort by the addressee of a telegram for a negligent mistake of the telegraph company in increasing the price at which he is directed to buy goods, where he buys them in good faith at the increased price, in accordance with the message, is the amount of the damages that proximately result to him from the purchase, but the case does not otherwise pass upon the measure of damages.

In *De Rutte v. New York, A. & B. Electric Magnetic Teleg. Co.* 1 Daly, 547, it appeared that through error in transmitting a telegram plaintiff was led to purchase a cargo of grain at an increased price and charter a vessel, but, upon discovering the mistake before the vessel sailed, he sold the grain at a loss and disposed of the charter party, and it was held that the loss sustained was the proper measure of damages.

In *Wolf Co. v. Western U. Teleg. Co.* 24 Pa. Super. Ct. 129, it appeared that the price named in a telegram from the manufacturer of certain machinery was made the basis of a contract between the receiver of the telegram and a third person, and by mistake in transmitting the telegram the price announced was considerably less than that originally stated by the sender, and it was held that the telegraph company was liable to the receiver of the telegram for the difference between the amount actually and necessarily paid for the machinery, in order to make good his contract, and the amount stated in the telegram as delivered by the telegraph company as the cost of the machinery.

Some of the cases seem to hold or at least assume that the measure of damages is the difference between the amount paid and the amount which the plaintiff, in consequence of the error, supposed he was to pay. It seems clear, however, that while that difference may properly be regarded as the maximum recovery in any case, and in some cases, *e. g.*, where the market price was less than the amount the plaintiff supposed he was to pay, represents mathematically the actual amount that should be recovered, it does not give the true general measure of damages, at least unless it appears that a contract of resale was made before the discovery of the error at a price based upon

no market where they were located, be determined by the ruling price at the nearest market, less cost of getting them there and the probable shrinkage in transportation.

(April 28, 1913.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for mistake in the transmission of a telegram. Affirmed.

The facts are stated in the opinion.

the mistaken quotation. If it did, the plaintiff might in consequence of the mistake make a large profit, or avoid a large loss or a pre-existing contract of sale, which could not have been realized or avoided but for the mistake. In other words, it might enable him to realize a dream of profit engendered solely by the mistake of the telegraph operator.

In some of the cases referred to, the question was really whether the plaintiff could recover at all, rather than the amount of recovery, and in some, so far as the report shows, the amount paid and the amount plaintiff supposed he was to pay are the only data bearing on the measure of damages.

Thus, in *Western U. Tele. Co. v. McCants*, — Miss. —, 46 So. 535, where it merely appeared that the principal authorized his agent to purchase cotton at 9½ cents per pound, but by mistake the telegram was made to read 9¼ cents per pound, it seems to have been assumed, without discussion, that the measure of damages was ½ of a cent per pound. This would doubtless be the correct measure of damages on the assumption that the plaintiff would not have made the purchase but for the mistake, and that he sustained a loss equal or exceeding ½ of a cent per pound, or upon the assumption that cotton could have been purchased at 9½ cents per pound even though he may have made a profit on the resale; or perhaps on the assumption that the mistake deprived him of an opportunity to make a resale of the cotton at an advance of ½ of a cent per pound over the true price.

So, in *Western U. Tele. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4, it was held that a restaurant keeper who was induced to purchase a quantity of fruit which he otherwise would not have purchased but for the erroneous transmission of a telegram, whereby he was led to believe that the price was less than in fact quoted by the seller, was entitled to recover the difference between the price that he was compelled to pay and that mentioned in the telegram. The amount of recovery in this case was small, and the court probably did not attempt to define the measure of damages with the accuracy that would have 46 L.R.A. (N.S.)

Messrs. George H. Fearons, and Hughes, McMicken, Dovell, & Ramsey, for appellant:

The discrepancy as to the price for January delivery between the telegram of December 7th and the telegrams of December 3d and 5th was such as to put any reasonable man upon notice that a possible error existed.

Western U. Tele. Co. v. Wright, 18 Ill. App. 337, Gray, Communication by Tele. § 76.

Even if misled, he cannot recover any sum other than the amount paid for sending the telegram, unless he proves by a fair pre-

been appropriate in a case involving a larger amount. Perhaps the amount allowed might be sustained as a prima facie measure of damages, in the absence of any evidence as to what the fruit was worth to the plaintiff or as to what he could have sold it for.

In some cases where the amount allowed was just equal to the difference between the amount paid and the amount which the plaintiff supposed he was to pay, the result, upon the facts at least, may be reconciled with the rule stated at the beginning of the note, for the reason that the market value was equal to, or less than, the amount the plaintiff supposed he was to pay.

Thus, in *Turner v. Hawkeye Tele. Co.* 41 Iowa, 458, 20 Am. Rep. 605, where the plaintiff was allowed to recover the difference between the price paid for grain and the amount named in an incorrect market report furnished by a telegraph company; it appeared that the plaintiff purchased for the purpose of meeting a contract for future delivery, and that before the expiration of the time of that contract he could have purchased the grain for even less than the price named in the false report upon which he acted.

In *Western U. Tele. Co. v. Bradford*, 52 Tex. Civ. App. 392, 114 S. W. 686, where the plaintiff, in reliance on the telegraph company's erroneous quotations of the market price, bought grain to meet a contract for future delivery previously made by him, the trial court instructed the jury that the measure of damages was the difference between the amount the plaintiff paid for the grain and the lowest amount at which he could have purchased the grain between the date of the purchase and the date at which he must make good on his contract of resale, not lower, however, than the prices quoted in the telegram. The appellate court, however, said that the instruction was erroneous and the true measure of damages was the difference between the erroneous prices quoted and the correct or real prices on the date the quotation was made. As it appeared in this case that before the expiration of the time for filling the contract of resale, the market prices of the grain fell below the prices quoted in the telegram, it would seem that

ponderance of the evidence that the purchase of the Maurer sheep for January delivery resulted in an actual loss to him.

Western U. Teleg. Co. v. Waxelbaum, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, 10 Am. Neg. Rep. 254; *Muser v. Magone*, 155 U. S. 240, 249, 39 L. ed. 134, 138, 15 Sup. Ct. Rep. 77.

Messrs. John E. Ryan and Grover E. Desmond, for respondent:

The issue of contributory negligence was purely a question for the jury.

Strong v. Western U. Teleg. Co. 18 Idaho, 380, 30 L.R.A. (N.S.) 409, 109 Pac. 910, Ann. Cas. 1912 A, 55; *Tobin v. Western U.*

Teleg. Co. 146 Pa. 375, 28 Am. St. Rep. 802, 23 Atl. 324; *Garrett v. Western U. Teleg. Co.* 83 Iowa, 257, 49 N. W. 88; *Western U. Teleg. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 903; *Western U. Teleg. Co. v. Virginia Paper Co.* 87 Va. 418, 12 S. E. 755.

There was in fact an actual loss sustained by respondent, because there was an actual purchase at a higher price than respondent would have been compelled to pay if the message had been properly transmitted and delivered.

Western U. Teleg. Co. v. Waxelbaum, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, 10

the measure of damages given by the trial court, if correctly applied, would have produced the same result as the measure given by the appellate court. As a precedent, the measure given by the trial court seems preferable, since it avoids the implication inherent in that given by the appellate court, that there could be a recovery of the difference between the correct or real price and the erroneous prices quoted, even though the market prices never fell as low as the quoted prices.

In *Hays v. Western U. Teleg. Co.* 70 S. 16, 67 L.R.A. 481, 106 Am. St. Rep. 731, 48 S. E. 608, 3 Ann. Cas. 424, where a telegram purporting to give the market price of different sizes of mules by a mistake in transmission, quoted one size at \$10 less per head than the actual price, it was held that the plaintiff, who purchased a number of mules in reliance thereon, could recover from the telegraph company an amount equal to \$10 per head.

In this case, however, it appeared that but for the mistake the plaintiff could, and would, have purchased smaller mules, which were worth practically the same on the resale market, for the amount erroneously stated in the telegram as the price of the larger mules which he did purchase. Although the opinions in both cases were written by the same judge, the importance of the feature just alluded to in connection with the *Hays* Case seems to have been overlooked when upon the supposed authority of that case, it was held in *Bowie v. Western U. Teleg. Co.* 78 S. C. 424, 59 S. E. 65, that where the plaintiff having purchased flour in reliance upon a telegram underquoting the price immediately, before learning of the mistake, resold at an apparent profit of 10 cents per barrel over the quoted price, he was entitled to recover from the telegraph company an amount equal to the difference between the price stated in the telegram and the price he was obliged to pay (it being held under the evidence that the latter price represented the market value). It will be observed that the measure of damages thus applied not only made the plaintiff good for the loss of 20 cents per barrel due to the mistake, but also gave him the 10 cents per barrel profit which he would have realized if he

could have bought flour at the price stated in the telegram. But there was nothing to show that he could have purchased the flour, or other flour that would have answered his purpose equally well, at that price, and in that respect the case differed from the *Hays* Case. The case of an action by the buyer against a seller for breach of contract is not analogous, since in that case the buyer has a contract right to receive the goods at the price named in the contract, whereas in case of an erroneous quotation in a telegram he has merely a mistaken belief that they can be purchased at the price named therein. It will be observed that in the *Bowie* Case, however, the plaintiff resold the flour at a price, apparently based on the mistaken quotation, after the receipt of the telegram and before the discovery of the mistake, and the measure of damages allowed by the court may, perhaps, be sustained upon the assumption that, if the price had been correctly quoted, he could, and would, have sold the flour at an advance of 10 cents per barrel over the real price. This theory, however, only applies to a case where the contract of resale is made after, and in reliance upon, the telegram, and before the discovery of the mistake, and it cannot be properly applied to a case like the *Bradford* Case, supra, where such contract was made before the receipt of the telegram, and was therefore not influenced by the mistaken quotation.

In *T. P. Sims & Sons v. Western U. Teleg. Co.* 89 S. C. 237, 71 S. E. 783, where it appeared that a telegram by mistake stated the price of flour at \$5 per barrel, instead of \$5.50, and, in reliance upon the telegram, plaintiff accepted the offer and resold the flour at \$5.50 per barrel, it was held, in reliance on the *Bowie* Case, that he was entitled to recover from the telegraph company an amount equal to the difference between the price quoted in the telegram and the market value which was found to be the price he was obliged to pay, although that amount apparently included a net profit on the transaction. Here, as in the *Bowie* Case, it will be observed that the contract of resale was made after the receipt and in reliance upon the erroneous telegram.

A. L. R.

Am. Neg. Rep. 254; Strong v. Western U. Tele. Co. 18 Idaho, 389, 30 L.R.A.(N.S.) 409, 109 Pac. 910, Ann. Cas. 1912 A, 55; Hays v. Western U. Tele. Co. 70 S. C. 16, 67 L.R.A. 481, 106 Am. St. Rep. 731, 48 S. E. 608, 3 Ann. Cas. 424; Pepper v. Western U. Tele. Co. 87 Tenn. 554, 4 L.R.A. 661, 10 Am. St. Rep. 699, 11 S. W. 783; Reed v. Western U. Tele. Co. 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904; Western U. Tele. Co. v. Hall, 124 U. S. 458, 31 L. ed. 484, 8 Sup. Ct. Rep. 577; Bowie v. Western U. Tele. Co. 78 S. C. 424, 59 S. E. 65; McCarty v. Western U. Tele. Co. 116 Mo. App. 441, 91 S. W. 976; Western U. Tele. Co. v. Shottler, 71 Ga. 760; Western U. Tele. Co. v. Dubois, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; Turner v. Hawkeye Tele. Co. 41 Iowa, 458, 20 Am. Rep. 605; Western U. Tele. Co. v. Landis, 9 Sadler (Pa.) 357, 12 Atl. 467; United States Tele. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751; Western U. Tele. Co. v. Spivey, 98 Tex. 308, 83 S. W. 364; Ayer v. Western U. Tele. Co. 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; Squire v. Western U. Tele. Co. 98 Mass. 232, 93 Am. Dec. 157; Manville v. Western U. Tele. Co. 37 Iowa, 214, 18 Am. Rep. 8; Thompson v. Western U. Tele. Co. 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263.

The evidence is sufficient to establish the value of the sheep at Dillon.

35 Cyc. 636; 24 Am. & Eng. Enc. Law, 2d ed. 1154; 3 Wigmore, Ev. §§ 1922, 1923; Rothrock v. Hunter, 66 Wash. 543, 119 Pac. 1114; Graham v. Frazier, 49 Neb. 90, 68 N. W. 367; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Wallingford v. Western U. Tele. Co. 53 S. C. 410, 31 S. E. 275.

Ellis, J., delivered the opinion of the court:

This is an action to recover damages alleged to have been sustained through error in the transmission of a telegram. The plaintiff is a wholesale and retail butcher and packer in the city of Seattle, and in the conduct of his business employs live stock buyers throughout the several states of the Northwest. Among these, in the month of December, 1910, was one C. F. Walker, employed as a cattle buyer in Montana. He was not an expert sheep buyer, but in buying sheep he would report their condition and the price asked, and be guided by the plaintiff's instructions as to purchases. Early in December this buyer was directed by the plaintiff to investigate a certain band of 2,500 sheep near Dillon, Montana, referred to throughout the record as the "Maurer sheep." On December 5, 1910, Walker wired the plaintiff to the effect

that these sheep could be purchased 1,000 for delivery January 1st at \$4.70 a hundredweight, 1,000 February 1st at \$5.30 per hundredweight, and the balance February 20th at \$5.70 a hundredweight. On the next day the plaintiff answered: "Maurer sheep too high. Could not use them." On December 7th Walker delivered to the defendant's agent at Dillon for transmission to the plaintiff a message reading as follows:

45 Collect Night Letter.

Dillon, Mont., 12/7, 190—.

To James Henry, 818 Western Ave., Seattle: I contracted three loads of steers and calves at four and five delivered Jan. fifteenth Belgrade grain fed stuff. I think I can contract Maurer sheep thousand Jan. first four seventy thousand Feb. first five. Answer as soon as you get this.

C. F. Walker.

As delivered to the plaintiff at Seattle, that portion of the message referring to the sheep read: "I think I can contract Maurer sheep thousand Jan. first four twenty, thousand Feb. first five." Plaintiff, in response, wired as follows:

12/8—10.

C. F. Walker, Dillon, Montana: Contract all good cattle you can get some bulls. Get Idaho Falls Cattle. If you can get proper shrinkage buy Maurer sheep. Can't you get some good lambs also load small calves answer. James Henry.

Upon the receipt of this telegram Walker immediately entered into a contract to purchase the sheep in question at the price of \$4.70 per hundredweight; the total weight of the sheep contracted for January delivery being 115,905 pounds. Walker telegraphed to plaintiff that he had bought the sheep, but as the price was not again given it was several days before the error in the transmission of the message of December 7th was discovered. The plaintiff's evidence tended to show that the market price of the sheep at Dillon for January 1st delivery was approximately \$4.25. The trial resulted in a verdict for the plaintiff for the sum of \$522.17; this being the difference between the market price and the price paid, plus 60 cents paid for the transmission of the message. Motions for a nonsuit, a new trial, and for judgment notwithstanding the verdict, were made at appropriate times and overruled. Judgement having been entered on the verdict, defendant appealed.

The several assignments of error are all directed to two grounds, a consideration of which will be determinative of the case:

1. It is first contended that the re-

spondent was not misled by the error in the transmission of the telegram. As to the actual fact of deception, the respondent and his manager, who consulted and determined upon purchases, both testified, in substance, that they were misled by the erroneous telegram of December 7th; that they would not have authorized the purchase at \$4.70 the hundredweight; and that when they authorized the respondent's purchaser in the field to contract for these sheep it was in the belief, induced by the telegram as received, that the purchase was being made at \$4.20 a hundredweight. The appellant argues, however, that the respondent should not have been misled; that the difference between the prices stated in the two telegrams as received and the discrepancy between the price for January 1st delivery and February 1st delivery, as stated in the erroneous telegram, were so great as to put an ordinarily prudent man upon inquiry, and make it his duty to have the telegram repeated, or bear the consequences of his failure to do so.

This argument presents the simple question of contributory negligence as a defense. It must be determined upon the same principle as when the same question arises in other relations. *Jones, Teleg. & Teleph. Cos.* § 314. Were these discrepancies so extraordinary as to challenge the attention and excite the caution of a man of ordinary business prudence and experience? The uncontradicted evidence shows that sheep for January delivery would be very little corn fed; that they would be practically grass-fed sheep; and that the expense of feeding to keep in fit condition for later deliveries would be much greater. The jury might easily find from this circumstance that the caution of a man of ordinary prudence would not be aroused by the wide difference in price for January 1st and February 1st deliveries contained in the erroneous telegram. Nor can we say, in view of respondent's flat refusal to purchase at the prices stated in the prior telegram, that the discrepancy in prices between the offer contained in that telegram and the later erroneous message should be held, as a matter of law, to impose notice of the error. Was it not natural that the respondent, as an ordinarily prudent man, would assume that his purchasing agent, fortified by the refusal to consider the price stated in the prior message, had succeeded in reducing the offer to what the evidence shows was about the market price for January delivery? There was obvious ground for reasonable difference of opinion on these things. The question was properly submitted to the jury, and we are concluded by the verdict. *Tobin v. Western U. Teleg. Co.* 146 Pa. 375, 46 L.R.A. (N.S.)

28 Am. St. Rep. 802, 23 Atl. 324; *Garrett v. Western U. Teleg. Co.* 83 Iowa, 257, 49 N. W. 88, 90; *Western U. Teleg. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 903, 905; *Western U. Teleg. Co. v. Virginia Paper Co.* 87 Va. 418, 12 S. E. 755.

2. It is next contended that, assuming that he was misled, there was no competent proof that respondent was damaged. The argument is that the respondent might have made a profit on these sheep at the price actually paid; that, there being no evidence as to whether he did or not, there was no evidence that he was damaged. It seems to us that the matter of profits was not involved. The respondent did not sue for loss of profits, but for damages suffered by reason of the purchase to which he was committed through appellant's negligence. That the loss of profits could not be the correct measure of damages is demonstrated by the obvious fact that, even if it had been proven that there could have been no profit on a purchase at \$4.20 a hundredweight, still the respondent would have been damaged by the purchase at \$4.70 a hundredweight in just the amount in which that price exceeded the market price at the time and place of the purchase. On the other hand, if it had been proven that the sheep, as mutton, were resold by the respondent at a clear profit above the \$4.70 a hundred paid, his profits would be diminished by just the excess of the price paid over the market price. His loss in either case would be the same. The message itself gave notice to the appellant that it might become the basis of a business transaction, and that a failure to properly transmit it might result in a purchase at a price greater than intended to be paid, and that in such a case, whatever the profit might be, there would be a certain loss equal to the excess of the price paid over the market price.

The only measure of damages, therefore, both free from uncertainty and speculation, and within the reasonable contemplation of the sender and the appellant when it undertook to transmit the message, was the excess of the price paid through its error over the market price of sheep at Dillon on December 7, 1909, for January delivery, plus the cost of sending the message. Nothing less would compensate the respondent; anything more would penalize the appellant. The inevitable tendency to this conclusion was emphasized by a colloquy between the court and appellant's counsel during the argument of the motion for a nonsuit. The contention was made that the respondent had made no effort to minimize the loss. The court asked: "How could he have minimized the loss? He bound him-

self on a written contract to take the sheep." And counsel replied: "If he had turned around and immediately sold the sheep for what he could get at the market price, he could have recovered from us the difference. As soon as he found the mistake, he could have sold them at the market, and he could have recovered his actual loss from us. If he kept them, the question is whether he can turn around and say: 'I can take care of these sheep and save myself from loss; I will keep them; I will butcher them and retail them out and save myself from a loss.' He may have done that. We don't know in this case. It is up to him to show whether he actually suffered any loss. It is not a question of whether he should be allowed to have made a profit on this transaction." We can hardly formulate a clearer demonstration than this that the certain loss determinable by the excess of the price paid over the market price, and not the speculative loss contingent upon the profits of a butchering business and the future fluctuations of the meat market, must be the true measure of damages. The minimum attained by the course suggested by counsel would be reached by exactly the same process which we hold fixes the true measure of damages. The minimum so attained is all that this measure requires the appellant to pay. That the measure above stated is the true measure is sustained both by what we conceive to be the better reasons and the more persuasive authorities. This principle, under varying conditions, is exemplified and sustained by the following decisions: *Strong v. Western U. Teleg. Co.* 18 Idaho, 389, 30 L.R.A.(N.S.) 409, 423, 109 Pac. 910, Ann. Cas. 1912 A, 55; *Wallingford v. Western U. Teleg. Co.* 53 S. C. 410, 31 S. E. 275, 276; *Hays v. Western U. Teleg. Co.* 70 S. C. 16, 67 L.R.A. 481, 483, 106 Am. St. Rep. 731, 48 S. E. 608, 3 Ann. Cas. 424; *Reed v. Western U. Teleg. Co.* 135 Mo. 661, 34 L.R.A. 492, 498, 58 Am. St. Rep. 609, 37 S. W. 904; *Bowie v. Western U. Teleg. Co.* 78 S. C. 424, 59 S. E. 65; *McCarty v. Western U. Teleg. Co.* 116 Mo. App. 441, 91 S. W. 976, 977; *Western U. Teleg. Co. v. Shotter*, 71 Ga. 760, 767; *Turner v. Hawkeye Teleg. Co.* 41 Iowa, 458, 464, 20 Am. Rep. 605; *Western U. Teleg. Co. v. Landis*, 9 Sadler (Pa.), 357, 12 Atl. 467, 469; *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 267, 93 Am. Dec. 751; *Western U. Teleg. Co. v. Spivey*, 98 Tex. 308, 83 S. W. 364, 365; *Ayer v. Western U. Teleg. Co.* 79 Me. 403, 1 Am. St. Rep. 353, 10 Atl. 495, 498; *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 238, 93 Am. Dec. 157; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 265, 4 Am. Rep. 673.

There are cases which sustain the theory 46 L.R.A.(N.S.)

of recovery advanced by the appellant. We have been cited to one, *Western U. Teleg. Co. v. Waxelbaum*, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, 10 Am. Neg. Rep. 254. It is not convincing. It seems to us that to measure the damages by the difference between the price paid and the sum realized on a resale at a different time and place, under different conditions, would in many cases render the telegraph company liable for a loss in excess of that traceable to its error, and in others cause the purchaser to sustain a loss traceable solely to the error in the telegram. The measure which we approve is not subject to these possibilities. Of course, if the market price was equal to or greater than that paid because of the error, there would be no loss traceable to the error; but where it is less there is an inevitable loss in just that amount, regardless of the actual profits realized through a resale by the purchaser at another time and place and under different conditions.

The contention of the appellant that there was no evidence as to the market price of sheep at Dillon, Montana, at the time of respondent's purchase is not tenable. The evidence shows, without contradiction, that the market price at Dillon at a given time would be determined by the then market prices at Portland and Chicago by deducting from the market prices at those points the freight, shrinkage, and other losses and expenses incident to transportation, amounting to about \$1 on the hundredweight; Chicago and Portland being the two competing sheep markets for that part of Montana. While neither the respondent nor his business manager could recall the exact prices prevailing at Chicago and Portland on December 7, 1910, both stated that it was in the neighborhood of \$5.25 a hundredweight, and both testified in substance that respondent received current Chicago and Portland quotations; that they knew these prices at that time, and then on the prices then quoted estimated that a purchase at \$4.20 a hundredweight would approximate or be a little under the then market price at Dillon so determined. No evidence was offered to the contrary. This evidence was competent as tending to establish the market price of sheep at that time at Dillon, Montana. *Graham v. Frazier*, 49 Neb. 90, 68 N. W. 367; *Rothrock v. Hunter*, 66 Wash. 543, 119 Pac. 1114; 35 Cyc. 638; 24 Am. & Eng. Enc. Law, 1154.

The weight of this evidence was for the jury, which evidently found that the then market price at Dillon was \$4.25 a hundredweight. We cannot say that the finding was not justified by the evidence.

Other claims of error are predicated upon the instructions given by the court. These,

however, present the same questions which we have considered in the foregoing discussion, and it will be unnecessary to notice them further. We find no error in the instructions.

The judgment is affirmed.

Crow, Ch. J., and Fullerton, Main, and Morris, JJ., concur.

WASHINGTON SUPREME COURT.
(Department No. 2.)

B. A. KENNEDY, Appt.,
v.

SPOKANE, PORTLAND, & SEATTLE
RAILWAY COMPANY, Respnt.

(— Wash. —, 132 Pac. 50.)

Release — consideration — medical attention.

1. Medical attention furnished by an employer to an employee injured by his negligence is not a sufficient consideration to support a release of liability to make compensation for the injury.

Master and servant — injury — insufficient treatment — effect.

2. An action by a servant against his master to recover damages for injuries due to the latter's negligence is not defeated by the fact that the plaintiff did not give proper attention to his injury.

(May 6, 1913.)

Note. — Furnishing medical attention as a consideration for release of liability for personal injuries or death.

It will be observed that the decision in *KENNEDY v. SPOKANE, P. & S. R. Co.* was not upon the ground that the furnishing of medical attention was not an adequate consideration for the release, but upon the ground that it constituted no consideration at all, inasmuch as the company's physician did not expect any compensation from the plaintiff, and he at no time considered that he was incurring a personal obligation therefor. In this respect the case is quite similar to *Richmond & D. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604, where the reviewing court upheld the charge of the trial court to the effect that, if "the plaintiff made no agreement to pay that (medical) bill, and none is reasonable and fairly inferable or to be implied on his part to pay it," its assumption and payment by the releasee was not sufficient consideration for the release, and it would be a mere *nudum pactum*.

The syllabus by the court in the same case deals with the other phase of the same question in declaring that, since the injury was the result of negligence of the releasee, it was liable for the expenses of the treatment which the injury occasioned, although 46 L.R.A. (N.S.)

A PPEAL by plaintiff from a judgment of the Superior Court for Spokane County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, as a defense to which defendant set up a release. Reversed.

The facts are stated in the opinion.

Messrs. O. C. Moore and Robert Corkery, for appellant:

Medical services furnished do not constitute a consideration for a release of damages.

1 Page, Contr. § 311; 24 Am. & Eng. Enc. Law, 289; 34 Cyc. 1051; Louisville & N. R. Co. v. Helm, 121 Ky. 645, 89 S. W. 709; Richmond & D. R. Co. v. Walker, 92 Ga. 485, 17 S. E. 604.

Gratuitous services already performed do not constitute consideration for a release of damages.

Bartholomew v. Jackson, 20 Johns. 28, 11 Am. Dec. 237; Page, Contr. § 319; 6 Am. & Eng. Enc. Law, 693; 9 Cyc. 358, 365.

The release was secured under a mutual mistake of fact, and by fraud, as to injuries.

Pattison v. Seattle, R. & S. R. Co. 55 Wash. 625, 104 Pac. 825; Bjorklund v. Seattle Electric Co. 35 Wash. 439, 77 Pac. 727, 1 Ann. Cas. 443, 17 Am. Neg. Rep. 139; Pederson v. Seattle Consol. Street R. Co. 6 Wash. 202, 33 Pac. 351, 34 Pac. 665, 7 Am. Neg. Cas. 77; Lumley v. Wabash R. Co. 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66; Great Northern R. Co. v. Fowler, 69 C. C.

such was furnished at the request of the injured party, and that, consequently, the assumption of such liability was no advantage to the injured party, and was inadequate as consideration for the release.

These two cases appear to be the only ones holding that the furnishing of medical attention constituted no consideration at all. In the other cases the question was whether the consideration, including, *inter alia*, medical attention, was adequate or inadequate, or whether the release was executed under such circumstances as to invalidate it.

In *Kelly v. Homer Compress Co.* 110 La. 983, 35 So. 256; *Jennings v. Ft. Worth*, 7 Tex. Civ. App. 329, 26 S. W. 927; and *Pederson v. Seattle Consol. Street R. Co.* 6 Wash. 202, 33 Pac. 351, 34 Pac. 665, 7 Am. Neg. Cas. 77, where the validity of the release was upheld, it appeared that the consideration consisted in part of medical attention. These cases are doubtless distinguishable from the *KENNEDY CASE* and the *Walker Case*, supra, in that the discharge by the releasor of the bill for medical attention relieved the releasee of an obligation that would otherwise have rested upon him.

On the other hand, in *Great Northern R. Co. v. Fowler*, 69 C. C. A. 106, 136 Fed. 118, the court refused to sustain a release,

A. 106, 136 Fed. 119; Lake Shore & M. S. R. Co. v. Ehlert, 25 Ohio C. C. 37; Nelson v. Chicago & N. W. R. Co. 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748; Houston & T. C. R. Co. v. Brown, — Tex. Civ. App. —, 69 S. W. 651; Missouri P. R. Co. v. Goodholm, 61 Kan. 758, 60 Pac. 1066.

Messrs. Cannon, Ferris, & Swan and W. A. White, for respondent:

Appellant failed to introduce any testimony to show that said release was not supported by an adequate consideration; the release so recites, and, in the absence of evidence to the contrary, consideration will be presumed.

Pierson v. Northern P. R. Co. 61 Wash. 460, 112 Pac. 509; Louisville & N. R. Co. v. Crutcher, 135 Ky. 381, 122 S. W. 191; St. Louis & B. Electric R. Co. v. Erlinger, 112 Ill. App. 506.

To accomplish impeachment of a formal written instrument on the ground of fraud or mistake, the proof must be clear, precise, cogent, and convincing beyond a reasonable controversy.

Kowalke v. Milwaukee Electric R. & Light Co. 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762; Steffen v. Supreme Assembly, 130 Wis. 485, 110 N. W. 401; Wallace v. Skinner, 15 Wyo. 233, 88 Pac. 221; Demark v. Milwaukee Electric R. & Light Co. 142 Wis. 624, 126 N. W. 13; Schiefelbein v. Fidelity & C. Co. 139 Wis. 612, 120 N. W. 398; Schweikert v. John R. Davis Lumber Co. 147 Wis. 242, 133 N. W. 136; De-Douglas v. Union Traction Co. 198 Pa. 430, 48 Atl. 262; McFarland v. Missouri P. R. Co. 125 Mo. 253, 28 S. W. 590; Tank v.

Rohweder, 98 Iowa, 154, 67 N. W. 106; Johnson v. Berdo, 131 Iowa, 524, 106 N. W. 609; Perry v. M. O'Neil & Co. 78 Ohio St. 200, 85 N. E. 41; Och v. Missouri, K. & T. R. Co. 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962; St. Louis, S. F. & T. R. Co. v. Bowles, — Tex. Civ. App. —, 131 S. W. 1176; Spritzer v. Pennsylvania R. Co. 226 Pa. 166, 75 Atl. 256; Kilmartin v. Chicago, B. & Q. R. Co. 137 Iowa, 64, 114 N. W. 522; Nason v. Chicago, R. I. & P. R. Co. 149 Iowa, 608, 128 N. W. 854; Pederson v. Seattle Consol. Street R. Co. 6 Wash. 202, 33 Pac. 351, 34 Pac. 665, 7 Am. Neg. Cas. 77; Chicago, St. P. M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437; Chicago & N. W. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913.

A person is in duty bound to know the contents of any instrument he signs, and a failure to read before signing cannot be pleaded as a defense.

Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; McNamara v. Boston Elev. R. Co. 197 Mass. 383, 83 N. E. 878; New York C. & H. R. R. Co. v. Difendaffer, 62 C. C. A. 1, 125 Fed. 893; Heck v. Missouri P. R. Co. 147 Fed. 775; Pacific Mut. L. Ins. Co. v. Webb, 84 C. C. A. 603, 157 Fed. 155, 13 Ann. Cas. 752; Simpson v. Pennsylvania R. Co. 86 C. C. A. 403, 159 Fed. 423; Steffen v. Supreme Assembly, 130 Wis. 485, 110 N. W. 401; Chicago, St. P. M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437.

A releasor cannot subsequently avoid his release on the ground that his injuries

consideration for which, *inter alia*, was payment of doctors' and nurses' bills, which had been executed under a mutual mistake of fact induced by statements of the railroad company's physician, who expressed the opinion that the injuries were slight, and that plaintiff could go to work in two weeks, whereas it developed that the injuries were serious and permanent.

And also in Atchison, T. & S. F. R. Co. v. Cunningham, 59 Kan. 722, 54 Pac. 1055, where part of the consideration was care to be given the plaintiff at a hospital, the release was held invalid as based on such terms as condemned it as a fraud and imposition, the amount paid being trifling and utterly disproportionate to any just compensation, and unseemly haste having been made in inducing the settlement.

And in Davis v. Diamond Carriage & Livery Co. 146 Cal. 59, 79 Pac. 596, 17 Am. Neg. Rep. 443, an action for personal injuries resulting from the defendant's negligence, the defense was a "receipt in full of all demands," given by the plaintiff in consideration of a sum of money alleged by the plaintiff to be his wages then due and \$10 on his doctor bill. The question of the sufficiency of this as consideration for the 46 L.R.A. (N.S.)

release was not considered, the contention of the plaintiff being that the intention of the parties was not to release all damages resulting from the injury. The court held that the intention of the parties governed the effect of the contract, implying that if the intention had been to create a release of all damages, the agreement would have been so construed. When it is considered that the court declared the jury to be warranted in finding the defendant negligent, it clearly appears that, according to the doctrine of Richmond & D. R. Co. v. Walker, supra, the paying of the doctor's bill would not have been sufficient as a consideration to support such release, and it would hardly be contended that paying plaintiff his wages then due would constitute a consideration. However, the conclusion reached was against the operation of the receipt as a release, and it was not necessary for the court to look further to find other reasons for its decision.

A note appended to Pattison v. Seattle, R. & S. R. Co. 35 L.R.A. (N.S.) 660, considers the necessity of return or tender of consideration for release of claim for personal injuries set aside on the ground of fraud.

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were more serious than he thought them to be.

Doty v. Chicago, St. P. & K. C. R. Co. 49 Minn. 499, 52 N. W. 135; *Achison, T. & S. F. R. Co. v. Bennett*, 63 Kan. 781, 66 Pac. 1018; *Nelson v. Minneapolis Street R. Co.* 61 Minn. 167, 63 N. W. 486; *Kowalke v. Milwaukee Electric R. & Light Co.* 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762; *Chicago & N. W. R. Co. v. Wilcox*, 54 C. C. A. 147, 116 Fed. 913; *Great Northern R. Co. v. Fowler*, 69 C. C. A. 106, 136 Fed. 118; *Kilmartin v. Chicago, B. & Q. R. Co.* 137 Iowa, 64, 114 N. W. 522; *Homuth v. Metropolitan Street R. Co.* 129 Mo. 629, 31 S. W. 903; *Nason v. Chicago, R. I. & P. R. Co.* 140 Iowa, 533, 118 N. W. 751.

Main, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The defendant corporation owns and operates a steam railway line extending from the city of Spokane, Washington, in a southwesterly direction through the states of Washington and Oregon until it reaches Portland. At a point on the line of the road known as Cliffs, in Klickitat county, Washington, it maintains a roundhouse and repair shops. On September 23, 1909, and for some time prior thereto, the plaintiff had been employed in the roundhouse in the capacity of locomotive hostler. His duties in this position were to receive the engines in the yard from the crew when they came off of the line, and take them from there into the roundhouse. On the night of September 23, 1909, at about 1 or 2 o'clock in the morning, the plaintiff received an engine in the manner described and conducted it into the roundhouse. When he went aboard the engine in the yard, he ascended from the left-hand side. After getting the engine into the roundhouse, owing to the fact that there was some obstruction which prevented his easy getting down from the engine on the left-hand side, he got down on the right-hand side, and in passing down, owing to a defective step, he fell and was precipitated upon a pile of scrap iron which was on the floor of the roundhouse. The point of one piece of scrap iron penetrated his foot. The injury apparently not being serious, he continued with his work the remaining portion of that night and for five or six nights thereafter, but, the injury to the foot becoming more or less painful, and there being no physician at Cliffs, or medical supplies, he went to Stevensburg, which was about 45 miles distant, and consulted the company's doctor located at that point. The doctor here dressed the foot and kept

him under treatment for about ten days, when he, the doctor, then advised him to go to Portland to see the company's head physician. In going to Portland the plaintiff stopped off at Vancouver to consult with the master mechanic relative to his returning to work, and was there informed, according to his testimony, that it would be necessary first for him to go into the offices in Portland and fix up some papers. He went to Portland and went to the company's offices, and there saw the claim agent, also the company's head physician, and was presented by the claim agent with a written release of damages, with the request that he sign the same, which he did. This release recites: "That, in consideration of medical and surgical attention furnished to me by the Spokane, Portland, & Seattle Railway Company, the receipt whereof is hereby acknowledged, I have released, acquitted, and discharged, and do by these presents release, acquit, and discharge, said railway company, its successors and assigns, of and from any and all liability, causes of action, costs, charges, claims, or demands of every nature and description, in any manner arising or growing out of, or to arise or grow out of, personal injuries received by me, B. A. Kennedy, while working as hostler at or near Cliffs, Washington, on or about the 23d day of September, 1909, while getting off engine 462 in roundhouse, slipped on account of defective step and injured right foot, which became infected." It will be noted that this release specifies, as a consideration for the signing thereof by the plaintiff, "medical and surgical attention furnished."

After leaving Portland, the plaintiff returned to Vancouver, where he was told by the master mechanic that they had no work for him, and gave him transportation to Spokane, saying that when they had work they would send for him. While the plaintiff was at Spokane, his foot became in a greatly inflamed condition, which finally resulted in an operation and the removal of a portion of the foot. Thereafter the plaintiff brought this action for damages. The cause in due time came on for trial before the court and a jury. When the plaintiff had rested his case, the defendant challenged the legal sufficiency of the evidence upon two grounds: First, that the injury to the plaintiff's foot was due to his own neglect of the wound which he received; and, second, that the plaintiff was not entitled to recover because he had executed a release of damages. The challenge was sustained by the trial court, and the case dismissed. From which judgment the plaintiff appeals.

The first question to be determined is:

Did the medical services furnished by the defendant's physician to the plaintiff constitute a consideration for the release? It is apparently a fair inference, though there is no positive evidence to that effect, that the company's physicians for the services rendered did not expect compensation from the appellant therefor; neither did he at the time the services were rendered, or thereafter, consider that he was incurring a personal obligation therefor. The release recited that the consideration therefor was medical and surgical attention furnished by the Spokane, Portland, & Seattle Railway Company.

If the rendition of these services by the physician, and the acceptance of them by the appellant, did not create the relation of debtor and creditor between them, then the services would not be a consideration for the release. In other words, if they were rendered under such circumstances that a recovery could not have been had for them in an action against the appellant, then they would be insufficient as a consideration.

In Am. & Eng. Enc. Law, 2d ed. vol. 6, p. 693, it is said: "A person cannot make another his debtor by the rendering of voluntary services, and, as such services impose no liability upon the person for whose benefit they are rendered, they cannot be a consideration for his subsequent promise to pay for them. But, on the other hand, from the statement of the rule it follows that, when the thing given or done imposes a liability upon the promisor, it is a sufficient consideration for his subsequent promise to discharge it."

It was not contended in the trial court, neither is it urged here, that the evidence fails to make out a prima facie case of negligence on the part of the respondent which produced the original injury.

When negligence is once established, the person or corporation being guilty thereof becomes liable for the expenses incurred for medical attention and physician's services. And, on the hypothesis that there was negligence which produced the original injury, the services of a physician, being an element of legal liability, would not be a consideration for the release of damages.

In Am. & Eng. Enc. Law, 2d ed. vol. 24, p. 289, the author states the rule thus: "Payment of doctor's fees by the company inflicting the injuries is no consideration for the employee's release; the company being liable for expenses which the injuries occasioned."

In *Richmond & D. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604, in the syllabus written by the court, it is said: "Where a railroad company negligently inflicts a personal

injury on one of its employees, and thereupon has him treated for the injury by the company's surgeon, a payment made by the company to the surgeon, even at the employee's request, is no consideration for a release by the employee to the company for all damages occasioned by the injury; the company being liable for expenses of treatment which the injury occasioned."

In the second place, it is urged that the appellant's condition is due to his own neglect of the original injury, and therefore he cannot recover. But this is an argument which goes to the amount of the recovery rather than to the right to recover. And the neglect of the appellant, if he did neglect the wound after the injury was inflicted, would not support a judgment of dismissal.

The case will be reversed and remanded for new trial.

Mount, Ellis, Morris, and Fullerton, JJ., concur.

WISCONSIN SUPREME COURT.

FRANCIS QUINN, Plff. in Err.,
v.
STATE OF WISCONSIN.

(153 Wis. 573, 142 N. W. 510.)

Rape — assault with intent — intoxicated woman.

1. That a woman arranges by telephone to meet a man upon the street, and after meeting him drinks intoxicating liquor and permits familiarities from him, does not *per se* show consent to sexual intercourse, so as to prevent his attempt to secure it at a time when she is intoxicated to a state of insensibility from being an assault with intent to rape, especially when he denies the attempt.

Appeal — omission in instruction — evidence — prejudice.

2. Omission to instruct the jury that, to be guilty of rape by intercourse with an intoxicated woman, accused must have knowledge of her intoxicated condition, is not prejudicial error where the evidence discloses that he himself had brought about her intoxicated condition.

Note. — Giving liquor or drugs to female with view to having sexual intercourse with her as constructive rape or assault with intent to commit rape.

A necessary ingredient of the crime of rape is the use of force, but that the force necessary to the commission of the crime need not be actual, but may be constructive, is the practically unanimous opinion of the authorities; and the same unanimity of

Rape — assault with intent — producing intoxication.

3. One who gives intoxicating liquor to a woman with the intention of putting her in a condition of insensibility, so that she has no power of opposing sexual intercourse, and of then having intercourse with her, is guilty of assault with intent to rape.

Criminal law — failure to instruct — absence of evidence.

4. Failure to charge upon the effect of absence of outcry is immaterial in a trial for assault with intent to rape, where the victim was in a state of insensibility produced by intoxication.

Appeal — failure to charge — circumstantial evidence.

5. It is not reversible error to refuse a charge on circumstantial evidence in a prosecution for assault with intent to rape, if no issue in the case depends entirely upon such evidence.

(May 31, 1913.)

opinion prevails, that this constructive force exists where intoxicating liquors or drugs are administered for the purpose of rendering a woman unconscious, so that sexual connection may be had without her consent.

As was said in *Reg. v. Sweeney*, 8 Cox, C. C. 223: "Force actual or constructive is an essential element in the crime of rape; that any mode of overpowering the will without actual personal violence, such as the use of threats or drugs, is force in the estimation of law; and that any degree of force is sufficient in law to constitute the crime of rape, if it is sufficient in fact to overcome the opposing will of the woman, but it must be force employed to overcome the will."

And again where sleep in a woman is induced by the use of drugs, the will might justly be said "to have been overcome with a view to the possession of her person without her consent, just as in the case where, through fear and dread by threats of death, the woman has been thrown into a state of prostration, or as when through such threats, or through actual personal violence at the first meeting of the parties, she has been thrown into a swoon and then her person ravished."

And also the "drugging to the extent of insensibility is even less remote from direct personal violence than presenting a pistol to the forehead, or a dagger to the breast, for such drugging overpowers the will by means of physical appliances to the body (no matter whether to the stomach internally, or by chloroform or the like externally), just as much as if the insensibility had been produced by a blow. That the woman, by deception or persuasion, may have been made the instrument of introducing into her own stomach the deleterious ingredient, or may have been induced to allow the man to hold chloroform to her nostrils, does not make the resulting insensibility less an act of physical violence and injury to the person, than if the man had

ERROR to the Walworth County Court to review a judgment convicting defendant of assault with intent to rape. Affirmed.

Statement by Siebecker, J.:

The plaintiff in error prosecutes a writ of error to review a judgment sentencing him to confinement in the state reformatory at Green bay for the crime of assault with the intent to commit rape upon one Agnes Secquist.

The crime is alleged to have been committed on the 22d day of February, 1912, in the city of Whitewater. Agnes Secquist was eighteen years of age in June, 1911. She had resided at La Crosse with her father up to August, 1909, when she had been committed to the industrial school for girls at Milwaukee, where she remained until September, 1911, at which time she

induced her to take into her own hands a machine which immediately exploded and left her stunned and helpless."

An early English case which is a leading one in that country on the question under annotation, and which has been cited extensively by the courts in this country, is *Reg. v. Camplin*, 1 Car. & K. 746, 1 Cox, C. C. 220, 1 Den. C. C. 89. In that case there was a conviction of rape where accused got the prosecutrix drunk, and while she was in a state of insensibility violated her, though the evident purpose of accused in giving her the liquor was to excite in her an uncontrollable desire for sexual intercourse, and not to render her insensible, and then to have intercourse with her. The court, in pronouncing sentence, said that the young woman upon whose person the offense was committed refused her consent so long as she had sense or power to express such want of consent; but that when made quite insensible by the administration of liquor to her, and while she was in a state of insensibility, accused took advantage of it and violated her person; that the only ground upon which any doubt could possibly arise on this state of facts was that the jury found that the liquor was given for the purpose of exciting her and then having sexual intercourse with her, and not for the purpose of rendering her insensible. But the court was of the opinion that the evidence that rape was committed without the consent and against the will of the prosecutrix was sufficient, and consequently that the offense had been completely proved, because the prosecutrix showed, by her words and conduct up to the very latest moment at which she had any sense or power to express her will, that it was against her will that intercourse should take place. And it was by accused's illegal act alone, that of administering liquor to her to incite her to consent to his unlawful desire, that she was deprived of the power of continuing to express such want of consent. Whatever the

was paroled and put into the home of Ralph Tratt, a farmer residing near the city of Whitewater. It is shown that she had led a wayward life and was insubordinate to parental control, and therefore had been committed to the industrial school. She was informed that she was paroled upon condition of good behavior, and that she must refrain from communicating and associating with men. It appears that she violated this condition, and that she soon began to call up men and boys by phone, secretly, and planned to have them call for and meet her. She learned of the defendant by telephone communication under

the name of Frank Johnson, in January, 1912, and thereafter they repeatedly communicated by telephoning. They first met on Sunday, February 18th, on the city streets, pursuant to a telephone call by her at the saloon of one Kraft, where she had been in the habit of calling him. After meeting him they made an unsuccessful attempt to go to this saloon to secure something to drink, and after spending some time on the street, they upon parting exchanged kisses in the street, and she went home.

On February 22d she called defendant on the phone at Kraft's saloon and arranged

original intention was in giving her the liquor, accused knew that it was calculated in its natural consequences to make her insensible, and he knew also that it had produced that effect upon her at the time he took advantage of her insensibility, and therefore the case fell within the description of those cases in which force and violence constituted the crime, but in which fraud is held to supply the want of both.

And in the later case of *Reg. v. Page*, 2 Cox, C. C. 133, it was said that the effect of the decision in the *Camplin* Case was that where the state of unconsciousness is caused by an act of the accused, connection with the woman while in such state would constitute rape. *Alderson, B.*, in commenting on the judgment in the *Camplin* Case, stated that he had concurred in that judgment at the time only on the ground that, though the taking of the wine was the voluntary act of the girl, yet it was offered to her by the accused, and there was evidence that he had induced her to take it.

The *Camplin* Case, it will be seen, turned in great measure, if not wholly, upon the wrong conduct of the accused, for the purpose of obtaining the woman's consent, by which he deprived her of the power of refusal and resistance which she had manifested up to the time of becoming insensible.

In *Reg. v. Ryan*, 2 Cox, C. C. 115, it was said that one who has connection with a girl who is in a state of utter unconsciousness, whether occasioned by his act or otherwise, is guilty of rape.

It will be seen from these English decisions that they are in harmony with *QUINN v. STATE*, and so also are the American cases which have considered this question.

As in *Harlan v. People*, 32 Colo. 397, 76 Pac. 792, a verdict of assault with intent to rape was sustained by evidence that chloroform was administered for the purpose of so stupefying a woman that the act could be accomplished without her resistance.

And also in *State v. Hairston*, 121 N. C. 579, 28 S. E. 492, it was held that one who gets a female drunk for the purpose of having carnal intercourse with her is guilty of rape.

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In *Com. v. Childs*, 2 Pittsb. 395, in the charge to the jury the court said: "If a man, by giving a woman drugs or liquors, renders her insensible, and then has connection with her in that condition, it is rape, although his original intention was simply to excite criminal desires for the purpose of more easily persuading her to consent to the act, and not with the purpose of rendering her insensible and having connection with her in that state."

And in *Com. v. Burke*, 105 Mass. 377, 7 Am. Rep. 531, in affirming a conviction of rape where one had carnal intercourse with a woman he knew to be so drunk as to be utterly senseless and incapable of consenting, though in this case the liquor was not given by the defendant, the court said that the crime is rape where a man has carnal intercourse with a woman without her consent while she is, as he knows, wholly insensible so as to be incapable of consenting, and with such force as is necessary to accomplish the purpose. That if it were otherwise, any woman in utter stupefaction whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the man himself, would be unprotected from personal dishonor.

In *Territory v. Edie*, 6 N. M. 555, 30 Pac. 851, where by statute rape is committed when "resistance is prevented by stupor or weakness produced by an intoxicating, narcotic, or anesthetic agent administered by or with the privy of defendant," it was held that it was a question of fact for the jury as to what extent prosecutrix, a girl of fifteen, was affected by the use of wine given her by accused, and, further, that it was not error to instruct the jury upon the degree of stupor or extent of weakness essential for her to prove in order to warrant conviction.

In Texas, where the offense is committed by administering to a woman, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, the offense is rape by fraud.

And so it has been held that the use of chloroform as a means of accomplishing the purpose comes within the meaning of fraud, and it cannot be construed as force

with him to meet him near the home where she was staying. After having put the children to bed, she and the hired man of Mr. Tratt went to meet the defendant at the place suggested; they saw the defendant and Hughes coming along the middle of the street; the hired man then went home, and she went to meet the two men. When they met she put her arm about Quinn and kissed him. Quinn introduced Hughes to her as George Miller; she knew that this man introduced to her as Miller was not one Carlson, whom she had requested the defendant to bring with him. She and Hughes saluted by kissing, and the defend-

ant then produced a bottle and asked her to drink, which she declined, stating that she had already had two drinks of Canadian rye and some Miller's high life, but in fact she had drunk neither, and did not know what Canadian rye was. She took a drink from the bottle, filling her mouth and then swallowing it; it was strong, and she could hardly swallow it; she then returned the bottle to the defendant, who gave it to Hughes, who took a drink, and the defendant then took a drink and put the bottle in his pocket; they walked eastward toward town; she calculated to walk as far as Hall's, where Mr. and Mrs. Tratt were.

to sustain an indictment for assault with intent to rape. *Milton v. State*, 23 Tex. App. 204, 4 S. W. 574; *Ford v. State*, 41 Tex. Crim. Rep. 270, 96 Am. St. Rep. 787, 53 S. W. 846.

The court in the *Ford Case* said that where the party attempting the rape uses some substance producing unnatural sexual desires, or such stupor as prevents or weakens resistance, he would be guilty of rape provided he had sexual intercourse with the female while she was under the influence of such substance; and using such means, but failing in the ultimate design, he would be guilty of an attempt to commit rape by fraud.

And in the *Milton Case*, that an assault with intent to rape can be established only by proof of force or attempted force. This offense cannot be committed by means of threats or fraud; the offense of attempting to commit rape may, however, be committed by the use of such means.

The California statute provides that "rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances," among which is the administration of intoxicating or narcotic substances, and so, in *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441, it was held that a verdict of guilty of rape will be sustained where the evidence tends to show that the failure to make resistance or outcry was due to the fact that the prosecutrix was drugged by a narcotic placed in wine by the accused, and that she was weak and dizzy.

And also in *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297, by the administration of intoxicating liquor.

In *People v. Snyder*, 75 Cal. 323, 17 Pac. 208, it was contended that the indictment under such a statute must set out the means by which the offense was committed, and that charging it to have been committed by force is insufficient; but it was held that an indictment charging the crime to have been committed by force, violence, etc., will be sustained by evidence that it was committed by means of an intoxicating or narcotic substance administered by accused, as any matters mentioned in the statute as a means by which the act may be committed are included in the 46 L.R.A. (N.S.)

words "by force and violence, and against her will," and "did felonious ravish," and so such facts could be proved as fully under the statute as they could formerly at common law.

And to the same effect is *People v. Vann*, 129 Cal. 118, 61 Pac. 776, which follows, as authority on this question, *People v. Snyder*, supra.

And it has been held that a distinction should be made between a case where the drug or liquor is given for the purpose merely of creating an uncontrollable desire for sexual intercourse, so assent will be readily given, and cases where it is for the purpose of rendering the woman incapable either to assent or resist.

Thus, in *State v. Lung*, 21 Nev. 209, 37 Am. St. Rep. 505, 28 Pac. 235, it was held that an attempt to administer cantharides to a woman with the purpose of creating in her an uncontrollable desire for sexual intercourse is not an attempt to commit rape, where there is no offer or effort to have sexual connection. And it was said that, even though a man intended to have connection with a woman, and believed that the operation of such a drug would materially assist in accomplishing his purpose by inducing her to consent, it would not, even if he was successful, be rape.

The court said that, to constitute rape where there is no actual force used, the woman must have been unconscious or unable fairly to comprehend the nature and consequences of the sexual act. It must necessarily go thus far, or else there is no distinction between rape where the force used is constructive, and seduction. Anything which may excite the woman's passion, leaving her at the same time in the full possession of her mental and physical power, capable of comprehending the nature of the act, and of exercising her own volition in the matter, is classed rather among the arts of the seducer, than the weapons of him who would destroy female virtue by force. And the court pointed out that in *Reg. v. Camplin*, 1 Car. & K. 746, 1 Cox, C. C. 220, 1 Den. C. C. 89, the crime was held to be rape only because accused had taken advantage of prosecutrix's unconscious condition.

J. H. B.

They stopped at times on their way and drank, when they reached the Normal school they stopped and drank and embraced and kissed. Then she thought that she saw some persons coming and feared that they would recognize her and suggested that they turn north on Graham street; she remembered nothing of any drinking on this street, and of no insult to her by either of the men. They then left Graham street, crossed Main street to Hall's residence, and saw Mrs. Tratt through a window, and from there they went to Center street, where she offered to go home, and the defendant suggested, and started ahead, to get some more whisky, and she and Hughes followed him to a large building where there was a light on the street corner; she feared that they would be seen by others, and she and Hughes walked to the middle of the block on the side street, where they stopped, and Hughes embraced and kissed her, proposing that she treat him right, and she declined to do so, understanding full well what he meant. When Quinn returned, he whistled and came across the street, and they then walked down Center street homeward. They drank at the Esterly schoolhouse, from the fresh bottle which Quinn had procured, until it was empty. She drank freely, and as much or more than the men; while at this school they embraced and kissed; but neither of the men made an indecent proposal there; the last she remembers at this point was that she suggested going home, and that she could not walk; they crossed the Esterly school yard to the side street leading to the Normal school. She remembers they were carrying her, but does not remember walking on the walk; at the Normal school her impressions were vague, but she had an impression of passing a large building with lights in it, and that she fell down and was carried, and recalls being in bed in a strange place and of seeing Dr. Miller, whom she had seen at Tratt's home. She testifies to having no recollection of having, or of anyone attempting to have, sexual intercourse with her.

The defendant Quinn was then twenty-five years old, living with and supporting his mother at Whitewater, and had been a factory worker for three years immediately preceding this day. The evidence discloses that he was a liquor drinker. Hughes was twenty-six years old, and had been married for two years; he and his wife were living with her mother. Hughes was arrested and jointly informed against with the defendant; but demanded a separate trial, which was awarded him. The men's version of the transactions of the evening after meeting Agnes Secquist, as to their

walking on the streets, drinking of liquor, and the conversation they had, is in substantial accord, except as to what occurred between Hughes and Agnes Secquist when Quinn left them on the Esterly school grounds, while he procured the second bottle of liquor and returned thereto, and as to what occurred between her and defendant when Hughes first left them on the Normal school grounds and returned, at which time Hughes testified he observed them as he approached, and saw defendant on top of her, in the position of having sexual intercourse with her; that after defendant arose, he saw her lying on her back, her legs stretched out, and her garments raised up to her waist; that she was in a condition of stupor and unconsciousness; that she made no effort to put her clothes down to cover the exposed parts of her person; and that he, after the defendant spoke suggesting to him to help himself, pulled up one of her stockings, which had come down, and she said, "Stop that;" and that he then pulled her clothes down to cover her, and to him she appeared unconscious, and as if she knew nothing. It appears that she could not walk nor give intelligible replies to inquiries when found by others immediately after she was left by the defendant and Hughes; and that she was in a maudlin stupor, the result of alcoholic liquors.

The defendant denies that he had, or attempted to have intercourse with her at any time on the occasion in question, and denies that he was in the position on her as testified by Hughes, or that he did or said anything tending to show he was guilty of outraging her, as is alleged and claimed by the state.

The jury found that defendant assaulted her with intent to commit the crime of rape, and upon this verdict the court adjudged the defendant guilty of this crime, and sentenced him to two years' confinement in the state reformatory. This judgment is before us for review.

Mr. D. S. Tullar, with Messrs. E. T. Cass and Henry Lockney, for plaintiff in error:

The court erred in charging and refusing to charge the jury on the subject of reasonable doubt.

Murphy v. State, 108 Wis. 111, 83 N. W. 1112; Buel v. State, 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175; Meehan v. State, 119 Wis. 621, 97 N. W. 173; Hoffman v. State, 97 Wis. 571, 73 N. W. 51; McAllister v. State, 112 Wis. 496, 88 N. W. 212.

Reasonable doubt is a doubt causing pause and hesitation, by a reasonably pru-

dent man, in the most important affairs of life.

Crilley v. State, 20 Wis. 232; State v. Ford, 21 Wis. 611; Croghan v. State, 22 Wis. 444; State v. Wilner, 40 Wis. 304; Anderson v. State, 41 Wis. 430, 2 Am. Crim. Rep. 198; Hill v. State, 17 Wis. 679, 86 Am. Dec. 736; Revoir v. State, 82 Wis. 295; 52 N. W. 84; Ryan v. State, 83 Wis. 486, 53 N. W. 836; Murphy v. State, 86 Wis. 626, 57 N. W. 361; Barnard v. State, 88 Wis. 656, 60 N. W. 1058; Kollock v. State, 88 Wis. 663, 60 N. W. 817; Fossdahl v. State, 89 Wis. 482, 62 N. W. 185; Jackson v. State, 91 Wis. 253, 64 N. W. 838; Emery v. State, 92 Wis. 146, 65 N. W. 848; Franklin v. State, 92 Wis. 269, 66 N. W. 107; Hoffman v. State, 97 Wis. 571, 73 N. W. 51; Butler v. State, 102 Wis. 364, 78 N. W. 590; Buel v. State, 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175; Miller v. State, 106 Wis. 156, 81 N. W. 1020; Murphy v. State, 108 Wis. 111, 83 N. W. 1112; McAllister v. State, 112 Wis. 496, 88 N. W. 212; Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965; Secor v. State, 118 Wis. 621, 95 N. W. 942; Lowe v. State, 118 Wis. 641, 96 N. W. 417; Meehan v. State, 119 Wis. 621, 97 N. W. 173; Cupps v. State, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546; Loose v. State, 120 Wis. 115, 97 N. W. 526; Baker v. State, 120 Wis. 135, 97 N. W. 566; Schwantes v. State, 127 Wis. 160, 106 N. W. 237; Duthey v. State, 131 Wis. 178, 10 L.R.A.(N.S.) 1032, 111 N. W. 222; Miller v. State, 139 Wis. 57, 119 N. W. 850; Spick v. State, 140 Wis. 104, 121 N. W. 664; Hack v. State, 141 Wis. 346, 124 N. W. 492; Oborn v. State, 143 Wis. 249, 31 L.R.A.(N.S.) 966, 126 N. W. 737; Hedger v. State, 144 Wis. 279, 128 N. W. 80; Dillon v. State, 137 Wis. 655, 119 N. W. 352, 16 Ann. Cas. 913; Beauregard v. State, 146 Wis. 280, 131 N. W. 347; Birmingham v. State, 145 Wis. 90, 129 N. W. 670.

In prosecutions for rape or assault to commit rape, the character of a woman for chastity is material.

Watry v. Ferber, 18 Wis. 500, 86 Am. Dec. 789; Wigmore, Ev. §§ 62, 68; Barton v. Bruley, 119 Wis. 326, 96 N. W. 815; Seals v. State, 114 Ga. 518, 88 Am. St. Rep. 33, 40 S. E. 731; Pratt v. State, 19 Ohio St. 277; 23 Am. & Eng. Enc. Law, 870, 871, 873; Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309; Com. v. Tucker, 110 Mass. 405; Freeman v. State, 52 Tex. Crim. Rep. 500, 107 S. W. 1127; Neace v. Com. 23 Ky. L. Rep. 127, 62 S. W. 733; Brown v. Com. 102 Ky. 227, 43 S. W. 214.

The court erred in instructing the jury on the subject of the knowledge by defend-

ant of the unconscious condition of the girl.

State v. Cunningham, 100 Mo. 382, 12 S. W. 376, 8 Am. Crim. Rep. 669; Com. v. Burke, 105 Mass. 377, 7 Am. Rep. 531; Whittaker v. State, 50 Wis. 518, 36 Am. Rep. 856, 7 N. W. 431, 3 Am. Crim. Rep. 391; State v. Warren, 232 Mo. 185, 134 S. W. 522, Ann. Cas. 1912 B, 1043; Reg. v. Ryan, 2 Cox, C. C. 115; Reg. v. Camplin, 1 Den. C. C. 89, 1 Car. & K. 746, 1 Cox, C. C. 220; Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 774; State v. Tarr, 28 Iowa, 398; State v. Enright, 90 Iowa, 520, 58 N. W. 901; Hudson v. State, 49 Tex. Crim. Rep. 24, 90 S. W. 177; Milton v. State, 23 Tex. App. 204, 4 S. W. 574; State v. Riseling, 186 Mo. 521, 85 S. W. 372; State v. Painter, 67 Mo. 84; Garnet v. State, 1 Tex. App. 605, 28 Am. Rep. 425.

This is a case of circumstantial evidence. No witness directly charges the commission of the crime,—the girl does not.

Colbert v. State, 125 Wis. 423, 104 N. W. 61.

Messrs. Walter C. Owen, Attorney General, W. W. Gilman, Assistant Attorney General, Robert C. Bulkley, and Jay W. Page, for the State:

All cases where it has been held necessary to instruct the jury upon the question of knowledge are cases where the woman was weak or feeble minded, and no case will be found requiring that instruction where the girl has been incapable of consent by the act of the defendant.

Clark & M. Crimes, § 295; Reg. v. Camplin, 1 Den. C. C. 89, 1 Car. & K. 746, 1 Cox, C. C. 220; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531; 33 Cyc. 1426; Reg. v. Fletcher, 8 Cox, C. C. 131, Bell, C. C. 63, 28 L. J. Mag. Cas. N. S. 85, 5 Jur. N. S. 179, 7 Week. Rep. 204; Harlan v. People, 32 Colo. 397, 76 Pac. 792; People v. O'Brien, 130 Cal. 1, 62 Pac. 297; People v. Griffin, 117 Cal. 583, 59 Am. St. Rep. 216, 49 Pac. 711; Com. v. Lowe, 116 Ky. 336, 76 S. W. 119; State v. Huff, 161 Mo. 459, 61 S. W. 900; Gore v. State, 119 Ga. 419, 100 Am. St. Rep. 182, 46 S. E. 671; State v. Tarr, 28 Iowa, 397; State v. Enright, 90 Iowa, 520, 58 N. W. 901; People v. Snyder, 75 Cal. 323, 17 Pac. 208; People v. Crosby, 17 Cal. App. 518, 120 Pac. 441.

Giving liquor with intent to secure intercourse is an assault.

McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260; Hays v. People, 1 Hill, 351; Rex v. Rosinski, 1 Moody, C. C. 19; Gage v. State v. Tarr, 28 Iowa, 397; State v. En-565; Duckett v. State, — Tex. Crim. Rep. —, 150 S. W. 1177; Reg. v. Dungey, 4 Post. & F. 102; State v. Smith, 80 Mo.

516; *State v. Montgomery*, 63 Mo. 296; *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25, 18 S. E. 132; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286; *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350; *Reg. v. Button*, 8 Car. & P. 660; *Baer v. Hepfinger*, 152 Wis. 558, 140 N. W. 345.

Stiebecker, J., delivered the opinion of the court:

The defendant contends that the evidence fails to establish the fact of his guilt of the crime charged in the information, and that the court erred in refusing to direct a verdict of not guilty. The grounds for this contention are that the evidence affirmatively shows that the defendant did not assault Agnes Secquist as alleged, and that the defendant and she, from the time they met on the evening in question, had an understanding by which she consented to sexual intercourse, and hence the essential elements of the crime were not proven. The finding of the jury that the defendant committed an assault upon her is abundantly supported by the positive and circumstantial evidence of the case. The jury were fully justified to find this fact from the evidence of Hughes, the parties at the Normal school, and all of the details of what took place there, and the defendant's conduct as regards giving her the liquor, shown by his evidence and that of the girl and Hughes. Whether such an assault was made with the intent to commit rape is the serious question presented upon this branch of the case. It is insisted that Agnes Secquist's conduct from the time she communicated with the defendant on the evening of February 22d, to the time of the alleged assault on the Normal school grounds, conclusively shows that she consented to having sexual intercourse with the defendant, and that the evidence therefore fails to establish an essential element of the crime of assault with intent to commit rape. Under the facts and circumstances as disclosed by the evidence, it is important to ascertain how the fact of Agnes Secquist's intoxication affects the question of the defendant's guilt in the matter. The evidence leaves no room for argument but that the jury were warranted to find that she was intoxicated so as to be insensible and in a stupor at the time it is claimed defendant assaulted her on the Normal school grounds. Her evidence, as well as that of Hughes and others who saw her, clearly tends to show that she was in a mental stupor from alcoholic drink which made her insensible and incapable of consenting. This fact has an important bearing

in characterizing the assault on her by the defendant, which the jury must be presumed to have found by their verdict. In *Whittaker v. State*, 50 Wis. 521, 36 Am. Rep. 856, 7 N. W. 432, 3 Am. Crim. Rep. 391, in discussing the effect of intoxication as regards the element of nonconsent of the female in rape cases, it is declared: "In further explanation and palliation of this use of the word, it has been held that forcible connection with a female who is insane, or an idiot, or intoxicated so as to be insensible, or who is deceived, believing the defendant to be her husband, and in other like cases, where the will of the female does not concur with the act, or oppose it, and does not act at all, and where she has no power of consenting or dissenting, the act is said to be 'against her will,' and this necessary ingredient of rape is present. 2 Wharton, Crim. Law, § 1142, and note a; and as in *Walter v. People*, 50 Barb. 144; *People v. Quin*, 50 Barb. 128; and *Crosswell v. People*, 13 Mich. 427, 87 Am. Dec. 774. In such cases it is consistent to hold that the act is 'against the will' only because it was not approved by the will, or the will did not concur with the act. In all cases where there is no sensibility or consciousness, or freedom of the will, the act is said to be against the will."

As above stated, the evidence adduced fully sustains the conclusion that Agnes Secquist was intoxicated so as to be insensible, and that if the defendant assaulted her with the intent to commit the crime of rape, she was incapable of consenting thereto, and his act must be considered in the light of her incapacitated condition of approving it by her will, and be treated as being against her will. The court fully informed the jury that the alleged assault upon her could not be found to constitute the offense of assault with intent to commit rape under the facts and circumstances adduced in evidence, unless they found beyond a reasonable doubt that the defendant in fact assaulted her with such intent, and that she was so intoxicated as to be insensible and thus rendered incapable of consenting thereto. The claim that her conduct in arranging with the defendant to meet him, and her conduct after meeting him and Hughes, shows that she thereby gave her consent to sexual intercourse, cannot be considered established as a matter of law in the light of her intoxication, and his denial that he had or attempted to have intercourse with her. We therefore consider that the court properly refused to direct the jury to acquit the defendant of the charge preferred against him upon these grounds.

The court informed the jury that the

crime of rape necessarily included an assault with intent to rape, and that a defendant charged with the latter offense could be convicted thereof if the jury found a rape had been committed, and proceeded by instructing them as follows: "If the testimony convinces you beyond a reasonable doubt that the defendant, Francis Quinn, actually had sexual intercourse with Agnes Secquist at the time and place alleged, and that at the time of such intercourse the said Agnes Secquist was so intoxicated as to be incapable of either resisting or consenting to such act, then you should find the defendant guilty as charged. Or, if the testimony convinces you beyond a reasonable doubt that the witness, Agnes Secquist, on the night in question, was so intoxicated as to be incapable of either resistance or consent to sexual intercourse, and then the defendant, with knowledge that she was so incapable of either resisting or consenting, laid hands upon her with the intent then and there to have sexual intercourse with her, then you should find him guilty as charged." The first part of this portion of the charge is assailed as prejudicially erroneous because it asserts that it is not necessary that the defendant knew of her intoxicated condition to warrant a verdict of guilty. It must be borne in mind that the charge preferred against the defendant was an assault with the intent to commit rape, and that the jury were repeatedly informed that this was the offense for which the defendant was being tried. The foregoing instructions must be considered in the light of this fact and that the jury must be presumed to have acted in accordance therewith. Examining it from this view point, we do not find the instructions prejudicially erroneous, though the first part omits the element of knowledge by the defendant of her intoxication. The jury had their attention specifically directed to the necessity of finding that he must have had knowledge of her condition to authorize them to find him guilty as charged. We cannot think that the omission to bring this to their attention specifically in the first part of this portion of the charge misled them to defendant's prejudice. Furthermore, the evidence on the subject is indisputable, to the effect that defendant must have known the actual condition as to her intoxication brought about through his own acts, and hence the alleged omission complained of in the charge could not have operated to his prejudice by having any of his rights substantially affected thereby. *Reg. v. Camplin*, 1 Den. C. C. 89, 1 Car. & K. 746, 1 Cox, C. C. 220; *Com. v. Burke*, 105 Mass. 376, 7 Am. Rep. 531.

It is urged that the court erred in charging

that, if defendant gave Agnes Secquist the liquor with the intention fully formed in his mind of putting her in a condition of insensibility, so that she had no power of opposing sexual intercourse with him, and with the intent then present in his mind to have such intercourse with her while in such powerless condition, then the giving of the liquor constituted an assault with intent to commit rape. The charge immediately following this instruction directed the jury that, if defendant gave her liquor for the purpose only of inducing her to submit to sexual intercourse with him, then no assault was committed in giving it to her, and he could not be held guilty of the crime charged against him. It is clear that the instruction complained of informed the jury that the giving of the liquor by the defendant constituted an assault only if it was done by him with the intent to destroy her power of resistance by reducing her to insensibility, and the present intent to have sexual intercourse with her when in that condition. Under such circumstances, the assault with intent to commit rape is complete, and we find no objection to the instruction, because it did not require that some additional force must be employed by the assailant to that involved constructively in the acts of giving her the liquor with these intents in his mind. There is no dispute but that he took the actual steps of giving her the liquor, and, since the jury found this was done with the criminal intent charged, the essentials of the offense are present. *State v. Lung*, 21 Nev. 209, 37 Am. St. Rep. 505, 28 Pac. 235.

It is argued that the court erred in its charge to the jury, in that it did not correctly state the law upon the question of reasonable doubt. We have examined the charge on this subject and find it substantially correct. The phraseology employed is in no way misleading to the jury, and they undoubtedly gave him the benefit of every reasonable doubt.

It is argued that the court erred in refusing to charge as requested upon the effect, in cases of this nature, of outcry or its absence by the person assaulted. Under the evidence of Agnes Secquist's condition, the instruction was immaterial, and its omission deprived the defendant of no right.

It is also argued that the refusal to give the requested charges as to circumstantial evidence was error. The evidence in the case is largely direct and positive in character, and no necessity is shown requiring the jury to resolve any issues on such evidence alone. While the instruction might, properly, have been given as requested, its rejection cannot reasonably be said to have

affected any substantial right of the defendant.

We examined the case with care, and find no reversible error in the record.

Judgment affirmed.

ALABAMA SUPREME COURT.

NASHVILLE, CHATTANOOGA, & ST.
LOUIS RAILWAY, Appt.,

v.

W. F. GARTH.

(— Ala. —, 59 So. 640.)

Railroad — injury to stock — statutory requirements.

1. The statute requiring a railroad com-

Note. — Duty of train men where animals are frightened by train, but are not struck by it.

As to duty of railroad employees to keep a look out for live stock on track, see note to Harris v. Missouri, K. & T. R. Co. 24 L.R.A. (N.S.) 858.

As to duty to give crossing signals for animals, see note to Campbell v. Mobile & O. R. Co. post, 881.

As to liability for frightening animal to death, see Louisville & N. R. Co. v. Melton, 23 L.R.A. (N.S.) 183, and note appended thereto.

It is the purpose of the present note to treat only those cases wherein an animal was injured on the railroad right of way while attempting to escape from a train by which it was frightened, but with which it did not come in actual contact; and as indicated in the title, includes only cases involving the duty of the train men in the premises. So far as the liability depends upon the breach of the company's statutory duty to fence its tracks, it is considered in the note in 37 L.R.A. (N.S.) 1181.

The general rule seems to be that, in the absence of a breach of statutory duty, a railroad company is liable for killing or injuring animals upon its right of way resulting from fright caused by the operation of its rolling stock in a negligent or wanton manner, but is not liable in the absence of such a failure to use reasonable and ordinary care. Of course, the question whether there was negligence or want of ordinary care in a particular instance depends upon the surrounding circumstances, it being impossible to lay down any general rule.

A number of attempts have been made to have cases of the class herein under discussion declared within the meaning of various statutes which modify or change the common-law rule of liability of railroads for injuries to animals, but the majority of such statutes have been held inapplicable in that there was no actual contact with the train, and that the stat-

pany to prove care in case stock is killed or injured by its locomotive does not apply to injury to stock falling through a trestle in fleeing from a locomotive.

Same — stock on track — duty of engineer.

2. A railroad company is not liable for the death of a colt which is frightened at the approach of a locomotive and runs along the track into a trestle, if those in charge of the engine, upon seeing the animal near the track, did not wantonly or maliciously frighten it, and after it entered on the track, used due care to stop the engine, which was done before the trestle was reached, although the track was elevated a little, with water on each side of it, which might render it more difficult for the animal to leave the track.

(June 29, 1912.)

utes contemplated only cases of injuries resulting from actual collision.

In general.

There seems to be no question but that the railroad company is liable for injuries resulting from fright caused by wanton, unnecessary, or unusual conduct upon the part of the railroad employees. Southern R. Co. v. Pool, 108 Ga. 808, 34 S. E. 141 (horse frightened by wanton, unnecessary, and unusual blowing of locomotive whistle, and ran into barbed wire fence); Louisville & N. R. Co. v. Upton, 18 Ill. App. 605 (whistle was unnecessarily and continuously sounded after passing animal, which caused it to run into unlawful fence). And it has been expressly held that the acts and conduct of the train men in operating the train, if negligent, need not necessarily be wilful and malicious, in order to render the railroad company liable. Ibid. But see Denver & R. G. R. Co. v. Nye, 9 Colo. App. 94, 47 Pac. 654, 1 Am. Neg. Rep. 12, wherein, in holding that a railroad company would be liable for any injuries caused by being struck by a negligently operated railroad train, the court said that an instruction to the effect that, for any injury to stock caused by running against, into, or attempting to jump a right of way fence, though caused by fright at the speed or noise of the train, or the escape of steam or smoke from the locomotive, and the noise occasioned thereby, the defendant would not be liable, "no matter in what manner it might have been operating its locomotive train,"—was held "to fairly state the law of the case."

And it is equally clear that a railroad company is liable if its servants were negligent, and the negligence was the proximate cause of the injury (see, generally, to this effect, Southern R. Co. v. Hobson, 4 Ala. App. 408, 58 So. 751; Alabama G. S. R. Co. v. Hall, 133 Ala. 362, 32 So. 259; Paragould Southeastern R. Co. v. Crunk, 81 Ark. 35, 98 S. W. 682; Central R. Co. v. Lindley, — Ark. —, 151 S. W. 246;

APPPEAL by defendant from a judgment of the Circuit Court for Madison County in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's colts, which were alleged to have been negligently frightened by defendant. Reversed.

The facts are stated in the opinion.

Messrs. Cooper & Cooper for appellant.

Messrs. Walker & Spragins, for appellee:

Negligence in allowing the colts to run out of their inclosure, even where it amounts to a criminal offense, cannot be regarded as a proximate cause of an injury negligently inflicted upon them by a railroad train.

Alabama G. S. R. Co. v. McAlpine, 71 Ala. 545; Alabama G. S. R. Co. v. Jones, 71

Ala. 487; Louisville & N. R. Co. v. Kelsey, 89 Ala. 287, 7 So. 648.

Failure to sound the alarm or attempt to get the train under control was the cause of the injury.

Alabama G. S. R. Co. v. Hall, 133 Ala. 362, 32 So. 259; Chattanooga Southern R. Co. v. Daniel, 122 Ala. 366, 25 So. 197; Chattanooga Southern R. Co. v. Wilson, 124 Ala. 444, 27 So. 486.

Simpson, J., delivered the opinion of the court:

This action is brought by the appellee for damages resulting from the fact, as alleged, that the defendant caused thirteen colts belonging to the plaintiff to become frightened by an approaching train, thereby causing them to run into a trestle on de-

Atlanta & W. P. R. Co. v. Hudson, 62 Ga. 679; Louisville & N. R. Co. v. Upton, 18 Ill. App. 605; Indianapolis, B. & W. R. Co. v. McBrown, 46 Ind. 229; Kentucky C. R. Co. v. Marsh, 7 Ky. L. Rep. 761; Ohio Valley R. Co. v. Major, 12 Ky. L. Rep. 797; Alabama & V. R. Co. v. Moore, 81 Miss. 14, 32 So. 908; Brinkley v. Wilmington & W. R. Co. 126 N. C. 88, 35 S. E. 238; and Brothers v. South Carolina R. Co. 5 S. C. 55), but that no liability attaches at common law if there was no negligence (see East Tennessee, V. & G. R. Co. v. Watters, 77 Ga. 69; Richmond & D. R. Co. v. Buice, 88 Ga. 180, 14 S. E. 205; Pittsburgh, C. & St. L. R. Co. v. Stuart, 71 Ind. 500; and Brothers v. South Carolina R. Co. 5 S. C. 55), it being sufficient if the servants of the railroad company, upon discovering animals upon its right of way, used ordinary care and prudence in so operating their trains as not to cause injury to such animals (Chicago & N. W. R. Co. v. Taylor, 8 Ill. App. 108).

But what constitutes negligence in the class of cases under discussion is a matter often difficult to determine, and so necessarily dependent in each instance upon the particular facts that, as before stated, general rules cannot well be deduced.

In the following cases, it was held that the particular facts did not show negligence upon the part of the company's servants in charge of the train: Thus, in Barnhart v. Chicago, M. & St. P. R. Co. 97 Iowa, 654, 66 N. W. 902, it was held that the railroad company's employees were not negligent where they stopped the train at least a quarter of a mile from the bridge in which the horse was injured, and a brakeman had gone ahead to help the keeper of the animal to keep it off the bridge, and had, in fact, got ahead of the animal, but it rushed past them and into the bridge. And a similar conclusion was reached in Southern R. Co. v. Phillips, 100 Tenn. 130, 42 S. W. 925, 3 Am. Neg. Rep. 610, where the train not only stopped, but the fireman went ahead and attempted to drive the animal off the track. And see Georgia 46 L.R.A. (N.S.)

P. R. Co. v. Money, — Miss. —, 8 So. 846, as set out in NASHVILLE, C. & ST. L. R. Co. v. GARTH.

So, it has been held that there was no negligence which would render the railroad company liable for injuries to a horse caused by running into a railroad trestle, where the evidence showed that the train almost stopped and gave it time to escape, that the whistle was blown to frighten it off the track, and that the disaster was caused by its own obstinacy in following the track when it might have left it. Gay v. Wadley, 86 Ga. 103, 12 S. E. 298; Southern R. Co. v. Frix, 137 Ga. 607, 73 S. E. 1057.

And it has been held that there was no negligence where a horse suddenly jumped on the track and, running ahead of the train, ran into an open culvert, it appearing that the horse had opportunity to leave the track, that the engineer let off steam to scare it off the track, and, using every proper means to stop the train, did stop it before the culvert was reached. Brothers v. South Carolina R. Co. 5 S. C. 55.

And it was held in Chicago & N. W. R. Co. v. Taylor, 8 Ill. App. 108, that ordinary care was used where the engineer, upon discovering a horse upon the railroad right of way, slackened the speed of the train to that of an ordinary pedestrian, and so ran it for over a quarter of a mile, there being no evidence that the animal could not have left the track easily, and the engineer in fact thought it had left the track.

So, it has been held that there was no lack of reasonable care where a horse frightened at a train ran along the foot of the railroad embankment, and upon an emission of steam from the engine which, so far as the proof showed, was in the usual management of the train, left its path, which it could have pursued safely, and fell into a ditch. Lowe v. Alabama & V. R. Co. 81 Miss. 9, 32 So. 907.

But the railroad company was held liable in the following cases upon the ground that it did not use sufficient due care to prevent

pendant's road, from which some of them died and others were injured.

The only eyewitness to the occurrence was the engineer, James Barrett, who testifies that the track is straight and the ground pretty level at the place in question, and that there is a fill something like 2 or 2½ feet above the natural surface of the ground; that when he first discovered the colts they were near a gate that opened out from the grazing farm onto a private road, which crosses the railroad about 250 feet from the trestle (or stock gap, as it is sometimes called); that they were 400 or 500 yards from him, "bunched together more in a playful mood than anything else;" that the gate was open; that when he first saw them at the gate, he applied the emergency

brake, also the service brake, which checked the train to some extent. After he traveled a while, they started towards the track, and he applied the emergency brake at once, reversed the engine, pulled open the sand lever, and blew the whistle once; that they were about 500 feet from him when they came up to the track, and ran north in front of him; that he was traveling about 25 miles an hour, and used all the means known to skilful engineers to stop the train, and did stop it within about 200 or 225 feet of the trestle.

On cross-examination he stated that the function of the service brake is to "just steady the train and get it under control, so I could stop it if I wanted to;" that he could stop the train in about 150 to 200

horses from becoming so frightened as to jump into an illegal fence to their injury: *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679 (speed of train not checked and short and frequent blasts of whistle given); *Louisville & N. R. Co. v. Upton*, 18 Ill. App. 605 (whistle unnecessarily and continuously sounded after driving horse off track).

In a number of instances an attempt to hold the railroad company liable as for negligence predicated upon the giving of signals has been made. Thus, where an animal running in front of a train was frightened off the track, and ran into a fence to its injury, by a signal given for the purpose of frightening it off, the failure to give which would have been a failure to use ordinary care, the company has been held not to be liable for the injury. *St. Louis Southwestern R. Co. v. Conger*, 84 Ark. 421, 105 S. W. 1177, referred to in *NASHVILLE, C. & St. L. R. Co. v. GARTH* (engineer let off steam); *Southern R. Co. v. Puryear*, 2 Ga. App. 75, 58 S. E. 306 (engineer blew stock alarm). And the same rule has been held to apply where the injury was caused by fright occasioned by the noises reasonably incident to the movements and workings of the engine, the giving, in a reasonable manner, of crossing signals and signals to employees, etc. *Southern R. Co. v. Puryear*, supra (statutory crossing signal); *Kentucky C. R. Co. v. Marsh*, 7 Ky. L. Rep. 761 (noises incident to workings of engine and signal to employees); *Lowe v. Alabama & V. R. Co.* 81 Miss. 9, 32 So. 907 (emitting steam in the usual management of the engine). But this rule does not hold where the signals or alarms were given in an unusual and unnecessary manner. *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 16, 18 L.R.A. 110, 38 Am. St. Rep. 217, 20 S. W. 545, quoted in the *GARTH CASE*.

In perhaps a majority of the cases, the question of the existence or nonexistence of negligence depended upon whether the servants of the railroad company were under the facts in duty bound to stop the train in an attempt to avoid the injuries.

Thus, it has been held that the train men

were not guilty of negligence in not stopping the train before the frightened animal was injured, where it could not have been reasonably anticipated, as a natural or probable consequence of the failure to stop, that the animal would attempt to pass over the culvert in which it was injured instead of getting off the track as others had done. *Hot Springs R. Co. v. Newman*, 36 Ark. 607, followed in *St. Louis, I. M. & S. R. Co. v. Bragg*, 66 Ark. 248, 50 S. W. 273, wherein a mule frightened by an approaching train ran into a culvert and was injured by a fall, and it was held that the train men were under no duty to stop the train, as they could not have foreseen, as a natural or probable consequence of the failure to stop, that the animal would go upon the trestle and be injured. And see to the same effect *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 38, 50 S. E. 448.

And it has been held that the engineer was under no duty to stop his train and send out a man to prevent a horse running upon a trestle, where he slackened the speed of the train to that of a person walking and so ran it for over a quarter of a mile, and there was no evidence to show that the animal could not have left the track easily, and in fact the engineer did think that the horse had left it. *Chicago & N. W. R. Co. v. Taylor*, 8 Ill. App. 108.

So, where the whistle was blown and the speed of train was so slackened as to give the animal ample opportunity to leave the track, which it could easily have done, it has been held that the railroad employees fulfilled their duty, and that it was not necessary to stop the train in violation of the company's duty to its passengers, to whom it was said the company owed the first duty as regards safety and despatch, and go forward and drive the animal off the track. *Pittsburgh, C. & St. L. R. Co. v. Stuart*, 71 Ind. 500.

And where a horse ran along by the side of the track until the train at which it had become frightened had partially passed it, and then turned off, and injured itself in some "borrow pits," it was held that the railroad company was not liable

yards. Putting on the emergency brake had the effect of a sudden stop, jarring and jolting, which would be noticed by a railroad man, but not by a passenger; that, as a general rule, he blew the whistle whenever he saw stock near the track, and they usually went away, and for this reason he blew the whistle when he saw the colts; that they did not seem to be coming towards the track until he blew the whistle, and he then stopped the train as quickly as he could.

The conductor did not see the accident, but testifies to feeling the effect of the emergency brake.

The fireman testified that he was putting in coal when Barrett began blowing the whistle; that he leaned out of the window and saw the stock,—part of them coming on

the track, and part running by the side of the track; that Barrett, after first applying the service brake, applied the emergency brake when the stock began to come on the track, and the train came to a standstill about 175 or 200 feet from the trestle.

James Barrett, on being recalled, explained that he meant to say that he blew the whistle 400 or 500 feet (not yards) from the crossing.

W. A. Cummings, who was baggage master, testified that he was standing in the door of the baggage car when he heard the danger whistle blow, immediately looked out, saw the colts about to enter on the track, or in the act of crossing, and felt the brakes applied immediately upon the blowing of the whistle; that it was 260 feet by

for such injuries, although the engineer did not stop or check the speed of the train, it being said that the extent of the risk arising from his failure to do so was of the horse getting on the track and being injured. *New Orleans & N. E. R. Co. v. Thornton*, 65 Miss. 256, 3 So. 654.

But, on the other hand, where an approaching hand car so frightened a horse that it ran down the track pursued by the car, and in its fright jumped into a trestle, it was held that it was the duty of the railroad employees to stop the hand car and remove the cause of the fright, and that the failure to do so constituted negligence which rendered the company liable for the resulting injury to the horse. *Southern R. Co. v. Hobson*, 4 Ala. App. 408, 58 So. 751.

And that it is the duty of the train men to stop the train and remove the cause of the flight of the frightened animal, where the surroundings are such that the animal will probably continue his flight along the track and into a trestle if the train is not stopped, see *Alabama G. S. R. Co. v. Hall*, 133 Ala. 362, 32 So. 259, as set out and quoted in *NASHVILLE, C. & ST. L. R. Co. v. GARTH*; *Paragould Southeastern R. Co. v. Crunk*, 81 Ark. 35, 98 S. W. 682, wherein a horse ran into a trestle, and the evidence tended to show that the train could have been stopped in time to avoid the resulting injury; *Central R. Co. v. Lindley*, — Ark. —, 151 S. W. 246, wherein a carman breached his statutory duty to keep a look out, whereas, if he had kept a look out, he would have been cognizant of facts making it his duty to stop his car so as to remove the cause of the fright of an animal which ran into a trestle; and *Brinkley v. Wilmington & W. R. Co.* 126 N. C. 88, 35 S. E. 238, wherein it was found that the train could have been stopped in time probably to have avoided the injury.

And it has been held that the fact that the noises which frightened the injured animal were not unnecessary or unusual did not relieve the company from its duty to put an end to the cause of such fright by stopping the car, where there was time to do so and the employees knew that the sur-

roundings were such that, if such cause was not discontinued, the animal would probably continue its flight and be injured. *Southern R. Co. v. Hobson*, supra.

So, where the engineer knew that horses ahead of the train could not get away from the roadbed because of barbed wire fences on the sides, and that there was a trestle in front which they could not safely cross, it was held to be his duty to stop the train until the horses could be driven out of danger, a failure to perform which rendered the company liable for injuries received by the horses in running into the trestle. *Ohio Valley R. Co. Major*, 12 Ky. L. Rep. 797.

And it has been held that the railroad employees were guilty of negligence rendering the company liable for injuries to an animal caused by its jumping into a trestle, where the evidence showed that the animal ran upon the track and into a cut from which it could not escape on either side, and that the train pursued the horses and continued to sound the whistle, which caused them to run into a trestle at the end of the cut, the ground being that in such case the train should have been stopped, it having been averred that it could have been stopped easily after the horses were in the cut and before they fell into the trestle. *Indianapolis, B. & W. R. Co. v. McBrown*, 46 Ind. 229.

So, in *Alabama & V. R. Co. v. Moore*, 81 Miss. 14, 32 So. 908, where a railroad bicycle closely pursued a frightened horse along a track from which it could not escape, until it ran into a trestle, it was held that the jury properly found that the railroad employee failed to exercise proper care, he having seen the horse and comprehended its danger.

Under statute.

As to liability of railroad company for injury to stock other than by trains, because of breach of statutory duty to fence, see note to *Jimerson v. Erie R. Co.* 37 L.R.A.(N.S.) 1181.

Aside from the fence cases above referred to, but few decisions have involved the is-

actual measurement from the place where the train stopped to the trestle.

Wm. R. Ridgway, a witness for plaintiff, who was a passenger in the rear coach, did not see the colts until the train stopped. He testified that the track was straight for about a mile; that he could not tell how long it was before the train stopped that he heard the alarm whistle; that when he got off the engine was stopped, and within 25 or 30 feet of the trestle; that there was water on both sides of the trestle, and the colts that were not injured ran on down the railroad (north) towards Huntsville; that "at the time the alarm whistle was blown that train was running at the usual speed, and ran this way for a while thereafter, and then slacked up."

Henry Strong, a witness for the plaintiff, testified that the engine was 30 or 40 feet from the trestle when it stopped, but he did not measure it, and could not say positively whether the engine had crossed the private road.

Fait E. Drake, a witness for the plaintiff, testified to hearing the whistle; could not testify as to distances, but thought the engine was about 40 feet from the trestle when it stopped, though could not say whether it had crossed the private road.

sue of the applicability of a statute which changes or modifies the common-law rule of liability, and in those at hand the ruling has been universal that they do not apply to cases where the rolling stock does not come into actual contact with the animals injured.

Thus, a statute similar in effect to that construed in *NASHVILLE, C. & St. L. R. Co. v. GARTH* was held not to apply to injuries to frightened animals resulting from running into a trestle, in *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 38, 50 S. E. 448.

And a statute making a railroad company liable whenever any animals shall be killed or injured by the "cars or locomotives or other carriages," without regard to the question whether such injury or destruction was the result of wilful misconduct or negligence, or the result of unavoidable accident, was held not to apply to an injury to stock resulting from fright, where the animal was not actually struck by the train, in *Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335, wherein a horse was injured by trying to jump a culvert; in *Ohio & M. R. Co. v. Cole*, 41 Ind. 331, wherein a colt ran upon tracks and broke its leg in a cow pit; in *Indianapolis, B. & W. R. W. Co. v. McBrown*, 46 Ind. 229; in *Louisville, N. A. & C. R. Co. v. Smith*, 58 Ind. 575; and in *Baltimore, P. & C. R. Co. v. Thomas*, 60 Ind. 107.

And under the Texas statute which made every railroad company liable for the value of all stock killed by the "locomotive and cars" of such companies in running their 46 L.R.A. (N.S.)

The first question which presents itself is whether § 5476 of the Code of 1907, which provides when any "stock is killed or injured, or other property destroyed or damaged, by the locomotive or cars of any railroad, the burden of proof, in any suit therefor, is on the railroad company to show a compliance with the requirements of such sections, and that there was no negligence on the part of the company or its agents," is applicable to this case.

The wording of the section itself shows that it refers to those cases in which stock is killed or injured by coming into collision with the engine or cars; for in a case like the present, if the contention of the plaintiff be sustained, the stock is not killed, or injured by the locomotive or cars, but as a consequential result of the negligence of the agents of the defendant in frightening them.

In the state of Indiana, they have a statute fixing an absolute liability upon railroads where animals are "killed or injured by the locomotives, cars, or other carriages of the company;" and the supreme court of that state holds that the statute has no application to a case where animals are frightened by the locomotives, etc., and caused to kill themselves. *Baltimore, P. &*

trains, it has been held that there is no liability in the absence of actual collision between the train and the animals injured. *Houston & T. C. R. Co. v. Harris*, 3 Tex. App. Civ. Cas. (Willson) 270, where a horse frightened at a train ran upon a bridge and fell off; *Texas & P. R. Co. v. Mitchell*, 4 Tex. App. Civ. Cas. (Willson) 454, 17 S. W. 1078, where a horse frightened at a train ran into a fence; *International & G. N. R. Co. v. Hughes*, 68 Tex. 290, 4 S. W. 494, where the frightened animal ran upon a trestle.

So, it has been held that a statute making proof of injury "inflicted by the running of locomotives or cars" prima facie evidence of want of reasonable skill and care on the part of the railroad company's employees does not apply to cases where the injury was not caused by actual contact with the locomotive or cars. *Lowe v. Alabama, & V. R. Co.* 81 Miss. 9, 32 So. 907.

And for a statute providing that the railroad company shall be liable for all damages resulting from any "accident or collision," upon a failure of the company to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident where an animal appears on the railroad roadway, which has been held to apply only to injuries directly inflicted by the train or the result of the omission of any statutory requirement, see *Holder v. Chicago, St. L. & N. O. R. Co.* 11 Lea, 176, as set out and quoted in *NASHVILLE, C. & St. L. R. Co. v. GARTH*.

G. J. C.

C. R. Co. v. Thomas, 60 Ind. 107; Ohio & M. R. Co. v. Cole, 41 Ind. 331; Peru & I. R. Co. v. Hasket, 10 Ind. 409, 71 Am. Dec. 335. and note.

The state of Texas also provided that "each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotive and cars of such railroad company in running over their respective railways;" and the supreme court of that state holds that the statute applies only to cases of actual collision, and not to cases where animals are injured through fright caused by the train. *International & G. N. R. Co. v. Hughes*, 68 Tex. 290, 4 S. W. 492; *Texas & P. R. Co. v. Mitchell*, 4 Tex. App. Civ. Cas. (Willson) 454, 17 S. W. 1079.

The statutes of Tennessee provided that when any animal or other obstruction appears on the track "the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train, and prevent an accident;" also, by another statute, that every railroad company that fails to observe these precautions "shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur;" and by another that, "where a railroad company is sued for killing or injuring stock, the burden of proof that the accident was unavoidable shall be upon the company." The supreme court of that state holds that "the injuries to persons and property provided against were injuries directly produced by the trains, and not injuries which stock might inflict upon themselves in the fright occasioned by the running of the trains in the legitimate exercise of the company's franchise." *Holder v. Chicago, St. L. & N. O. R. Co.* 11 Lea, 176, 181.

The reasoning of the foregoing decisions is satisfactory to us, and we hold that § 5476 of the Code of 1907 has no application to this case.

It may be stated as a general proposition that a railroad company has a right to operate its trains in the usual manner, making such noise as is incident to the proper conduct of the business, and is not liable for the consequences of fright to animals, unless its servants are negligent, by using its whistles, bells, etc., in an unusual or improper manner; and, "where animals are frightened merely by the approach of trains, the company will not be liable in the absence of any negligence in the operation of the train, or failure to exercise ordinary care to avoid the injury; but it will be liable if the fright of the animal was due to the train being operated in a negligent manner, or if, after discovering the fright and danger of the animal, the

injury could, by the exercise of ordinary care, have been avoided." 33 Cyc. 1166, 1167; *New Orleans & N. E. R. Co. v. Thornton*, 65 Miss. 256, 3 So. 654.

Where a horse broke his tether, came on the track, and ran ahead of the train, jumped into a trestle, and was killed, and the train did not stop immediately, but stopped before reaching the trestle, it was held that the company was not liable. *Georgia P. R. Co. v. Money*, — Miss. —, 8 So. 646.

Where animals were seen running along a road parallel to the track, and the engineer, after blowing the regular crossing signal, also sounded the cattle alarm to frighten them away, which proved ineffective as to one, which ran across the track and into a fence, the supreme court of Georgia held that, there being no unusual and improper noise made, the company was not liable. *Southern R. Co. v. Puryear*, 2 Ga. App. 75, 58 S. E. 306.

Where a horse strayed upon the track, and the engineer let off steam to frighten it away, which caused the animal to run into a winged fence extending across the track, the supreme court of Arkansas held the company not liable. *St. Louis S. W. R. Co. v. Conger*, 84 Ark. 421, 105 S. W. 1177.

In another case, where a horse straying on the track became frightened and ran into a wire fence badly out of repair, on the right of way, the same court held the company not liable, saying: "But appellant did owe to appellee the duty, when it discovered his colt upon its track, to use ordinary or reasonable care to avoid injury to it by running its train against it, or by frightening and driving it by unnecessary alarms against the wire fence." *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 16, 18 L.R.A. 110, 38 Am. St. Rep. 217, 221, 20 S. W. 545.

In our own court, in a case where a horse attached to a buggy, at a public crossing, became frightened at the noises or movements of the train and ran away, it was held that the company was not liable, unless the acts of the servants of defendant were wanton and malicious, and done in the discharge of duty by wanton whistling of the engine and reckless discharge of steam. *Stanton v. Louisville & N. R. Co.* 91 Ala. 383, 386, 8 So. 798, 11 Am. Neg. Cas. 66; *Louisville & N. R. Co. v. Lee*, 136 Ala. 182, 96 Am. St. Rep. 24, 33 So. 897; *Southern R. Co. v. Crawford*, 164 Ala. 179, 185, 51 So. 340.

In another case this court states: "On the evidence before them, it was open to the jury to find that defendant's train was being moved forward toward a trestle; that

plaintiff's horse was on the track between the engine and the trestle, running, in apparent fright of the train, toward the trestle; that the track along which the horse ran was on an embankment 5 or 6 feet high, the sides of which, while not 'precipitous,' were yet at such an incline as that a horse, in attempting to go down them, would partially slide; that the train was from 30 to 50 yards behind the horse, and going faster than he was,—'gaining on him;' that the engineer was aware of the situation, but did not seasonably stop or check the speed of his train; that, had he done so, the horse would not have continued his flight onto and into the trestle, and the injury to the animal would have been averted." On those facts the court held the general charge in favor of the defendant properly refused; that the engineer owed the plaintiff the duty of stopping the train; and that "if he negligently failed to discharge this duty, and in consequence the horse was injured, the defendant is liable." *Alabama G. S. R. Co. v. Hall*, 133 Ala. 362, 366, 32 So. 259, 260.

From these decisions of our own court, in connection with the decisions of other courts, we extract the principle that, as to the initial fright, the company is not liable, unless the acts of the servants of defendant were wanton and malicious; but after the animal is on the track, frightened, and running under conditions that indicate that, unless the train is stopped, it will run into the trestle, and that the danger may be averted by stopping the train, a duty arises to stop it; and if the engineer negligently fails to do so, the company will be liable.

The testimony of the only eyewitness shows, not only that he did not wantonly and maliciously make any unusual noise before the animals came on the track, and did not negligently fail to use the means of stopping the train after they got on the track, but shows affirmatively that as soon as he saw them approaching the track he used proper means to frighten them back, and commenced at once to use means to stop the train, and, according to the testimony of all the witnesses, he did stop the train at a distance variously estimated at 25, 30, 40, or 225 feet from the animals and the trestle.

There is nothing to show that the animals could not have run off from the track; it being merely stated that the track was on a fill of $1\frac{1}{2}$ or 2 feet, through a marshy place, with water on both sides. Some of the witnesses place the fill at 6 feet at the place where the accident occurred, but not at the place where the colts entered on the track; and one witness states that the water on one side of the track or right of way was

about 6 feet deep, but how far this water was from the track is not shown, except by the facts that the right of way is 100 feet wide, and colt tracks are described on both sides of the track, between it and the water, showing that there was a space between; and another witness states that the animals which were unhurt did avoid the trestle, and ran on down the road towards Huntsville.

There is no testimony tending to show that the engineer negligently failed to use the means to stop the train after the animals were on the track, and running down it frightened.

It is contended in the brief of appellee that the witness Ridgway stated that the train continued to run at its usual speed after the alarm whistle was sounded, and that the jury might well find that the perilous position of the animals was in plain view for more than half a mile, and he negligently failed to get his train under control, to slacken the speed, or try to stop until it was too late.

In reaching a conclusion in this case, it must be remembered that the claim is not for running against or over the stock, but simply for frightening them.

As to the engineer's seeing the stock when a half mile distant, there is not any evidence tending to show that. The witness Barrett stated at first that when he first saw them he was 500 yards distant (which would be less than a third of a mile); but he came back on the stand to explain that he intended to say feet in place of yards. At that time they were at the gate, in a playful mood, and the engineer was not called on to do anything, although he testifies that he did, according to his custom, blow the whistle once, which usually drove animals away, and as soon as he saw them start towards the track, he commenced using the means to stop the train. Even then, starting towards the track would not indicate running down the track in front of the train.

The witness Ridgway says that he cannot say how long before they got to the trestle it was when he heard the alarm whistle blown; that he heard the whistle, "and the train ran some little distance before it came to a stop." "It ran this way for a while thereafter, and then slackened up," which does not contradict Barrett and other witnesses, who testify that 200 or 225 feet is as short a space within which the train could be stopped. While he and others state that they estimated the distance from the engine to the trestle, when the train stopped, at from 25 to 40 feet, yet they testify further that they are uncertain whether the engine or the baggage car had passed the private

road crossing, which is shown by actual measurement to be 250 feet from the trestle.

We fail to find any evidence tending to show that the engineer was guilty of negligence in not using means to stop the train after it was apparent that the animals were frightened by the train. It results that the general charge should have been given in favor of the defendant.

The judgment of the court is reversed, and the cause remanded.

All the Justices concur, except McClellan, J., not sitting.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. W. J. ARMSTRONG COMPANY, Appt.,

v.

CITY OF WASECA et al., Respts.

(122 Minn. 348, 142 N. W. 319.)

Municipal corporation — furnishing electricity — obligation.

1. A city which undertakes to furnish electric light and power to the public is subject to the same duties and obligations, and possesses the same rights and privileges, as private persons or corporations doing the same class of service.

Same — equal service — duty to render.

2. Such a city is obliged to furnish power to all applicants who pay its proper and reasonable charges therefor. It cannot dictate to consumers what selection of appliances they shall make, as between those in common practical use. In this case relator found it necessary or advantageous in his business to use three-phase motors. Such motors are in common practical use. The city could not furnish current for three-

Headnotes by HALLAM, J.

Note. — *Duty to adapt electrical appliances and connections to the system which supplies the current.*

But one reported case has been found similar to STATE EX REL. W. J. ARMSTRONG CO. v. WASECA, as to facts and questions considered. In Kimball Bros. Co. v. Citizens' Gas & Electric Co. 141 Iowa, 632, 118 N. W. 891, it appeared that the consumer, who had a motor adapted to the three-phase electric system, applied for current to a power company which used the monocyclic system. It was contended by the consumer that the power company, knowing the system to which its motor was adapted, contracted to furnish current sufficient to run that motor. This contention was denied by the power company. It developed that the power company's current could not be used by the consumer successfully without the use of a clutch or some

phase motors without the use of transformers costing about \$80. With such transformers it could do so. It refused to furnish power at all, unless relator would discard his three-phase motors and install one-phase motors, to which the city system was adapted. Held, the court should require it to do so.

Same — necessary appliances — duty to furnish.

3. It does not follow that the city must bear the burden of the expense of such transformers. If a particular consumer desires service which the city can supply only by the installation of transformers at an expense which is substantial, and which is not entailed in furnishing power to others, then the consumer who occasions such special expense should bear the burden thereof. The one essential is that, whatever the charge, it must apply to all persons similarly situated, to the end that there shall be no discrimination.

Same — adjustment of expense — discretion.

4. As to the method of adjustment of such expense, whether by an installation charge, a rental, or an increased rate, the city has a large discretion. Its regulation, if fair and reasonable and free from discrimination, is binding on the applicant for service.

(July 3, 1913.)

A PPEAL by relator from an order of the District Court for Waseca County denying a writ of mandamus to compel defendants to furnish electric current for the operation of relator's machinery. Reversed.

The facts are stated in the opinion.

Messrs. Moonan & Moonan, for appellant:

When a municipality engages in a private enterprise for profit, it should have the same right, and be subject to the same liability, as private individuals.

other mechanism that would allow the motor to get up full speed before the elevator which it operated was to be lifted, and so the consumer had to abandon altogether the use of the power company's current. In an action for damages for breach of contract, it was held that it was the consumer's duty to use the clutch in order to lessen damages, but that, if the power company was at fault in having contracted to furnish electricity with the knowledge of the motor used by the consumer, it would have to bear the expenses entailed. The court in the course of its opinion said that when the attempt to run the motor was abandoned, it was the duty of the consumer to accept what was being furnished as sufficient and adequate, or to change its motor power by installing some other system which would operate the elevator to its satisfaction.

Two other cases which have considered

Gordon & Ferguson v. Doran, 100 Minn. 343, 8 L.R.A.(N.S.) 1049, 111 N. W. 272; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Keever v. Mankato, 113 Minn. 55, 33 L.R.A.(N.S.) 339, 127 N. W. 158, 775, Ann. Cas. 1912A, 216, 1 N. C. C. A. 187.

Having entered the field as the sole supplier to the city and inhabitants thereof of this power, it became and was its duty to furnish the power in question, and it cannot arbitrarily refuse so to do.

Independent School Dist. v. Le Mars City Water & Light Co. 131 Iowa, 14, 10 L.R.A.(N.S.) 859, 107 N. W. 945; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; State ex rel. Latshaw v. Water & Light Comrs. 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827; Snell v. Clinton Electric Light, Heat & P. Co. 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082; State ex rel. Wood v. Consumers' Gas Trust Co. 157 Ind. 345, 55 L.R.A. 245, 61 N. E. 674; Vermilye v. Postal Teleg. Cable Co. 205 Mass. 598, 91 N. E. 904; State ex rel. Marion v. Marion Light & Heating Co. 174 Ind. 622, 92 N. E. 731; Orcutt v. Pasadena Land & Water Co. 152 Cal. 599, 93 Pac. 497; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 579, 93 Pac. 490; Rushville v. Rushville Natural Gas Co. 132 Ind. 575, 15 L.R.A. 321, 28 N. E. 853; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 21 L.R.A. 639, 34 N. E. 818; American Waterworks Co. v. State, 46 Neb. 194, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; State ex rel. Gwynn v. Citizen's Teleph. Co. 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; Rothwell v. Consumers'

Co. 13 Idaho, 568, 24 L.R.A.(N.S.) 485, 92 Pac. 533; State ex rel. Mason v. Consumers' Power Co. 119 Minn. 225, 41 L.R.A.(N.S.) 1181, 137 N. W. 1104.

Mr. P. McGovern, for respondents:

The relator has no right to insist on a special kind of apparatus which he might think more suitable to him than the kind which the respondent offered to furnish.

Gardner v. Providence Teleph. Co. 23 R. I. 262, 55 L.R.A. 113, 49 Atl. 1004; State ex rel. Sagness v. Hawk Creek Teleph. Co. 120 Minn. 395, 139 N. W. 711; State ex rel. Mason v. Consumers' Power Co. 119 Minn. 225, 41 L.R.A.(N.S.) 1181, 137 N. W. 1104.

Hallam, J., delivered the opinion of the court:

The city of Waseca owns and operates an electric light and power plant which was installed at public expense for the purpose of furnishing electric light and power to its inhabitants.

Relator, W. J. Armstrong Company, operates a mercantile business in Waseca, and, as part of its business, has established and equipped a bottling works, which requires, for its operation, electric power. In order to operate said plant, relator installed two three-phase electric motors, with the intention of operating them by electric current to be furnished by the city. Having installed its motors, relator made application to the water and light board, requesting said board to connect its plant with the city system, and to furnish electric current and power. Said board refused to do so, on the ground that it could not furnish power to operate relator's three-phase motors without the installation of two transformers. It appears that such transformers would cost, if purchased new, about \$80. It further appears that transform-

the right of a power company to impose conditions precedent to the furnishing of current are included in this note, though they are not strictly in point with the distinctive question considered in the principal case. In State ex rel. Mason v. Consumers' Power Co. 119 Minn. 225, 41 L.R.A.(N.S.) 1181, 137 N. W. 1104, it was held to be an unreasonable discrimination for an electric light company to require an applicant for service to procure for it a right of way to his premises, where it did not impose the same conditions upon other applicants and patrons.

And in Snell v. Clinton Electric Light, Heat & P. Co. 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082, where the light company endeavored to collect the cost of a transformer from the consumer, under its rule that where it did not do the wiring the consumer should be required to pay for such transformer, it 46 L.R.A.(N.S.)

was held that, inasmuch as it furnished transformers free of charge for buildings wired by itself, it could not impose, as a condition to furnishing electricity to one whose building is wired by a third person, that he should pay for such transformer, although it may consider that the profits from the wiring justified furnishing the transformers without extra charge.

As to right to compel consumer to pay for connection with water mains, see note to Bothwell v. Consumers' Co. 24 L.R.A.(N.S.) 485. As to right of water company to require customer to keep service pipe in repair, see note to State ex rel. McClaugherty v. Bluefield Waterworks & Improv. Co. 32 L.R.A.(N.S.) 229. As to right of a municipality to require use of water meters and impose expense of same on consumer, see note to Cooper v. Goodland, 23 L.R.A.(N.S.) 410.

J. H. B.

ers were not in general use in the city. The board advised relator that, if it would install one-phase motors, the city could furnish power without the use of such transformers, and would immediately do so.

Relator instituted this mandamus proceeding to compel the city and its water and light board to install the service applied for. The trial court denied the writ. From an order denying a motion for a new trial, relator appeals.

1. In our opinion the water and light board should have given relator electrical power service, and the court should have issued a writ of mandamus requiring it to do so. The city has undertaken to furnish a public utility. It is to be governed in its duties and obligations, and in its rights and privileges, by the same rules as those which apply to private persons or corporations doing the same class of service. *Wiltse v. Red Wing*, 99 Minn. 255, 109 N. W. 114; *Gordon & Ferguson v. Doran*, 100 Minn. 343, 8 L.R.A.(N.S.) 1049, 111 N. W. 272; *Keever v. Mankato*, 113 Minn. 55, 62, 63, 33 L.R.A.(N.S.) 339, 343, 129 N. W. 158, 775, Ann. Cas. 1912A, 216, 1 N. C. C. A. 187.

2. The city is obliged to furnish power to all applicants who shall pay its proper and reasonable charges therefor. It cannot arbitrarily dictate to consumers what appliances they shall use, nor direct what selection they shall make as between appliances in common practical use. The difference in detail between one-phase and three-phase motors is not important. The testimony shows that both one-phase and three-phase motors are in common commercial use by consumers of electric power. Each has its advantages. The three-phase motor is best adapted to certain conditions. One of the defendant's witnesses testified that, if the total power used in any plant came to over 3 horse power, he would put in a three-phase motor. If below 3 horse power, he would put in one-phase. Mr. Armstrong testified that, while his company proposed to use less than 3 horse power to begin with, it expected to use 10 or 15 horse power "before the year rolls around." Relator was engaged in a legitimate business. It found it necessary or advantageous to install three-phase motors, as best adapted to the needs of that business. It demanded that power be furnished. It was the duty of the city to furnish such power and to install such appliances as were necessary for that purpose.

3. It does not follow that the city must bear the expense of conforming its appliances to those of relator. A single customer cannot dictate the sort of system the city shall install. The city officers must

determine in the exercise of their own best judgment the sort of system best adapted to the needs of the greatest number of consumers. If, then, a particular consumer desires service which the city can supply only by the installation of transformers at an expense which is substantial, and which is not entailed in furnishing power to others, the consumer who occasions such special expense should bear the burden thereof. Any other rule would operate as a discrimination in his favor.

This rule is well sustained by authority. Either the city or a private utility company may require special rates proportioned to the expense of the particular service (*Souther v. Gloucester*, 187 Mass. 552, 69 L.R.A. 309, 73 N. E. 558); may exact a minimum charge (*Gould v. Edison Electric Illuminating Co.* 29 Misc. 241, 60 N. Y. Supp. 559); may require the installation of meters and other necessary appliances at the consumer's expense (*Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 18 L.R.A.(N.S.) 746, 85 N. E. 90, 15 Ann. Cas. 377; *State ex rel. Hallauer v. Gosnell*, 116 Wis. 608, 61 L.R.A. 33, 93 N. W. 542; *Sheffield Waterworks Co. v. Bingham*, L. R. 25 Ch. Div. 443, 52 L. J. Ch. N. S. 624, 48 L. T. N. S. 604); may exact a meter rental (*Smith v. Capital Gas Co.* 132 Cal. 209, 54 L.R.A. 769, 64 Pac. 258); or may require a deposit to secure its fair return (*Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Shepard v. Milwaukee Gas-light Co.* 6 Wis. 539, 548, 70 Am. Dec. 479). The one essential rule in all such cases is that, whatever the charge, it must apply uniformly to all persons similarly situated (*Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 18 L.R.A.(N.S.) 746, 85 N. E. 90, 15 Ann. Cas. 377), to the end that there shall be no discrimination.

4. As to the method of adjustment of such expense, the city has a large discretion. *Ladd v. Boston*, 170 Mass. 332, 40 L.R.A. 171, 49 N. E. 627. It may no doubt do so, in its discretion, by a first charge as an installation charge, or by a rental, or by an increased rate. We cannot upon this record determine what method should be adopted in this case. This is a matter for the water and light board of the city to regulate, and its regulation is binding, if fair and reasonable and free from discrimination, either in favor of or against the applicant. If the board has not yet fixed rates or charges adapted to this class of service, it is its duty to do so. The trial court, should have issued a writ of mandamus requiring that respondent city and its water and light board furnish the relator the power asked for, on condition of payment by relator of any proper rate

or charge to cover expenses which may be incident to such service in excess of that entailed in installing electric power service for consumers generally, such rate or charge to be made in such reasonable manner as the board shall determine.

Order reversed, and new trial granted.

OKLAHOMA SUPREME COURT.

W. H. DILL, Impleaded, etc., Plff. in Err.,
v.

W. H. EBEBY, Receiver of Citizens' Bank &
Trust Company.

(27 Okla. 584, 112 Pac. 973.)

Pleading — creditors' bill — sufficiency.

1. A complaint in a suit in equity, wherein E. as receiver of an insolvent bank joins

Headnotes by KANE, J.

Note.—*Jurisdiction of equity to enforce liability on unpaid subscriptions to stock of a corporation.*

I. General rule, 440.

II. Effect of statutes giving other remedy, 442.

III. Grounds of equity jurisdiction, 443.

IV. Necessity of assessment, 445.

V. Necessity of exhausting legal remedies against corporation.

a. Domestic corporation, 446.

b. Foreign corporation, 447.

VI. Nature of action and character of relief granted.

a. Action by creditor or creditors in behalf of all the creditors, 448.

b. Action by creditor or creditors for individual benefit, 450.

c. Action by receiver, 452.

d. Action by assignee or trustee, 452.

e. Joinder of stockholder and creditor as complainants, 453.

f. Joinder of stockholders as defendants, 453.

Scope.

As indicated in the title, this note is confined to the liability on unpaid subscriptions to the exclusion of added statutory liability. As to rights and remedies of a creditor who is also a stockholder of an insolvent corporation, as affected by his own statutory liability, see note to Shurlock v. Lewis, 41 L.R.A. (N.S.) 981.

I. General rule.

Unless jurisdiction is expressly taken away by statute, it is the general rule that where a corporation becomes insolvent, and its stockholders have not paid their stock subscriptions, and no attempt to enforce the same is made by the corporation, a court of equity or a court administering 46 L.R.A. (N.S.)

certain subscribers to the capital stock of the bank as defendants, for the purpose of recovering unpaid subscriptions, that further alleges, in substance, that the judge of the court wherein said receiver was appointed, upon application of creditors, supported by a showing that the bank was entirely insolvent, and without assets sufficient to distribute any part thereof to the bank or its shareholders, entered an order directing said receiver to retain counsel, and institute proper proceedings against the defendants as subscribers for the capital stock of said insolvent bank, to recover the respective amounts remaining unpaid on said subscription or for the stock issued to them, for the benefit of all the creditors of said bank, and that this suit is filed in compliance with said order, states facts sufficient to warrant the trial court to treat such suit as one brought by the creditors of said insolvent bank, over which a court of equity has jurisdiction, and in which all the subscribers to the capital stock may be joined as defendants.

equitable remedies will assume jurisdiction of a proceeding to compel delinquent stockholders to make good their subscriptions, either in whole or in part, as the necessities of the case may require.

U. S.—Potts v. Wallace, 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196; Patterson v. Lynde, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Morgan County v. Allen, 103 U. S. 498, 26 L. ed. 498; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Ogilvie v. Knox Ins. Co. 22 How. 380, 16 L. ed. 349.

Fed.—Re Putnam, 193 Fed. 464; Brown v. Fisk, 23 Fed. 228; Terry v. Bank of Cape Fear, 20 Fed. 777; Holmes v. Sherwood, 3 McCrary, 405, 16 Fed. 725; Bisbit v. Kentucky River Nav. Co. 15 Fed. 353; Faull v. Alaska Gold & S. Min. Co. 8 Sawy. 420, 14 Fed. 657; Walser v. Seligman, 21 Blatchf. 130, 13 Fed. 415; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Winans v. McKean R. & Nav. Co. 6 Blatchf. 215, Fed. Cas. No. 17,862.

Ala.—Hall v. Alabama Terminal & Improv. Co. 173 Ala. 398, 56 So. 235; Alabama Terminal & Improv. Co. v. Hall, 152 Ala. 262, 44 So. 592; Harris v. Gateway Land Co. 128 Ala. 652, 29 So. 611; Pickering v. Townsend, 118 Ala. 351, 23 So. 703; Nicrosi v. Irvine, 102 Ala. 648, 48 Am. St. Rep. 92, 15 So. 429; Glenn v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Allen v. Montgomery R. Co. 11 Ala. 437; De Mony v. Johnston, 7 Ala. 51. Compare with Henderson v. Hall, 134 Ala. 455, 63 L.R.A. 673, 32 So. 840.

Ark.—Ford Hardwood Lumber Co. v. Clement, 97 Ark. 522, 135 S. W. 343.

Cal.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Harmon v. Page, 62 Cal. 448.

Colo.—Universal F. Ins. Co. v. Tabor, 16 Colo. 531, 27 Pac. 890.

Corporation — insolvency — administration of assets — equity.

2. Under such circumstances, the right to maintain suit against the individual stockholders of an insolvent corporation, to enforce their liability on unpaid stock subscriptions, does not constitute such a plain, full, adequate remedy at law as to defeat a suit in equity against all stockholders for the collection and administration of the corporate assets as a trust fund for the benefit of the creditors.

(November 16, 1910.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in a suit to enforce liability on unpaid stock subscriptions. Affirmed.

The facts are stated in the opinion.

Messrs. John H. Burford and C. T. Huddleston for plaintiff in error.

Conn.—Ward v. Griswoldville Mfg. Co. 16 Conn. 593.

Ga.—Cherry v. Lamar, 58 Ga. 541; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412 (holding that the capital stock of a corporation remaining unpaid is a trust fund for the payment of the debts of the corporation, and where the latter becomes insolvent, it may be reached in a court of equity and made available for this purpose).

Ill.—Edwards v. Schillinger, 245 Ill. 231, 33 L.R.A. (N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048; Moore v. United States One Stave Barrel Co. 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536; Hickling v. Wilson, 104 Ill. 56.

Ind.—Indiana Novelty Mfg. Co. v. McGill, 15 Ind. App. 1, 43 N. E. 464 (holding that stockholders who have not paid for their stock are at least constructive trustees for creditors, and courts of equity will compel them to surrender up the fund for the benefit of the creditors upon the insolvency of the corporation).

Md.—Crawford v. Rohrer, 59 Md. 599.

Miss.—Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74.

Mo.—Shields v. Hobart, 172 Mo. 491, 72 N. W. 669, 95 Am. St. Rep. 669; Rood v. Crocus Hill Min. Co. 157 Mo. App. 405, 139 S. W. 222; Bonet Constr. Co. v. Central Amusement Co. 153 Mo. App. 185, 132 S. W. 270; State ex rel. House-Wrecking, Salvage & Lumber Co. v. Goodrich, 138 Mo. App. 283, 120 S. W. 646; Leucke v. Tredway, 45 Mo. App. 507.

N. M.—Albright v. Texas, S. F. & N. R. Co. 8 N. M. 422, 46 Pac. 448 (holding that in equity unpaid subscriptions for stock in insolvent corporation constitute a trust fund for the benefit of the creditors).

N. Y.—Mann v. Pentz, 3 N. Y. 415; Ford v. Chase, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed in 189 N. Y. 504, 81 N. E. 1164 46 L.R.A. (N.S.)

Messrs. Clinton A. Galbraith, Tom D. McKeown, and W. W. Witten, for defendant in error:

An action to recover for unpaid subscriptions to the capital stock of an insolvent corporation is an equitable and not a law action.

Jones v. Jarman, 34 Ark. 323; Carter v. Union Printing Co. 54 Ark. 576, 16 S. W. 579; Lester v. Bemis Lumber Co. 71 Ark. 379, 74 S. W. 518; Lanigan v. North, 69 Ark. 62, 63 S. W. 62; Fletcher v. Bank of Lonoke, 71 Ark. 1, 69 S. W. 580.

The capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien upon, a right or priority of payment out of, it, in preference to any of the shareholders of the corporation.

10 Cyc. 653, 654; Shields v. Clifton Hill Land Co. 94 Tenn. 123, 26 L.R.A. 509, 45

(sustaining a bill by a creditor in his own behalf and in behalf of all the other creditors of the corporation, to recover of the stockholders sums alleged to be unpaid on their stock, to which proceeding the delinquent stockholders and a receiver of the corporation were made parties defendant); McDonough v. Phelps, 15 How. Pr. 372.

N. C.—Bronson v. Wilmington, North Carolina L. Ins. Co. 85 N. C. 411.

Ohio.—Henry v. Vermilion & A. R. Co. 17 Ohio, 187.

Okla.—DILL v. EBEEY.

Or.—Macbeth v. Banfield, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693; Hodges v. Silver Hill Min. Co. 9 Or. 200.

Pa.—Cook v. Carpenter, 212 Pa. 165, 1 L.R.A. (N.S.) 900, 108 Am. St. Rep. 854, 61 Atl. 799, 4 Ann. Cas. 723; Johnston v. Markle Paper Co. 153 Pa. 189, 25 Atl. 560, 885; Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166; Bank of Virginia v. Adams, 1 Pars. Sel. Eq. Cas. 534.

S. C.—Ehrd v. Piedmont Land Improv. & Invest. Co. 55 S. C. 78, 32 S. E. 758.

Va.—Martin v. South Salem Land Co. 94 Va. 28, 26 S. E. 591.

Wash.—Barnard Mfg. Co. v. Ralston Mill. Co. 71 Wash. 659, 129 Pac. 389.

Wis.—Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57.

Where unpaid capital stock in an insolvent corporation is regarded as constituting a trust fund for the creditors, the fund cannot be appropriated by an individual creditor by means of attachments or executions directed against a stockholder, but it should be distributed upon equitable principles among all the creditors, and a bill in equity is the proper remedy to subject such assets of a corporation to the claims of its creditors. Potts v. Wallace, 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196.

And equity has jurisdiction of a suit by the joint holders of all the bonds of the

Am. St. Rep. 700, 28 S. W. 668; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365, Hatch v. Danna, 101 U. S. 205, 25 L. ed. 885; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Patterson v. Lynde, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; Potts v. Wallace, 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196; Cook v. Carpenter, 212 Pa. 165, 1 L.R.A.(N.S.) 902, 108 Am. St. Rep. 854, 61 Atl. 799, 4 Ann. Cas. 723.

Kane, J., delivered the opinion of the court:

This suit was filed prior to statehood in the United States court for the western district of the Indian territory, sitting at Okmulgee, on the equity side of the docket,

corporation secured by a trust deed which has been foreclosed, for the purpose of subjecting to the decree of foreclosure the amount due upon subscriptions to the capital stock of the corporation. Morgan County v. Allen, 103 U. S. 498, 26 L. ed. 498.

The decisions of the Alabama courts on this question have not at all times been entirely consistent.

In Allen v. Montgomery R. Co. 11 Ala. 437, it is held that equity has jurisdiction where a corporation is joined with the stockholders in a bill by several joint creditors of the corporation, to enforce unpaid stock subscriptions as an asset of the corporation, and also to reach other property of the corporation fraudulently disposed of.

And in Nicrosi v. Irvine, 102 Ala. 648, 48 Am. St. Rep. 92, 15 So. 429, it is held that since subscribed capital is a trust fund, creditors of an insolvent corporation may proceed in equity against stockholders who have attempted payment of their subscriptions in property at a fictitious valuation. And see to the same effect Elyton Land Co. v. Birmingham Warehouse & Elevator Co. 92 Ala. 407, 12 L.R.A. 307, 25 Am. St. Rep. 65, 9 So. 129, and Pickering v. Townsend, 118 Ala. 351, 23 So. 703.

In Nicrosi v. Irvine, it is said that the right of creditors of an insolvent corporation to have conserved the integrity of a trust fund of a corporation, being unpaid stock subscriptions, is purely equitable, and not enforceable at law. It is enforceable in equity on the independent standing of creditors in relation to the capital stock, and not with regard to any supposed legal or equitable right in the corporation itself to demand payment.

And in Harris v. Gateway Land Co. 128 Ala. 652, 29 So. 611, it is said that no principle is better settled than that courts of equity may enforce payment of stock subscriptions when the directors have neglected or refused to make the assessment and calls for them, in the exercise of their plain duty to do so.

In Henderson v. Hall, 134 Ala. 455, 63 L.R.A. 673, 32 So. 840, however, it is said 46 L.R.A.(N.S.)

by the defendant in error, W. H. Ebey, as receiver of the Citizens' Bank & Trust Company of Stonewall, as plaintiff, against the plaintiffs in error, M. W. Krause, W. H. Dill, H. G. Malot, J. E. Guier, and Sam Ward, as defendants. The complaint, omitting the caption, is in words and figures as follows: "Comes now the said plaintiff, and represents that he is the duly appointed qualified receiver of the Citizens' Bank & Trust Company of Stonewall, Indian territory, a corporation organized under the laws of the Indian territory, and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot are citizens of the western district of the Indian territory, and reside

that it is not well or at all settled, and is not true in point of legal fact, that the chancery court ever had or has original jurisdiction at the suit of a corporation creditor to coerce the payment by stockholders of their subscriptions to its capital. Said the court: "Such debts to a corporation stand upon the same footing as indebtedness generally. In the absence of statutes on the subject, no court, whether of law or equity, has any power to reach and subject this class of a debtor's property to the satisfaction of demands against it."

The Hall Case was again before the court on a subsequent appeal, 152 Ala. 262, 44 So. 592, and also in 173 Ala. 398, 56 So. 235. In the latter case it is said: "The bill in this case is by the judgment creditors, to subject equitable assets of an insolvent corporation to the payment of their judgments, after the return of execution, 'No property found.' The particular assets sought to be subjected are debts or choses in action alleged to be due the insolvent corporation from its original stockholders, for their unpaid subscriptions to its capital stock. The equity of the bill for this purpose has once been doubted (if not denied) by this court; but we take it that it has now been settled affirmatively."

II. Effect of statutes giving other remedy.

Neither the corporation nor the stockholders have any vested right to have the question of the liability of a stockholder for unpaid subscriptions determined and enforced in equity. Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589.

It is within the power of the legislature to limit the remedy of a creditor of an insolvent corporation to enforce unpaid stock subscriptions, to actions at law, thereby giving defendant a trial by jury, and the right to resort to equity to enforce such subscriptions may be taken away.

nearer to Okmulgee than any other place of holding court in said district; and for cause of action the plaintiff avers: (1) That heretofore, to wit, on or about the 14th day of March, 1905, the said defendants M. W. Krause, J. E. Guier, W. H. Dill, and Sam Ward, as incorporators, organized the Citizens' Bank & Trust Company, for the purpose of transacting a general banking and trust business at Stonewall, in the Indian territory. That M. W. Krause was elected president, and W. H. Dill was elected vice president, and J. E. Guier was elected cashier, of said corporation. That said officers, together with Sam Ward, constituted the first board of directors of said Citizens' Bank & Trust Company, and the articles of incorporation and certificate re-

quired by law were filed with the clerk of the United States court of appeals for the Indian territory, at South McAlester, on the 13th day of February, 1905. That the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens' Bank & Trust Company is and was \$25,000, divided into shares of \$25 each, and that \$10,000 of said capital stock had been actually paid in by the subscribers, and that the names of the stockholders and the number of shares subscribed for by them are as follows: M. W. Krause, president, 120 shares; W. H. Dill, 80 shares; J. E. Guier, 160 shares; and Sam Ward, 40 shares. That on the said 14th day of March, 1905,

Shickel v. Berryville Land & Improv. Co. 99 Va. 88, 37 S. E. 813.

But a creditor of an insolvent corporation is not denied the right to have recourse to equity to enforce the liability of a stockholder for unpaid subscriptions, by a statute which imposes individual liability on the shareholders of the corporation for unpaid stock, but which prescribes no remedy and gives no form of redress. *Kelly v. Clark* (*Kelly v. Fourth of July Min. Co.*) 21 Mont. 291, 42 L.R.A. 621, 69 Am. St. Rep. 668, 53 Pac. 959, 19 Mor. Min. Rep. 431.

And equity jurisdiction is not affected by a statute giving a remedy at law to creditors of an insolvent corporation, to enforce unpaid stock subscriptions. *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

A creditor of a corporation who seeks to reach unpaid stock subscriptions to satisfy his debt may bring an action in equity, or proceed under the statute by a motion for execution against the owner of the stock, since the remedies are concurrent. *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 669, 72 S. W. 669; *Rood v. Crocus Hill Min. Co.* 157 Mo. App. 405, 139 S. W. 222; *Bonet Constr. Co. v. Central Amusement Co.* 153 Mo. App. 185, 132 S. W. 270; *State ex rel. Housewrecking, Salvage & Lumber Co. v. Goodrich*, 138 Mo. App. 283, 120 S. W. 646. This is upon the theory, as stated in the latter case, that unpaid subscriptions to capital stock constitute a trust fund for the benefit of creditors, and the right of equity to administer such a fund is fundamental. Hence, where the statute contains no language indicative of a legislative intention to make exclusive the remedy therein provided, it must be merely cumulative.

This Missouri statute received a contrary construction in *Haskins v. Harding*, Fed. Cas. No. 6,196a, the court holding that the remedy therein provided was exclusive, and precluded a proceeding in equity by a creditor to reach unpaid stock subscriptions.

The jurisdiction of equity to entertain a creditor's bill against a corporation and its stockholders, to subject the assets of

the corporation to the lien of the creditors, is not divested by the personal liability imposed upon the stockholders by statute. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

A creditor may have recourse to a bill to reach and apply the property of the stockholder which could not be seized upon execution, and a bill can be maintained for the establishment of the debt and for equitable relief, including the payment by the stockholder of his unpaid subscription. *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942 (applying the Illinois statute which provides that each stockholder shall be individually liable to the creditors of the corporation to an amount not exceeding the amount unpaid on the stock held by him).

An act relative to the enforcement of unpaid stock subscriptions by the corporation, its receivers, or assignees, limiting the remedy to an action at law, does not apply to creditors of insolvent corporations, and they may resort to equity to enforce in their behalf stockholders' unpaid subscriptions. *Martin v. South Salem Land Co.* 94 Va. 28, 26 S. E. 591.

III. Grounds of equity jurisdiction.

The remedy of a creditor to enforce the statutory individual liability of stockholders of insolvent corporations for unpaid stock is in equity, and not in law, since in equity the rights of the corporation stockholders and all the creditors may be adjusted in one suit. *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432.

Actions by creditors are sustained on the ground that the capital stock is a trust fund, and may be followed by creditors and others having an interest in its proper application in the hands of third persons having notice of the trust attaching thereto. And stockholders, both in law and in fact, are charged with such notice. The rights of creditors being superior, and partaking somewhat of the character of a lien, equity will regard and work them

as the plaintiff is advised and believes, and on such information and belief alleges the fact to be, H. G. Malot subscribed for 80 shares of the capital stock of the Citizens' Bank & Trust Company, taking 40 shares of the 160 shares subscribed for by J. E. Guier, and 40 shares of the 120 subscribed for by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate No. 1 to M. W. Krause for 80 shares of the capital stock of the said Citizens' Bank & Trust Company. That on the same day certificate No. 3 for 80 shares of the capital stock of the said Citizens' Bank & Trust Company was issued to W. H. Dill; that on the same day certificate No. 5 for 80 shares of the capital stock of said Citizens' Bank & Trust Company was issued to H.

G. Malot. That on the same day certificate No. 4 for 120 shares of the capital stock of the said Citizens' Bank & Trust Company was issued to J. E. Guier. That on the same day certificate No. 6 for 40 shares of the capital stock of the said Citizens' Bank & Trust Company was issued to Sam Ward. That each of the said defendants undertook and agreed to pay the said Citizens' Bank & Trust Company the par value of the respective shares of stock issued to them, namely; that M. W. Krause undertook and agreed to pay to the Citizens' Bank & Trust Company for the 120 shares of stock issued to him the sum of \$3,000. That H. G. Malot undertook and agreed to pay the par value of the 80 shares of stock issued to him, to wit, \$2,000. That W. H. Dill undertook and

out by the same means by which the corporation itself should have done. *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57.

Where instalments of capital stock have not been paid into the corporation treasury in consequence of the neglect or refusal of the directors of the company to make the necessary demand on the stockholders, and to enforce the same, a court of equity will entertain a bill by a creditor on behalf of himself and others, to coerce a proportionate payment of instalments to be applied to the satisfaction of the indebtedness; and this is true although the creditors are not absolutely without a remedy at law, since, to induce equity to refuse its aid, it is not sufficient that there be no remedy at law, but there must be an adequate and complete one. And where, from the nature of the case and complications presented, justice may best be reached by means of the flexible machinery of a court of equity, that court will extend its jurisdiction in the furtherance of justice. *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534.

With its power to appoint an auditor or master in chancery to audit the amount of the debts of the corporation in gross, and the debt due to each creditor, to ascertain the number of stockholders solvent and insolvent, the per cent necessary to be paid by each stockholder in proportion to his stock, complete justice can be better administered to the creditors and the solvent stockholders by a court of equity, than by any other form of procedure, since it will prevent a multiplicity of suits, save cost, and give speedy and effectual relief. *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191.

In the enforcement by a receiver of an insolvent corporation, of subscriptions to its stock, for the purpose of paying creditors, the community of interest of the stockholders in every question of law and of fact involved, together with the greater convenience in saving expense by a single suit in equity against all the delinquent stockholders, is sufficient to sustain the

jurisdiction of that court. *Wyman v. Bowman*, 82 C. C. A. 189, 127 Fed. 257 (enforcement of a constitutional provision that original subscribers to the stock of a corporation shall be individually liable for its debts to the extent of their unpaid subscriptions. Other equitable relief, however, was asked, being the avoidance of a release by the corporation of an assessment upon its capital stock).

The remedy in equity is the more appropriate since the rights of the corporation, the stockholders, and creditors may all be adjusted in one suit on principles of equity and justice. *Hodges v. Silver Hill Min. Co.* 9 Or. 200.

The superiority of the remedy in equity is manifest in actions by creditors to enforce the payment by stockholders of an insolvent corporation of unpaid subscriptions to the stock, and to apply the proceeds to the satisfaction of creditors, according to the particular equities of each. *Bank of Virginia v. Adams*, supra.

While the necessity for an account is a large and influential element in equitable relief, yet its presence or absence is not the conclusive jurisdictional fact. *Cook v. Carpenter*, 212 Pa. 165, 1 L.R.A. (N.S.) 900, 108 Am. St. Rep. 854, 61 Atl. 799, 4 Ann. Cas. 723.

The action must be in equity if a creditor of an insolvent corporation desires to be the actor in the proceeding to collect and apply unpaid subscriptions upon the indebtedness of the corporation. *Burch v. Taylor*, 1 Wash. 245, 24 Pac. 438.

In the absence of statute regulating the procedure, a judgment creditor of an insolvent corporation cannot maintain an action at law to enforce payment by a stockholder of an unpaid subscription to the stock of an insolvent corporation, since matters of this nature are cognizable only in equity. *Brown v. Fisk*, 23 Fed. 228.

And see *Reed v. Burg*, 2 Neb. (Unof.) 117, 96 N. W. 414, holding that a single creditor can not maintain an action at law against a stockholder in an insolvent corporation, to enforce, for the former's benefit, the latter's unpaid subscription, but such action

agreed to pay said Citizens' Bank & Trust Company the par value of the 80 shares of stock issued to him, to wit, \$2,000. That Sam Ward undertook and agreed to pay said Citizens' Bank & Trust Company the par value of the 40 shares of stock issued to him, to wit, \$1,000. That J. E. Guier undertook and agreed to pay said Citizens' Bank & Trust Company the par value of the 120 shares of stock issued to him, to wit, \$3,000. That plaintiff is advised and believes, and on such information and belief alleges the facts to be, that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed for and issued to them was the defendant M. W. Krause, who paid to said Citizens' Bank &

Trust Company the sum of \$2,000, and that after said sum had been paid, the same was later returned to said defendant, and as plaintiff is informed and believes, and on such information and belief alleges the fact to be, the said defendants organized said Citizens' Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the \$2,000 paid in by the defendant Krause, and that this sum was paid in with distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of incorporation, that \$10,000 has been actually paid in to the contrary notwithstanding.

(2) That the said Citizens' Bank & Trust Company was and is insolvent, and on the

can be maintained only in equity, for the benefit of all the creditors and against all the stockholders whose subscriptions are unpaid.

Where, however, a suit can be maintained only after an assessment has been duly made by a court in the original insolvency proceeding, or facts appear upon the face of the proceeding which will do away with the necessity for an assessment, an action to enforce an unpaid subscription for the benefit of a creditor should ordinarily be at law. *Covell v. Fowler*, 144 Fed. 535.

In a suit to wind up the affairs of an insolvent corporation, where it becomes necessary to order an assessment to be made upon unpaid subscriptions, to satisfy the claims of corporate creditors, a court of equity is the proper tribunal; where, however, an assessment has been ordered, an action at law may be brought against a stockholder to collect his quota. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

If a corporation is utterly insolvent, and is being administered in insolvency proceedings, separate actions at law by the assignee in insolvency against the several stockholders, to enforce unpaid stock subscriptions, are preferable, since they are cheaper and more speedy and effectual. *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220.

IV. Necessity of assessment.

As to effect of assessment upon jurisdiction of court in equity, see *Covell v. Fowler*, and *Clevenger v. Moore*, supra.

The necessity for an assessment arises from the consideration that only sufficient of the unpaid capital can be called in to pay the unsatisfied debts. In order to ascertain the amount, there must be an account taken of debts, assets, and unpaid capital. *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166.

And there can be no recovery against a delinquent stockholder until a call or assessment has been made upon him, fixing the amount he is required to pay prior to 46 L.R.A. (N.S.)

insolvency. This may be done by the corporation, if it is not disabled by the special terms of the subscription contract; but where insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors; and whether the proceeding originates in the name of one or of several or of all the creditors, the result is the same. The capital, when recovered, will inure to the benefit of all, and must be distributed among all ratably. *Ibid*.

On the failure of a board of directors so to do, equity may make the call necessary to charge subscribers to stock with liability for unpaid subscriptions, and no action at law to enforce the unpaid subscriptions following such a call or assessment is necessary. *Glenn v. Soule*, 22 Fed. 417.

In *Salmon v. Hamborough Co.* 1 Ch. Cas. 204, an assessment was ordered by a court of equity in behalf of the creditors of an insolvent corporation, upon its stockholders who had not paid for their stock, and who had agreed to pay only when ordered so to do by the corporation, the proper officers or trustees of the corporation having refused to make the necessary order.

There is no obligation upon a stockholder to pay an unpaid subscription payable upon call of the corporation, until an assessment or a call by the company has been made, or until such assessment has been ordered by a court of competent jurisdiction. *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968.

A receiver of an insolvent corporation cannot maintain an action at law to recover the amount due on a subscription to stock of the corporation, without showing that a call or assessment has been made either by the corporation before insolvency, or by the court since. *Chandler v. Siddle*, 3 Dill. 477, Fed. Cas. No. 2,594.

But stockholders are liable on stock subscriptions, although no call or assessment is made by the creditors of the corporation,

20th day of February, 1906, on the petition of one of its creditors, the plaintiff was appointed by the United States court for the southern district of the Indian territory receiver to take charge of all of its property and effects, and to administer the same under the order of said court for the benefit of all its creditors. That the liabilities of said Citizens' Bank & Trust Company at the time the plaintiff took charge of its assets as receiver, as shown by its books, were \$15,179.02. That a great deal of the paper of said Citizens' Bank & Trust Company is worthless, and a very small sum can be realized from the same and the rest of its assets. That after six months' efforts the plaintiff has only been able to collect on notes \$60.50, and to realize on

other property the sum of \$100. That all of the capital stock of said Citizens' Bank & Trust Company represented as paid in, namely, \$10,000, and the assets in the hands of the plaintiff as receiver, will not be sufficient to pay to the creditors of said Citizens' Bank & Trust Company. (3) That, on a partial presentation of the foregoing facts to Judge J. T. Dickerson, an order was made on the 15th day of August, 1906, directing the plaintiff as receiver to retain counsel, and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens' Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscriptions or for the stock issued to them, for the benefit of all the creditors of the

where an assignment is made by the corporation for the benefit of its creditors. *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

And an assessment against a delinquent stockholder is not necessary where the liabilities of the corporation exceed its assets, so that it will require the entire amount of unpaid stock to liquidate the indebtedness. *Potts v. Wallace*, 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196.

A stockholder of an insolvent corporation cannot be heard to urge the objection that the directors of the corporation failed to make a call for the balance remaining unpaid upon his subscription, where the indebtedness of the corporation largely exceeds its corporate assets, exclusive of unpaid subscriptions. *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

Neither may a stockholder urge that no call or assessment has been made, as a defense to a bill in equity by a creditor of the corporation to enforce a stockholder's subscription, where the creditor has exhausted his legal remedies against the corporation, and it fails to make an assessment upon its stockholders for unpaid stock to be used in discharge of the judgment. *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867.

And it has been held that a creditor of an insolvent corporation can proceed in equity to enforce the liability of a stockholder for unpaid stock, without a call and without taking an account of other indebtedness or making all stockholders defendants, when the liability of a stockholder for unpaid subscriptions is several, and not joint, since such a creditor is not bound to settle up the affairs of a corporation in order to obtain his due. *Edwards v. Schillinger*, 245 Ill. 231, 33 L.R.A. (N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048.

V. Necessity of exhausting legal remedies against corporation.

a. Domestic corporation.

Actions to enforce unpaid stock subscriptions of insolvent corporations may be maintained by a judgment creditor of 46 L.R.A. (N.S.)

the corporation who has exhausted his remedy at law against the corporation by the procurement of a judgment against it, and the issuance of an execution thereon, and its return *nulla bona*.

U. S.—*Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Ogilvie v. Knox Ins. Co.* 22 How. 300, 16 L. ed. 349.

Fed.—*Re Putnam*, 193 Fed. 464; *Brown v. Fisk*, 23 Fed. 228; *Terry v. Bank of Cape Fear*, 20 Fed. 777; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725; *Bissitt v. Kentucky River Nav. Co.* 15 Fed. 353; *Faull v. Alaska Gold & S. Min. Co.* 8 Sawy. 420, 14 Fed. 657; *Walser v. Seligman*, 21 Blatchf. 130, 13 Fed. 415; *Winans v. McKean R. & Nav. Co.* 6 Blatchf. 215, Fed. Cas. No. 17,682; *Marsh v. Burroughs*, 1 Woods, 463, Fed. Cas. No. 9,112.

Ala.—*Pickering v. Townsend*, 118 Ala. 351, 23 So. 703; *De Mony v. Johnston*, 7 Ala. 51.

Ark.—*Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343.

Cal.—*Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Harmon v. Page*, 62 Cal. 448.

Colo.—*Universal F. Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890.

Conn.—*Ward v. Griswoldville Mfg. Co.* 16 Conn. 593.

Ga.—*Cherry v. Lamar*, 58 Ga. 541; *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191.

Ill.—*Edwards v. Schillinger*, 245 Ill. 231, 33 L.R.A. (N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048; *Moore v. United States One Stave Barrel Co.* 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536; *Hickling v. Wilson*, 104 Ill. 54.

Md.—*Crawford v. Rohrer*, 59 Md. 599.

Miss.—*Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74.

Mo.—*Lencke v. Tredway*, 45 Mo. App. 507.

N. Y.—*Mann v. Pentz*, 3 N. Y. 415; *McDonough v. Phelps*, 15 How. Pr. 372.

Citizens' Bank & Trust Company. That this suit is filed in compliance with said order. That the plaintiff has made demand on each of said defendants for the amount due on his subscription or for the stock of said Citizens' Bank & Trust Company issued to him. That they have each failed, neglected, and refused to pay the same or any part thereof. That there is now due the plaintiff as receiver of the Citizens' Bank & Trust Company as unpaid subscription for capital stock issued to them, namely, M. W. Krause, \$3,000; W. H. Dill, \$2,000; H. G. Malot, \$2,000; Sam Ward, \$1,000; J. E. Guier, \$3,000, together with interest thereon from the 14th day of March, 1905. (4) That the plaintiff has no adequate remedy at law, and, unless this

court takes jurisdiction of this suit in equity, he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions. Wherefore, the plaintiff prays the decree of this court in his favor as receiver against M. W. Krause for \$3,000 and interest; against H. G. Malot for \$2,000 and interest; against W. H. Dill for \$2,000 and interest; against J. E. Guier for \$3,000 and interest, and for such other and further relief as to the court may seem just and proper." To this complaint defendant W. H. Dill filed a demurrer, upon the grounds (1) that said complaint does not state any

Ohio.—Henry v. Vermilion & A. R. Co. 17 Ohio, 187.

Or.—Macbeth v. Banfield, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693; Hodges v. Silver Hill Min. Co. 9 Or. 200.

Pa.—Johnston v. Markle Paper Co. 153 Pa. 189, 25 Atl. 560, 885; Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166; Bank of Virginia v. Adams, 1 Pars. Sel. Eq. Cas. 534.

S. C.—Efrd v. Piedmont Land Improv. & Invest. Co. 55 S. C. 78, 32 S. E. 758, modified in 55 S. C. 88, 32 S. E. 897.

Va.—Martin v. South Salem Land Co. 94 Va. 28, 26 S. E. 591.

Wash.—Burch v. Taylor, 1 Wash. 245, 24 Pac. 438; Barnard Mfg. Co. v. Ralston Mill. Co. 71 Wash. 659, 129 Pac. 389.

Wis.—Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57.

In Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57, the mode of procedure in equity is thus pointed out: "The creditor is first to establish his claim by judgment at law, and then, after execution issued and returned in whole or in part unsatisfied, he may file his bill in his own behalf and in behalf of such other creditors of the corporation as may elect to become parties thereto, against the corporation and its delinquent or withdrawing stockholders, alleging the recovery and nonpayment of his judgment, and praying the decree or order of the court that an account of the assets and debts be taken and a receiver be appointed, and that the stockholders and officers pay in and account to the receiver for so much of the capital stock as will be sufficient to pay the debt of the plaintiff, and those of such other creditors as may choose to join him and come in under the decree; and that the receiver be directed to apply the same in discharge thereof."

It has been held that the issuance and return *nulla bona* of an execution are necessary to entitle a judgment creditor of an insolvent corporation to maintain a proceeding in equity to subject to his judgment unpaid stock subscriptions. Burch v. Taylor, 1 Wash. 245, 24 Pac. 438.

As a prerequisite to a suit in equity 46 L.R.A. (N.S.)

against stockholders of a corporation to enforce their liability for stock, a judgment must generally be obtained against the corporation, and an execution issued and returned *nulla bona*. This is, however, not necessary where the condition of the corporation, either through dissolution or insolvency, renders such a proceeding futile. Hodges v. Silver Hill Min. Co. 9 Or. 200.

While it is a general rule that a mere contract creditor has no standing in equity to enforce a creditors' bill, unless he has obtained a judgment or a specific lien on the property sought to be reached, this is, however, not an invariable rule, and it does not apply where legal process against the debtor in the state of the forum is impossible. In such case a creditors' bill to reach unpaid stock subscriptions to the stock of an insolvent corporation, to apply upon the complainant's debt against the corporation, may be maintained, although the debt is not reduced to judgment. Rule v. Omega Stove & Grate Co. 64 Minn. 326, 67 N. W. 60.

A creditor may proceed in equity upon an established or admitted claim against a stockholder or stockholders, to enforce his or their liability to an insolvent corporation for the amount remaining due upon his or their subscription to the stock, although no account is asked to be taken of the other indebtedness of the company. Crawford v. Rohrer, 59 Md. 599.

b. Foreign corporation.

Where creditors have pursued their remedy in a foreign state by recovering judgments against the corporation and issuing executions thereon, which were returned *nulla bona*, and the assets of the corporation have been placed in the hands of a receiver, they cannot proceed against resident stockholders in any other forum than in a court of equity, to enforce the unpaid stock subscriptions of the latter, since such sums are equitable assets recoverable only in a court possessed of chancery jurisdiction. Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

sufficient facts to authorize a court of equity to assume jurisdiction; (2) that said complaint shows upon its face that complainant has a complete, adequate remedy at law; (3) that this defendant is entitled to a trial by jury under the law and Constitution of the United States, of which he would be deprived should this cause be tried in equity; (4) for the reason that said court has no jurisdiction in equity to hear and determine the said cause.

This demurrer was overruled by the court, to which ruling the defendant Dill duly excepted. After statehood the cause was transferred from the district court for

Okmulgee county to the district court for Okfuskee county, and the defendant Dill was given thirty days within which to file his answer. The answer of Dill amounted to an admission that he subscribed to the stock, and an averment that he had paid for the same. Mr. Dill seems to be the only defendant to file any pleadings, although the record shows that defendant Malot appeared at the trial in person and by counsel. Upon trial the court found in favor of the defendant Malot, and against the defendant Dill, and entered a decree dismissing the cause against Malot; and that the plaintiff, W. H. Ebey, as receiver of the Citizens'

A court of equity having jurisdiction of the real owner of stock in a foreign corporation can enforce, against the holder of such stock, a liability in favor of a creditor residing in the state. *Mount Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

It has been held that the only remedy in equity which a creditor of an insolvent corporation has to reach unpaid stock subscriptions is by way of a creditors' bill. And to maintain such a bill, he must first have exhausted his remedy at law by procuring judgment and causing an execution to be issued and returned *nulla bona*. Hence, to enforce the liability of resident stockholders in a foreign corporation for unpaid stock, it is not sufficient that a creditor has secured a judgment against the corporation in the state of its origin. *Turner Bros. v. Alabama Min. & Mfg. Co.* 25 Ill. App. 144.

A creditor cannot enforce payment of an unpaid subscription to the stock of a foreign corporation, where he does not proceed through the corporation, nor in such manner as to bring the money directly into its treasury, but merely seeks to have the amount of the judgment applied upon his own claim, disregarding the rights of other creditors and the equities of the defendant stockholders in respect to other stockholders who have not paid the amount of their subscription. *Patterson v. Lynde*, 112 Ill. 196; *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845.

A bill in equity will not be entertained where filed by creditors of a foreign corporation against a stockholder thereof found within the jurisdiction of the court, who has not paid his subscription to the capital stock of the corporation, because of the inconvenience and difficulties which would arise from the exercise of such jurisdiction. *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534.

VI. Nature of action and character of relief granted.

a. Action by creditor or creditors in behalf of all the creditors.

It has been pointed out that, in the enforcement of unpaid stock subscriptions to 46 L.R.A. (N.S.)

insolvent corporations, the nature of the right to be enforced, and the circumstances under which it is to be enforced, render the proceedings by a creditors' bill eminently proper for a court of equity, for the practice should be such as not to be unnecessarily oppressive on those against whom the proceedings are directed; and, since the liability is incurred only when the capital paid in is not sufficient to satisfy the debts of the corporation, and then only to an amount sufficient for that purpose, it is necessary that an account should be taken of the assets and debts, of the amount of the capital remaining unpaid upon the shares, and the amount unpaid by each stockholder, in order that each may be made equally liable. *Mann v. Pentz*, 3 N. Y. 415.

A judgment creditor of the corporation, after execution returned unsatisfied, may maintain an action in equity in his own behalf and in behalf of the other creditors of the corporation becoming parties to the proceeding, against delinquent stockholders in the corporation, and secure a decree for an account of the debts of the corporation and the amount unpaid by stockholders, and for the payment of sufficient to pay the debts of the complainant and other creditors joining in the action. *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725.

Generally, the action is by the creditor in his own behalf and in behalf of all other creditors who may join in the proceeding. *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725; *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191; *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166; *Bank of Virginia v. Adams*, Pars. Sel. Eq. Cas. 534; *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed in 189 N. Y. 504, 81 N. E. 1164; *Bronson v. Wilmington North Carolina L. Ins. Co.* 85 N. C. 411. And it has been held that the action by a single creditor to enforce unpaid stock subscriptions must be in equity for the benefit of all the creditors of the corporation, and it must be against all the stockholders whose subscriptions are unpaid. *Reed v. Burg*, 2 Neb. (Unof.) 117, 96 N. W. 414.

Since it is generally necessary that an account of the assets and of the debts of

Bank & Trust Company of Stonewall, do have and recover of and from the defendant W. H. Dill the sum of \$2,000, together with interest thereon from the 14th day of March, 1905, and the costs incurred by him in this action. To reverse this judgment this proceeding in error was commenced.

The main contention of counsel for plaintiff in error is that the obligations arising, under the facts stated in the complaint, are legal, and not equitable; that they are based upon the contract of subscription, and each subscription constitutes a separate obligation that may be dependent upon separate, independent, and distinct facts; that the

the corporation should be taken together, with the amount of the capital remaining unpaid upon the shares and the amount unpaid by each stockholder, to the end that each may be made equally liable, this can be effected only by a bill filed in behalf of all the creditors against the corporation and the delinquent stockholders as defendants. *Mann v. Pentz*, 3 N. Y. 415.

Therefore, when a creditor is obliged to seek the aid of equity for the enforcement of his demand, he must do so for the benefit of all creditors of the corporation who may desire to unite with him, to the end that all may share alike in proportion to the amount of their respective claims in the funds which may be realized by the proceeding, since the maxim of the law in such cases is that equality is equity. *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57, and see *infra*, b.

The suit may be maintained by the creditor of a corporation in behalf of himself and other creditors, against the corporation, to subject its assets, including unpaid subscriptions of stockholders, to the creditors' lien. And the court will either compel the corporation to assess the stock the amount necessary for the payment of its liabilities, or it will itself make the assessment. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

Generally, the relief given is by a decree compelling stockholders to pay up their subscriptions for stock, to be used in satisfaction of the corporate debts generally. *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Pickering v. Townsend*, 118 Ala. 351, 23 So. 703; *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92 (holding that courts of equity may enforce payment of stock subscriptions to an insolvent corporation, where the directors of the corporation refuse to make an assessment); *Harmon v. Page*, 62 Cal. 448 (holding that the creditors of an insolvent corporation, by a bill in equity, may compel the officers of the corporation to enforce contribution from the stockholders according to their unpaid subscriptions); *C. H. Little Co. v. Woodward Ave. Cemetery Asso.* 135 Mich. 248, 97 N. W. 682 (holding that directors may make an assessment and sue the stockholders for the purpose of paying the debts 46 L.R.A. (N.S.)

action stated is equitable in form only, being but a bundle of separate actions, each of which grows out of and rests upon an independent and distinct transaction; that the relief prayed for is not of an equitable nature; that the object and purpose of the action is the recovery of money, and in all such cases, where a money judgment only is prayed for, a court of equity is without jurisdiction. Counsel base their contentions upon the rule laid down in the case of *Tompkins v. Craig* (C. C.) 93 Fed. 885, from which they quote as follows: "The bill is demurred to upon the ground of multifariousness, and we think the objection must

of the corporation, and it is their duty, both moral and legal, to do so, and what they have power to do, and what in good conscience and law they ought to do, courts of equity have jurisdiction to compel them to do); *Pettibone v. McGraw*, 6 Mich. 441 (holding that where the capital stock of an insolvent corporation has not been paid in, a court of equity will compel its collection for the creditors of the company as a fund for the benefit of the creditors); *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454 (holding that a court of equity may compel trustees of the insolvent corporation to collect unpaid stock subscriptions and apply the proceeds to the payment of a corporate debts); *Eldred v. Piedmont Land Improv. & Invest. Co.* 55 S. C. 78, 32 S. E. 758 (holding that a creditors' bill may be maintained by a judgment creditor of an insolvent corporation, after the issuance and return *nulla bona* of the execution upon his judgment, to have stockholders pay into the hands of a receiver a dividend due from them on their subscriptions to the capital stock of the corporation).

Relief of this character is given upon the theory that where stock is subscribed to be paid upon the call of the corporation, and it refuses or neglects to make the call, if the interests of the creditors require it, the court of equity will do what it is the duty of the corporation to do. *Seoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968.

Also, upon the ground that where a corporation becomes insolvent, the property is to be administered as a trust fund for the benefit of its creditors, and a court of equity in administering the trust will require stockholders to pay any unpaid subscriptions. *Richardson v. Green* (*Washburn v. Green*) 133 U. S. 30, 3 L. ed. 516, 10 Sup. Ct. Rep. 280.

Judgment creditors of an insolvent corporation whose proper officers refuse to compel payment of its unpaid capital stock may maintain a bill in equity against the corporation and numerous stockholders indebted for their stock, to compel the latter to liquidate such indebtedness. This proceeding is in the nature of a judgment in which the defendants are called upon to answer as garnishees of the principal debt.

prevail. The statute does not impose a joint but a several liability upon the defendants, and they have no common interest in the decree asked for by the bill. The plaintiff seeks to support the action upon the ground that such a proceeding will prevent a multiplicity of suits, but this is a reason in form rather than in substance; for, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant. The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription; an implied term of that contract being the declaration of

the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. As was pointed out upon the argument by the learned counsel for the defendants, this is not a proceeding to determine how large the assessment should be. For obvious reasons, such an inquiry should be made in equity, and all the stockholders should be parties. But after the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholder are distinctively to be considered. *Flash v. Conn*, 109 U. S. 380, 27 L. ed. 970, 3 Sup. Ct. Rep.

Ogilvie v. Knox Ins. Co. 22 How. 380, 16 L. ed. 349.

After judgment and execution against a corporation, resort may be had by a creditor to a suit in equity to ascertain the general indebtedness of the corporation, and compel a ratable contribution of the stockholders upon their indebtedness for stock; and where not otherwise provided by statute this is the only remedy. *Faull v. Alaska Gold & S. Min. Co.* 8 Sawy. 420, 14 Fed. 657.

An action by a creditor in his own behalf and in behalf of other creditors has also been sustained upon the principle that unpaid subscriptions are part of the capital stock of the corporation, and, like other debts due to it, constitute a fund to which the creditors may look for the payment of their claims, and when the corporation neglects to call them in, equity will enforce their payment. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

And on this theory a suit in equity is held maintainable by a creditor to recover from the stockholder of an insolvent corporation an unpaid balance on his stock subscription, although the liability is not to the creditor, but is for an indebtedness due the corporation, which is treated as an asset, and to which the creditors are entitled in the adjustment of legal demands against the corporation. *Macbeth v. Banfield*, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

Where it is sought to impound stock subscriptions of the stockholders of a foreign corporation, and in a single action have the amount thereof applied equably to the payment of all the debts of the corporation, an action in the nature of a creditors' bill is the proper remedy, if not the only one. *Rule v. Omega Stove & Grate Co.* 64 Minn. 326, 67 N. W. 60.

Actions in equity by a creditor in many respects resemble an ordinary creditors' suit, but on account of the peculiar nature of the trusts to be enforced as against stockholders, the action may still be maintained although the remedy by creditors' 46 L.R.A. (N.S.)

bill is abolished by statute. *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57.

b. Action by creditor or creditors for individual benefit.

In some jurisdictions the right of a judgment creditor who has exhausted his remedy at law, to proceed in equity to have applied upon his own indebtedness, unpaid stock subscriptions, is sustained. *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Crawford v. Rohrer*, 59 Md. 599; *Henry v. Vermilion & A. R. Co.* 17 Ohio, 187; *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343.

Moore v. United States One Stave Barrel Co. 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, sustains the right of a creditor of a corporation to enforce in equity the liability of stockholders for unpaid stock to the extent of his judgment, where, by statute, stockholders and assignees of stock are made liable for the debts of the corporation, to the extent of the amount unpaid on their stock.

And *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343, holds that a stockholder of an insolvent corporation, indebted to it for stock, is liable in equity for the claim of a creditor against the corporation, to the extent of his unpaid subscription. To the same effect is *Re Putnam*, 193 Fed. 464.

These cases rest upon the ground that the liability of a subscriber for the capital stock of a corporation is several, and not joint. By his subscription he becomes a several debtor to the company, and in equity his liability does not cease to be several. A creditors' bill merely subrogates the creditor to the place of the debtor, and garnishes a debt due to the indebted corporation. It does not change the character of the debt attached or garnished. *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885.

Other stockholders or other creditors are not necessary parties to a suit to enforce the liability of a stockholder for unpaid stock in favor of a creditor of the corpo-

263." We think the case at bar is somewhat distinguishable from the case above quoted from and from the other cases to the same effect cited by counsel. In those cases the receiver appointed by the court to wind up the affairs of their respective corporations represented the corporations in the suits in which they appeared as parties. In the complaint herein there is an allegation to the effect that, on a showing made to the judge who appointed the receiver that the corporation was entirely insolvent, and that there would be no funds arising from the sale of its assets for distribution amongst the stockholders, he directed the receiver to retain counsel, and institute proper proceedings against the defendants as subscribers of the capital stock of said

Citizens' Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscription or for the stock issued to them, for the benefit of all the creditors of the Citizens' Bank & Trust Company, and that this suit was filed in compliance with said order. It seems to us the foregoing allegation brings the instant case within the rule laid down in *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580. That was an action commenced by the receiver and other creditors for the use of the German National Bank and certain other creditors of the Bank of Lonoke against the latter bank, G. W. England, and other stockholders thereof, to recover so much of the stock of such shareholders as remained unpaid. *Battle, J.*, in discussing the jurisdic-

tion, nor is it necessary to wind up the corporation in order to enforce such a liability, where the liability of stockholders is several, and not joint. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

Unpaid stock subscriptions constitute a fund for the benefit of the corporate debts, and when a creditor has exhausted his legal remedies against the corporation, and it fails to make an assessment upon its stockholders for unpaid stock, by a bill in equity he may subject such subscriptions to the satisfaction of the judgment, and a stockholder cannot then urge that no call or assessment has been made. *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867.

By proper proceedings in equity, as well before as after dissolution, in cases of insolvency or of failure or refusal to levy the requisite assessments, judgment creditors of an insolvent corporation may reach the unpaid balance of a stockholder's subscription, and apply the same to the discharge of their judgments. *Universal F. Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890.

A judgment creditor who has exhausted his legal remedy by execution returned *nulla bona* may alone or with other creditors proceed in equity to enforce the liability of the stockholders for unpaid stock, and to have the amount realized applied upon his indebtedness. *Marsh v. Burroughs*, 1 Woods, 463, Fed. Cas. No. 9,112.

In *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70, the cases sustaining the right of a single creditor to proceed in equity against one or several stockholders, to enforce the unpaid stock subscriptions of the latter, are criticized as being in disregard of the rights of stockholders and of the familiar principles upon which equity is commonly administered, since such proceeding leaves out of view the necessity of assessment to fix the liability of stockholders. The determination of the amount of the assessment, of course, would be made only with due regard to the amount of the debts of the 46 L.R.A. (N.S.)

corporation and the amount of its assets, including unpaid stock subscriptions.

And it has been held that where there are a number of creditors, a single creditor cannot maintain a bill in equity against the stockholders of an insolvent corporation having no corporate assets, to collect unpaid subscriptions for capital stock, but the proceedings must be either by all the creditors or in behalf of all the creditors who desire to make themselves parties to the action. *George W. Signor Tie Co. v. Monett & S. W. Constr. Co.* 198 Fed. 412.

And in *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 1666, it is said that where insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, since the unpaid capital is a trust fund belonging not to the corporation, but to its creditors as a whole, and whether the proceeding originates in the name of one, or of several, or of all the creditors, if the object is to enforce unpaid subscriptions, the proceeds of the judgment will be distributed among all the creditors of the corporation ratably.

A creditor may maintain a general creditors' bill to wind up an insolvent bank, and share ratably with all other creditors in the assets; but after he has abandoned whatever remedy, if any, he has at law, he cannot appeal to a court of equity to enforce his lien upon the remaining assets of the corporation, including unpaid stock subscriptions, to the exclusion of other creditors, since the fund in which the creditors claim an interest is a trust fund pledged for the payment of the corporation debts; and it is a doctrine of universal application in chancery, that whenever there is a trust fund over which a court of equity has jurisdiction, all parties interested therein as creditors are to be paid *pari passu*, unless the law clearly provides a different rule. *Marr v. Bank of West Tennessee*, 4 Coldw. 471. And see *Reed v. Burg*, 2 Neb. (Unof.) 117, 96 N. W. 414; *Mann v. Pentz*, 3 N. Y. 415, and *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57.

Two or more creditors may join in a bill

tional question raised, says: "The authority of the receiver to bring the action is not shown. We shall treat it as brought by creditors." And on that ground sustained the jurisdiction of the court. Counsel for plaintiff in error, in distinguishing the Arkansas case from the case at bar, quoted the foregoing statement by the judge who delivered the opinion for the court, and says: "Upon the theory that the suit was by the creditors of the bank, of course, equity had jurisdiction." These cases seem to be similar in principle at least. The Arkansas suit was instituted for the use of the German National Bank and certain other creditors of the Bank of Lonoke; and this, by positive direction of the court, was commenced by the receiver for the benefit of all the creditors of the Citizens' Bank & Trust Company, the insolvent corporation, after it was made to appear that the assets of the bank were entirely inadequate to pay the creditors. In *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62, it was held that a liability created against the stockholders of a banking corporation may be enforced by a credi-

tor in the courts of that state at law, as well as in equity, and this notwithstanding it was held that "the statute definitely fixes the proportion of each debt or claim for which the stockholder is liable." As the laws of Arkansas were in force in the Indian territory at the time the obligation herein was incurred and this suit commenced, the decisions of the supreme court of that state, although rendered after said laws were put in force in said territory, are entitled to great weight. The case of *Cook v. Carpenter*, 212 Pa. 165, 1 L.R.A. (N.S.) 900, 103 Am. St. Rep. 854, 61 Atl. 799, 4 Ann. Cas. 723, was a suit in equity by Cook as assignee of an insolvent corporation against various stockholders, to recover unpaid subscriptions to the capital stock. As in this case, the jurisdiction of a court of equity to determine such a cause was raised. Mr. Chief Justice Mitchell, who delivered the opinion of the court, in discussing this proposition, says: "The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full, and adequate remedy at law by suits against the

to subject to the payment of their claims the indebtedness of stockholders for unpaid stock in an insolvent corporation, since in such cases there is an identity of interest in the question involved and in the relief sought, and the separate injury sustained by each complainant is produced by the same cause or wrongful action. Moreover, the direct effect of joining several creditors in one bill is to prevent a multiplicity of suits. *Hickling v. Wilson*, 104 Ill. 54.

c. Action by receiver.

An action in equity to compel stockholders of an insolvent corporation to pay unpaid subscriptions has been sustained where prosecuted by the receiver of the corporation. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

And see *Williams v. Traphagen*, 38 N. J. Eq. 57, sustaining a bill in equity by the receiver of an insolvent corporation, to enforce the liability of the stockholders for unpaid stock subscriptions.

A receiver in a foreign corporation is entitled by a suit in equity to recover unpaid balances due from stockholders upon their stock subscriptions, to the extent necessary to enable him to pay a creditor in whose behalf he was appointed. *Winans v. McKean R. & Nav. Co.* 6 Blatchf. 215, Fed. Cas. No. 17,862.

In an equitable suit by the stockholders against a corporation and its creditors, for the appointment of a receiver to have the assets of the corporation marshaled, its liability determined, the assets applied to the payment of the liabilities, and the corporation dissolved, the court may order the receiver to prepare and file an intervening
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petition against the plaintiffs as stockholders, for the purpose of determining the amount so owing by each upon stock subscriptions. *Calef v. Wyandotte Realty Co.* 70 Kan. 318, 78 Pac. 816.

In *Mann v. Pentz*, 3 N. Y. 415, in the enforcement of the unpaid subscriptions of a domestic corporation, the remedy is said to be a creditors' bill, the proceeding to be prosecuted by a creditor or creditors in behalf of all the creditors of the corporation, and it is said that a receiver of the corporation has no power to file such a bill. There is a distinction in this respect between actions to enforce unpaid subscriptions to the stock of a domestic corporation, and actions for a similar purpose as to the stock of a foreign corporation, at least, where the liability by statute is dissimilar. Thus, it has been held that a receiver of a foreign corporation may maintain an action to enforce the liability of resident stockholders for unpaid subscriptions. *Dayton v. Borst*, 31 N. Y. 435. And applying the New Jersey statute, it is held that the liability of the stockholder of a New Jersey corporation for unpaid subscriptions cannot be enforced by creditors, even by a bill in equity, but it must be by a proceeding by a receiver of the corporation or a trustee in bankruptcy. *Manufacturers' Commercial Co. v. Heckscher*, 144 App. Div. 601, 129 N. Y. Supp. 556, affirmed and special question answered in 203 N. Y. 560, 96 N. E. 1121.

d. Action by assignee or trustee.

An assignee in insolvency of a corporation may maintain a proceeding in equity against all the delinquent stockholders jointly, to enforce payment of their un-

several stockholders defendant, where each can defend upon his own case, untrammelled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable; but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in *Lane's Appeal*, 105 Pa. 49, 65, 51 Am. Rep. 166: 'When insolvency and exhaustion of assets [of corporations] exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one or of several or of all the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and

must be distributed among all ratably.' This result as to collection, and still more forcibly as to distribution, is not reasonably practicable except in equity. A bill may be filed, as in this case, by assignees representing the corporation, for the benefit of creditors, or, as in *Lane's Appeal*, supra, by creditors, in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complainant should not oust in one case the jurisdiction that must be sustained in the other. It is earnestly argued by appellants that in all the cases where a bill has been sustained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief; but we do not find it said in any of the cases

paid subscriptions. *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220.

Such a proceeding may also be maintained by a trustee in insolvency of a corporation. *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92.

e. Joinder of stockholder and creditor as complainants.

Creditors and stockholders may join in a bill in equity to enforce the liability of other stockholders for unpaid shares of the stock, where the corporation is insolvent; and the corporation need not be made a party to the suit. *Walser v. Seligman*, 21 Blatchf. 130, 13 Fed. 415.

f. Joinder of stockholders as defendants.

The general rule is that, in an action in equity to enforce unpaid stock subscriptions of resident stockholders to a foreign corporation, all the stockholders of the corporation within the jurisdiction should be joined. *Leucke v. Tredway*, 45 Mo. App. 507.

It has been held that in actions in equity by a creditor to enforce the liability of a stockholder in an insolvent domestic corporation for unpaid stock, unless it is impossible or impracticable, all the stockholders must be made parties in order to enable the court to do complete justice between the stockholders themselves, and so that no one of them may be compelled to pay more than his due proportion, and that all alike may be obliged according to the number of their respective shares and their pecuniary ability, to contribute towards the losses which the company has sustained. *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57.

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And under the ordinary rule of equitable procedure, stockholders may be made parties to a proceeding in equity by creditors to reach their unpaid stock subscriptions, and several judgments may be entered against them for the amounts for which they are assessed. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

Where a personal judgment against the stockholders is not sought, and the relief asked is a decree for an assessment, it is unnecessary to make all of them parties. *Ibid.*

So, when the only object of a bill is to obtain payment of a judgment against a corporation out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. And a creditor is under no obligation to make all the stockholders of an insolvent corporation defendants in his bill, since it is not his duty to marshal the assets of the corporation, or to adjust the equities between the corporators. He may proceed in a court of equity against one or more delinquent subscribers, to recover the amount of his debt without an account being taken of other indebtedness, and without bringing in all the stockholders for a contribution. *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885.

When the purpose of the suit is to compel payment of a debt out of the unpaid subscription of a single stockholder, the corporation is not a necessary party. If not made a party, it cannot be prejudiced by a judgment against the stockholder, and if the latter goes to trial and judgment without objecting to the nonjoinder of the corporation, he cannot thereafter complain. *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777. A. G. S.

that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments, and thus made the necessity of an accounting and assessment an issue. That would at once have made the case one cognizable in equity. *Citizens' & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full, while some paid only part, and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was well said by the learned judge below: "There are more than forty defendants. Most of them live within the jurisdiction, some do not; and it is quite conceivable that there might be hundreds living without the jurisdiction not reachable by our process at law. The question involved in all the cases is substantially the same, namely: Ought the corporation collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any: If, on the other hand, it should be collected, then none should escape." In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common-law forms. When later the legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common-law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. *Wesley Church v. Moore*, 10 Pa. 273. The question of such cases turns on the completeness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. *Kirkpatrick v. McDonald*, 11 Pa. 387; *Bierbower's Appeal*, 107 Pa. 14; *Brush Electric Co's Appeal*, 114 Pa. 574, 7 Atl. 794; *Johnston v. Price*, 172 Pa. 427, 33 Atl. 688; *Gray v. Citizens' Gas Co.* 206 Pa. 303, 55 Atl. 988. In the last case it was said by 46 L.R.A. (N.S.)

our Brother Dean: "The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, you have a remedy at law in an action for damages, such reply would have been the end of his bill. He would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction. Courts now go further and inquire whether, under the facts, the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of." Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity, and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction." In *Hayden v. Thompson*, 17 C. C. A. 592, 38 U. S. App. 361, 71 Fed. 60, the right of a receiver of an insolvent national bank to maintain a bill in equity against the shareholders of the bank collectively, to recover dividends which had been paid in violation of the national banking laws, was upheld. The right to sue in equity was maintained on the ground of avoiding a multiplicity of actions; also on the grounds that the suit was one to redress a fraud and breaches of trust; and generally because the remedy at law was inadequate. The doctrine is well settled in the Federal courts that in those cases where the right of a court of equity to afford redress for wrongful acts depends upon the inadequacy of the legal remedy, courts of equity may exercise jurisdiction, unless the legal remedy is as plain, practical, and efficient to the ends of justice and its prompt administration, as the remedy in equity. In determining whether a suitor should be permitted to sue in equity, the Federal courts have always attached much importance to the fact that the remedy in the latter forum, as compared with the remedy at law, will save time and expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. *Cockrill v. Cooper*, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Oelrichs v. Spain* (Oelrichs v. Williams) 15 Wall. 211, 21 L. ed. 43; *Preteca v. Maxwell Land Grant Co.* 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674. If the foregoing principles are applied to the case at bar, we think it may be safely asserted that the receiver is en-

titled to invoke the remedial powers and processes of a court of equity, to redress the wrongs of which he complains.

All the other errors assigned by counsel for plaintiff in error hinge upon the ruling of the court upon the foregoing, except the assignment that the judgment is not supported by the evidence. We have examined the record very carefully, and are of the opinion that there was sufficient competent evidence introduced at the trial to support the finding of the court below. The judgment of the court below is affirmed.

Dunn, Ch. J. and Williams, Hayes, and Turner, JJ., concur.

Petition for writ of error dismissed by the Supreme Court of the United States, May 26, 1913 (229 U. S. 199, 57 L. ed. 1148, 33 Sup. Ct. Rep. 620).

OKLAHOMA SUPREME COURT.
(Division No. 1.)

GEORGE B. NOBLE, Plff. in Err.,
v.

FT. SMITH WHOLESALE GROCERY
COMPANY.

(— Okla. —, 127 Pac. 14.)

Sale — bulk sales law — constitutionality.

1. The act of May 26, 1908 (Session Laws 1907-08 of Oklahoma, p. 558), commonly known as the "bulk sales law," which declares that a sale in bulk shall be presumed to be fraudulent and void as against creditors of the seller unless certain specific conditions have been complied with, is not in contravention of, nor repugnant to, the due process clause, nor the equal protection clause, of the 14th Amendment of the Federal Constitution.

Same — state Constitution.

2. Neither is said act violative of any of the provisions of the state Constitution.

Same — police power.

3. The subject to which the said act relates is clearly within the police powers of the state.

Chattel mortgage — possession — passing title.

4. A chattel mortgage, covering a stock of
Headnotes by ROBERTSON, C.

merchandise, where the mortgagor remains in possession, and has the usual right of redemption, creates a lien only, and does not pass title, and is not a sale, exchange, or assignment within the meaning of said act, and is therefore not within the inhibition of said statute.

(September 28, 1911.)

ERROR to the County for Le Flore County to review a judgment in favor of plaintiff in an action brought to recover an amount due under a mortgage. Affirmed.

Statement by Robertson, C.:

The Ft. Smith Wholesale Grocery Company filed its petition on June 17, 1909, in the county court of Le Flore county, against George B. Noble, and alleged, in substance, that on December 30, 1908, one W. B. Thomas, a merchant, was indebted to plaintiff in the sum of \$430 for goods, wares, and merchandise, to secure the payment of which a chattel mortgage was executed, and which covered his stock of merchandise, located in said county; that on February 5, 1909, the defendant, who was sheriff of Le Flore county, acting under and by virtue of the authority of a writ of attachment issued out of the county court of Le Flore county, in a suit by the McAlister Grocery Company against said W. B. Thomas, levied upon and took possession of and sold the said stock so covered by the chattel mortgage, without paying the debt which said chattel mortgage secured. At the time of the levy of the attachment process, default had been made in the payment of the debt secured by the mortgage, but the mortgagor remained in possession, and there was due to the mortgagee the sum of \$350, with interest, for which judgment was prayed. A copy of the mortgage was set up as an exhibit to the petition, and is in the usual form, and provides that the mortgagor shall retain possession of the stock, and that he may sell the same or any portion thereof for cash, and to keep an account of sales, and make a statement of the sales to the mortgagee as stated at intervals. The said mortgage was duly executed and filed for record with the register of deeds of said county prior to the levy of the attachment. The defendant answered and admitted all

Note.—In a note in 12 L.R.A.(N.S.) 178, are gathered the cases considering the question whether a chattel mortgage is within the meaning of a sales in bulk sales law. No case considering the question other than those therein referred to have been found except NOBLE v. FT. SMITH GROCERY Co. The question was raised in 46 L.R.A.(N.S.)

Lee v. Gillen, 90 Neb. 730, 134 N. W. 278, but the court declined to pass upon it and disposed of the case on another point.

As to constitutionality of bulk sales laws, see notes to Everett Produce Co. v. Smith, 2 L.R.A.(N.S.) 331, and Young v. Lemieux, 20 L.R.A.(N.S.) 160.

the allegations of the petition, except the legality of the mortgage, claiming that the execution of the mortgage by the debtor was a violation of the "sale of merchandise in bulk act" (Session Laws 1907-08, p. 558), and that by reason thereof the mortgage was void and of no effect, as against the attaching creditor, the McAlester Grocery Company. The case was tried to the court without a jury upon an agreed statement of fact, and a judgment was rendered by the court in favor of plaintiff for the amount due under the mortgage, and holding the mortgage valid.

Messrs. Jean P. Day, T. H. Dubois, and E. L. Taylor, for plaintiff in error: The act of May 26, 1908, Sess. Laws 1907-08, p. 557, is constitutional.

Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A.(N.S.) 334, 82 Pac. 496, 6 Ann. Cas. 970; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 986, 76 Pac. 22, 1 Ann. Cas. 550; Walp v. Moorar, 76 Conn. 515, 57 Atl. 277; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; Feingold v. Steinberg, 33 Pa. Super. Ct. 39; Spurr v. Travis, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250; Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280; Sampson v. Brandon Grocery Co. 127 Ga. 454, 56 S. E. 488, 9 Ann. Cas. 331; Kolander v. Dunn, 95 Minn. 422, 104 W. 371, 483.

The mortgage is void for noncompliance by the mortgagee with the terms of the act.

Bank of Perry v. Cooke, 3 Okla. 534, 41 Pac. 628; Hixon v. Hubbell, 4 Okla. 224, 44 Pac. 222; Will T. Little Co. v. Burnham, 5 Okla. 283, 49 Pac. 66; Smith v. Baker, 5 Okla. 326, 40 Pac. 61; Smith-M'Cord Dry Goods Co. v. Jno. B. Farwell Co. 6 Okla. 318, 50 Pac. 149; Nix v. Underhill, 8 Okla. 123, 56 Pac. 959; Frick Co. v. Oats, 20 Okla. 473, 94 Pac. 682.

Mr. T. T. Varner, for defendant in error:

The act of 1907-8 is materially different from the act of 1903, in that the latter act only made the sale a presumption of fraud which could be rebutted by evidence material for such purpose, while the act of 1907-8 allows the presumption of fraud to be rebutted only by showing a full compliance with the act.

Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A.(N.S.) 334, 82 Pac. 496, 6 Ann. Cas. 970; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 46 L.R.A.(N.S.)

76 Pac. 22, 1 Ann. Cas. 550; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Everett Produce Co. v. Smith Bros. 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Young v. Lemieux, 79 Conn. 434, 20 L.R.A.(N.S.) 160; 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452.

The mortgage is not within the terms of the sales in bulk law.

Hannah & Hogg v. Richter Brewing Co. 149 Mich. 220, 12 L.R.A.(N.S.) 178, 119 Am. St. Rep. 674, 112 N. W. 713, 12 Ann. Cas. 344; Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959; McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53; 1 Moore, Fraud. Conv. § 49, p. 175; Litz v. Exchange Bank, 15 Okla. 564, 83 Pac. 790; Edmison v. Drumm-Flato Commission Co. 13 Okla. 440, 73 Pac. 958; Jones, Chat. Mortg. 5th ed. § 27; Mechem, Sales, § 36; 2 Kent. Com. 625; 2 Bl. Com. 446; Burrill, Assignm. 6th ed. §§ 1, 6; Tompkins v. Wheeler, 16 Pet. 106, 10 L. ed. 903; Leitch v. Hollister, 4 N. Y. 211; Johnson v. Robinson, 68 Tex. 399, 4 S. W. 625; Manufacturers' & M. Bank v. Bank of Pennsylvania, 7 Watts & S. 335, 42 Am. Dec. 240; Johnson's Appeal, 103 Pa. 373; Smith v. Moore, 2 Ind. Terr. 126, 48 S. W. 1025; Smith-M'Cord Dry Goods Co. v. Jno. B. Farwell Co. 6 Okla. 318, 50 Pac. 149; Nix v. Underhill, 8 Okla. 123, 56 Pac. 959; Smith v. Baker, 5 Okla. 326, 49 Pac. 61; Bessant v. Levy, 5 Okla. 340, 49 Pac. 1118; Turner Hardware Co. v. Reynolds, 2 Ind. Terr. 49, 47 S. W. 307; Cluett v. Rosenthal, 100 Mich. 193, 43 Am. St. Rep. 446, 58 N. W. 1009; Noyes v. Ross, 23 Mont. 425, 47 L.R.A. 400, 75 Am. St. Rep. 543, 59 Pac. 367.

Robertson, C., filed the following opinion.

There are but two questions raised by the record in this case, viz.:

First. Is the act of May 26, 1908 (Session Laws of Okla. 1907-08, p. 558), constitutional?

Second. Is the mortgage of W. B. Thomas to the Ft. Smith Wholesale Grocery Company such a transfer of a stock of goods, wares, and merchandise as to require a compliance with the terms of such act to render it valid as against the creditors of the mortgagor?

That the act in question is valid and the proper exercise of legislative power and authority there seems to be no doubt. In discussing this identical subject, the author of the note in 2 L.R.A.(N.S.) 331, says: "Statutes regulating the sale and purchase of goods in bulk are of very re-

cent origin. The earliest was that of Louisiana in 1896, but, like mushrooms, they have sprung up in twenty-two states and territories, and already the courts of twelve have passed upon them. The provisions of all have but the one aim—to prevent the sale of goods in bulk until the creditors of the seller have been paid in full. . . . The provisions vary somewhat, but there is a very close similarity in the wording of most of them, and a central idea may probably be traced in all.” Section 1, Acts 1907–08, reads as follows: “Section 1. The transfer of any portion of a stock of goods, wares, or merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferor’s business, or the transfer of an entire such stock in bulk, shall be presumed to be fraudulent and void as against the creditors of such transferor, and such presumption may be rebutted only by a proposed transferee showing that, at least ten days before the transfer and in good faith, he made a full and explicit inquiry of the transferor as to the names and addresses of each and all of his creditors, and that he demanded and received from such transferor at least ten days before such transfer, a list of the names and addresses of all of the creditors of such transferor, showing the amount owing each, which statement must be sworn to by such transferor and shall include a declaration that it is a correct list of all of his creditors with the postoffice addresses and the amount owing each; and that at least ten days before such transfer, he notified or caused to be notified of such proposed transfer, personally or by registered mail, each of the creditors of the transferor of whom such transferee had knowledge, or could, with the exercise of reasonable diligence, acquire knowledge; and that such purchase was made by him in good faith for a fair consideration actually paid.” And section 3 of the same act is as follows: “Transfers under this act shall include sales, exchanges, and assignments, but nothing contained in this act shall apply to transfers made by executors, administrators, receivers, assignors under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or to sales under judicial process.” The supreme court of the state of Connecticut, in construing the provisions of Pub. Acts 1903, chap. 72, p. 49, which is very similar to the Oklahoma statute, said: “The act under consideration is not unconstitutional, either as applying only to a particular class, namely, retail dealers, or as depriving such persons of their property without due process of law. A law which is uniform in its

operation is not rendered invalid merely because of the limited number of persons who will be affected by it. The act in question applies equally to all the people of the state who may engage in the business described. The limitation of the act to retail dealers is not an arbitrary classification.” *Walp v. Moar*, 76 Conn. 515, 57 Atl. 277. In *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312, the court sustained it under the police power and also under chapter 1, § 1, art. 4, of the state Constitution, which permits the legislature “to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth. . . . Although the requirements of the act are very strict, we cannot say that the determination of the legislature as between the interests of owners of stocks of merchandise and their creditors was so far wrong as to render the statute unconstitutional. Within certain limitations it is for the legislature to judge of the policy and expediency of a law if in other respects they have power to enact it.”

In *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50, the court said in construing a similar statute: “That it is merely a regulation of the business of merchandising; that it is not class legislation, and that the limitation of the act to merchants is not an arbitrary classification; that it does not take away the property of the citizen, but only regulates the sales of merchandise in such manner as to prevent fraud.” In *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37, the court said. “The act, it is true, does prohibit owners of certain kinds of property from disposing of it in a particular way without complying with certain conditions, but it is not for that reason necessarily unconstitutional.” In *Moore Dry Goods Co. v. Rowe*, 97 Miss. 775, 53 So. 626, a case decided December 5, 1910, it was held by the court in construing a statute with similar provisions that “the statute in question is not repugnant to the due process nor the equal protection clauses of the 14th Amendment of the Constitution of the United States.” And cited with approval *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Walp v. Moar*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Con-*

nelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37,—all involving statutes fundamentally like this so far as affected by these clauses of the Constitution.

In *Kidd, D. & P. Co. v. Musselman* Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 806, the Supreme Court of the United States, speaking through Mr. Justice White, in construing a Michigan statute, which to all intents and purposes is like the one now under consideration, said: "The errors assigned embody the proposition that the sales in bulk act in question was not a valid exercise of the police powers of the state, and is hence repugnant to the 14th Amendment, because wanting in due process of law, and denying the equal protection of the laws. Substantially the same arguments are urged as are presented in *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174. . . . In the *Lemieux* Case the validity of legislation of the general character of that embodied in the Michigan statute was passed on. A Connecticut law, the constitutionality of which was particularly involved, was held to be a valid exercise of the police power of the state, and not to be repugnant to the due process or equal protection clauses of the 14th Amendment, although it avoided as against creditors sales by retail dealers in commodities of their entire stock at a single transaction, and not in the regular course of business, unless notice of intention to make such sale was recorded seven days before its consummation. . . . 'As the subject to which the act relates was clearly within the police powers of the state, the statute cannot be held to be repugnant to the due process clause of the 14th Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to a mere arbitrary usurpation of power. *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute would be to deny the equal protection of the laws.' These principles are decisive against the contentions made in this case, as we do not find in the provisions of the Michigan statute, when compared with the Connecticut statute, such differences as would warrant us in holding that 46 L.R.A. (N.S.)

the regulations of the Michigan statute are so beyond all reasonable relation to the subject to which they are applied, as to amount to mere arbitrary usurpation of power. The purpose of both statutes is the same, viz., to prevent the defrauding of creditors by the secret sale of substantially all of a merchant's stock of goods in bulk, and both require notice of such sale, and make void, as to creditors, the sale without notice."

The same learned judge in delivering the opinion in *Lemieux v. Young*, supra, quoted with approval the language of the supreme court of errors of the state of Connecticut which sustained the bulk sales law of the state, and which quotation is as follows: "It does not seem to us, either from a consideration of the requirements themselves of the act, or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause such serious inconvenience to those affected by them as will amount to an unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed. It is, of course, possible that an honest and solvent retail dealer might, in consequence of the required notice, before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such notice, but 'a possible application to extreme cases' is not the test of the reasonableness of public rules and regulations. . . . 'The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public.' . . . That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the state, we think, is too clear to require discussion. As pointed out by Vann, J., in a dissenting opinion delivered by him in *Wright v. Hart*, 182 N. Y. 350, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263, the subject has been with great unanimity considered not only to be within the police power, but, as requiring the exertion of such power, he said: "Twenty states as well as the Federal government in the District of Columbia, have

similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal. California, Civil Code, p. 3440, as amended March 10, 1903 (Stat. 1903, chap. 100, p. 111); Colorado, Session Laws 1903, chap. 110, p. 225; Connecticut, Pub. Acts 1903, chap. 72, p. 49; Delaware, Laws 1903, chap. 387, p. 748; District of Columbia, 33 Stat. at L. 555, chap. 1809, Acts 58th Cong. April 28, 1904; Georgia, Laws 1903, pp. 92, 457; Idaho, Laws 1903, p. 11, 11 H. B. 18; Indiana, Acts 1903, chap. 153, p. 276; Kentucky, Acts 1904, chap. 22, p. 72; Louisiana, Acts 1896, p. 137, No. 94; Maryland, Laws 1900, chap. 579, p. 907; Massachusetts, Acts and Resolves 1903, chap. 415, p. 389; Minnesota, General Laws 1899, chap. 291, p. 357; Ohio, Laws 1902, p. 98, H. B. 334; Oklahoma, Session Laws 1903, chap. 30, p. 249; Oregon, Bellinger & C. Anno. Codes & Statutes, chap. 7, p. 1479; Tennessee, Acts 1901, chap. 133, p. 234; Utah, Laws 1901, chap. 67, p. 67; Virginia, Acts approved Jan. 2, 1904, Acts 1902-1904, chap. 554, p. 884 (Virginia Code 1904, p. 1217, § 2460A); Washington, Laws 1901, chap. 109, p. 222; Wisconsin, Laws 1901, chap. 463, p. 684. A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee, and Washington. *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Walp v. Moorar*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37. An act declaring such sales fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland. *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661."

A similar statute was upheld by our territorial supreme court in the case of *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A.(N.S.) 334, 82 Pac. 496, 6 Ann. Cas. 970, and the reasons given there are applicable to the case at bar. We feel that it is unnecessary to pursue the subject further. The foregoing decisions, in our opinion, amply sustain the constitutionality of the statute in its every phase. The right to pass such an act cannot, in our opinion, be questioned, as certainly it is a proper subject of legislation, and does not contravene in any sense the provisions of, nor is it in any way repugnant to, the due process clause, or the equal protection clause of the 14th Amendment to the Federal Constitution.

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Neither is the act violative of any provision of our state Constitution.

Having disposed of this question, let us now determine whether or not the execution and delivery of a chattel mortgage is a "transfer" of a stock of goods, wares, or merchandise otherwise than in the ordinary course of trade. Section 3 of said article provides: "Transfers under this act shall include sales, exchanges, and assignments," etc.

The agreed statement of fact shows that Thomas, the mortgagor, was to remain in possession of the stock and sell the same at retail for cash. The mortgage contained the usual defeasance clause, and gave Thomas, the mortgagor, the right to pay the debt and have the mortgage released at any time. He was in possession when the attachment order was executed. The debt was past due, and no foreclosure had been attempted by the mortgagee. A transfer under this act, to be void, must be either by sale, exchange, or assignment. Is a chattel mortgage, such as was given in this case, either a sale, an exchange, or an assignment? If it is, then it comes clearly within the inhibition of the act, and will be void as to other creditors. If it is not a sale, exchange, or assignment, then it is not within the inhibition of the act, and is valid against attachment creditors. It seems to be admitted by the parties, and correctly, too, that a chattel mortgage is not an exchange, but it is contended earnestly by counsel for plaintiff in error that it is a sale, as well as an assignment.

A transfer, as defined by Bouvier's Law Dictionary, is: "The act by which the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter." Counsel for plaintiff in error, on page 13 of their brief, contend that under this definition a chattel mortgage is a transfer. We cannot agree with the contention, for the mortgagor never surrendered possession under the mortgage, but only agreed to deliver possession upon default or breach of conditions of the mortgage. And the creditor, if so disposed, even after a breach of conditions, could, and in this case did, fail to take possession, and yet the instrument was none the less a chattel mortgage with the possession in the mortgagor, who still had the full right of redemption under the laws of this state.

Bouvier's definition of the word "Sale" is as follows: "An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price." But, under this definition, it is necessary that the title to the thing sold should pass before

there would be a sale, and no one surely will contend that under the Oklahoma laws and decisions the title to property covered by chattel mortgage passes until after default and foreclosure.

In *Litz v. Exchange Bank*, 15 Okla. 564, 83 Pac. 790, it is said: "Under the provisions of our statute, a mortgage does not convey title to the property mortgaged, but only creates a lien thereon. Hence a mortgagor has the undoubted right to pay the indebtedness, which thereby extinguishes the lien, at any time before the property is sold by the mortgagee. One of the objects of the statutory notice of ten days, which is required to be given in case the mortgagee attempts to foreclose his mortgage, is to give the mortgagor an opportunity to pay the indebtedness, and thereby extinguish the lien upon the property." See also *Edmisson v. Drumm-Flato Commission Co.* 13 Okla. 440, 73 Pac. 958. Neither is a chattel mortgage given under the circumstances such as we find in the case at bar a conditional sale. "Whether there is a debt between the parties is an important inquiry in determining the nature of the transaction. If there was a previous debt, and this was not extinguished by the sale, but remained as a subsisting obligation, the bill of sale, when connected with the debt by proper evidence, will be regarded as a mortgage. But if the previous debt was extinguished by the sale, and the vendor has the privilege of repurchasing within a given time, the transaction is a conditional sale." *Jones, Chat. Mortg.* 5th ed. § 27, and cases cited. "If a pre-existing debt was extinguished by a bill of sale, a verbal agreement by the creditor to resell on the debtor's fulfilling certain conditions makes the transaction a conditional sale, and not a mortgage. If the previous debt was not discharged by the sale, its continuance raises a strong presumption that the transaction was a mortgage." *Ibid.* "Sale to be distinguished from mortgage.—So sale is to be distinguished from mortgage, which, in most of the states, is a conditional sale of personal property as security for the payment of a debt as a performance of some other obligation, though, in some states, it is regarded, like the mortgage upon land, as a mere lien upon the property, rather than a conditional sale." 1 *Mechem, Sales*, § 36. "A sale is a contract for the transfer of property from one person to another for a valuable consideration." 2 *Kent, Com.* 625. "A sale or exchange is a transaction of property from one man to another in consideration of some price or recompense in value." 2 *Bl. Com.* 446. A "sale is a word of precise legal import, both at law and equity. It means, at all times, 46 L.R.A. (N.S.)

a contract between parties to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold." Per *Wayne, J., Williamson v. Berry*, 8 How. 495, 544, 12 L. ed. 1170, 1191. "A sale is the transfer of the absolute title to property for a certain agreed price." *Story*. "A sale is the transfer by mutual agreement of the absolute title to certain property for a certain price." *Schouler*. "A sale of chattel is an exchange thereof for money." *Parsons*.

This settles the question conclusively that a chattel mortgage is not a sale, nor a conditional sale; and the ingenious and able argument of counsel in support of the theory must also fail in the light of the laws and adjudicated cases arrayed against it. Then, having thus disposed of the terms "sale" and "exchange," we must determine whether or not the chattel mortgage herein was an assignment. As we understand the matter, the difference between a chattel mortgage and an assignment is that a chattel mortgage is merely a pledge, lien, or security for a sum of money due; while an assignment passes the complete title with the possession to the assignee, without the defeasance clause, and it is a wiping out or full settlement of the debt, while the chattel mortgage does not extinguish the debt.

"An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, the term denoting not only the act of transfer, but also the instrument by which it is effected." *Burrill, Assignments*, 6th ed. § 1. "Distinguished from mortgages.—The enactment in many states of statutes prohibiting preferences in general assignments has afforded a ground of attack on partial assignments with preferences sometimes successfully resorted to by nonpreferred creditors, where the claims of other creditors are satisfied by the debtor with mortgages or other conveyances. A mortgage resembles an assignment more closely in the leading feature of being a security or provision for debt and involving a resulting interest to the grantor on a certain contingency. An assignment is more than a security for the payment of debts. It is an absolute appropriation of property for their payment. It does not create a lien in favor of creditors upon property which in equity is still regarded as the assignor's, but it passes both the legal and the equitable title to the property absolutely beyond the control of the assignor. There remains, therefore, no equity of redemption in the property, and the trust which results to the assignor in the unemployed balance does

not indicate such an equity." Burrill, Assignments, 6th ed. § 6. Gardiner, J., in the case of Leitch v. Hollister, 4 N. Y. 211, speaking of the assignments, observes as follows: "The conveyance, whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it." Johnson v. Robinson, 68 Tex. 399, 4 S. W. 625. In Van Patten v. Thompson, 73 Iowa, 103, 34 N. W. 763, the court says: "Chattel mortgages covering substantially all of the mortgagor's property and aggregating all that the property is really worth do not amount, in effect, to an assignment for the benefit of creditors, with preferences, even though they provide that the mortgagees shall take immediate possession and sell the goods, unless the mortgagor regards the transaction as a complete disposition of his property." In Manufacturers' & M. Bank v. Bank of Pennsylvania, 7 Watts & S. 335, 42 Am. Dec. 240, it was contended that the conveyance was an assignment in trust to pay a particular creditor, and not a mortgage. But the court observed: "It is clearly a mortgage limited to a trustee in fee with a power to sell, and the statute has regard not to a conditional conveyance which may revert the property in the debtor, but to an absolute assignment to sell and pay at all events." In Johnson's Appeal, 103 Pa. 373, it was held that "no particular form of words is necessary to constitute an assignment . . . under the act of June 14, 1836, . . . but the transaction must be in substance an absolute transfer of property of the assignor in trust for the benefit of his creditors. A mortgage executed by the assignor to a trustee for creditors, in consideration of an extension of time for the payment of the assignor's debts, being a mere security, cannot be treated as an assignment for the benefit of creditors under said act." "A failing debtor conveyed by mortgage all of his property, not exempt by law from execution, to four of his creditors. He owed them about \$1,500. The value of the goods conveyed was \$1,700. The instrument reserved to the mortgagor any surplus that might remain after paying said indebtedness. Held, on its face, the instrument constituted a mortgage, and not a deed of assignment." Smith v. Moore, 2 Ind. Terr. 126, 48 S. W. 1025. "Where an insolvent debtor makes conveyance of the whole of

his property by chattel mortgage to one or more of his creditors in good faith, for the security of a bona fide indebtedness, although in exclusion of other creditors, the transaction lacks the essential elements of a trust for the benefit of creditors, and cannot be brought within the range of the statutes relating to voluntary assignments." Smith-M'Cord Dry Goods Co. v. Jno. B. Farwell Co. 6 Okla. 318, 50 Pac. 149; Nix v. Underhill, 8 Okla. 123, 56 Pac. 959; Smith v. Baker, 5 Okla. 326, 49 Pac. 61; Bessant v. Levy, 5 Okla. 340, 40 Pac. 1118; Turner Hardware Co. v. Reynolds, 2 Ind. Terr. 49, 47 S. W. 307. "Chattel mortgage authorizing the mortgagee to take possession forthwith, and, in addition to the usual power of sale upon default, authorizing the mortgagee to sell at private sale or in the usual course of trade, does not vest any actual title in the mortgagee, and is not inconsistent with the rights of the mortgagors, or their creditors, who may acquire liens to redeem at any time. Hence such mortgage is not void as a general assignment with preferences." Cluett v. Rosenthal, 100 Mich. 193, 43 Am. St. Rep. 446, 58 N. W. 1009. "A chattel mortgage on all of the mortgagor's property intended as a lien only, the mortgagor retaining possession and intending to continue in business, and not to convey the title or right of possession, does not operate as an assignment in favor of the mortgagee as a creditor." Noyes v. Ross, 23 Mont. 425, 47 L.R.A. 400, 75 Am. St. Rep. 543, 59 Pac. 367.

In the case of Hannah & Hogg v. Richter Brewing Co. 149 Mich. 220, 12 L.R.A. (N.S.) 178, 119 Am. St. Rep. 674, 112 N. W. 713, 12 Ann. Cas. 344, the court expressly holds that "a chattel mortgage is not within the meaning of a statute forbidding the sale, transfer, or assignment of a stock of goods in bulk without certain preliminary proceedings." In Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959, it was contended a chattel mortgage of a stock in trade was invalid because of the statute invalidating sales in bulk of stock in trade. The court held, however, that such a statute had no application to the case at bar. The court used the following language in passing on the question: "We are of opinion, however, that this act has no application to the case at bar. The object of the statute was to protect creditors against fraudulent sales. Here no fraud was shown. The mortgage was on six months' time, and was given for a valuable consideration. It does not appear that when it was given the mortgagor had any creditors except the mortgagee. The mortgage was duly recorded." In McAvoy v.

Jennings, 44 Wash. 79, 87 Pac. 53, a trust deed for the benefit of certain creditors was held not to be within the terms and meaning of the sales in bulk act of Washington; the court saying: "The contention that the transfer was void by reason of its being in contravention of what is termed the 'sales in bulk' law, chap. 109, p. 222, Laws of 1901, is untenable, for the reason that this was not a sale within the contemplation of that act. The object of that law was to prevent the vendor, generally a retail merchant, from escaping his responsibilities to his creditors by disposing of all his stock, pocketing the proceeds, and leaving his creditors without redress. But in this case Jennings did not purchase the stock, and, under the terms of the agreement, was not to pay any portion of the value of the stock of which he took possession to the owners. But he simply acted as a trustee, so far as the goods assigned to him went, for the benefit of the creditors."

We fully appreciate the views expressed by the learned counsel when they recite the evil effects which flow from the abuse of the chattel mortgage in cases similar to the one under consideration, but it is not the province of courts to write into statutes words that the legislature did not insert, or to give a meaning to a law that was not intended to be given by the lawmakers. The legislature, with full authority in the premises, prohibited transfers by sale, exchange, and assignment, unless certain conditions have been complied with. The term "mortgage" or "chattel mortgage" was not included in the list. Why, we do not know. Had the legislature intended to include other methods of transfer, no doubt it would have been done. Certainly a chattel mortgage is not such a transfer as was meant by the legislature, and therefore does not come within the inhibition of said act, for the terms of the statute are plain and unequivocal.

We conclude, therefore, that Acts 1907-08 (Session Laws [Okla.] p. 558), are not in conflict with the organic law, either state or Federal, and that a chattel mortgage does not come within the inhibition of said act, and is not void as to the attaching creditors.

The judgment therefore should be affirmed.

Ames and Sharp, C. C., concur.

Per Curiam:

Adopted in whole.

Petition for rehearing denied,
46 L.R.A. (N.S.).

NEW YORK COURT OF APPEALS.

JOHN MARTIN JOHNSON, by Carolina Locke, Guardian *ad Litem*, Resp't.,
v.

CITY OF NEW YORK, App't.

(208 N. Y. 77, 101 N. E. 691.)

Municipal corporation — laying sewer — protection of children.

A municipal corporation which closes, by means of barricades, a street in which a deep sewer is being made, is not liable for injury to a child which passes the barricade and slips into the trench from a pile of sand deposited by the side of the trench for use in the work, upon which he goes to play, in the absence of anything to charge it with notice of some special danger to children in the conditions which exist.

(Hiscock, J., dissents.)

((April 4, 1913.))

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Kings County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. James D. Bell and Frank Julian Price, with Mr. Archibald R. Watson, for appellant:

The evidence showed the plaintiff clearly guilty of contributory negligence, and the complaint should have been dismissed.

Brennan v. New York, 51 N. Y. S. R. 617, 22 N. Y. Supp. 304; Reynolds v. New York Co. & H. R. R. Co. 58 N. Y. 248.

Defendant was not guilty of negligence.

McDonald v. Degnon-McLean Contracting Co. 124 App. Div. 824, 109 N. Y. Supp. 519; Hunt v. New York, 109 N. Y. 134, 16 N. E. 320; Maginnis v. Brooklyn, 16 N. Y. S. R. 760, 1 N. Y. Supp. 522, affirmed in 126 N. Y. 644, 27 N. E. 852; Hart v. Hudson River Bridge Co. 84 N. Y. 56; Steinbrenner v. M. W. Forney Co. 143 App. Div. 73, 127 N. Y. Supp. 620; Albert v. New York, 75 App. Div. 553, 78 N. Y. Supp. 355.

Note. — For duty toward children as to obstructions or defects in street, see notes to Gibson v. Huntington, 22 L.R.A. 561; Newport News & O. P. R. & Electric Co. 6 L.R.A. (N.S.) 905; and Townley v. Huntington, 34 L.R.A. (N.S.) 118, and see also the case of Irvine v. Greenwood, 36 L.R.A. (N.S.) 363.

Messrs. Philip A. Brennan and Fred S. Lyke, with Mr. George J. S. Dowling, for respondent:

The absolute duty was upon the city to keep this street in a safe condition for public use, and when the excavation was made, it was bound to see that it was carefully guarded.

Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437; *Brusso v. Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Bullock v. New York*, 99 N. Y. 654, 2 N. E. 1; *Johnson v. New York*, 186 N. Y. 146, 116 Am. St. Rep. 545, 78 N. E. 715, 9 Ann. Cas. 824, 20 Am. Neg. Rep. 694.

The fact of the plaintiff playing on the sidewalk and upon the sand there placed does not constitute contributory negligence.

McGarry v. Loomis, 63 N. Y. 104, 20 Am. Rep. 510; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Johnson v. New York*, 186 N. Y. 139, 116 Am. St. Rep. 545, 78 N. E. 715, 9 Ann. Cas. 824, 20 Am. Neg. Rep. 694; *McDonald v. Metropolitan Street R. Co.* 167 N. Y. 66, 60 N. E. 282.

The law does not require the same degree of prudence of children as of adults.

Quinlan v. Richmond Light & R. Co. 133 App. Div. 402, 117 N. Y. Supp. 641; *Stone v. Dry Dock, E. B. & B. R. Co.* 115 N. Y. 104, 21 N. E. 712; *Thurber v. Harlem Bridge M. & F. R. Co.* 60 N. Y. 326; *Porcella v. Mutual Reserve Fund Life Asso.* 50 App. Div. 158, 63 N. Y. Supp. 599.

Werner, J., delivered the opinion of the court:

The plaintiff, a lad of twelve, fell into a trench which the defendant's contractor had made for the building of a sewer in Gold street, between Tillary and Johnson streets, in the borough of Brooklyn. He sustained severe injuries, and through his mother as guardian he instituted this suit to recover damages. At trial term he recovered a verdict which was sustained by a divided court at the appellate division, and the defendant has brought its appeal to this court. The case is one which must arouse sympathy, even if it cannot bear the test of rigorous legal rules, for the unfortunate plaintiff has doubtless sustained injuries which may affect the whole of his life. It is possible that this consideration may have had its influence in securing a verdict that was not satisfactory to either of the litigants, for both moved to have it set aside. The grounds of these motions are not set forth in the record, but obviously the plaintiff's counsel was not satisfied with the amount (\$2,500), and the counsel for the defendant held to his contention, made upon the motions to dismiss the complaint, that the

evidence did not support a verdict for the plaintiff.

We think the motion to dismiss the complaint, made at the close of the plaintiff's case, should have been granted; but the necessity for such a ruling was made even more apparent by the evidence adduced on behalf of the defendant. The whole case was then so conclusive against the plaintiff as to require the trial court to grant the motion when it was renewed.

There is no controversy as to the physical conditions which existed in Gold street at the time of the accident. The defendant, through its contractors, was constructing a sewer 12 feet in diameter, and this was to be laid at a depth variously stated of from 25 to 35 feet. The trench for this work was 16 feet or more in width at the top, and left undisturbed a narrow strip of the roadway on either side, probably not more than 6 or 7 feet in width. The walls of the trench were retained by sheathing which, in some places, had been driven down so that the upper end was level with the street, and in other places it protruded somewhat above this level. At intervals along the line of the work there were timbers or planks laid transversely from which were suspended chain hangers for the temporary support of the sewer and other pipes. Along the side of the trench was a "concrete mixer," which apparently occupied a part of the street and extended over into the sidewalk. This structure was movable, and was changed from point to point as the work progressed. Cement, crushed stone, and sand were brought to this mixer, and after being converted into a semifluid concrete, the material was taken in wheelbarrows to the trench. The sand thus delivered was evidently brought in dump carts or wagons, and deposited in such piles as would naturally form in that method of delivery. This was the general condition in Gold street on the 20th day of May, 1908, when the plaintiff was hurt. After the close of the afternoon session of the public school, he came to a place, near the school, where there was a pile of sand 3 feet or more in height, which extended over the walk about 2 feet and out into the street from 5 to 10 feet, so that the outer margin came to a point within a foot, more or less, of the trench. This was near the mixer, which was then about 30 or 40 feet from the entrance to the school. The plaintiff went to this pile where he saw another boy playing, and as he started to go home he slipped into the trench.

His own narrative is as follows: "I tried to get up and go home, my foot slipped, and I went down into the hole. I do not know how big this sand pile was. I went

up on it and my foot slipped; my foot slipped on the sand; it caved under me and I went down with it, down into this hole." The only other eyewitness to the whole of the accident was a boy named Richards, who was on the sand pile with the plaintiff. This witness testified: "Between the side of the hole and the sidewalk, and on the sidewalk, on the day the boy was hurt, for about 10 feet there was, well, about 3 feet of sand. This sand was near the hole, about a foot and a half from it. It extended over the sidewalk about 10 feet from it, the edges. I was on that pile of sand. When he [plaintiff] got ready to go home, he started to stand up; when he did he slid right in the hole off the sand. He was sitting down in the sand, playing. He started to get right up and slid down in the hole. There was nothing on the edge of the hole to keep anybody from sliding in." No witness attempts to state how long this particular pile of sand had been there, although there is a bit of testimony from which it may be inferred that the same condition had existed on the previous day. The trend of all the evidence, however, indicates that the conditions were constantly changing as the materials were needed at different points in the progress of the work, and it seems to be a fair inference, even from the testimony for the plaintiff, that this identified pile of sand had not existed for so long a time as to charge defendant or its contractors with notice of probable danger from that one source. This is practically the whole of the story for the plaintiff. There are a number of witnesses who testify as to the general situation, but they add nothing of importance to what has been referred to or quoted.

In what was the defendant negligent? Counsel for the respondent argues that it was the duty of the defendant to keep the street in a safe condition, and he attempts to support his contention by citing such cases as *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Weston v. Troy*, 139 N. Y. 281, 34 N. E. 780, and other similar cases which are obviously not applicable to such a situation as is disclosed by the record in this case. It is horn book law that a municipality is required to exercise reasonable care to keep its streets in a safe condition for travelers and all other persons who may lawfully use them. But that is not the rule which governs a case like this. Cities and villages must build sewers and other conduits, the construction of which necessitates the taking up of pavements and the making of excavations. Manifestly a street that is torn up by such operations cannot be safe in the ordinary acceptation

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of the term, for the very prosecution of the work creates obvious dangers. In such circumstances a municipality is chargeable with a reasonable degree of care and diligence in employing proper safeguards to prevent wayfarers and others lawfully using a street, from getting into pitfalls and places of hidden danger. That was done in the present instance by barricading the street against vehicular traffic, and by the display of signs indicating that the street was closed. Even that was apparently a work of supererogation, at least by day, for the character of the excavation and its surroundings were such as to bar the usual access to the street, and to give notice to all that for the time being it was closed. For obvious reasons the sidewalks had to be kept open for the use of the abutters and their families, and for the children who attended the public school situate in the block, but not even a child, old enough to go to school, could have misapprehended the situation. The defendant and its contractors had apparently done everything for the safety of the public that reasonable prudence could have dictated, except to fence off the trench or to station a watchman at each sand pile. Nothing in the previous course of the work had indicated any necessity for such extraordinary precautions, and the record contains no suggestion that such a course would have been practicable, even if the law were so stringent as to require it. Doubtless a barrier might have been erected that would have rendered impossible such an accident as befell this plaintiff, but we are not informed whether the sewer could have been built under such conditions. It is evident, also, that a man might have been stationed at each pile of sand to warn away the children, but the record contains no suggestion that children had previously played in the sand. Apart from all this, however, there is the conclusive answer that neither the defendant nor its contractors were bound to go to any such length, unless previous experience with children there might have suggested the necessity for greater care than they exercised. They were not insurers against accident. They were simply bound to use such reasonable care to prevent accident as the nature of the work and the surroundings would suggest to men of ordinary prudence and foresight. It may be that under certain circumstances, which are not here shown to have existed, the defendant and its contractors might have been chargeable with a degree of care respecting children that would not be necessary as to adults. Children have playful instincts which render some dangerous places peculiarly attractive. For purpose of illustration we may refer to the "mixer" in this

case as an example. If, for instance, that mechanical appliance had been allowed to continue in motion unattended by workmen with the result that it had habitually attracted children to positions of danger, we might have a case in which even a municipality in the prosecution of work in a public street would be chargeable with a degree of care which, in similar circumstances, but upon private property, could not be imputed to an owner of such an appliance. The well-known "turntable" case (Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068, in which it was held that the defendant was not liable for injuries to a child at a turntable that was left unlocked and unguarded on the railroad lands, was decided upon the principle that one who maintains such an appliance upon his own lands is under no obligation, even to a trespassing infant, to keep it in a safe condition. Conceding that the rule of that case has no application to a similar situation in a public street, we do not perceive how that can help this plaintiff.

The rule of reasonable care must be considered, not in the light of the accident which happened, but with reference to what ordinary prudence should have anticipated as likely to happen. In the absence of evidence tending to show that the defendant was chargeable with notice of some special danger to children in the conditions which existed, it would be as reasonable to hold that, even if there had been a fence around the trench, there should have been a watchman to prevent mischievous boys from climbing over it, as it would be to decide that the defendant should have anticipated that a boy was going to slide into this excavation from a pile of sand 3 feet in height and covering an area of from 8 to 10 feet in diameter.

We have considered the case upon the evidence for the plaintiff, giving him the benefit of every inference which can legitimately be drawn in his favor. We might go farther, and demonstrate by the more complete and convincing evidence adduced for the defendant, that the conditions were clearly such as to impute to the defendant no negligence in respect of the unfortunate accident to the plaintiff. This we deem unnecessary, since the plaintiff's case must fail on his own showing.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Cullen, Ch. J., and Gray, Collin, Cuddeback, and Miller, JJ., concur.

Hiscock, J., dissents.
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MASSACHUSETTS SUPREME JUDICIAL COURT.

ELIZABETH GEROMINI

v.

LOUIS BRUNELLI.

(214 Mass. 492, 102 N. E. 67.)

Husband and wife — alienation of affections — necessity of malice.

Malice is an ingredient of liability to a woman for the alienation of her husband's affections, if his conduct was caused by advice given with a friendly desire to assist him, although it may have been mistaken.

(May 22, 1913.)

Note. — Malice as essential to an action for alienation of affections, in absence of meretricious relations.

As to the effect of the fact that the husband or wife of the plaintiff, in an action for alienation of affections or criminal conversation, was the active and aggressive party, see the notes to Scott v. O'Brien, 16 L.R.A. (N.S.) 742, and Miller v. Pearce, 43 L.R.A. (N.S.) 332.

Generally.

It may be laid down as a general rule, at least where there is no element of seduction or adultery, that a defendant in an action for alienation of affections is not liable unless he acted maliciously whether he is a parent or stranger to the plaintiff's spouse. It is true that, as is hereinafter shown, it requires more evidence to establish malice on the part of the parent, than is necessary in the case of a stranger, but this difference is an evidential one merely.

It does not affect the truth of the above statement that it is always material to inquire whether the defendant was influenced by malevolent or improper motives (Boland v. Stanley, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163); and the question is ordinarily one for the jury (Kelso v. Kelso, 43 Ind. App. 115, 86 N. E. 1001).

It is held that in actions of this character, the term "malice" does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but implies merely a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct is unjustifiable, and actually caused the injury complained of, malice in law will be implied. Boland v. Stanley, supra; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

Strangers.

While, as will be seen in a subsequent division of this note, the law is inclined to be indulgent toward a parent who by interfering, alienates the affections of his

EXCEPTIONS by plaintiff to rulings of the Superior Court for Norfolk County made during the trial of an action brought to recover damages for causing plaintiff's husband to desert her, which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

Mr. E. O. Howard, for plaintiff:

There is a marked distinction between the rights and privileges of a parent in such cases, and those of a mere intermeddling stranger.

Payne v. Williams, 4 Baxt. 583; *Huling v. Huling*, 32 Ill. App. 519; *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Oakman v. Belden*, 94 Me. 280,

80 Am. St. Rep. 396, 47 Atl. 553; *Tucker v. Tucker*, 74 Miss. 101, 32 L.R.A. 623, 19 So. 955; *Schouler*, Dom. Rel. p. 52.

Slight acts tending to dissuade the wife from living with her husband are requisite to a cause of action.

Bennett v. Smith, 21 Barb. 439.

By refusing to follow her husband to Italy, the plaintiff forfeited none of her legal rights.

Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

Messrs. H. T. Richardson and G. P. Holbrook, for defendant:

Malice on the part of the defendant was the foundation of the action, and, if none

or her child, and frequently indulges the presumption that the parent was actuated merely by parental affection and solicitude for the child's welfare, the courts stand ready to condemn a stranger who similarly invades the home. So, while malice, as said before, is always a vital element of every action for alienation of affections, there is this difference between the two lines of cases, namely: in the case of a parent good faith will be presumed in the absence of circumstances indicating malice, whereas a stranger who alienates the affections of another's spouse does so at his peril, and is aided by no such presumption. *Boland v. Stanley*, *supra*.

Even though the wife may have a just cause for separation or divorce, she may elect to abide by her situation and remain with her husband, and if she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife, and if he voluntarily does so, he is amenable for the consequences. *Modisett v. McPike*, 74 Mo. 636. In this case, however, the court said that it would be otherwise if the wife, having just cause for the separation or for a divorce, voluntarily sought the advice, shelter, and protection of a relative or even a stranger; and that in such a case a relative or stranger affording protection or advice is not answerable to the husband for such conduct, if he acts in good faith and from motives of kindness and humanity.

So, the husband makes out a prima facie case against a stranger when he shows that the latter voluntarily and unasked interfered with his domestic affairs, and intentionally urged and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence to justify or excuse such conduct, the plaintiff's right to a recovery is established. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650.

In *Sickler v. Mannix*, 68 Neb. 21, 93 N. W. 1018, involving a wife's action against another woman for alienating her husband's affections, the defendant contended that the petition did not state a cause of action in that it failed to charge that she was actuated by malicious motives, but 46 L.R.A. (N.S.)

the court held that, if the conduct of the defendant was unjustifiable, and actually caused the injury, malice in law would be implied, and that therefore a petition which charged that the defendant wrongfully, wickedly, and unlawfully sought and courted the society of the plaintiff's husband sufficiently charged that it was maliciously done.

In actions for the enticing away and harboring the plaintiff's wife, the New York courts have stated in general terms that the husband has the right to the society and assistance of his wife, and that whoever persuades or entices her to separate herself from him, and thus deprives him of that right, is liable to an action. *Schuneman v. Palmer*, 4 Barb. 225, and that whenever a wife is unjustifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie. *Barnes v. Allen*, 30 Barb. 663.

In *Heermance v. James*, 47 Barb. 120, 32 How. Pr. 142, the court indorsed the doctrine that if the defendant, by persuasion or force, prevents the plaintiff's wife from returning to her husband, he is liable, or if he persuades her to stay away from her husband, such persuasion is an unlawful act; and that the law imputes an unlawful purpose to all persons who do an unlawful act; and that if the defendant had done either of these acts, he was liable without reference to his motives and intentions.

In *PHELPS v. BERGERS*, 92 Neb. 851, 139 N. W. 632, involving a husband's action against another man for alienating the affections of the former's wife, the court held that there was error, as against the plaintiff, in so much of an instruction as told the jury that any enticements of the plaintiff's wife by the defendant with a view of causing a separation, otherwise than those of an adulterous nature, must be shown to have been maliciously done; and that there was error, as against the defendant in the remainder of the instruction, which told the jury that the law presumes malice, if one wrongfully does acts tending to disturb the harmony of the family relations between husband and wife, and that the law

existed, there was no liability, even if whatever advice or assistance the defendant gave to the husband was partly or wholly the cause of the desertion.

Tasker v. Stanley, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417; *Walker v. Cronin*, 107 Mass. 555; *Houghton v. Rice*, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843.

Morton, J., delivered the opinion of the court:

The only exception in this case is to the refusal of the trial judge to instruct the jury as requested by the plaintiff, that she need not prove malice on the part of the

defendant in order to entitle her to recover. We do not understand the plaintiff to find any fault with the instructions that were given, if the instruction requested was rightly refused.

We think that the instruction asked for could not have been properly given. In *Tasker v. Stanley*, 153 Mass. 148, 150, 10 L.R.A. 468, 26 N. E. 417, in an action for alienating the affections of the plaintiff's wife, and enticing her to leave him, it was held that the defendants had a right to show that their advice was honestly given with a view to the welfare of both parties, and that, in order to render them liable, it should appear that the advice was not given

concludes in such circumstances that the acts were malicious. In reaching this conclusion the court, after alluding to the presumption of good faith that obtains in favor of a parent, said that only when a stranger interferes in the family matters, there is no presumption of good faith, and that if his acts were wrongful and calculated to alienate the wife's affections from her husband, and did produce that result, he is liable for such damages as he occasions. It is to be noted that this case was appealed by the defendant, and that apparently the only objection to the charge mentioned was the defendant's objection to the statement relating to the presumption of malice, but it does not seem just clear why the court regarded the instruction as erroneous in that respect.

In *Miller v. Pearce*, — Vt. —, 43 L.R.A. (N.S.) 332, 85 Atl. 620, involving an action against a stranger for alienating the affections of the plaintiff's husband, the court held that malice need not be found to support a judgment against the defendant, although exemplary damages were claimed, as malice goes to the amount of damages, not to the right of recovery. But this case seems to stand alone on this proposition. GEROMINI v. BRUNELLI goes to the other extreme, and practically places the burden of proof of malice on the plaintiff; and it is the accepted rule of the other cases, that even a stranger is not liable if he did not act from malice, actual or implied. Not only is there a plain implication to this effect in some of the foregoing cases, but it is expressly held that giving advice to a wife which induces her to leave her husband is not actionable if given honestly, with a view to the welfare of both parties, by one who has no special influence or authority over her, and such one may, as defendant in an action for enticing the wife, be permitted to testify that he had no intention to bring about a separation. *Tasker v. Stanley*, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417. See also *Modisett v. McPike*, *supra*.

And the New York court holds that one who marries a woman who has obtained an invalid divorce in another state from her former husband is not to be regarded as a

mere stranger, intermeddler, or seducer, and cannot be held liable in an action for alienation of affections, where he is to be regarded as having acted in the honest belief that he had the right to marry the woman. *Hollister v. Valentine*, 69 App. Div. 582, 75 N. Y. Supp. 115.

Therefore, a letter from the judge of a foreign state certifying that a divorce from the plaintiff obtained there by her husband was valid is admissible in evidence for the purpose of showing the defendant's good faith. *Strock v. Russell*, 148 App. Div. 483, 132 N. Y. Supp. 968.

In *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. Supp. 3, involving an action by a wife against another woman for alienating her husband's affections, the court laid down a rule that it was incumbent upon the plaintiff to prove that the defendant was blamable for plaintiff's husband's infatuation, and that unless the defendant did or said something with the wrongful and wilful intent to engage his affections, and thereby seduce him from his fidelity to his wife, and unless she was successful in this purpose, she was not liable; and that the law imputed to her no fault because of her attractiveness, nor because she may have been pleased with the admiration of the plaintiff's husband. It seems that this case goes upon the ground that the defendant was not guilty of alienating the affections, rather than the ground that she did not alienate them maliciously.

Parents.

In an earlier note appended to *Multer v. Knibbs*, 9 L.R.A. (N.S.) 322, presenting the earlier cases on this phase of the question, it is shown that the authorities are agreed that a parent will not be liable to the spouse of his child for causing their separation, if the counsel given and the persuasion used by him are such as he thoroughly and honestly considers to be called for by the best interests of the child,—in other words if his acts are done in good faith and without malice; and that the rule is the same whether the child advised or persuaded is a son or daughter. This rule is supported by the

honestly, or was given from malevolent motives. We think that the same principles apply in an action by the wife for persuading and enticing her husband to leave her and take with him their minor children. It is true that the husband is bound to support his wife, and that he is liable to a criminal complaint if he unreasonably refuses or neglects to do so. But we do not think that that fact can affect his right to such advice, or render a third party liable for advice which is given with an honest and friendly desire to assist him, even though it may lead to his separation from his wife, and may turn out not to have been the best advice that could have been given. The liability of the defendant does not depend upon whether the separation resulted

wholly or in part from the advice which he gave, but *quo animo* the advice was given. There must have been an invasion of the plaintiff's rights in some form by the defendant, in order to entitle her to maintain an action against him. In order to show that in the present case, she had to show malice on his part. This she failed to do. It follows that the exceptions must be overruled. See *Corey v. Eastman*, 186 Mass. 279, 287, 55 Am. St. Rep. 401, 44 N. E. 217; *Plant v. Woods*, 178 Mass. 492, 500, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Multer v. Knibbs*, 103 Mass. 556, 9 L.R.A.(N.S.) 322, 79 N. E. 782, 9 Ann. Cas. 958.

Exceptions overruled.

later cases, which include, besides the other cases cited in this division of the note, the case of *Hostetter v. Green*, 150 Ky. 551, 150 S. W. 652.

And the existence of malice must be affirmatively proved, for a parent who advises his son or daughter to leave the marital home is presumed to have done so out of parental affection and solicitude for the welfare of the child, and he cannot be held liable unless the plaintiff, who has the burden of proof, establishes that his advice or conduct is actuated by malicious motives. *Hossfeld v. Hossfeld*, 110 C. C. A. 131, 188 Fed. 61; *Jonas v. Hirschburg*, 18 Ind. App. 581, 48 N. E. 656; *Workman v. Workman*, 43 Ind. App. 382, 85 N. E. 997; *Heisler v. Heisler*, 151 Iowa, 503, 131 N. W. 676; *Corrick v. Dunham*, 147 Iowa, 320, 126 N. W. 150; *Busenbark v. Busenbark*, 150 Iowa, 7, 139 N. W. 332; *Miller v. Miller*, 164 Iowa, 344, 134 N. W. 1058; *Cornelius v. Cornelius*, 233 Mo. 1, 135 S. W. 65; *Miller v. Miller*, 122 Mo. App. 693, 99 S. W. 757; *Fronk v. Fronk*, 159 Mo. App. 543, 141 S. W. 692; *Allen v. Forsythe*, 160 Mo. App. 262, 142 S. W. 820; *Greuneich v. Greuneich*, 23 N. D. 368, 137 N. W. 415; *Beisel v. Gerlach*, 221 Pa. 232, 18 L.R.A.(N.S.) 516, 90 Atl. 721; *Gross v. Gross*, 70 W. Va. 317, 39 L.R.A.(N.S.) 261, 73 S. E. 961; *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179.

Any other rule would be an unjust one. For instance, it would be unjust as applied in the situation in the case of *Bailey v. Kennedy*, 148 Iowa, 715, 126 N. W. 181, where the court said: "Taking the situation of these parties as it was in 1903, the plaintiff's wife was living apart from him, and was in poverty and dependent upon her own efforts to make a living. If, under such circumstances, her father-in-law could not employ her, or even furnish her a home, without being guilty of harboring her in an evil sense, then her situation was very helpless indeed."

For, as has been said, the father's home is the child's refuge and consolation in distress, and when a father receives a married daughter into his household, he does not

subject himself to an action for alienation of affections, unless it appears either that he detains the wife against her will, or that he enticed her away from her husband from improper motives. Bad or unworthy motives cannot be presumed in such a case. They are to be positively shown or necessarily deduced from the facts and circumstances. *Boland v. Stanley*, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163.

There can be no recovery from the parent unless the evidence shows either malice, or a continued effort on the defendant's part to keep the parties to the marriage separated. *Farneman v. Farneman*, 46 Ind. App. 459, 90 N. E. 775, 91 N. E. 968.

And the measure of proof of malice must be greater than is necessary in the case of a mere stranger. *Ickes v. Ickes*, 237 Pa. 582, 44 L.R.A.(N.S.) 1118, 85 Atl. 885.

An instruction which omits the qualification that the defendant must have acted intentionally or knowingly is properly refused. *Powers v. Sumblor*, 83 Kan. 1, 110 Pac. 97.

And it is error for the court to charge that it is the duty of the parents to advise their son to live with his spouse. *Walter v. Walter*, 172 Mich. 351, 137 N. W. 677.

In *Ellsworth v. Shimer*, 71 Misc. 576, 128 N. Y. Supp. 883, the court holds that in an action for alienating a wife's affections, the *quo animo* of the defendant is a material point, and it was held that a complaint which did not allege the defendant's motives, or show that there were improper relations between the defendant and the wife, was insufficient, since for all that appeared from the complaint the defendant might have been the wife's father or brother, who had performed only his duty in doing the act which caused the separation.

Without commenting upon the necessity of malice, the court, in *Leucht v. Leucht*, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845, denied a recovery against the parent where the evidence sought to be introduced, apparently for the purpose of showing malice, was incompetent.

In *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, involving an action

by a wife against her father-in-law, it was held that the trial court erred in refusing to charge that, to entitle the plaintiff to recover, the defendant must have maliciously caused the separation of the husband and wife; but the supreme court added that if the conduct of the defendant was unjustifiable, and actually caused the injury complained of, which was a question for the jury, malice in law would be implied from such conduct, and that the court should have so charged.

But the Indiana appellate court holds that while the fact that the parent may do the act without legal excuse may warrant the jury in inferring malice, it does not constitute malice as a matter of law, and it is therefore error to instruct the jury that an act is deemed to have been done maliciously when done purposely, without just cause or legal excuse, and that a parent when so acting is liable for damages. *Kelso v. Kelso*, 43 Ind. App. 115, 86 N. E. 1001.

The protection afforded a parent in this respect is, of course, not an absolute one. The later cases, like the earlier ones set out in the note in 9 L.R.A.(N.S.) 324, hold that if the parent acts maliciously and unjustifiably in bringing about the separation, he is liable to the injured party as if he were a stranger. This proposition is supported by implication by some of the decisions above cited in this division of the note, and it has been expressly applied in the following cases: *Boland v. Stanley*, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163; *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656; *Heisler v. Heisler*, 151 Iowa, 503, 131 N. W. 676; *White v. White*, 76 Kan. 82, 90 Pac. 1087; *Klein v. Klein*, 31 Ky. L. Rep. 28, 101 S. W. 382; *Allen v. Forsythe*, 160 Mo. App. 262, 142 S. W. 820; *Gerner v. Gerner*, 185 Pa. 233, 40 L.R.A. 549, 64 Am. St. Rep. 646, 39 Atl. 884; *White v. White*, 140 Wis. 538, 133 Am. St. Rep. 1100, 122 N. W. 1051.

In *Cochran v. Cochran*, 196 N. Y. 86, 24 L.R.A.(N.S.) 160, 89 N. E. 470, 17 Ann. Cas. 782, the court clearly recognizes that a wife can recover from the parents of her husband for the alienation of his affections, where they act unjustifiably and maliciously; but upon the grounds that the wife was erroneously permitted to testify to declarations of the husband tending to show their hostile attitude and disposition, which were made in their absence, the court reversed a recovery for the plaintiff allowed by the appellate division in 127 App. Div. 319, 111 N. Y. Supp. 588.

Other relatives.

The presumption indulged in favor of a parent would also seem to apply in the case of a child. At least, there is an implication in *McGregor v. McGregor*, — Ky. —, 115 S. W. 802, involving an action by a father against his son, that the son could not be held liable upon the basis of harbor-

ing and extending kindnesses to his step-mother, unless the plaintiff proved that he acted from a spirit of malice or revenge.

In *Allen v. Forsythe*, 160 Mo. App. 262, 142 S. W. 820, involving a joint action by the husband against the father and other relatives of the wife, and recognizing that the element of malice must be present to render the father liable, but holding him liable upon the ground of malice,—the court said that it was willing *arguendo* to accord to the other defendants the same status as that enjoyed by the father, and to treat them as entitled to any benefit the parental rule conferred upon the father, but it held such defendants, who were brother, sister, and sister-in-law, liable upon the ground that they too acted maliciously.

The North Dakota supreme court holds that whether the rule of presumptive good faith, which obtains in the case of a parent or other blood relative, or the rule applied in the case of a stranger, shall extend to the husband of the sister of the plaintiff's wife, is a question for the jury, the court saying that it was satisfied that it was proper to instruct the jury as to both phases of the question under the testimony, and to leave it to the jury to determine whether the defendant was entitled to the exemption from liability accorded a relative, or not. *Luick v. Arends*, 21 N. D. 614, 132 N. W. 353.

And the Iowa supreme court seems to take it for granted that the presumption of good faith indulged in behalf of the parents will likewise be indulged in behalf of the plaintiff's sister-in-law. *Miller v. Miller*, 154 Iowa, 344, 134 N. W. 1058.

Guardian.

The Nebraska court takes the view that the privileges of a parent in this respect extend to a guardian, holding that where advice is given by a parent or guardian which leads to the separation by the child or ward from the husband, the presumption is that the advice was given in good faith, and that he cannot be held liable unless it appears that the advice given by him was reckless or malicious. *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812. L. A. W.

OKLAHOMA SUPREME COURT. (Division No. 2.)

J. W. WELLINGTON, Plff. in Err.,
v.

E. W. SPENCER et al.

(— Okla. —, 132 Pac. 675.)

Pleading — joinder of allegations of conversion and trespass.

1. It is not improper to join, in the same count in a petition, an allegation that the

Headnotes by ROSSER, C.

defendant took possession of certain personal property belonging to plaintiff and converted it to his own use, with an allegation that defendant entered a building where plaintiff was carrying on a hotel business, took possession of the building, closed same, and thereby destroyed plaintiff's business, where it is alleged that the goods alleged to have been converted were taken from the building at the time it was entered, and the entering of the building and the taking of the personal property are parts of the same transaction.

Damages — destruction of business — profits.

2. The loss of profits proximately resulting from the destruction of an established business constitute an element of damages recoverable for such destruction.

Trespass — attachment as defense.

3. It is not a defense to an action for entering a building occupied by plaintiff as a hotel, ejecting him therefrom, destroying his business, and seizing and converting his goods, that the defendant was acting by virtue of a writ of attachment which he had sued out as plaintiff in an action against the plaintiff in this action, to recover a debt, where there were no grounds for the attachment, and it was dissolved.

Landlord and tenant — eviction — knowledge of illegal sale of liquors — effect.

4. The plaintiff occupied a building belonging to the defendant. The rent was payable in advance. The plaintiff failed to pay at the beginning of the month, and six days later the defendant sued him for the rent, of the current month, sued out a writ of attachment, and by virtue thereof took

possession of the personal property in the building, and closed the building, and ejected plaintiff therefrom. The attachment was dissolved. In an action brought against him by plaintiff to recover damages for the closing of his business and conversion of his chattels, defendant offered to testify that plaintiff was selling intoxicants in the building. It appeared that, if true, defendant had knowledge thereof before he demanded rent, but that he brought suit for the rent and closed the building without making complaint as to the unlawful use thereof, or demanding possession thereof. Held, that the evidence as to such use was properly excluded.

(May 20, 1913.)

ERROR to the Superior Court for Pottawatomie County to review a judgment in favor of plaintiff in an action brought to recover damages for injury to his business and for the conversion of personal property by evicting him from leased property. Affirmed.

The facts are stated in the commissioner's opinion.

Mr. P. O. Cassidy, for plaintiff in error:

The claim of \$1,098.33 for conversion of personal property, and the claim of \$1,500, for loss of profits, constitute two distinct causes of action, and should be pleaded in separate counts.

Carlson v. Albert, 117 App. Div. 836, 102 N. Y. Supp. 944; *Mullich v. Brocker*, 119 Mo. App. 332, 97 S. W. 549; *Louisville & N. R. Co. v. Hurt*, 129 Ga. 234, 58 S. E.

Note. — Loss of profits as element of damages for wrongful attachment.

For the earlier cases on this subject, see subdivision at page 54 of note to *Wallace v. Pennsylvania R. Co.* 52 L.R.A. 33, upon the general question as to damages for torts as affected by loss of profits.

For notes upon numerous other aspects of the general question as to loss of profits as an element of damages, see Index to L.R.A. Notes, Damages, §§ 107-118.

It seems to be the general rule, as stated in the earlier note, and as held in *WELLINGTON v. SPENCER*, that a loss of profits which is the proximate result of a wrongful attachment is a proper element of the damages recoverable on account thereof, where the prospective profits were reasonably certain, and not merely speculative or conjectural, and the amount thereof can be estimated with reasonable accuracy.

Thus, the actual, ascertainable loss of profits consequent upon the interruption of a debtor's business is a proper element of damage recoverable for the wrongful attachment of his stock of goods: *Sterling v. Marine Bank*, — Md. —, 87 Atl. 697.

And in *United States Fidelity & G. Co. v. Howes*, 33 Ky. L. Rep. 131, 109 S. W. 343, an action upon an attachment bond to 46 L.R.A. (N.S.)

recover the damages sustained by reason of the wrongful attachment of the plaintiff's property, resulting in the locking up of his store for forty-three days, and necessitating his paying an attorneys' fee of \$350, and going to another place and incurring considerable expense there in making his defense, the court said that, in view of the expense the plaintiff was at and the length of time his store was locked up and his business suspended, it could not say that a verdict of \$550 was excessive.

But in an action to recover damages for wrongfully suing out a writ of attachment against the property of a copartnership engaged in the painting and paper hanging business, although "in actions of this kind no doubt a recovery may be had for loss of ascertainable profits arising out of an established business," the plaintiff is not entitled to recover prospective profits, where, at the time of the attachment, the business had not been long established and had been disrupted and disorganized by the absconding of the plaintiff's copartner, after he had collected the firm accounts so far as he was able, leaving the stock in trade almost wholly unpaid for, of which absconding the plaintiff notified the firm creditors and allowed them to reclaim the goods which they had respectively shipped to the firm,

706; *Wolff v. Southern R. Co.* 130 Ga. 251, 60 S. E. 569; *Hoag v. Lehigh Valley R. Co.* 55 Misc. 388, 105 N. Y. Supp. 200; *Coyne v. Memphis*, 118 Tenn. 651, 102 S. W. 355; *Kuchler v. Weaver*, 23 Okla. 420, 100 Pac. 915, 18 Ann. Cas. 462; *Hall v. Cudahy*, 40 Colo. 324, 104 Pac. 415; *Baker v. Atlanta, B. & A. R. Co.* 163 Ala. 101, 49 So. 751; *Harvey v. Southern P. Co.* 46 Or. 505, 80 Pac. 1061; *H. B. Clafin Co. v. Simon*, 19 Utah, 153, 55 Pac. 376; *Langell v. Langell*, 17 Or. 220, 20 Pac. 286; *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591; *Keens v. Gaslin*, 24 Neb. 310, 38 N. W. 797; *Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117; *Harris v. Avery*, 5 Kan. 146; *Emerson v. Nash*, 124 Wis. 369, 70 L.R.A. 326, 109 Am. St. Rep. 944, 102 N. W. 921.

The court erred in admitting Spencer's testimony and instructing the jury that they could return a verdict for the loss of profits of his business.

Seattle Crockery Co. v. Haley, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650; *Cunningham v. Sugar*, 9 N. M. 105, 49 Pac. 910; *Fitler v. Fossard*, 7 Pa. 541, 49 Am. Dec. 492; *Lovejoy v. Murray*, 3 Wall. 1, 9, 18 L. ed. 129, 131; *Munns v. Loveland*, 15 Utah, 250, 49 Pac. 743; 4 Cyc. 853; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Steen v. Ross, K. & Co.* 22 Fla. 480; *McCullough v. Walton*, 11 Ala. 492; *Bunt v. Rheum*, 52 Iowa, 619, 3 N. W. 667; *Azlin v. Lake*, 57 Miss. 693; *Eaton v. Baertscherer*, 5 Neb. 469; *Adkins v. Lacy*, 68 Ark. 170, 56 S. W. 876; *Elder v. Kutner*, 97 Cal. 490, 32 Pac.

563; 4 Cyc. 872, 879, note; *Carter v. Wilson*, 61 Ala. 434; *State v. Allen*, 12 Mo. App. 566; *Lang v. Fritz*, — Tex. Civ. App. —, 38 S. W. 233; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499; *Thompson v. Webber*, 4 Dak. 240, 29 N. W. 671; *Reidhar v. Berger*, 8 B. Mon. 160; *Pettit v. Mercer*, 8 B. Mon. 51; *State use of Roe v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *Kirbs v. Provine*, 78 Tex. 353, 14 S. W. 849; *Weeks v. Prescott*, 53 Vt. 57; *Union Nat. Bank v. Cross*, 100 Wis. 174, 75 N. W. 992; *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194; *Blass v. Lee*, 55 Ark. 329, 18 S. W. 186; *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305; *Carpenter v. Stevenson*, 6 Bush, 259; *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048; *Braunsdorf v. Fellner*, 76 Wis. 1, 45 N. W. 97; *L. Bucki & Son Lumber Co. v. Fidelity & D. Co.* 109 Fed. 393; *Kennedy v. Meacham*, 18 Fed. 312; *Anderson v. Sloane*, 72 Wis. 566, 7 Am. St. Rep. 885, 40 N. W. 219; *Beveridge v. Welch*, 7 Wis. 465.

Messrs. J. H. Wood, S. P. Freeling, and J. H. Miley for defendants in error.

Rosser, C., filed the following opinion:

E. W. Spencer occupied a building belonging to J. H. Wellington and used it as a hotel. The rent on the building was payable in advance and was due June 20, 1908. Wellington called on Spencer to pay the rent, but he did not pay. Wellington brought suit against him in justice court

the plaintiff laying no claim thereto. *McGill v. W. P. Fuller & Co.* 45 Wash. 615, 88 Pac. 1038.

And in an action on attachment bonds issued in actions brought by a vendor for an alleged breach of a contract under which he was furnishing the vendee with logs with which to operate the latter's sawmill, while evidence as to the net profits of the plaintiff's sawmill business for the few months prior to the attachment is admissible, "not as in and of itself constituting the measure of damages, but as tending to show what damages the [plaintiff] . . . sustained by the brief interruption of its business," during the time the operation of the mill was suspended on account of the attachment,—loss of profits because of the vendor's refusal to make further deliveries under the contract is not an element of damages recoverable under the bonds. *Fidelity & D. Co. v. L. Bucki & Son Lumber Co.* 189 U. S. 135, 47 L. ed. 744, 23 Sup. Ct. Rep. 582, affirming 48 C. C. A. 436, 109 Fed. 393.

So, where a debtor was conducting a pool room in connection with a store at the time of the wrongful attachment of his stock of goods, but his pool tables and their appurtenances were not taken or removed in the execution of the writ, and the debtor still

carried on some business on his pool tables after the levy of the attachment, loss of profits derived from the conduct of the pool room is not an element of the damages recoverable for the wrongful attachment. *Sterling v. Marine Bank*, supra.

And the owner of property used in his business and wrongfully attached under a writ against another person cannot recover, as an element of his damages against the attachment plaintiff who procured the illegal levy, loss of profits from his business during the period of litigation concerning the title to the property, arising from a suspension of the business for want of such property, where this loss is traceable to the plaintiff's own refusal to protect himself from the result of the defendant's tort, in that he declined either to give a bond which would have enabled him to retain the property, or to obtain other like property in the open market for his use, and made no effort to keep up the business. *Maxwell v. Speth*, 9 Ga. App. 745, 72 S. E. 292.

In *Moravec v. Grell*, 78 App. Div. 146, 79 N. Y. Supp. 533, it was held that in an action against a sheriff for the wrongful conversion of a stock of goods in a store, under a warrant of attachment issued against the property of another person, loss of profits does not constitute an element of dam-

for \$60 and sued out an attachment. The constable, Arthur, acting under Wellington's direction, attached everything in the building, except some wearing apparel of Spencer and his family, and posted notices on the doors of the various rooms in the building that the building and the contents were attached at the suit of Wellington. The officer set the trunks of Spencer and wife out of the house and locked the doors. Spencer sought other employment and made no effort to regain possession of the house. The case was tried before the justice in a few days and the attachment was discharged. Wellington appealed to the county court, but for some reason not clearly appearing in the record the appeal was dismissed. After a short time the attached property was removed from the hotel building and placed in storage, and Wellington rented the building to someone else. At the suggestion of Wellington or his attorney the holder of a mortgage on a portion of the attached property took possession of the portion mortgaged, without foreclosing, and about a year after the attachment was levied the balance of the property was returned to Spencer. He then brought this suit against Wellington and Arthur, the constable, who made the levy. Plaintiff's amended petition alleged that the defendant's took possession of the hotel business, building, furniture, and equipment, and certain wearing apparel; that the value of the hotel business and good will was \$1,500, and of the property taken and not returned something more than \$900; that by reason of defendant's wrongful acts the hotel business was broken up; and that he was damaged in the sum of \$2,430.33. Wellington filed a motion, which stated that the loss of profits to the hotel business and the dam-

ages by reason of the taking of the property were separate causes of action, and which asked to have said causes of action set forth in separate counts. This motion was overruled, and the action of the court thereon is assigned as error.

The point is not well taken. There was only one wrongful act. The destruction of the business was only one item of damages occasioned by the act of Wellington. The fact that a different class of property was affected by the closing of the hotel from that affected by the taking of the furniture did not make a different cause of action, any more than the taking of each item of personal property constituted a separate cause of action. The whole matter was one transaction, and therefore it was proper to state it in one count. If the plaintiff had undertaken to make two counts of his petition, he would have been compelled to state the same facts in both counts. The only difference in them would have been that he would have alleged the extent of his damage with reference to the personal property in one count and to the leasehold interest as to the other. *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310.

In *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609, it was held that a petition which alleged that the defendants wrongfully, and without notice or legal proceedings, ejected plaintiff from his office, and removed all his office furniture and placed it in the street, refused to permit and allow the plaintiff to enter his office, and prevented him from carrying on his business, and published to the public that the plaintiff had no right, title, or interest in certain machines or in the business of selling them, and notified all parties from whom the plaintiff had obtained orders for the ma-

ages for which a recovery is authorized, but the interest upon the sum of money awarded as the value of the property is the legal substitute for the loss of profits in such a case.

And in an action against an attachment plaintiff for damages for wrongful attachment of certain railroad cars, although the chief business of the attachment defendant was the hiring out of such cars for use on other roads,—its own road being only 17 miles long, and it having a large stock of cars,—it has been held that it cannot recover, as an element of its damages, the profits which it might have made from hiring out the attached cars, because that would be speculative damages; but "the true measure of damages is the interest upon the value of the cars, increased or diminished, as the case might be, by the difference between the deterioration in the cars, if in daily use, and their deterioration while wrongfully tied up, provided, of course the plaintiff could not have avoided

all injury from the attachment by simply giving bond,—as it is shown that it was amply able to do,—and retaining possession of its cars." *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 143 N. C. 54, 55 S. E. 422.

And in *State ex rel. Clark v. Parsons*, 109 Mo. App. 432, 84 S. W. 1019, an action on an attachment bond to recover for the wrongful attachment and sale of plaintiff's stock of goods, it was held that the proper measure of damages was not the market value of the attached goods when sold at retail, but the amount which it would cost to replace the merchandise in the store,—the court saying: "To permit a plaintiff in an action like this to recover what the merchandise would bring when retailed would be to give him more than compensation for his loss; for he would get at once the probable proceeds of the stock, including a profit, without having incurred the expense of selling."

A. C. W.

chines that they should cancel their orders and send new orders to be placed with the defendants, and published to the commercial agencies and the public that the plaintiff was irresponsible, stated a single cause of action. *Bahr v. Boley*, 85 Hun, 448, 32 N. Y. Supp. 881, was an action for damages for trespass on lands, and the complaint, after alleging the trespass and conversion of property, alleged that "on said day, after forcibly assaulting and ejecting plaintiff, the defendant, maliciously and without cause, caused the plaintiff to be arrested and taken through the public streets of the city of Brooklyn to a station house, in charge of a policeman in uniform." It was held that the plaintiff could allege and prove all his injuries caused by the trespass, either to his person or to his personal property. The court said: "There is no doubt that in an action for trespass on lands the plaintiff could allege and prove all his injuries caused by the trespass either to his person or to his personal property. In such case the cause of action would be the trespass, and the injury to his person and personal property will not be an independent cause of action, but aggravations of the damages. We think that the allegation of the complaint quoted is to be construed as alleging the continuation of a single trespass. In this view there is but a single cause of action set forth in the complaint." See, also, *Brown v. Master*, 104 Ala. 451, 16 So. 443; *Belden v. Granniss*, 27 Conn. 511.

The next question presented is whether the closing of the hotel building and consequent destruction of plaintiff's business was an element of damage to which he was entitled. The decisions upon this question are not uniform. A number of cases hold that no recovery can be had for loss of profits. However, not many late cases can be found supporting that proposition. A number of cases hold that no recovery for loss of profits occasioned by the destruction of business can be had unless the act which occasioned the loss was malicious. *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048; *L. Bucki & Son Lumber Co. v. Fidelity & D. Co.* 48 C. C. A. 436, 109 Fed. 393; *Union Nat. Bank v. Cross*, 100 Wis. 174, 75 N. W. 992; *Braunsdorf v. Fellner*, 76 Wis. 1, 45 N. W. 97. But a large number of well-considered cases hold that when the loss of profits is the proximate result of the unlawful act, and the amount is capable of proof to a reasonable certainty, the earnings of a business may be taken into consideration when assessing damages for the unlawful act. *Smith v. Eubanks*, 72 Ga. 280; *Stewart v. Lanier House Co.* 75 Ga. 582; *Chapman v. Kirby*, 49 Ill. 211; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Dobbin* 46 L.R.A. (N.S.)

v. Duquid, 65 Ill. 464; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Moore v. Schultz*, 31 Md. 418; *Lawson v. Price*, 45 Md. 123; *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109; *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847. See *Sedgw. Damages*, §§ 173 et seq.

The reason that prospective profits cannot be considered in estimating damages is that they are uncertain, and not capable of sufficiently definite proof to justify a verdict or decision as to their amount. The law does require reasonable certainty, but not more than that. In personal injury cases, where there is permanent disability, the juries are always permitted to consider the plaintiff's earning capacity in connection with his probable life duration, and thus, in the face of the fact that we are constantly taught that life is uncertain, and that no one is justified in presuming that he will live any particular length of time. The jury is simply permitted to use the best basis possible for estimating the damages. Why should not the same rule apply in cases where a business has been broken up or interrupted? Of course, juries will not be permitted to merely speculate as to damages. Where the plaintiff has just made his arrangements to begin business, and he is prevented from beginning either by tort or a breach of contract, or where the injury is to a particular subject-matter profits of which are uncertain, evidence as to expected profits must be excluded from the jury because of the uncertainty. There is as much reason to believe that there will be no profits as to believe that there will be profits, but no such argument can be made against proving a usual profit of an established business. In this case the plaintiff, according to his testimony, had an established business, and was earning a profit in the business, and had been doing that for a sufficient length of time that evidence as prospective profits was not entirely speculative. Men who have been engaged in business calculate with a reasonable certainty the income from their business, make their plans to live accordingly, and the value of such business is not such a matter of speculation as to exclude evidence from the jury.

In the case of *Allison v. Chandler*, 11 Mich. 542, the court, speaking by Christiancy, J., said: "This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable . . . for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the

plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of \$1,000 per year, and he is ousted from the premises, and this business entirely broken up for the balance of the time; can be allowed to recover nothing but 6 cents damages for his loss? To ask such a question is to answer it."

In *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327, the court said: "It is objected that the respondent was allowed to recover damages for the profits which he would have made had he not been prevented, by the injunction, from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business, he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade? If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained could be inquired into. The best-considered cases agree that, where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissible. *Terre Haute v. Hudnut*, 112 Ind. 550, et seq. 13 N. E. 686; *Allison v. Chandler*, 11 Mich. 558 et seq.; *Chapman v. Kirby*, 49 Ill. 219; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Gibson v. Fischer*, 68 Iowa, 30, 25 N. W. 914; *Goebel v. Hough*, 26 Minn. 256, 2 N. W. 847; *Shafer v. Wilson*, 44 Md. 268."

In the case of *Chapman v. Kirby*, 49 Ill. 211, the court said: "As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well-founded objection. We all know that in many, if not all, professions and callings, years of effort, skill, and toil are necessary to establish a profitable business, and that when established it is worth more

than capital. Can it then be said that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? It has long been well-recognized law that, when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate; and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained with a reasonable degree of certainty."

The question was decided by the supreme court of the territory in the case of *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310.

In the case of *Ft. Smith & W. R. Co. v. Williams*, 30 Okla. 726, 40 L.R.A. (N.S.) 494, 121 Pac. 275, the general doctrine with reference to proving expected profits as an element of damages was considered, and a large number of authorities cited and discussed. It was held in that case where a railroad company undertook to deliver a rotary swing, sometimes called a "merry-go-round," to be used at a picnic, knowing the purpose for which it was to be used upon its failure to deliver same, it was liable for the profit that would have been made by the use of the swing during the progress of the picnic; and that opinion clearly points out that the reason evidence as to anticipated profits is excluded in many cases is because they are incapable of being proved with a reasonable degree of certainty.

Defendant assigns as error the instruction that the fact that plaintiff was indebted to the defendant, and that an attachment writ was issued, was no defense to the action. Defendant asserts that this was error, but does not cite any cases or give a satisfactory reason for the assertion. The fact that a man owes another does not give the creditor the right to take his goods or shut up his place of business. The defendant was unsuccessful in the attachment suit. There is nothing in the record showing that any statutory grounds for attachment existed. A person who sues out an attachment and causes it to be levied cannot defend

an action for the taking and converting of the property attached and the closing of the house containing the property, upon the ground that the acts were done by virtue of the writ, unless the statutory grounds existed justifying the issuance of the writ. Where malice is charged and exemplary damages asked, the attachment proceedings might be material under restrictions not necessary to be defined here. But malice is not charged here, though the record shows exceedingly oppressive conduct on the part of the defendant.

Finally, it is claimed that the court erred in excluding the testimony of the defendant himself to the effect that he knew that plaintiff sold intoxicating liquor in the hotel. The defendant had the right to eject the plaintiff from the building if he was selling intoxicants there. And, though the statute provides that the landlord may recover possession as in forcible entry and detainer, that does not mean that he must bring such a proceeding if he can obtain possession in any other peaceable way. But it does not mean that he can use force or fraud to obtain possession. In this case, by the abuse of the attachment process, defendant obtained possession by fraud, which was equivalent to force. The evidence shows conclusively that the defendant made this defense as an afterthought. There is no evidence that he made any complaint to the plaintiff that he was using the premises for an illegal purpose. On the other hand, he demanded the rent; and the conclusion is irresistible that, if plaintiff had paid the rent, the defendant would have been willing for him to remain another month. If the plaintiff was engaged in an unlawful business, defendant was conniving at it. He did not make complaint before he got possession, but, on the other hand, sued for the rent for another month. He did not give the unlawful use of the premises as a reason for taking possession. He used the attachment for that purpose. He is in exactly the same attitude as if he had taken possession by force. If he had taken possession by force, he would not be heard to say that he did so because plaintiff was selling liquor. He cannot take possession for one reason and hold it for another. His positions before and since taking possession are inconsistent.

The judgment of the trial court should be affirmed.

Per Curiam:

Adopted in whole.

46 L.R.A.(N.S.)

IDAHO SUPREME COURT.

ASAPH D. CLARK et al., Respts.,
v.

EMMA L. PADDOCK, Appt.

(— Idaho, —, 132 Pac. 795.)

Damages — secured note — diverse provisions — construction.

1. Provisions in a mortgage that default in payment shall mature the entire debt at the option of the holder, and in the note secured by the mortgage, that default shall render the whole sum immediately due and collectable, will be construed together and held to mean that default will render the whole sum due at the option of the creditor.

Same — default — tender — effect.

2. Tender of the amount due before the exercise of the option to declare the whole debt secured by a mortgage due for default in payment of interest will prevent an exercise of the option for that default and the institution of proceedings for foreclosure.

(May 22, 1913.)

Note. — Differences between bond or note and mortgage, affecting maturity.

- I. Scope, 475.
- II. General rules, 476.
- III. Both instruments to be construed together, 476.
- IV. Conflict in the instruments, 477.
- V. Acceleration clause in one instrument only.
 - a. In general, 478.
 - b. In note, and not in mortgage, 479.
 - c. In mortgage and not in note.
 1. Effect on foreclosure, 479.
 2. Effect on maturity of note or bond, 480.
- VI. Miscellaneous, 482.

I. Scope.

Cases of several obligations held by several parties and secured by a single mortgage or deed are omitted when the matter of several holders is material upon the question of maturity.

It is not intended to include cases upon the construction of subsequent agreements relating to notes and mortgages. (See *Brickell v. Batchelder*, 62 Cal. 623.)

As to effect of provision in bond or note that interest when due and unpaid shall be added to the principal, on right to foreclose mortgage securing the same for default in interest, see the note to *Castor v. Muramoto*, 42 L.R.A.(N.S.) 108.

For recital in note as to security affecting its negotiability, see the note to *Zollum v. Jackson Trust & Sav. Bank*, 32 L.R.A.(N.S.) 858.

As to negotiability of notes secured by mortgage as affected by provisions in mortgage, see the note to *Brooks v. Struthers*, 35 L.R.A. 536.

APPPEAL by defendant from a judgment of the District Court for Ada County in plaintiffs' favor in an action brought to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Good & Vaughan, for appellant:

The tender was sufficient.

38 Cyc. 146-7; Germania L. Ins. Co. v. Potter, 124 App. Div. 814, 109 N. Y. Supp. 435; Bunte v. Schumann, 46 Misc. 593, 92 N. Y. Supp. 806; Jones v. Arthur, 8 Dowl. P. C. 442, 4 Jur. 859; Barnhart v. Fulkerth, 73 Cal. 526, 15 Pac. 89; Loughborough v. McNevin, 74 Cal. 256, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; Oakland Bank v. Applegarth, 67 Cal. 86, 7 Pac. 139, 476.

II. General rules.

The cases of discrepancy in relation to maturity between the bond or note and the mortgage securing it generally are resolved by one of two rules; to wit, first, that if the two instruments are not conflicting, effect is to be given to the provisions of both of them; and, second, that if there is a conflict the terms of the note or bond will control those of the mortgage.

III. Both instruments to be construed together.

The difficult question often is whether or not there is a conflict between the instruments; but in the cases where the bond or note contains a complete statement of the time of maturity, and the mortgage is incomplete in this respect, it is not very material whether there is or is not a conflict, for, if there is, the rule that in conflict the bond prevails would leave the result the same.

Thus, in *Kennedy v. Ross*, 25 Pa. 256, it was held that the terms of a bond dated September, 1853, for the payment of a certain sum, "with interest from the 1st day of May last, in three equal annual instalments from that date, interest payable on the whole sum annually," cleared the obscurity in a mortgage conditioned for the payment of such sum "in three annual payments, with interest thereon from the 1st day of May, 1853."

Maturity of interest.

Where no separate time of maturity of the interest is given in one instrument, but such a time is stated in the other, such statement will fix the time of maturity of the interest whether such statement be in the note (*Winchell v. Coney*, 54 Conn. 24, 5 Atl. 354) or in the mortgage (*Dobbins v. Parker*, 46 Iowa, 357; *Muzzy v. Knight*, 8 Kan. 456; *Bell v. Engvolsen*, 64 Wash. 33, 116 Pac. 456).

Thus, where several promissory notes were all payable five years after date, "with interest annually at 6 per cent," and the 46 L.R.A. (N.S.)

A note and mortgage, being parts of one transaction, are to be read together, and the mortgagee may rely on the provision in the mortgage making the principal due for nonpayment of interest, at its option, though the note contains no such provision.

Trinity County Bank v. Haas, 151 Cal. 553, 91 Pac. 385; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Belloc v. Davis*, 38 Cal. 248; *Fletcher v. Dennison*, 101 Cal. 294, 35 Pac. 868; *Wilson v. Winter*, 6 Fed. 16; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510.

A holder of a note stipulating for maturity on default cannot be held to have exercised such option until he manifests his election by some outward act.

mortgage referred to each of these notes as "bearing interest at 6 per cent per annum," and was conditioned upon the payment of the notes "according to their tenor," it was held that the interest was payable annually, and that, upon default in interest, the holder of the notes might foreclose for the interest unpaid, and that it was not necessary to reform the mortgage. *Winchell v. Coney*, supra.

So, where notes were payable at different times, "with 10 per cent interest per annum from date," and the mortgage provided for payment of the principal, "with interest payment of the principal, "with interest on all of said money at the rate of 10 per cent per annum until paid, payable annually according to the tenor of" the notes, it was held that the interest was payable annually. *Dobbins v. Parker*, 46 Iowa, 357.

Absence of discrepancy.

In some of the cases the ground of the decision has been that there was no discrepancy as to maturity in the instruments: that is to say, that there was no want of harmony between them.

Thus, in *Lyon v. New York, S. & W. R. Co.* 13 N. Y. S. R. 732, where railroad bonds contained a provision that in case of ninety days' default in the payment of interest, "the principal of this bond will thereby become due and payable upon and subject to all the conditions provided in the mortgage," and the mortgage provided for a waiver of this provision by a majority of the bondholders, it was held that such waiver would not prevent a suit at law on interest coupons of the bonds, as the waiver did not relate to such right.

And where an acceleration clause in the bond matured the debt, but that in the mortgage allowed a sale out of which the mortgagee was to retain the amount then due on the bond, it was held that the whole debt matured on default, and the power of sale was then properly exercised. *Harper v. Ely*, 56 Ill. 179.

The right to foreclose a railroad mortgage to collect interest on the bonds, be-

Trinity County Bank v. Haas, 91 Pac. 385, 151 Cal. 553; Cykes v. Arne, — Cal. —, 47 Pac. 868; Foxcroft v. Mallett, 4 How 353, 11 L. ed. 1008; Wheeler & W. Mfg. Co. v. Howard, 28 Fed. 741; 27 Cyc. 1523, 1524; Swearingen v. Lahner, 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431; Broadbent v. Brumback, 2 Idaho, 360, 16 Pac. 555.

Messrs. Alfred A. Fraser and Charles S. Kingsley for respondents.

Allshie, Ch. J., delivered the opinion of the court:

The motion made in this case to strike the agreed statement of facts and the reporter's transcript from the record is not well taken, and must be denied. The stipu-

fore the expiration of twelve months from default, is not precluded by provisions of the mortgage authorizing the trustees, upon default in payment of interest continuing for twelve months, to enter upon and sell the premises, where the mortgage declares its purpose to be to secure the due payment of principal and interest to accrue "according to the tenor and effect" of the bonds and coupons, is conditioned for the payment of principal and interest at the "times and in the manner" prescribed for the payment thereof in the bonds and coupons, and further provides that the mortgagor shall remain in possession of the property until default shall have been made in principal or interest. Central Trust Co. v. New York City & N. R. Co. 33 Hun, 513.

In Mallory v. West Shore H. R. R. Co. 3 Jones & S. 174, where a railroad bond to A and B or bearer had no agreement as to the consequences of a default in payment of interest, but had upon it a certificate signed by A and B, trustees, stating that the bond with other bonds was secured by a certain mortgage, with power of entry and foreclosure in case of default, and "with provision that the principal sum secured by said mortgage should become due, in case the interest on the bonds remain unpaid for four months," and the mortgage was made to A and B, trustees, it was held that a holder of a bond could not sue for the principal on four months' default in the interest, as this default was only available to the trustees.

IV. Conflict in the instruments.

Where there is an actual conflict as to maturity in the instruments, the note or bond will prevail over the mortgage. Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014, where a chattel mortgage misrecited the due date of the note as later than it was.

So, where the principal of a railroad bond became due after default in interest and demand, a demand was held necessary although the provision in the mortgage omitted the requirement of demand. Indiana 46 L.R.A. (N.S.)

lation of facts constitutes a part of the evidence in the case, and is referred to both in the reporter's notes and the findings of the court. The transcript of the evidence is duly settled and certified by the presiding judge in accordance with the statute.

This is an action for foreclosure of a real estate mortgage. On the 16th day of August, 1909, Asaph D. Clark, one of the respondents herein, sold to Emma L. Paddock, the appellant, a farm, and as part payment therefor received two promissory notes secured by a mortgage on the land sold. The first note was for the principal sum of \$10,800, due August 11, 1911, and the second note was for the sum of \$15,000, due August 11, 1914. The notes each contained the following stipulation: "Interest

ana & I. C. R. Co. v. Sprague, 103 U. S. 754, 26 L. ed. 554.

And where, by the note, a default matures the entire debt at the option of the holder, while by the mortgage the maturity takes place upon the default itself, the note controls. Kennedy v. Gibson, 68 Kan. 612, 75 Pac. 1044.

In Linam v. Anderson, — Ga. App. —, 78 S. E. 424, where the note provided for maturity of the principal at the option of the holder on default of interest for thirty days, and the mortgage provided for maturity of the principal at the option of the holder immediately upon any default in interest, it was held that if these clauses were conflicting, that the note would control, the mortgage.

And where the respective clauses were similar to those in the last case, it was held that upon a suit on an interest coupon begun before such thirty days, the mortgagor could not tender the entire amount of the debt. Fletcher v. Daugherty, 13 Neb. 224, 13 N. W. 207.

But, in Swearingen v. Lahner, 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431, where the note provided that on default in the payment of interest, the whole principal and interest became due and collectable at the holder's option, and the mortgage provided that in case of thirty days' default in the payment of interest "the note shall become due and payable" and the mortgagee "may proceed at once to foreclose this mortgage, "while it was held that, inasmuch as the holder had waited until after thirty days' default, the note was due and that a tender of interest thereafter could not alter the case; it was also held that whether it was due or not, he had a right to foreclose the mortgage where he did not ask any personal judgment.

In Rothschild v. Rio Grande Western R. Co. 84 Hun, 103, 32 N. Y. Supp. 37, where a railroad bond and coupons contained a promise to pay the interest semi-annually, the bond containing also a covenant to pay the principal at a certain date, and reciting that it was "entitled to the benefits

to be paid annually, and if not so paid the whole sum of both principal and interest to become immediately due and collectable." The mortgage contained the following stipulation with reference to any default in making payment of interest: "But in case default shall be made in the payments of said principal sums of money or any part thereof as provided in said notes, or if the interest be not paid as therein specified, then, and from thenceforth, it shall be optional with said party of the second part, his executors, administrators, or assigns, to consider the whole of said principal sums expressed in said notes as immediately due and payable, although the time expressed in said notes for the payment thereof shall not have arrived." On about August 3,

1910, the appellant paid to respondent Asaph D. Clark the sum of \$1,290 by draft payable to his order, and this sum was received and accepted and indorsed on the notes. On November 2, 1910, appellant paid the first not of \$10,800 by draft, and the same was accepted, indorsed, and cashed, and the note surrendered. All interest and principal except the principal sum of the \$15,000 note was paid up to August 11, 1910. The interest on the latter note from August 11, 1910, to August 11, 1911, became due and payable on the 11th day of August, 1911, but was not then paid. This interest was not paid, and nothing whatever was done either by the maker or payee until the 27th day of February, 1912. On the latter date, the appellant tendered Clark

and subject to the provisions of" a trust deed, "which trust deed also provides, in the several cases of default as therein specifically stated, for the right in the trustee to exercise the power of entry thereby conferred, the right to declare the principal due, to sell in case of nonpayment of such principal, subject to the qualifications therein contained, to which trust deed reference is hereby made,"—it was held that the holder of the bond might maintain an action at law for unpaid interest, even if such right were denied by the mortgage, as if there was a direct conflict the bond must control, and if there was an ambiguity it must be resolved against the maker of the instruments.

There are some cases, however, in which a conflict in the instruments as to maturity has been resolved in favor of the mortgage.

Thus, in *Brownlee v. Arnold*, 60 Mo. 79, where four notes were given for land payable annually, respectively, and a deed of trust securing the notes stated that the notes should not become due nor the deed be foreclosed until the maturity of the last note, and after the maturity of the first note it was assigned to the plaintiff, who had knowledge of all the circumstances, it was held that he could not recover on it prior to the maturity of the last note. But this case was disapproved in *Owings v. McKenzie*, 133 Mo. 323, 40 L.R.A. 154, 33 S. W. 802.

See also *CLARK v. PADDOCK*.

And where it is clear that the contract of the parties was that the security will not be available until a certain period after default in the note, and this contract is only in the mortgage, there cannot be foreclosure before the time so specified in the mortgage.

Thus, where the condition of a mortgage securing a note payable on demand is that, if it be paid with interest within sixty days after such demand, etc., the mortgage may not be foreclosed until sixty days after such demand. *Union Cent. L. Ins. Co. v. Curtis*, 35 Ohio St. 343; *Union Cent. L. Ins. Co. v. Jones*, 35 Ohio St. 351. 46 L.R.A. (N.S.)

So, in *Chick v. Willetts*, 2 Kan. 384, where some time after the maker had made a note payable one day after date, he executed a mortgage to secure the note containing a stipulation that if default was made in the payment of the note for two years from the date of the mortgage that instrument might be foreclosed, it was held that the statute of limitations did not begin to run against the mortgage until two years from its date as foreclosure could not take place till that time; but this point was not necessary to the decision of the case.

It will be observed in this connection that in *Ferris v. Johnson*, 136 Mich. 227, 98 N. W. 1014, the date in the mortgage was a mere misrecital.

And that a general reference in a bond to the mortgage would carry into the bond a clause in the mortgage forbidding a suit for interest was probably held in the insufficiently reported case of *McClelland v. Norfolk Southern R. Co.* 3 N. Y. S. R. 250, where it is probable that the interest coupons referred to the bond, and that the bond referred to the mortgage; and it was held that the holder of a detached coupon could not sue for his interest when it was provided in the mortgage that the majority of bondholders might instruct the trustees of the mortgage to waive any default and such waiver had been made.

V. Acceleration clause in one instrument only.

a. In general.

It is not intended to discuss here the effect, meaning, or construction of acceleration clauses in themselves, but only the question which arises from the fact that such clause is incorporated in one instrument, and not in the other.

Cases of acceleration governed by statute are not included. For cases where such clauses differed in the two instruments, see *supra*, III. and IV. For provisions in one instrument as to waiving the acceleration clause in the other instrument, see *Lyon*

the sum of \$750 in payment of the interest. This tender was made first by draft and subsequently in gold coin, so no question arises here as to the sufficiency of the tender. It is stipulated that at the time this tender was made "Asaph D. Clark made no objection to the draft as tendered for the payment of said interest, but merely stated that he guessed he would not accept the payment of the \$750 interest, and that he would consult his attorney and let the defendant know later." It is further stipulated that "at no time did the said plaintiff or any one in his behalf notify the defendant or any one in her behalf that the said \$750 interest was due, and at no time did he make any demand on her for the payment of the same." Clark never

gave the appellant any notice whatever, after this tender was made, as to his determination in reference to accepting the payment or of his purpose to declare the debt due, until about 5 o'clock P. M., February 29th, when he stated to appellant's counsel that he had decided to foreclose the mortgage, and that complaint had been filed that afternoon. The complaint in foreclosure was in fact filed at 4:50 P. M., February 19, 1912, which was two days after the tender of payment of the \$750 interest due.

The case was submitted to the court on the foregoing facts, and the court decided in favor of the plaintiff and granted a decree of foreclosure, and defendant has appealed. There is no dispute over the facts in the case, and the only question presented

v. New York, S. & W. R. Co. supra, III.; and McClelland v. Norfolk Southern R. Co. supra, IV.

b. In note, and not in mortgage.

That an acceleration clause in the note, and not in the mortgage, permits the foreclosure of the mortgage according to the terms of such acceleration clause, was held in *San Gabriel Valley Bank v. Lake View Town Co.* 4 Cal. App. 630, 80 Pac. 360, where the court said: "The note and the mortgage constitute one contract; the latter is incidental and stands as security for the former, and whenever the note, for any reason, becomes due, a right of action of foreclosure is at once available." But it is at least doubtful whether the true construction of the mortgage itself did not admit of foreclosure for the full amount.

A fortiori where the note contains an acceleration clause and the mortgage is conditioned for the payment of the note according to its true intent and meaning, there may be a foreclosure on the default provided for by the acceleration clause. *Graham v. Fitts*, 53 Fla. 1046, 43 So. 512, 13 Ann. Cas. 149.

So, a foreclosure for the full amount was upheld in *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865, where the notes contained each a provision that, "on failure to pay interest thirty days after due, the holder may collect principal and interest at once," and the mortgage, after reciting the notes and the dates of their maturity (but not the acceleration clause) was conditioned on the payment of the money, "at the time and in the manner aforesaid."

For effect of acceleration provision in mortgage or note to set the statute of limitations running, see the notes to *Hall v. Jameson*, 12 L.R.A. (N.S.) 1190, and *Lovell v. Goss*, 22 L.R.A. (N.S.) 1110.

c. In mortgage and not in note.

1. Effect on foreclosure.

The subject of provision in bond or note that instrument when due and unpaid shall

be added to the principal, as affecting right to foreclose mortgage securing the same for default in interest is omitted, as treated in the note to *Castor v. Muramoto*, 42 L.R.A. (N.S.) 108.

Though there be no acceleration clause in the note, an acceleration clause in the mortgage will enable the holder, upon the breach mentioned in such clause, to foreclose the mortgage for the full amount of the note, although the debt be not due by its terms.

Swett v. Stark, 31 Fed. 858 (N. D. Ill.); *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555; *Brickell v. Batchelder*, 62 Cal. 623 (on default in taxes); *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Rasmussen v. Levin*, 28 Colo. 448, 65 Pac. 94 (taxes, reversed on other grounds); *Taylor v. Alliance Trust Co.* 71 Miss. 694, 15 So. 121 (citing *Dunton v. Sharpe*, 70 Miss. 850, 12 So. 800); *Waples v. Jones*, 62 Mo. 440; *Rumsey v. People's R. Co.* 154 Mo. 215; *Westminster College v. Peirsol*, 161 Mo. 270, 61 S. W. 811; *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58 Neb. 379, 76 Am. St. Rep. 101, 78 N. W. 724, 79 N. W. 731; *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554.

The same was probably held in the following cases, which, however, do not state definitely that the note omits the clause. *Gibbons v. Hoag*, 95 Ill. 45; *Hoodless v. Reid*, 112 Ill. 105; *Brown v. Miner*, 128 Ill. 148, 21 N. E. 223 (taxes also); *Gray v. Robertson*, 174 Ill. 242, 51 N. E. 248 (taxes); *Garrett v. Simpson*, 115 Ill. App. 62 (taxes); *Pope v. Durant*, 26 Iowa, 233 (taxes); *Stancil v. Norton*, 11 Kan. 218 (taxes); *Sharp v. Barker*, 11 Kan. 381 (taxes); *Ellwood v. Wolcott*, 32 Kan. 526, 4 Pac. 1056 (taxes); *Condon v. Maynard*, 71 Md. 601, 18 Atl. 957 (taxes); *Meier v. Meier*, 105 Mo. 411, 16 S. W. 223; *Hartsuff v. Hall*, 58 Neb. 417, 78 N. W. 716 (taxes); *Cincinnati Hotel Co. v. Central Trust & S. D. Co.* 25 Ohio L. J. 375; *Bell v. Engvolsen*, 64 Wash. 33, 116 Pac. 456.

In *Flesher v. Hubbard*, — Okla. —, 132 Pac. 1080, where a note contained a pro-

is the question of law to be applied in construing the stipulation contained in the note and the one in the mortgage with reference to default in payment of interest maturing the entire debt. The respondent contends that, notwithstanding the provision contained in the mortgage, the stipulation contained in the note is controlling, and that a failure to make payment of interest when due *ipso facto* matured the entire debt. The appellant, on the other hand, contends that the stipulation in the note and the one in the mortgage should be read and construed together as parts of one contract, and that, when so read, it will be found that a default in the payment of interest only matures the entire debt by the exercise of an option on the part of the

creditor to so declare the debt due.

The cases relied on by respondents do not go to the extent nor support the contention here claimed. In *Hutchinson v. Benedict*, 49 Kan. 545, 31 Pac. 147, the notes contained the provision that, if any part of the principal or interest should not be paid at maturity, it should bear interest thereafter at the rate of 12 per cent. The mortgage provided that, in case of any default, the whole debt should become due, with interest at 12 per cent from date. The court held that the note should control, and that the clause it contained meant "that both principal and interest were to bear interest after maturity at the rate of 12 per cent per annum."

New England Mortg. Secur. Co. v. Case-

vision that after maturity the interest rate would be greater, and the mortgage contained an acceleration clause on default of interest, etc., at the election of the holder, it was held that on default in interest the mortgage might be foreclosed for the whole sum.

The same was held in *Jones v. Hubbard*, — Okla. —, 132 Pac. 1082.

But where the bond provided that the obligor should pay taxes, and, in case of default, the obligee might discharge them and collect the same with interest as part of the bond, and the mortgage provided that if default was made in payment of taxes the mortgagee might sell the premises and from the proceeds retain the principal and taxes and charges, it was held that there could not be foreclosure for a mere default in paying the taxes unless the mortgagee had paid them. *Williams v. Townsend*, 31 N. Y. 411.

The four following cases are included as probably there was no acceleration clause in the notes, although the reports do not state that fact definitely:

In *Frink v. Neal*, 37 Ill. App. 621, where by mistake a note payable in three years recited that the interest was payable after maturity, instead of from date, and the deed securing the note recited it as bearing interest from date payable annually, and stated that the whole debt might be declared due for default in payment of interest, it was held that foreclosure might be maintained for default in interest before the three years had expired.

In *McLean v. Presley*, 56 Ala. 211, where a mortgage securing several notes provided that if payment was made of notes and interest, "as they respectively fall due, then this instrument is void," "but, if I fail to pay the said described promissory notes, as they fall due, with the interest thereon, then," etc., it was held that after failure to pay one note there might be a foreclosure of the whole premises, and the mortgagee had the right to retain out of any surplus over the amounts then due, a sum sufficient to meet the amounts coming due thereafter.

Where a mortgage securing bonds provided

ed for foreclosure on default in interest, and provided that the maturity of the debt should be at the time of the completion of the foreclosure sale, the court postponed the sale for eighteen months in view of the fact that the property was increasing in value, was paying off arrears, and that the ordinary redemption period of one year could not be availed of as the mortgage covered not only real estate, but personal property. *American Loan & T. Co. v. Union Depot Co.* 80 Fed. 36 (Dist. of Wash.).

In *Brockway v. McClun*, 243 Ill. 196, 90 N. E. 374 (affirming 148 Ill. App. 465), it was held that an agreement to extend the maturity of the debt did not affect the right of the mortgagee to foreclose for non-payment of taxes according to a provision in the mortgage.

2. Effect on maturity of note or bond.

There is a direct conflict in the cases upon the question whether the effect of an acceleration clause in the mortgage will be limited to foreclosure for the full amount of the note, or whether it will mature the debt itself.

The clause as maturing the debt.

It is not intended to go into the question whether an affirmative act taking advantage of the clause is necessary on the part of the mortgagee, but simply to consider whether in any event the clause when only in the mortgage may mature the note.

Upon the weight of authority a clause only in the mortgage providing that the debt shall become due upon a contingency therein set forth will mature the note, although it be not due by its terms.

Brewer v. Penn. Mut. L. Ins. Co. 36 C. C. A. 289, 94 Fed. 347 (8th circuit); *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741 (C. C. E. D. Mo.); *Chambers v. Marks*, 93 Ala. 412, 9 So. 74; *Gregory v. Marks*, 8 Biss. 44 Fed. Cas. No. 5802 (N. D. Ill.); *Hennessy v. Gore*, 35 Ill. App. 594; *Clayton v. Whitaker*, 68 Iowa, 412, 27 N. W. 296; *First Nat. Bank v. Peck*, 8 Kan. 660; *Spesard v. Spesard*, 75 Kan. 87, 88 Pac.

bier, 3 Kan. App. 741, 45 Pac. 452, simply held that where a note provided for interest at 7 per cent, and the mortgage securing the note called for interest at 12 per cent, the note, being evidence of the debt and the principal obligation, should control.

Rothschild v. Rio Grande Western R. Co. 84 Hun, 103, 32 N. Y. Supp. 37, holds that, where bonds and a trust deed given to secure their payment contained wholly inconsistent provisions, the terms of the bonds must prevail. This was on the theory that the bonds were the evidence of indebtedness and the principal obligation.

Banzer v. Richter, 68 Misc. 192, 123 N. Y. Supp. 678, involved the right of the holder of several notes secured by one mortgage to sue on one note, and subse-

quently maintain an action on another note that was due by the terms of a contract and chattel mortgage securing the same at the time the first action was commenced. The court held that under the terms of the contract and mortgage no option could be exercised, and that on the happening of the stipulated event the debt became immediately due.

In Fletcher v. Daugherty, 13 Neb. 224, 13 N. W. 207, the court held that the provisions of the note and mortgage must be construed "together as parts of one contract," and that, when so considered, it was evident that the holder of the note and mortgage must in some way elect to declare them due in order to set the statute of limitations running.

576; Kansas Loan & T. Co. v. Gill, 2 Kan. App. 488; Piersol v. Shelley, 3 Kan. App. 386, 42 Pac. 922; Evans v. Baker, 5 Kan. App. 68, 47 Pac. 314; Grand Island Sav. & L. Asso. v. Moore, 40 Neb. 686, 59 N. W. 115; San Antonio Real Estate Bldg. & L. Asso. v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386 (in lien securing notes citing Dodge v. Signor, 18 Tex. Civ. App. 45, 44 S. W. 926, notes secured by vendors' lien in deed); Schoonmaker v. Taylor, 14 Wis. 314.

See also, as recognizing the rule, Lewis v. Lewis, 58 Kan. 563, 50 Pac. 454; and Douthitt v. Farrell, 60 Kan. 195, 56 Pac. 9.

The same was probably held in the following cases, which, however, do not state definitely that the clause was not in the note: Leonard v. Tyler, 60 Cal. 299; Beal v. Stevens, 72 Cal. 451, 14 Pac. 186; Moore v. Sargent, 112 Ind. 484, 14 N. E. 466; Snyder v. Miller, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; Pope v. Hooper, 6 Neb. 178; Lantry v. French, 33 Neb. 524, 50 N. W. 679; Green v. Frick, 25 S. D. 342, 126 S. W. 579.

The same seems to have been held in effect in Williams v. Douglass, 47 La. Ann. 1277, 17 So. 805, though the court states that it cites the authorities "without aligning the court on either side of the controversy for the present;" but it was there held that future accruing interest capitalized in notes not yet due on their face must be excluded from the recovery.

A clause in a note that "the interest is paid to maturity by coupon notes hereto attached, which, with the principal, are secured by mortgage," will not overthrow an express agreement in the mortgage that, on failure to pay the interest or coupon notes at maturity, the whole of the mortgage debt shall become due and collectable at the mortgagee's option. Buchanan v. Berkshire L. Ins. Co. 96 Ind. 510.

In Spesard v. Spesard, 75 Kan. 87, 88 Pac. 576, it was held that an acceleration clause as to taxes solely in the mortgage matured the note, although the mortgage was dated some years later than the note.

So, also, where notes and a chattel mort-

gage were given in pursuance of an earlier agreement, providing that the mortgage should contain the accelerating clause, a default provided for therein will mature the notes. Banzer v. Richter, 68 Misc. 192, 123 N. Y. Supp. 678.

In Germond v. Hermosa Ice Co. 9 S. D. 387, 69 N. W. 578 (where there was probably no acceleration clause in the note), it was held that an acceleration clause in the mortgage would mature the debt on default in interest after an extension of time of the principal, or part thereof, as the interest clause remained unaffected.

The clause as limited to realizing upon the security.

There are other cases, however, which limit the effect of an acceleration clause only in the mortgage to realizing upon the security. Rasmussen v. Levin, 28 Colo. 449, 65 Pac. 94; White v. Miller, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736; Capehart v. Detrick, 91 N. C. 344; McClelland v. Bishop, 42 Ohio St. 113; Owings v. McKenzie, 133 Mo. 323, 40 L.R.A. 154, 33 S. W. 802; Lawson v. Cundiff, 81 Mo. App. 169; McMillan v. Grayston, 83 Mo. App. 425; Westminster College v. Peirsol, 161 Mo. 270, 61 S. W. 811 (*obiter*); Tobin v. Smith, 1 Ohio N. P. 75, 1 Ohio Dec. 675.

In American Nat. Bank v. American Wood Paper Co. 19 R. I. 155, 29 L.R.A. 103, 61 Am. St. Rep. 746, 32 Atl. 305, the court seems to have been of the same opinion, but it was not necessary to the decision of the case.

An acceleration clause in the mortgage, making the debt due on default in payment of taxes, enables a foreclosure to be had, but does not permit the foreclosure of a collateral quitclaim deed which has no provision for acceleration in it. Rasmussen v. Levin, 28 Colo. 448, 65 Pac. 94, the court following the White, Bishop and Owings Cases, *supra*.

In Taylor v. American Nat. Bank, — Fla. —, 57 So. 678, it was held that a default in interest did not mature the note

Magee v. Burch, 108 Mo. 336, 18 S. W. 1078, held that a misdescription in the mortgage of the payees named in the note was not fatal to the security, and that the note itself would prevail.

In *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044, the note provided that a default should mature the whole debt at the option of the holder thereof, while the mortgage provided that a default should make the whole debt immediately due. The court held that the provision in the note would prevail, and that the option must be exercised in order to set the statute of limitations running.

It will be seen from a review of the foregoing cases that no one of these covers a state of facts like we are dealing with here, where the note provided that a default

should render the whole debt due, and the mortgage provided that default should render the debt due at the option of the holder thereof. If in this case we should adopt the view taken by respondents, we would have to wholly disregard the provision in the mortgage providing that in case of default the debt should fall due at the option of the holder. On the other hand, if we follow the rule of construction that requires every provision of a contract to be given force and effect when possible and where they can be construed in harmony, we would hold that the provision in the note maturing the debt on default of any payment when due, and the clause in the mortgage providing for default, maturing the debt at the option of the holder, are not inconsistent with the intention that a default should

in the sense that an assignee of it without notice of the default would take it subject to any defenses between the original parties, although there was an acceleration clause in the mortgage (but not in the note) making the principal due on default in interest.

The Missouri court has not kept to the same side of the question. In *Noell v. Gaines*, 68 Mo. 649, it was held that an acceleration clause in the mortgage matured the note though there is reason to consider that some of the earlier Missouri cases did not support this view.

But in *Owings v. McKenzie*, 133 Mo. 323, 40 L.R.A. 154, 33 S. W. 802, *supra*; *Noell v. Gaines*, was overruled, and also *Brownlee v. Arnold* 60 Mo. 79, in so far as it agreed with the doctrine of the *Noell Case*.

And the other Missouri cases cited above have followed the *Owings Case*.

There are expressions in *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554, which seem at first to indicate that the court considered that an acceleration clause in the mortgage matured the debt, but the citation therein of *Capehart v. Dettrick*, 91 N. C. 344, *supra*, which holds the contrary, shows that the court was not intending to depart from that case.

VI. Miscellaneous.

In *Farrar v. Payne*, 73 Ill. 82, it was held that an omission in a deed of trust, of the date of maturity of a note secured, did not make the deed void as against purchasers of the equity of redemption.

In *Pettis v. Kellogg*, 7 Cush. 456, where after a note had become due a mortgage was given to secure it, conditioned for the payment of the note according to its tenor, it was held that this was a condition to pay the note on demand.

Where notes were made by two makers, and one of the makers gave a mortgage with a clause in it accelerating the payment of the principal if one of the notes or interest should be unpaid, it was held 46 L.R.A. (N.S.)

that such a default could not make the principal due, as one of the makers did not join in the mortgage; the court not passing upon the question that would have arisen if both had joined in the mortgage. *Trease v. Haggin*, 107 Iowa, 458, 78 N. W. 58.

In *Bourne v. Littlefield*, 29 Me. 302, where the question was not as to the date and time of maturity, but as to the identity of the instrument secured, it was held that parol testimony was admissible to show that a note payable on demand, with interest, was the note referred to in a mortgage conditioned for payment on a certain future date not mentioning interest, and referring to the note as payable "at the time aforesaid."

So, where one of the several notes secured by a deed of trust was described in a schedule to the deed as dated October 18, 1833, and payable May 21, 1834, when it was in fact payable April 21, it was held that parol evidence was admissible to show the mistake, particularly as the parties had provided in the deed "that such alterations and additions in and to the schedules hereto annexed may be made by the mutual consent in writing of one of each of the parties hereto, as shall be necessary for a more perfect and correct statement of the matters and things herein contained." *Pierce v. Parker*, 4 Met. 80.

While without the scope of this note, reference may be made to *Lomax v. Smyth*, 50 Iowa, 223, where to secure a past-due draft the debtor, after paying the interest to date, made a note with the same date and maturity as the draft, and he and his wife conveyed her land to the creditor, who executed a defeasance to reconvey upon payment of the note twelve months thereafter, with interest payable semiannually; it was held that, as there was a valid agreement for the extension of time of the principal, the creditor could not enforce the note until the time mentioned in the defeasance.

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mature the debt at the option of the holder of the note and mortgage. By such a construction the holder of the paper gets all the protection he could possibly get by any construction, because he could exercise his option as soon as a default is made, and by such a construction the statute of limitation would not begin to run against his claim unless he does exercise this option. On the other hand, the debtor is given the protection of having the holder of the paper exercise his option in some manner and by some act. Such a construction saves the debtor from going to the trouble, and oftentimes expense, of raising interest or an installment, and then, upon making tender being informed that the debt has already automatically fallen due.

Stipulations of this kind for the acceleration of the maturity of a debt should be so construed, if possible and consistent with the language employed, as to give the protection intended thereby to both the debtor and the creditor. Such a clause is inserted in a note or mortgage for the purpose of enabling the holder thereof, upon default in payment of interest or principal, as the case may be, to institute his action for the collection of the debt, if he so desires, before the apparent maturity of the instrument as appears upon its face. The financial circumstances of the debtor or the nature of the security may have become such in the meanwhile as to render it necessary and important for the protection of the creditor that he be authorized to immediately prosecute his action for the collection of the debt. This protection is afforded him as fully and amply by requiring him to exercise the option of declaring the debt due as by providing that the debt shall automatically become due on the failure to make the payment. The mere commencement of an action is an exercise of the option (*Trinity County Bank v. Haas*, 151 Cal. 553, 91 Pac. 385; *Bank of Commerce v. Scofield*, 126 Cal. 156, 58 Pac. 451), or a notice to the debtor that the debt is overdue, and that the creditor exercises the option of declaring it due, or that if not paid within a specified time the creditor will not receive payment thereafter, would constitute an exercise of the option. In other words, a creditor who is the holder of the paper can suffer no disadvantage or injury whatever by being required to exercise his option. The debtor, on the contrary, is afforded a degree of protection by requiring the creditor to exercise his option, rather than to allow the mere failure to make payment *ipso facto* mature the debt. So long as the debtor has not got the money with which to make the payment, and does not tender it, the creditor may not be par-

ticular about exercising his option, and if not he should not be allowed, after the debt or has gone out and raised the money, and made the tender, to then exercise his option or say the debt has automatically fallen due, when in truth and fact he has done no act whatever that would indicate his understanding or intention that the debt and obligation has matured, or that he has exercised his option to consider it matured.

It should be remembered that this is a foreclosure proceeding whereby the creditor not only seeks judgment for the amount of the debt, but also seeks a judgment and decree for the sale of the specific property encumbered by the mortgage for the payment of the debt. In such a case, the note and mortgage must be considered and construed together as one contract (*Lewis v. Sutton*, 21 Idaho, 541, 122 Pac. 911; *Trinity County Bank v. Haas*, 151 Cal. 553, 91 Pac. 385; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110), and the creditor should not be allowed to refuse a tender and foreclose his mortgage in spite of the tender, where the very instrument which gives him his security and lien provides that a default in payment of interest shall mature the debt only in case of the exercise of the option to declare the whole debt due. To allow him to do so would be contrary to both the letter and spirit of his lien contract.

The general rule that a note and mortgage given to secure the payment of the same must be construed together as one contract is reinforced by § 4520 of the Rev. Codes of this state, which provides that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions" of chapter 1, title 10, pt. 2, of the Code of Civil Procedure, which chapter is entitled, "Actions for the Foreclosure of Mortgages." In other words, under the statute of this state (§ 4520, Rev. Codes), no action can be maintained for the recovery on a promissory note secured by mortgage, unless the action be coupled with an action to foreclose the mortgage, except where it is shown that the security has become valueless. This rule is established both by the decisions in this state and the decisions of the supreme court of California from which our statute was taken. *First Nat. Bank v. Williams*, 2 Idaho, 670, 23 Pac. 552; *Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63; *Bartlett v. Cottle*, 63 Cal. 366; *Barbieri v. Ramelli*, 84 Cal. 157, 23 Pac. 1086; *McKean v. German-American Sav. Bank*, 118 Cal. 336, 50 Pac. 656; *Winters v. Hub Min. Co.* (C. C.) 57 Fed. 292; *Lilly-Brackett Co. v.*

Sonnemann, 157 Cal. 192, 106 Pac. 715, 21 Ann. Cas. 1279. See also dissenting opinion in *Kelley v. Clark*, 23 Idaho, 1, 129 Pac. 926. This being true, it necessarily follows that the action is primarily an action to foreclose the mortgage and obtain a decree authorizing a sale of the mortgaged property. Under the law of this state, "the mortgaged property becomes the primary security, and the personal obligation of the mortgagor a secondary one. The mortgagor, under our statute, is personally liable only after foreclosure, and then only for the balance shown to be due by the return of the sheriff." *Rein v. Callaway*, 7 Idaho, 634, 23 Pac. 63. Before such a decree can be had, it is necessary to determine the amount due. This is done, however, by the court as a court of equity, and the debtor is not entitled as a matter of law to a jury for the purpose of determining the amount due. *Christenson v. Hollingsworth*, 6 Idaho, 92, 96 Am. St. Rep. 256, 53 Pac. 211; *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391, 3 Ann. Cas. 245; *Naylor v. Lewiston & S. E. Electric R. Co.* 14 Idaho, 722, 95 Pac. 827. The primary charge is therefore *in rem*, and the personal charge or obligation can only arise for a deficiency after the *res* or thing pledged has been exhausted.

The judgment is reversed and the cause will be remanded, with direction to the trial court to dismiss the action upon payment to respondents of the money tendered into court as proffered by the answer. Costs awarded in favor of appellant.

Sullivan and Stewart, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 1.)

EXCHANGE NATIONAL BANK OF SPO-
KANE, Appt.,
v.

ALEXANDER PANTAGES, Respt.

(— Wash. —, 133 Pac. 1025.)

Guaranty — request for loan — knowledge of condition — effect.

The president of a corporation who, with knowledge that a bank will not renew a

note of the corporation without his guaranty, telegraphs a request for renewal with the assurance that he will arrange things satisfactorily upon his return, assumes the obligation of guarantor on the note accepted in accordance with such request.

(July 28, 1913.)

APPEAL by plaintiff from a judgment of the Superior Court for King County sustaining a demurrer to a complaint seeking to hold defendant liable as guarantor of a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Nuzum, Clark, & Nuzum and Sullivan & Christian, for appellant:

No particular form of words is necessary to constitute a guaranty.

Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572; 20 Cyc. 1412; *Goldring v. Thompson*, 58 Fla. 248, 25 L.R.A.(N.S.) 418, 51 So. 46; *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. 53; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Union Nat. Bank v. First Nat. Bank*, 45 Ohio St. 236, 13 N. E. 884; *J. L. Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227; *Miami County Nat. Bank v. Goldberg*, 133 Wis. 175, 15 L.R.A.(N.S.) 1115, 113 N. W. 301.

If there is any doubt about the meaning of the language, the allegations and extrinsic circumstances are to be considered in ascertaining the meaning.

Desgranges v. Newbauer, 149 Mo. App. 715, 129 S. W. 759; *London & S. F. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; 20 Cyc. 1423, 1425; *Robinson v. Fidelity Trust Co.* 111 C. C. A. 526, 188 Fed. 37; *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572; *Hartwell & R. Co. v. Moss*, 22 R. I. 583, 48 Atl. 941; *Lemp v. Armengol*, 86 Tex. 690, 26 S. W. 941; *Merchants' Nat. Bank v. Cole*, 83 Ohio St. 50, 93 N. E. 465, Ann. Cas. 1912 A, 773; *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89.

Extension of time or forbearance to sue is a sufficient consideration.

Brandt, Suretyship, § 365, p. 68; *Jones v. Britt*, 94 C. C. A. 264, 108 Fed. 852; *Schoening v. Maple Valley Lumber Co.* 61 Wash. 332, 112 Pac. 381; *Standard Supply Co. v. Person*, 154 N. C. 456, 70 S. E. 745; *Robinson v. Fidelity Trust Co.* 111 C. C. A. 526, 188 Fed. 37; *People's Bank v. Le-*

pression of opinion as to the reliability or solvency of another create a liability upon the part of the one using them. There seems to be little authority on the question now under consideration beyond the few cases cited in the earlier note.

It seems that the principal reason for holding a guaranty to have been made by the words involved in *EXCHANGE NAT. BANK v. PANTAGES* is that the defendant sent the

This note supplements the earlier note on the same question appended to *Miami County Nat. Bank v. Goldberg*, 15 L.R.A.(N.S.) 1115. The present note, like the earlier one, does not touch upon the question whether words that amount to a mere ex-
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marie, 106 La. 429, 31 So. 138, 141; 20 Cyc. 1417, 1418; Haskell v. Tukesbury, 92 Me. 551, 69 Am. St. Rep. 529, 43 Atl. 500; McDonald v. Fernald, 68 N. H. 171, 38 Atl. 729; College Park Electric Belt Line v. Ide, 15 Tex. Civ. App. 273, 40 S. W. 64.

It cannot be contended that any notice of acceptance was necessary.

Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Pruden v. Liebler, 22 N. D. 587, 135 N. W. 186; Snyder v. Click, 112 Ind. 293, 13 N. E. 581; Robinson v. Fidelity Trust Co. 111 C. C. A. 526, 188 Fed. 37; Bond v. John V. Farwell Co. 96 C. C. A. 546, 172 Fed. 58; Doud v. National Park Bank, 4 C. C. A. 607, 2 U. S. App. 655, 54 Fed. 846.

Messrs. John E. Ryan and Grover E. Desmond, for respondent:

A guaranty is contractual in its nature, and the essential elements of a binding contract must be expressed.

Williams & F. Co. v. Carpenter, 32 R. I. 349, 79 Atl. 821; Bank of Ipswich v. Ayers, 26 S. D. 216, 128 N. W. 127; Hughes v. Peper Tobacco Warehouse Co. 139 N. C. 158, 1 L.R.A.(N.S.) 305, 111 Am. St. Rep. 778, 51 S. E. 793; Switzer v. Baker, 95 Cal. 539, 30 Pac. 761; Fowler Nat. Bank v. Brown, 19 Ind. App. 433, 49 N. E. 833; First Nat. Bank v. Osborne, 18 Ind. App. 442, 48 N. E. 256; National Bank v. Rockefeller, 98 C. C. A. 8, 174 Fed. 22; London & S. F. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 165; Kenneweg

Co. v. Finney, 98 Md. 114, 56 Atl. 482; Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. Supp. 618; Taylor v. Shackelford, 132 Mo. App. 481, 111 S. W. 871.

There was no valid, enforceable, and existing right to sue on these notes at the time this telegram was sent, and the appellant gave up no right by reason thereof.

20 Cyc. 1418; Hoffman v. Mayaud, 35 C. A. 256, 93 Fed. 171; Lagomarsino v. Giannini, 146 Cal. 545, 80 Pac. 698.

Notice of acceptance of a proposal to guarantee is necessary before the obligee can be bound.

Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; German Sav. Bank v. Drake Roofing Co. 112 Iowa, 184, 51 L.R.A. 758, 84 Am. St. Rep. 335, 83 N. W. 760; T. & H. Smith & Co. v. Thesmann, 20 Okla. 133, 93 Pac. 977, 15 Ann. Cas. 1161; William Deering & Co. v. Mortell, 16 L.R.A.(N.S.) 353, note.

Mount, J., delivered the opinion of the court:

The lower court sustained a general demurrer to the plaintiff's complaint in this case and dismissed the action. The plaintiff has appealed. The complaint alleges in substance: That the plaintiff is a national bank doing business in the city of Spokane. That the Pantages Amusement Company is a corporation conducting a theater and amusement business in Spokane. The Pantages Theater Company is likewise a corporation doing a theater business. That the Pantages Amusement Company is one of a chain

telegram with knowledge that the bank would not renew the note without a guaranty.

Although, in Goldring v. Thompson, 58 Fla. 248, 25 L.R.A.(N.S.) 418, 51 So. 40, the court declared in a general way that a mere request by one to give credit to another does not create a legal liability to pay the debt, and that there must be a guaranty of the debt or a misrepresentation of the responsibility of the person to whom the credit is given in order to create such liability,—the court held that a guaranty was made by the instrument involved reading, "Please ship to Mr. B. L. Hall" certain goods. "Your money is good, I will be in your city in a few days," this being regarded as involving more than a mere request.

A contrary conclusion was reached in a similar situation in Eaton v. Mayo, 118 Mass. 141, where the plaintiff refused to deliver goods to a purchaser until he had obtained a guaranty, and the defendant wrote a letter requesting the plaintiff to let the purchaser have what goods he might want on four months, and that he (the purchaser) would pay as usual,—the court holding that there was no ambiguity in the meaning, and that therefore there was no 46 L.R.A.(N.S.)

occasion to resort to the surrounding circumstances or the relations of the parties to ascertain their intent; and that the writing was at most but an expression of confidence on the part of the defendant that the purchaser would himself pay for the goods he was about to purchase.

In the light of all the circumstances it was held in McCauley v. Croes, — Tex. Civ. App. —, 111 S. W. 790, that a guaranty was made by a father of one of the makers of a note, by an instrument directed to the intended payee of the note and reading: "I have sworn off going on notes, but want to help my son, and, if he should not pay . . . I will see that it is fixed, and told the banker that I would." Here the court invoked the principle that the intention of the parties should control, when the intention clearly appears, and that notwithstanding it might be necessary, in order to give such intention effect, to give to words used by them a meaning not uncommonly attached to them, yet not recognized as belonging to them by the compilers of dictionaries. This remark was used by the court in construing the word "fixed" as being used in the sense of "paid."

L. A. W.

of theaters controlled by the defendant, beginning at Spokane and ending at Los Angeles, California; theaters in Seattle and Tacoma being a part of the chain. That the Pantages Theater Company is also owned and controlled by the defendant. That at all times the defendant was a stockholder in and president of the Pantages Amusement Company. That on June 15, 1911, the amusement company executed to plaintiff its promissory note for \$2,500 due ninety days after date, with interest thereon at the rate of 8 per cent per annum. That the note was renewed when due for a period of ninety days. That on December 12, 1911, when the renewal note became due, plaintiff demanded that the amusement company pay the same or secure the guaranty or indorsement thereof by the defendant. That the amusement company agreed to secure the guaranty of the note by the defendant, and at that time the amusement company executed to plaintiff a new note for the same amount, payable ninety days after December 12, 1911. That said note was not delivered or accepted as an obligation of the amusement company nor in satisfaction of the previous note; but that plaintiff took and held the same in accordance with the understanding with the amusement company until the amusement company should secure the guaranty of the note by the defendant. That on the 14th day of January, 1912, the defendant, for a good and valuable consideration, telegraphed Clark Walker, who is the general manager of the amusement company, under the defendant's signature, a telegram of which the following is a copy, to wit:

San Francisco, Calif., Jan. 14, 1912.
Clark Walker,
Pantages Theater, Spokane.

Tell bank I request them to renew the note. Security just as good now as when loan was first made and they are collecting interest on their money. I will arrange things satisfactory to them upon my return to Seattle.

Alex. Pantages.

That, on account of said telegram and the assurances therein contained, the plaintiff accepted the new note, and did not enforce the payment on the original indebtedness, which, prior to that time, the bank had threatened to do, relying upon the assurances of the defendant that he would arrange things satisfactorily to the plaintiff; and but for these assurances the plaintiff would have proceeded with its remedy on the original indebtedness. That at or about the time of the execution of the original note, the defendant assured the

officers of the plaintiff that the amusement company had ample resources to meet the payment of the note, and defendant was instrumental in securing the loan of the money represented by the note and the renewal thereof. That it was to the interest of the defendant that the plaintiff desist from bringing suit upon the note or upon the original indebtedness, for the reason that, if the plaintiff had commenced suit against the amusement company, it could and would have closed the theater in Spokane in which the companies were showing and in other theaters owned and managed by the defendant, broken up the circuit, and made it impossible for the defendant to have shown his attractions in Spokane. That on or about the 26th day of March, 1912, an action was commenced by Lois Pantages, the wife of the defendant, against the amusement company, in King county, on sixteen promissory notes signed by the amusement company, in most cases payable to the Pantages Theater Company, owned and controlled by the defendant; said notes aggregating \$10,000. That a receiver was appointed, and all the property of the amusement company sold to the theater company for a nominal consideration. That there is no money or property of the amusement company out of which to satisfy the plaintiff's demands. That it was not true, as stated in the guaranty and telegram of the defendant that the security held by the plaintiff was as good at the time as when the loan was first made; but that the assets of the amusement company were being decreased by the defendant wholly and solely for the purpose of absorbing all of the assets of the amusement company. That plaintiff, on account of the matters contained in the telegram, did not bring suit upon the original indebtedness, but accepted the new note executed December 12, 1911, lost what security it had by reason of the then existing assets of the amusement company, and was prevented from realizing anything from the amusement company on account thereof. That no provision was made by the defendant for the payment of the note, no arrangement of any kind was made to secure the same by the defendant, and the note was never paid. The second cause of action was for a separate note for \$2,500, based upon substantially the same state of facts.

The controlling question presented here is whether the telegram hereinbefore quoted constituted a guaranty by the defendant, Alex. Pantages, of the note sued upon. The trial court was evidently of the opinion that this telegram did not constitute a guaranty of the note, and therefore held that the complaint did not state a cause of

action upon either note. It is conceded in the briefs that no particular form of words is necessary to constitute a guaranty. The rule seems to be that in order to constitute a guaranty the writing should be so construed as to determine the intention of the parties, or, as stated in *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89:

"We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court in *Douglas v. Reynolds*, 7 Pet. 122, 8 L. ed. 630: 'Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms.' Or it is 'to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety;' as declared in *Lee v. Dick*, 10 Pet. 493, 9 L. ed. 507. The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction."

According to the facts alleged in the complaint, the defendant knew that the bank was not satisfied with the note which was offered as an extension of the payment of the note which was then past due. He then telegraphed to Mr. Walker, who was attempting to arrange for the extension: "Tell bank I request them to renew the note. . . . I will arrange things satisfactory to them upon my return to Seattle." We think it was clearly the intention of the defendant to guarantee the payment of the note, and it was evidently so understood by the bank at that time, according to the allegations of the complaint. In *Goldring v. Thompson*, 58 Fla. 248, 25 L.R.A.(N.S.) 418, 51 So. 46, the language used was: "Your money is good. I will be in your city in a few days." It was held that this constituted a guaranty. In *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. 53, it was said that the plaintiff should be "taken care of." It was held that this constituted a guaranty. In *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279, where the statement was made, "Give John a little more time and I will see that you get your money," was held to be a guaranty. In *J. L. Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227, the statement, "I will see that you are protected in any dealings that you may have with this corporation," was held to be a guaranty. In *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572, the statement, "Please send my son the lumber

he asks for, and it will be all right," was held to be a guaranty. We think the language quoted above in this case used by Mr. Pantages in his telegram, under the circumstances surrounding the transaction, was understood to be and was a guaranty of the note. We are of the opinion, therefore, that the court was in error in sustaining the general demurrer to the complaint.

The judgment is reversed, and the cause remanded for further proceedings.

Gose, Chadwick, and Parker, JJ., concur.

KANSAS SUPREME COURT.

S. F. FREEMAN, Guardian, etc., of Hiram Moger,

v.

RHODA FUNK, Appt.

(85 Kan. 473, 117 Pac. 1024.)

Adverse possession — conveyance to hinder creditors — repossession.

1. In 1888 the plaintiff's ward, in order to avoid the payment of a note for \$175, given for a patent fence machine, and to prevent his liability thereon from becoming a lien on his homestead, conveyed the latter to his wife. In a short time she re-

Headnotes by WEST, J.

Note. — Use of possessory title as a weapon of offense.

I. Generally.

- a. Ejectment, 487.
- b. Trespass to try title, 500.
- c. Writ of entry, 501.
- d. Quieting title, 502.
- e. Trespass, 503.
- f. Partition, 505.
- g. Injunction, 505.

II. Title by adverse possession.

- a. Quieting title, 506.
- b. Ejectment.
 1. Generally, 508.
 2. Possession twenty years or more, 510.
 3. Possession fifteen years, 512.
 4. Possession for ten years, 513.
 5. Possession for seven years, 514.
 6. Possession over five years, 515.
- c. Specific performance, 515.
- d. Trespass, 516.
- e. Injunctive relief, 517.

I. Generally.

a. Ejectment.

In ejectment against an intruder or a trespasser, it is held by the weight of authority that a possessory title under

conveyed, and soon thereafter departed this life. In the same year he deeded his homestead to a daughter, with the understanding that she should deed it back to him when the note should be out of the way. He continued for more than fifteen years to occupy the land, asserting and exercising dominion over it. When requested to reconvey, the daughter, fearing that he contemplated remarriage, delivered to him a life lease made out on a warranty deed blank, which he supposed for some time to be a good deed of conveyance. In 1905 he was adjudged insane and placed in an asylum; symptoms of mental unsoundness having been manifested as far back as 1888. The daughter was shown to have made numerous statements that she did not pretend to own the land, but intended to deed it back. During the father's occupancy, he placed valuable

claim or color of title based on prior possession is sufficient to enable plaintiff to maintain the action.

Federal cases.

Prior possession is sufficient title to maintain ejectment against an intruder or trespasser. *Wilson v. Fine*, 38 Fed. 789; *Mickey v. Stratton*, 5 Sawy. 475, Fed. Cas. No. 9,530.

The law of Oregon was held to be in force in Alaska, and a person in possession was held entitled to maintain an action to recover possession of real property, from which he had been ousted by a mere intruder. *Campbell v. Silver Bow Basin Min. Co.* 1 C. C. A. 155, 7 U. S. App. 71, 49 Fed. 47. This was an action to recover mining property. *Hill's Comp. (Or.)* 1887, § 316, provides that a person who has a legal estate in real property and a present right of possession may recover the same in an action at law.

In *Christy v. Scott*, 14 How. 282, 14 L. ed. 422, it was held in ejectment that a plea of defendant that the title of plaintiff was not good as against the state was bad. If the plaintiff was actually seised, and the defendant, being a mere intruder, ejected him, it was an unlawful act, and the action was maintainable, notwithstanding the state of Texas might have the true title.

And, where plaintiff had possession and a documentary title, and the defendant had no title, it was held that plaintiff should recover in ejectment. *Turner v. Aldridge*, 1 McAll. 229, Fed. Cas. No. 14,249.

The party in possession is presumed to be the owner in fee, and, where there was no evidence to the contrary, proof of possession under a color of right was held to be sufficient proof of title in ejectment as against a trespasser. *Bradshaw v. Ashley*, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297. It was held that the proof that title was in a third person would not avail the defendant, as title by possession in plaintiff was a title.

And under 23 Stat. at L. 24, chap. 53, § 8, act May 17, 1884, providing that persons 46 L.R.A.(N.S.)

improvements upon the land, rented portions of it at times, and collected the rent, and repeatedly offered it for sale. Held, that the facts warranted a finding of adverse possession.

Fraud — conveyance of homestead — rights of creditors.

2. The land being the homestead of the grantor, his creditors could not have been defrauded by his conveyance thereof.

Adverse possession — subserviency.

3. Under the conditions and circumstances indicated, such occupancy was not in subserviency to the title of the grantee.

Guardian — quieting ward's title.

4. The title fully vested by such adverse possession for the statutory period can be quieted as against the daughter in a suit by the father's guardian.

in Alaska shall not be disturbed in the possession of lands actually occupied, it was held that an occupant could maintain ejectment against a United States deputy collector who had taken possession. *Miller v. Blackett*, 47 Fed. 547. There had been no legislation by Congress.

And possession for seven years was held sufficient to enable plaintiff in ejectment to recover against one showing no title. *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451.

Plaintiffs brought ejectment, relying on evidence of title by possession for nearly forty years. It was held that the possession of land would not enable the party to maintain a suit against one holding title from the government. *Oaksmith v. Johnston*, 92 U. S. 343, 23 L. ed. 682. The defendant acquired title in 1866 and entered in 1867.

Alabama.

Possession of land was held to be prima facie evidence of right, and a prior possession under a claim of right short of the period which creates a bar was held to prevail over a subsequent possession. *McCall v. Doe*, 17 Ala. 533.

The plaintiff in ejectment was held entitled to recover against a trespasser on the strength of prior actual possession, apart from the validity of title introduced. *Green v. Jordan*, 83 Ala. 220, 3 Am. St. Rep. 711, 3 So. 513.

And in ejectment a prior possession under color of title was held sufficient for plaintiff to recover, unless the defendant had shown a better title, or unless plaintiff was barred by the statute of limitations. *Russell v. Erwin*, 38 Ala. 44.

And a bare peaceable possession under claim of title was held sufficient to sustain ejectment against one who could not dispute plaintiff's title. *Clarke v. Clarke*, 51 Ala. 498; *Wilson v. Glenn*, 68 Ala. 383; *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264, 6 So. 837 (that a third party had better title was held no defense where there was no privity with defendant); *Jernigan v. Flowers*, 94 Ala. 508, 10 So. 437; *Barrett v. Kelly*, 131 Ala. 378, 30 So. 824.

Adverse possession — character of title.

5. Such adverse possession and the operation of the statute of limitations created a title which can be used either offensively or defensively.

(October 7, 1911.)

APPPEAL by defendant from a judgment of the District Court for Mitchell County in plaintiff's favor in an action brought to quiet title to certain land. Affirmed.

The facts are stated in the opinion.

Messrs. Charles L. Hunt and Park B. Pulsifer, for appellant:

The deed from Moger to defendant was made for the purpose of defrauding his creditors, and, as against him, passed title to the property irrevocably.

Proof of prior possession under color of title was held sufficient to maintain ejectment against a trespasser or a defendant not showing a better title, where the plaintiff was not barred by limitations. *Bradshaw v. Emory*, 65 Ala. 208.

If plaintiff in ejectment was in possession under claim of the title or by exercising acts of ownership, it was held that he showed a prima facie right of recovery in ejectment. *Doe ex dem. Mills v. Clayton*, 73 Ala. 359; *Beard v. Ryan*, 78 Ala. 37.

And possession and acts of ownership were held sufficient to enable plaintiff to recover realty from one who came into possession later without title. *Strange v. King*, 84 Ala. 212, 4 So. 600.

The plaintiff in ejectment was held entitled to recover where he had prior actual possession and color of title and claim of ownership, and the defendant was estopped from denying his title. *Ware v. Dewberry*, 84 Ala. 568, 4 So. 404.

A plaintiff in ejectment without title was held entitled to recover by showing prior possession under claim of title, or by the exercise of acts of ownership; but he would not be entitled to recover against a trespasser, unless he showed a prior possession. *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.

And a grantee in a defective deed, taking possession, was held entitled to maintain ejectment against a party taking possession subsequently, under a defective deed from the same grantor. *Branch v. Smith*, 114 Ala. 464, 21 So. 423.

A previous possession with claim of title for less than twenty years, with descent cast, was held sufficient title to sustain the claim of a husband to curtesy, and to recover in ejectment against a trespasser. *Rochon v. Lecatt*, 1 Stew. (Ala.) 609.

In *Dothard v. Denson*, 72 Ala. 541, it was said: "As to an intruder or trespasser, or as to one who does not show a better right, possession of lands, like the possession of personal property, is prima facie evidence of title, and will support ejectment."

In *Tennessee & C. R. Co. v. East Alabama* 46 L.R.A. (N.S.)

Crawford v. Lehr, 20 Kan. 509; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567; *Robinson v. Blood*, 64 Kan. 290, 67 Pac. 842.

Possession by grantor of land deeded is presumed not to be adverse to the title and right of possession of the grantee.

Dotson v. Atchison, T. & S. F. R. Co. 81 Kan. 816, 106 Pac. 1045; *McNeil v. Jordan*, 28 Kan. 7; *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205; *Hockman v. Thuma*, 68 Kan. 519, 75 Pac. 486; *Bird v. Whetstone*, 71 Kan. 432, 80 Pac. 942.

An act by the party in possession in negotiating for or purchasing an outstanding adverse title, during the time of the running of the fifteen-year statute of limitations, is a recognition of such title, and stops the running of such statute.

R. Co. 75 Ala. 516, 51 Am. Rep. 475, it was said: "Ejectment was originally classed as a possessory action. Hence it was, that, at common law, any number of actions could be maintained, by laying the demise at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession, in form legal as distinguished from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against anyone afterwards found in possession, unless the latter can show a paramount title, or a possession continuous, peaceable, and adverse, of sufficient duration to toll entry."

In *Mickle v. Montgomery*, 111 Ala. 421, 20 So. 441, it was said: "The possession of land is prima facie evidence of title, and is sufficient evidence against all who do not show a prior possession or a better title."

In *Crosby v. Pridgen*, 76 Ala. 385, it was said: "The rule is settled in this state, that peaceable possession of land by an actual occupant, who is in the exercise of acts of ownership or dominion over the premises, whether under claim or color of title, is ordinarily sufficient to authorize a recovery in ejectment against a mere trespasser."

Plaintiff in ejectment, depending entirely on prior possession, was held not entitled to recover against defendant claiming under color of title in *Bernheim v. Horton*, 103 Ala. 380, 15 So. 822. The party in possession holding under sheriff's deed to the land, who was placed in possession by order of the court, was said to have color of title.

Where the plaintiff in ejectment showed no other right of recovery than the presumption of title arising from possession, it was held that the rule was that the defendant might defeat the suit by showing that he or his grantors had prior possession. *Nashville, C. & St. L. R. Co. v. Mathis*, 109 Ala. 377, 19 So. 384.

Arkansas.

Proof of actual possession under a claim and color of title was held to be sufficient to enable the plaintiffs to recover in eject-

Squires v. Clark, 17 Kan. 84; *Pratt v. Ard*, 63 Kan. 186 65 Pac. 255.

There was no evidence of fraud or undue influence on the part of the defendant in procuring this deed from her father. The deed was absolute on its face, and any parol agreement (had there been any evidence to prove the same) that the land should be held in trust for him was void, and could not be enforced.

Gee v. Thrailkill, 45 Kan. 173, 25 Pac. 588; *Morrall v. Waterson*, 7 Kan. 199; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255.

The statute of limitations is a shield for defense, not a weapon of attack, and cannot be made the basis of a claim for affirmative relief.

ment until a better title was shown by defendants. *Jacks v. Dyer*, 31 Ark. 334.

And where the verdict was for the defendant in ejectment, it was held immaterial if the court erred in applying the rule as to the extent of the possession under a parol purchase. *Hames v. Harris*, 50 Ark. 68, 6 S. W. 233.

Plaintiff's ancestor had color of title and died in possession, claiming the land as his own. This was held sufficient to protect the heir in the continuous enjoyment of the possession, and to support an action of ejectment. *Wheeler v. Ladd*, 40 Ark. 108.

And where plaintiff in ejectment proved that his ancestor died in possession of real estate, under color of title, and claiming to be the owner, it was held that he made out a prima facie case. *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256.

But in an action of ejectment by an heir claiming that her ancestor died in possession, it was held that before she would be entitled to recover, it would be necessary for her to show that her ancestor died in possession, and the recovery would be confined to actual possession where there was no color of title. *Nicklance v. Dickerson*, 65 Ark. 422, 46 S. W. 945.

California.

In an action for the recovery of land upon a claim of title based on prior uninterrupted possession for several years, it was held that possession was prima facie evidence of title. *Hicks v. Davis*, 4 Cal. 67.

And a plaintiff in ejectment was held entitled to maintain the action on prior possession. *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597.

And proof of prior possession was held sufficient to enable plaintiff to maintain ejectment against a trespasser. *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Bequette v. Caulfield*, 4 Cal. 278, 60 Am. Dec. 615.

The prior possession was held sufficient to authorize a recovery in ejectment, unless 46 L.R.A. (N.S.)

Burditt v. Burditt, 62 Kan. 576, 64 Pac. 77; *Stump v. Burnett*, 67 Kan. 589, 73 Pac. 894; *Walker v. Boh*, 32 Kan. 354, 4 Pac. 272; *Capell v. Dill*, 82 Kan. 652, 109 Pac. 286; *Corlett v. Mutual Ben. L. Ins. Co.* 60 Kan. 135, 55 Pac. 844; *Johnson v. Wynne*, 64 Kan. 138, 67 Pac. 549; *Thompson v. Greer*, 62 Kan. 522, 64 Pac. 48; *Gibson v. Johnson*, 73 Kan. 261, 84 Pac. 982.

Messrs. J. E. Tice, Ira N. Tice, C. L. Kagey, and R. M. Anderson, for appellee:

The deed from Moger to defendant was not made for the purpose of defrauding his creditors.

Mull v. Jones, 33 Kan. 112, 5 Pac. 388; *Weaver v. First Nat. Bank*, 76 Kan. 540,

defendant could account for such possession. or show a prior possession or title in himself, or a third person. *Potter v. Knowles*, 5 Cal. 87.

And in ejectment, where plaintiff relied on actual possession, the defendant, if a trespasser, would not be authorized to show title in a third party; but he would be so authorized if plaintiff relied on strict title. *Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617. Title by prior possession may be lost by abandonment.

And where plaintiff had a conveyance from a party in peaceable possession, claiming title at the time it was executed, it was held that this was sufficient to enable him to maintain ejectment. *Nagle v. Macy*, 9 Cal. 427; *Foot v. Murphy*, 72 Cal. 104, 13 Pac. 163; *Leonard v. Flynn*, 89 Cal. 543, 26 Pac. 1099.

And in an action of ejectment by a party in possession, claiming under his possession and that of a predecessor, it was held that the defendant could not show that another party had a prior possession. *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

A party entering land under a deed with specific boundaries, and holding actual possession of part, was held to be in actual possession of all the land described in the deed, as against one who entered on part and built a fence insufficient for any purpose except to mark a line. *Baldwin v. Simpson*, 12 Cal. 560. The plaintiff claimed under possession.

And title by possession was held sufficient to authorize a recovery in ejectment unless the defendant showed a prior possession, or a better title. *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

Plaintiff could recover in ejectment on proof of prior possession, although the title might be in a third party, not a privy to either party. *Hubbard v. Barry*, 21 Cal. 321.

Prior possession was held sufficient ground for the maintenance of ejectment against a naked trespasser. *Shanahan v. Tomlinson*, 103 Cal. 89, 36 Pac. 1009; *Southmayd v. Henley*, 45 Cal. 101; *Fletcher v. Mower*, 56 Cal. 421. This latter was

16 L.R.A.(N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; Shattuck v. Weaver, 80 Kan. 82, 101 Pac. 649; Roser v. Fourth Nat. Bank, 56 Kan. 129, 42 Pac. 341; Hixon v. George, 18 Kan. 260; Monroe v. May, 9 Kan. 476; Arthur v. Wallace, 8 Kan. 269; Durand v. Higgins, 67 Kan. 110, 72 Pac. 567.

The possession of the grantor may be adverse to his grantee, if he expressly renounces the title of the grantee or positively asserts a claim of title in himself, which is brought to the attention of the grantee.

Dotson v. Atchison, T. & S. F. R. Co. 81 Kan. 818, 106 Pac. 1046; 1 Cyc. 1040, 1041.

The recovery was right.

Hunnicut v. Oren, 84 Kan. 460, 114 Pac. 1059; 25 Cyc. 1159.

an action entitled to "quiet title," but was really ejectment.

And where the plaintiff showed possession in himself at the time of entry of the defendants, it was held that they would not be permitted to overcome the presumption of title in the plaintiff, by showing title in a stranger. Carleton v. Townsend, 28 Cal. 219; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. 985.

Plaintiff in ejectment was held entitled to recover where he was in possession under a deed from a grantor in possession, and the defendant showed no title. Pierce v. Stuart, 45 Cal. 280.

In an ejectment, prior possession was held prima facie evidence of title as against the defendants, who were alleged to be wrongfully in possession when the action was commenced. Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408.

Possession of land was held prima facie evidence of ownership, and in ejectment proof of such possession prior to the intrusion of defendant was held to be sufficient to authorize a recovery, in the absence of evidence to support defendant's right to possession. Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18.

During the pendency of ejectment, it was held that the defendant could not acquire any new right from the fact that he remained in possession. So, when five years elapsed from time of his entry to time of his judgment of the eviction, he could not maintain an action to quiet title. Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33.

The plaintiff in ejectment, claiming under possession, was held entitled to recover such land as was actually in his possession. Slaughter v. Fowler, 44 Cal. 195.

Plaintiff in ejectment, relying on possession, was held not required to allege in his complaint adverse possession for five years prior to the suit. Gillespie v. Jones, 47 Cal. 259.

Connecticut.

The long possession of plaintiffs in ejectment, and of those under whom they 46 L.R.A.(N.S.)

The statute of limitations of fifteen years can form the basis of an action by the plaintiff to quiet title.

Lehrling v. Lehrling, 84 Kan. 766, 115 Pac. 556; Viking Refrigerator & Mfg. Co. v. Crawford, 84 Kan. 203, 35 L.R.A.(N.S.) 498, 114 Pac. 240; Liebheit v. Enright, 77 Kan. 321, 94 Pac. 203; Tourtelotte v. Pearce, 27 Neb. 57, 42 N. W. 915; Cramer v. Clow, 81 Iowa, 255, 9 L.R.A. 772, 47 N. W. 59; Walker v. Converse, 148 Ill. 622, 36 N. E. 202; Parker v. Metzger, 12 Or. 407, 7 Pac. 518; 1 Enc. Ev. 699.

A party may go into possession of land without any color of title whatever, and by an adverse possession for the statutory period acquire good title to the property. Anderson v. Burnham, 52 Kan. 454, 34

claimed, by deeds of sale in fee, was held sufficient against the naked possession of a stranger. Martin v. Sterling, 1 Root, 210.

In Cahill v. Cahill, 75 Conn. 522, 60 L.R.A. 706, 54 Atl. 201, 732, it was held that possessory rights alone would not sustain an action in ejectment, and that where title was not acquired by adverse possession, a legal title should be shown.

Delaware.

In Delaware it was held that ejectment could not be maintained against a trespasser, where plaintiff relied on a possessory title, but had not been in possession twenty years. Doe ex dem. Jefferson v. Howell, 1 Houst. (Del.) 178. The court said: "According to law, as recognized by the courts of this state, an action of ejectment cannot be maintained on the ground of possession alone short of twenty years, against a mere trespasser, who enters without any color or claim of title, and ousts the party in possession, although there are decisions to the contrary in some of the other states, and particularly in New York."

District of Columbia.

In ejectment a party in possession under a claim of title was held entitled to recover against a trespasser who subsequently entered. Bradshaw v. Ashley, 14 App. D. C. 485. In this case it was said: "That question is whether, in a suit of ejectment, a plaintiff who has been peaceably in possession of property, under a claim of title, for a period of time even less than twenty years, when the possession has never been voluntarily abandoned or relinquished, is entitled to prevail against a mere trespasser who subsequently enters, but shows no lawful right or title, or claim of title, in himself. And that question, it seems to us, has been conclusively determined in the affirmative for this jurisdiction by the decision of the Supreme Court of the United States in the case of Sabariego v. Maverick, 124 U. S. 296, 31 L. ed. 443, 8 Sup. Ct. Rep. 461."

Pac. 1056; *Liebheit v. Enright*, 77 Kan. 323, 94 Pac. 203; *Pratt v. Ard*, 63 Kan. 182, 65 Pac. 255; *Bird v. Whetstone*, 71 Kan. 430, 80 Pac. 942.

West, J., delivered the opinion of the court:

In 1888 Hiram Moger, a resident of Mitchell county, deeded his homestead to his wife for the purpose of avoiding payment of a note for \$175, given for a patent fence machine. During the same year, the property was deeded back to him by his wife, and he deeded it to his daughter, Rhoda Funk; the wife in the meantime having died. Not counting a temporary absence, he continued to live on the land until 1905, when he was adjudged insane and taken to

an asylum. In the meantime, he had claimed the land as his own, had put valuable improvements thereon, had rented portions of it, and collected the rents, and had offered it for sale. About 1895, after having erected a house and barn on the place costing upwards of \$1,000, he desired the land deeded back to him by Mrs. Funk, but she, being fearful that he contemplated a second marriage, made out on a warranty deed form a life lease, and delivered it to him. His guardian brought this action to settle for him the title to the land. The fourth, or third amended, petition, was filed, containing two causes of action, the first to quiet title, and the second for specific performance of an alleged contract to reconvey. To this

Florida.

In order to recover in ejectment it was held that the plaintiff relying on a possessory title must have had actual possession. *Seymour v. Creswell*, 18 Fla. 29. The rule was stated that the right to recover on a possessory title could not be resisted by showing that there may be an outstanding title in a third party. But it was said that this was questioned in Delaware, North Carolina, South Carolina, and Indiana. The rule was approved in Virginia, Georgia, Kentucky, California, New Jersey, Connecticut, Vermont, Ohio, Pennsylvania, Maryland, and Texas.

And the rule that plaintiff must recover in ejectment on the strength of his own title was applied, and it was held that plaintiff would have to show prior possession or title, as against one who had no title. *Burt v. Florida Southern R. Co.* 43 Fla. 339, 31 So. 265.

And as against a mere trespasser, it was held that a possessory title was sufficient to entitle plaintiff in ejectment to recover. *Jackson v. Haisley*, 35 Fla. 587, 17 So. 631.

And a recovery in ejectment was held authorized in favor of plaintiff without title, but who was in prior actual and proper possession. But this rule would only apply to actual possession, and not to lands covered by navigable waters, if plaintiff had no title to or right of possession of the lands opposite. *Bass v. Ramos*, 58 Fla. 161, 138 Am. St. Rep. 105, 50 So. 945.

Georgia.

Ejectment was held proper in favor of a party having a possessory title where he had abandoned the premises, if the abandonment was made with the purpose of resuming possession. *Jones v. Nunn*, 12 Ga. 469.

Under Ga. Code, § 3366 (5008), providing that a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone against one who acquires the land by mere entry, it was held that a plaintiff in ejectment was entitled to recover on his prior possession alone, as 46 L.R.A. (N.S.)

against a trespasser. *Jones v. Easley*, 53 Ga. 454.

In *Hadley v. Bean*, 53 Ga. 685, it was said that the rule in Georgia was the same as that stated in the Code, § 3366, before it ever was adopted.

Under Ga. Code, § 3366, prior possession was held sufficient to enable plaintiff to maintain a suit in equity in the nature of ejectment against an insolvent trespasser. *Nolan v. Pelham*, 77 Ga. 262, 2 S. E. 639.

Under Ga. Code, § 3366, an heir at law was held entitled to recover on the prior possession of his ancestor, but to make a prima facie case it should be shown that the ancestor was in possession under a bona fide claim of right at his death. *Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 260; *Brown v. Colson*, 41 Ga. 42; *Boynton v. Brown*, 67 Ga. 396; *Wolfe v. Baxter*, 86 Ga. 705, 13 S. E. 18; *Bagley v. Kennedy*, 85 Ga. 703, 11 S. E. 1091. In the latter case it was held that evidence of possession would change the burden of proof, and put the defendant on proof of title.

Evidence of prior possession by plaintiff in ejectment was held sufficient to put defendant on proof of title. *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786. The court said: "If plaintiffs had no title, they aver that they had been placed in possession by the former owner, and bare right of possession would entitle them to recover the land. Civil Code, §§ 3875, 5008." Section 3875 (3014) provides that the bare right of possession authorizes recovery by the owner of such right.

Prior possession of land was held sufficient to enable plaintiff to maintain ejectment against a trespasser. *Johnson v. Jones*, 68 Ga. 825. This was under Ga. Code, § 3014.

Under Ga. Civil Code, § 5008, it was held that a plaintiff in ejectment was entitled to recover on his prior possession alone. And this was held even if he had relinquished possession with *animo reverendi*. *Jackson v. Strickland*, 127 Ga. 106, 56 S. E. 107.

The plaintiff in ejectment was held entitled to recover from an intruder upon

pleading a demurrer was interposed, on the grounds that the second count did not state a cause of action, that the alleged cause was barred by the statute of limitations, and that several causes of action were improperly joined. This demurrer was overruled, and an answer filed containing a general denial and an admission that the defendant claimed to be the owner of the land, setting up the deed from her father, her life lease to him, a breach by the father of its provision to pay taxes for the year 1907, and that the second cause of action was barred, and praying that her title be quieted. To this answer the plaintiff filed an amended reply, verified on information and belief, containing a general denial and a claim that the deed was secured through

false representations and undue influence when the grantor was mentally weak and incompetent. A demurrer to this amended reply, except the general denial, was overruled. Upon the trial the court found that the deed was procured by undue influence, and that the defendant held the same in trust for the benefit of her father, but that his right to recover on this ground was barred; but after making extended findings of fact, the conclusion was reached that the plaintiff had a right to have his title quieted by reason of undisputed, quiet, peaceable, exclusive, and adverse possession since 1888. The defendant appeals and presses forty-three assignments of error; five relating to pleadings, twenty-eight to the findings of fact and conclusions of law,

proof of prior possession alone. Evidence of prior possession alone was held sufficient to put defendant on proof that he had a better title. *Moss v. Chappell*, 126 Ga. 196, 11 L.R.A. (N.S.) 398, 54 S. E. 968.

Where plaintiff in ejectment claimed under a possessory title holding the land three years, it was held that if the defendant was in possession as a trespasser, he could not rely upon that tortious possession, but if he came in under another party, he might show the latter's title. *Jones v. Scoggins*, 11 Ga. 119. In this case the court said: "But if the plaintiff, as in this case, relies upon possession acquired bona fide, and nothing else, and the defendant is in possession as a trespasser, the defendant cannot rely upon that tortious possession, nor can he protect himself by showing a title in a third person. The law will not permit him to take anything, or any account, by his trespass."

Illinois.

The prior possession of the land by plaintiff in ejectment was held conclusive on defendant, acquiring possession subsequently, unless he showed a better title. *Doe ex dem. Herbert v. Herbert*, *Breeze* (Ill.) 278, 12 Am. Dec. 192.

And proof of actual possession under a deed of ownership was held to be prima facie evidence of title on which a recovery could be had in ejectment, unless the defendant showed a better title. *Glantz v. Ziabek*, 233 Ill. 22, 84 N. E. 36.

And in ejectment it was held that proof of prior possession by plaintiff, under claim of ownership, was prima facie evidence of ownership and seisin, and sufficient for a recovery unless the defendant showed a better title. *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634.

And proof of prior possession by the plaintiff, claiming to be the owner in fee, was held sufficient to authorize a recovery in ejectment unless the defendant showed a better title. *Barger v. Hobbs*, 67 Ill. 592; *DeWitt v. Bradbury*, 94 Ill. 446. In the 46 L.R.A. (N.S.)

last case it was held that the claim of title need not be made by words.

And the possession by plaintiff in ejectment under a deed was held sufficient as against a defendant who showed no title. *Coombs v. Hertig*, 162 Ill. 171, 44 N. E. 392.

And prior possession alone under claim of title was held evidence of a fee until rebutted, and was sufficient to maintain ejectment. *Keith v. Keith*, 104 Ill. 397; *Harland v. Eastman*, 119 Ill. 22, 7 N. E. 59, 8 N. E. 810; *Anderson v. McCormick*, 129 Ill. 308, 21 N. E. 803. In this last case it was said: "It is sufficient, therefore, for a plaintiff, in order to make prima facie proof of title, to trace his title back to an immediate or remote grantor, who, at the time of his conveyance, was in possession of the land, claiming it in fee."

Possession under a deed from a party claiming to own the land was held sufficient to enable plaintiff to maintain ejectment against one who was a mere trespasser, who could not set up title in a third party. *Casey v. Kimmel*, 181 Ill. 154, 54 N. E. 905.

And possession of a part of land under a deed which included more land, with claim of ownership to the whole, was held to be a good title against all persons who could not show a title from the United States, or from someone having a prior possession. *Bowman v. Wettig*, 39 Ill. 416.

Indiana.

Possession was held to be prima facie evidence of title, and the possession of an ancestor was a sufficient foundation to support ejectment on the demise of his heirs. *Robinoe v. Doe ex dem. Colwell*, 6 Blackf. 85.

In ejectment, where defendant was in possession under a claim of ownership, it was held necessary for plaintiff to show title in himself, and the burden of proof was on him to show such title and right of possession. *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930. The court said: "If he failed to show title in himself, it would make no difference whether the de-

and ten to the reception of evidence. Owing to the trial court's restriction of the case to the issue joined upon the first cause of action, any errors which may have occurred in reference to the various pleadings cannot materially prejudice the defendant.

We have examined the findings and the evidence, giving careful heed to the challenge made to many items in the abstract of the appellee, and conclude that the decision is well supported, and, in view of the fact that the cause was tried by the court without a jury, we do not find any evidence wrongfully admitted which could by any fair reasoning be held to have led the court to a wrong determination. There were, as usual, conflicting claims and conflicting

feudant had title or not." Plaintiff claimed title by adverse possession under claim of ownership.

Title by prior possession was held sufficient, as against a mere intruder, to maintain ejectment. *Doe ex dem. Wood v. West*, 1 Blackf. 133.

Kansas.

In ejectment priority of possession was held to give precedence, in the absence of proof of a better title. *Duffey v. Rafferty*, 15 Kan. 9.

And possession of land under a claim of ownership was held title in low degree, and would prevail over subsequent possession acquired without any right. *Mooney v. Olsen*, 21 Kan. 691.

The plaintiff having prior possession under a defective tax deed was held entitled to maintain ejectment against a party acquiring possession under a forged deed. *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157.

And a party in possession under a title bond, which bond was barred by limitation, was held in ejectment to have a better title than one subsequently acquiring possession under a void tax deed. *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115.

Kentucky.

Possession of land for many years under a claim of title was held sufficient to maintain ejectment against intruders. *Jones v. Spralding*, 9 Ky. L. Rep. 756, 7 S. W. 31; *McLawrin v. Salmons*, 11 B. Mon. 96, 52 Am. Dec. 563.

In the absence of all other evidence, the fact of a plaintiff in ejectment having been once possessed of the land was held sufficient prima facie to authorize a recovery against an intruder on that possession. *Campbell v. Roberts*, 3 A. K. Marsh. 623.

And where the plaintiff in ejectment was in possession, and was ousted by defendant, it was held that a recovery should be had unless the defendant had a better title. *Sowder v. McMillan*, 4 Dana, 456.

And possession was held sufficient title to enable plaintiff to maintain ejectment 46 L.R.A. (N.S.)

testimony, but there is abundant evidence in the record to warrant the finding that from 1888 until his removal to an asylum, in 1905, Hiram Moger manifested symptoms of mental unsoundness which culminated in a mental and physical condition pathetic and repulsive. Many statements testified to by various witnesses as having been made by the defendant afford sufficient basis for the finding that she took the deed with the understanding that the land was to be re-conveyed upon the request of the father, and that the purpose was merely to hold the title until the patent fence matter should be out of the way. The guardian's attorney testified that shortly before the suit was brought she said to him, among other things: "I haven't any interest in the

against a trespasser. The defense could not show that title was in a third party. *Sowder v. McMillan*, 4 Dana, 462; *Adams v. Tiernan*, 5 Dana, 395.

Actual possession by plaintiff at the time of entry of defendant in ejectment was held to be a necessary foundation, where there was neither actual title nor twenty years' possession. *Myers v. McMillan*, 4 Dana, 485.

But adverse possession less than twenty years was held insufficient to authorize a recovery based on such possessory right. *Breeding v. Taylor*, 13 B. Mon. 477.

In *Fowke v. Darnall*, 5 Litt. (Ky.) 317, it was said: "There are cases where a plaintiff in ejectment may recover on a bare possession only."

Louisiana.

In a possessory action where plaintiff held under a void deed for more than fifteen years, it was held sufficient to show a possession for a year and a day, where the defendant had no title or possession. *Bernard v. Shaw*, 9 Mart. (La.) 49.

Massachusetts.

In *Jackson v. Boston & W. R. Corp.* 1 Cush. 575, it was said: "If A enters on the land of B and takes possession, and afterwards C enters on A and dispossesses him, A may well maintain an action against C to recover possession, although his entry on B was without right, and tortious; for mere possession is a good title against a stranger having no title."

Michigan.

A deed by the auditor general of Michigan for taxes, and open and peaceable possession for years, were held to entitle plaintiff to maintain ejectment against one subsequently taking possession. *Van Auken v. Monroe*, 38 Mich. 725.

And in ejectment, prior possession of land, claiming title, by plaintiff, was held sufficient to make a prima facie case, unless the defendant showed a better title.

land; I don't pretend to own it;" and that she was about to sign a statement to that effect, when her husband interposed and objected. Another witness testified that in a conversation between the Funks and Moger, the latter said he had deeded the place to Mrs. Funk until he could get some trouble about the fence machine settled, when they were to deed it back to him, and that both Mr. and Mrs. Funk said it (the statement) was all right. Defendant herself, upon the stand, in answer to the question as to whether there was any talk or promise on her part that she would deed the property back at any time, answered: "No, sir; no specified time." A brother-in-law testified that she told him she would make the deed back to Moger whenever

Moger called for it. Another brother-in-law testified that she said she did not pretend to own the land, but that she would not deed it back to Moger, because she wanted to keep him from disposing of it. She wrote a letter to her sister in which she stated that her father was mad about the deed to the land; that she had made him what the lawyer called a life lease; that a woman wanted to marry him to get the farm. "Father can use the land as long as he lives, and when he dies it will come to us children, and all of us will get the same share. He cannot deed it away." Of course, if she owned the land, it would not descend to her father's heirs, and the only way the others could get a share would be by deed from the owner. The probate

Covert v. Morrison, 49 Mich. 133, 13 N. W. 390.

Minnesota.

Possession of land by plaintiff's ancestor at the time of his death was held sufficient title to sustain ejectment against one entering subsequently without right. *Sherin v. Larson*, 28 Minn. 523, 11 N. W. 70.

Mississippi.

Against a trespasser, prior possession of cemetery lots was held sufficient to maintain the action of ejectment. *Wilkinson v. Strickland*, — Miss. —, 35 So. 177.

To prevent a recovery on a prior possession, by abandonment, the abandonment should be without any intention of resuming possession, and if there was *animus revertendi*, the plaintiff could recover by virtue of such possession. *Hicks v. Steigleman*, 49 Miss. 377.

As against an intruder without color of title, it was held that a plaintiff in ejectment could recover on the strength of his former possession, unless the plaintiff was barred by limitation, or had abandoned the premises. *Kerr v. Farish*, 52 Miss. 101.

And, against a mere intruder, it was held that the plaintiff should not be required to deraign his title, but could recover upon the strength of his former possession. *Lum v. Reed*, 53 Miss. 73.

And where defendant in ejectment claimed under a tax deed from the state, which was void, it was held that this did not compel plaintiff to deraign title independent of the common source. *Johnson v. Futch*, 57 Miss. 73. It was held that this deed did not show color of title.

And heirs of a party in possession were held entitled to recover in ejectment against an intruder or one claiming under a void title. *Dingey v. Paxton*, 60 Miss. 1038. The defendant claimed title under a void tax sale.

And continuous adverse possession for twelve years was held sufficient to maintain ejectment without reference to paper title, as against a subsequent intruder. *Anderson v. Moore*, 84 Miss. 400, 36 So. 520. 46 L.R.A. (N.S.)

Missouri.

Prior possession accompanied by a claim of the fee was held to raise a presumption of title, and to be sufficient to support ejectment against one who had only naked possession. So, the grantee of the prior possession could claim the same right. *Dale v. Faivre*, 43 Mo. 556.

In *Crockett v. Morrison*, 11 Mo. 3, where plaintiff in ejectment sought to recover on a possessory title, it was held that it should be shown that plaintiff's possession had not been voluntarily abandoned. The court said: "This is done by showing that the defendant entered upon his possession, or upon the possession of someone holding under him or trespassing upon him without any title."

And where it was claimed that prior possession would overcome one acquired subsequently by a mere intruder, it was held that the prior possession would have to be accompanied by a claim of title, otherwise the parties would be left where they were found. *Norfleet v. Russell*, 64 Mo. 176; *Alexander v. Campbell*, 74 Mo. 146; *White v. Keller*, 114 Mo. 479, 21 S. W. 860; *Dale v. Faivre*, 43 Mo. 556.

Where no title appeared on either side, it was held that the prior possession of plaintiff, though short of the statutory bar, would prevail over a subsequent possession, provided the prior possession was under a claim of right, and had not been abandoned. *Mulherin v. Simpson*, 124 Mo. 610, 28 S. W. 86.

And one having possession of land under a claim of right was held entitled to recover in ejectment from an intruder. *Bain v. Bullock*, 129 Mo. 117, 31 S. W. 342.

Plaintiff in ejectment was held entitled to recover on proof of prior possession against an intruder, where such prior possession was under a claim of right or color of title. *Hall v. Gallemore*, 138 Mo. 638, 40 S. W. 891.

Where a recovery in ejectment has been allowed on prior possession only, it was held that this would be limited to cases where defendant was an intruder or tres-

judge and others testified to her statement that she did not pretend to own the land, and that the deed was to save the farm from the hands of parties who would take advantage of her father, and she intended to deed it back to him. Considering the relation of the parties, the mental condition of the father, the subsequent conduct and statements of both, the continued unresisted acts and assertion of dominion and ownership for more than fifteen years, they fully justify the conclusion that a title by adverse possession had ripened, unless there be some rule of law preventing such conclusion.

It is asserted that the deed was made for the purpose of defrauding creditors, and therefore as against the grantor must be

held good. Whatever the law may have been thought to be at that time, it is certainly now settled that the property was the grantor's homestead, and therefore no creditor could be defrauded by its conveyance. *Mull v. Jones*, 33 Kan. 112, 5 Pac. 388; *Cross v. Benson*, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558; *Weaver v. First Nat. Bank*, 76 Kan. 540, 16 L.R.A. (N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649.

The defendant also urges that possession by the grantor must be presumed to be in subservience to the title of the grantee. This is no doubt true as a general proposition, when there are no circumstances leading to a contrary conclusion; but when the grantor constantly and persistently, for

passer, and would not apply where he was in possession under claim and color of title. *Prior v. Scott*, 87 Mo. 303; *Bledsoe v. Simms*, 53 Mo. 305.

Nebraska.

Adverse possession under a void tax deed and payment of taxes was held sufficient to sustain ejectment against an intruder having no claim to title. *Robinson v. Gantt*, 1 Neb. (Unof.) 51, 95 N. W. 506.

And where plaintiffs in ejectment showed that their ancestor occupied the land claiming to be the owner at the time of his death, and that they were his heirs, this was held sufficient to put the defendant on proof of title or prior possession. *Spitznagle v. Vanhessch*, 13 Neb. 338, 14 N. W. 417.

And adverse occupancy by the plaintiff and his grantors under a claim of right was held sufficient to maintain ejectment. *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494.

Nevada.

Where plaintiff in ejectment was not shown to have any pre-emption rights, his proof of prior possession entitled him to regain possession against all persons having no better right. *McFarland v. Culbertson*, 2 Nev. 280.

And where possession was relied upon in ejectment, it was held that it should be an actual bona fide possession. *Kraft v. Carlow*, 9 Nev. 20.

New Jersey.

The oldest possession, even for less than twenty years, was held to carry the presumption of title sufficient to put the defendant upon his defense, and to overcome the later possession of a mere trespasser. *Den ex dem. Penton v. Sinnickson*, 9 N. J. L. 149.

New Mexico.

A plaintiff in prior possession under claim of title was held entitled to maintain ejectment against a mere intruder. *Deemer v. Falkenburg*, 4 N. M. 149, 12 Pac. 717. 46 L.R.A. (N.S.)

And under N. M. Comp. Laws, § 1570. providing that an action of ejectment will lie for a mining claim as well as for any real estate, where plaintiff has been wrongfully ousted from the possession, it was held that the statute included possession wholly disconnected from the legal or even colorable title. It was held that the strength of a possessory title was in prior actual possession. *New Mexico, R. G. & P. R. Co. v. Crouch*, 4 N. M. 293, 13 Pac. 201. The court said: "If that be shown, it corresponds to the legal title in cases where the rule requires the claimant to recover on the strength of his own, and not upon the weakness of his adversary's, title."

New York.

A prior possession for less than twenty years, where there was no abandonment, was held sufficient to maintain an action of ejectment, and require the defendant to show his title. *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338. The court said: "A prior possession short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of the title appears on either side."

And a party in possession under color of title was held entitled to recover in ejectment against an intruder who was not allowed to show that title was in a third party. *Jackson ex dem. Duncan v. Harder*, 4 Johns. 202, 4 Am. Dec. 262.

And where a party in possession made a mortgage and was then disseised, it was held that a purchaser under foreclosure could maintain ejectment against the disseisor and recover on the right of possession of the mortgagor without showing possession in himself. *Clute v. Voris*, 31 Barb. 511.

And where plaintiff had a possessory title, it was held sufficient to enable him to recover in ejectment against a subsequent possessor short of twenty years without title, on the ground of prior possession. *Jackson ex dem. Weidman v. Hubble*, 1 Cow. 613.

nearly seventeen years, claims ownership, and exercises all the rights incident thereto, and the grantee from time to time concedes the possession of only a paper title, which is to be revested upon request of the grantor, the rule does not and cannot apply. The authorities cited in favor of the general rule give support thereto, but none of them involves conditions like those now under consideration. The leading case relied upon is *Dotson v. Atchison, T. & S. F. R. Co.* 81 Kan. 816, 106 Pac. 1045, which holds that such possession will not be considered adverse until the grantor explicitly renounces the title of the grantee, or positively asserts a claim of title in himself, which is brought to the attention of the grantee. The evidence is abundant that the

grantor all along asserted ownership in himself, and, as already suggested, the numerous statements made by the grantee, as testified to by various persons, amounted to repeated concessions that the grantor's claim was rightful, and that the shifting of the paper evidence of title back to the real owner was a mere formality.

Finally, it is earnestly insisted that to allow the grantor's title to be quieted on the ground of adverse possession for the statutory period is to change the rightful defensive nature of the statute into that of a wrongful offensive weapon. Under the footnote of 25 Cyc. 983, "Statute no basis of claim for affirmative relief," the Kansas authorities are the only ones cited. Beginning with *Corlett v. Mutual Ben. L. Ins. Co.*

A continued possession from 1805 to 1821 under a claim or assertion of right was held sufficient to enable plaintiff to maintain ejectment against one who subsequently entered without any pretense of right or title. *Jackson ex dem. Murray v. Denn*, 5 Cow. 200.

And where the plaintiff in ejectment made out a valid possession, and the defendant did not establish a valid prior possession, it was held that plaintiff should recover. *Jackson ex dem. Livingston v. Walker*, 7 Cow. 637. It was further held that a purchaser who failed to perform could not set up title.

Proof of prior possession by plaintiff was held sufficient to sustain ejectment against one having no better title. *Hopkins v. Mason*, 42 How. Pr. 115.

And possession and use by plaintiff without proof of paper title and ouster by defendant were held sufficient in ejectment. *Ibid.*

And prior possession, though not what was called "adverse possession," was held sufficient to enable plaintiff to maintain ejectment against an intruder or against one whose claim of title was founded on a later possession. *Hunter v. Starin*, 26 Hun, 529.

A conveyance of land to a person who entered into actual possession thereunder was held to create a legal presumption of good title in the grantee and enable him to maintain ejectment against all intruders who did not show a better title. *Zink v. McManus*, 49 Hun, 583, 3 N. Y. Supp. 487.

And where the lessor of plaintiff had been in peaceable possession for nearly three years, and the defendant entered upon him without any claim or color of right or title from any person whatever, it was held that plaintiff could recover in ejectment. *Jackson ex dem. Murray v. Hazen*, 2 Johns. 22.

And a person in possession under color of title was held entitled to recover in ejectment from a trespasser where he had not abandoned the premises. *Spies v. Rome, W. & O. R. Co.* 39 N. Y. S. R. 764, 15 N. Y. Supp. 348.

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In *Brewster v. Striker*, 1 E. D. Smith, 321, it was said: "It has been said that mere priority of possession, though all other title be expressly disproved, is sufficient in ejectment to enable the plaintiff to recover against everyone but the party having the true title. *Catteris v. Cowper*, 4 Taunt. 547, 13 Revised Rep. 682; *Allen v. Rivington*, 2 Wms. Saund. 111, note. The rule is stated a little too broadly by the reporter in his note to this case in *Taunton*. Priority of possession is undoubtedly sufficient where nothing but possession is shown by either party, for the prior possession carries with it the presumption of a legal title. It is but a presumption, however, which may be repelled, and which the plaintiff in this case has repelled, by showing that the legal estate is in the executors."

One who succeeded to his ancestor's possession was held entitled to ejectment as against a subsequent intruder. *Maltonner v. Dimmick*, 4 Barb. 566.

In *Jackson ex dem. Klock v. Rightmyre*, 16 Johns. 325, the rule is stated that a prior possession under a claim of right not voluntarily abandoned would prevail over a subsequent possession without right, where no proof of title was made on either side.

And in *Dominy v. Miller*, 33 Barb. 286, it was said: "A person who has been in possession of land for eight or ten years under a color of title may recover in an action of ejectment against a mere intruder or trespasser."

Plaintiff's possession was held sufficient to establish a prima facie right to recover in ejectment against one entering subsequently. *Carleton v. Darcy*, 90 N. Y. 566, reversing 14 Jones & S. 484. But a showing that defendant was in possession prior to plaintiff would defeat his right of recovery.

And a possession of seven years without more, where there had been an eviction by default in ejectment, was held insufficient to maintain an action to regain possession. *Jackson ex dem. Klock v. Rightmyre*, 16 Johns. 314, affirming 13 Johns. 367. This was on the ground that a recovery in eject-

60 Kan. 134, 55 Pac. 844, containing the phrase, "which is a weapon of resistance, not of attack" (p. 135), similar expressions are found in *Thompson v. Greer*, 62 Kan. 522, 64 Pac. 48; *Burditt v. Burditt*, 62 Kan. 576, 64 Pac. 77; *Johnson v. Wynne*, 64 Kan. 138, 67 Pac. 549; *Gibson v. Johnson*, 73 Kan. 261, 84 Pac. 982; *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121, 13 Ann. Cas. 860; *Salter v. Corbett*, 80 Kan. 331, 102 Pac. 452; *Capell v. Dill*, 82 Kan. 652, 109 Pac. 286. But in *Morris v. Hulme*, 71 Kan. 628, 81 Pac. 169, one who had deeded his land as security for another who had signed bonds for the appearance of the grantor's sons, sued for a reconveyance, and alleged that the statute had run against the judgment on the bonds.

ment changes the presumption of right founded on a possession less than twenty years.

And where possession in the ancestor of plaintiff was not proved, and plaintiff depended on his title, it was held that plaintiff in ejectment could not recover, although defendants had no title. *Enders v. Sternberg*, 52 Barb. 222.

And an abandonment by plaintiff in ejectment for thirteen years after an adverse possession for eleven years was held to warrant a finding for defendant. *Whitney v. Wright*, 15 Wend. 171.

North Carolina.

In this state it seems that a possessory title not perfected by limitation will not sustain ejectment.

Plaintiff in ejectment was held not entitled to recover against an intruder, where plaintiff had color of title, but not seven years' continuous possession. *Sheppard v. Sheppard*, 4 N. C. (Term. Rep. 108); *Ward v. Herrin*, 49 N. C. (4 Jones, L.) 23; *Dex dem. Jones v. Ridley*, 4 N. C. (2 Car. Law. Reps. 397).

It was held that ejectment could not be maintained on a naked possessory title where the legal title was in another party. *Duncan v. Duncan*, 25 N. C. (3 Ired. L.) 317.

North Dakota.

Where plaintiff in ejectment was in possession claiming ownership, in 1890, and the defendants had been in possession since February, 1894, claiming ownership, it was held that the plaintiff must rely on her own title or interest in the premises, and having failed to show any interest or title in herself, she had no right to call upon defendants to defend title or possession. *Conrad v. Adler*, 13 N. D. 199, 100 N. W. 722.

Ohio.

The possessory title of plaintiff and his ancestors was held sufficient to recover in 46 L.R.A. (N.S.)

This was held proper, as showing the limitation of defendant's liability on the judgments. In other words, the statute had created a condition of which the plaintiff could avail himself in an action for affirmative relief.

In *Gibson v. Johnson*, 73 Kan. 261, 84 Pac. 982, it was held that a mortgagor cannot quiet title against the holder of the mortgage on the naked ground that the mortgage is barred, following *Hogaboom v. Flower*, 67 Kan. 41, 43, 72 Pac. 547, 548. In the latter case Flower sued to quiet title against his mortgagee, who set up the mortgage in defense, the answer showing that it was barred, and it was held that the plaintiff could quiet his title. It was said that "a right of action thus barred is dead for all

ejectment where the defendant had no title. *Ludlow v. McBride*, 3 Ohio, 240.

Ejectment was held to be maintainable on a possessory right only against a disseisor who showed no better right. *Ludlow v. Barr*, 3 Ohio, 388.

The plaintiff in ejectment, in possession of premises under a defective title, was held to have prima facie right to recover against a party subsequently entering. *Newnam v. Cincinnati*, 18 Ohio, 323.

Pennsylvania.

A prior possession was held sufficient to enable the plaintiff in ejectment to recover against an intruder. *Kline v. Johnston*, 24 Pa. 72. The court said: "A man who enters on what is called vacant land, with a view to acquire title under the laws of the state, may recover against one who turns him out of possession without right."

A disseisor who first deprived the true owner of his possession in land was held to have the same right to the possession thereof as against any person subsequently entering on the same without his consent or the authority of the owner, that the owner had against him. *Hoey v. Furman*, 1 Pa. St. 295, 44 Am. Dec. 129.

And possession of land by a corporation was held sufficient title in ejectment to recover from one holding under an invalid tax sale. *Rockland & V. Coal & Oil Co. v. McCalmont*, 72 Pa. 221. In this case the legal title was in one of the members of the corporation.

In ejectment possession was held to be presumptive evidence of seisin in fee, until the contrary was shown. *Jones v. Bland*, 112 Pa. 176, 2 Atl. 541.

In *Woods v. Lane*, 2 Serg. & R. 53, it was said: "A naked possession is good title to recover in ejectment against one who puts me out of possession and can show no better title than mine."

A party was in possession of disputed land between lots. He sold his lot, thus cutting off all access to the disputed part. In a subsequent action of ejectment against a neighbor who took possession, it was held

purposes while the bar continues. . . . It is as if no such right had ever existed." p. 43.

In *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121, 13 Ann. Cas. 860, it was held that injunction would lie against execution upon a dormant judgment, because the plaintiffs sought only "to hold what the law had already given them." p. 459. In *Girard Trust Co. v. Jones*, 81 Kan. 753, 106 Pac. 1052, it was held that a tax deed good on its face, of record more than five years, the holders being in possession, vests in them an absolute title. It was further held, however, that when the fee title holder sought to foreclose or extinguish the mortgage lien, and made the tax deed holders (who had an absolute title) defendants,

while they could set up their tax deed, they could not properly ask to have their title quieted. The tax deed holders did in fact ask to have the title quieted, and it was said that they were "at least entitled to set up the tax deed by way of defense, and to prove that it was a valid conveyance which defeated the lien of the mortgage, and a judgment to that effect is as far reaching and effective as would be one which quieted their title as against the lien holder." p. 755.

The weapon and shield phrase is proper in many cases and under many circumstances, but it cannot be of general application. Whenever possession and the statute of limitations have created a fixed status, vesting a good title against all adverse

that the proof did not show that plaintiff had not abandoned, and he could not recover. *Akin v. Byrd*, 153 Pa. 23, 25 Atl. 866.

Texas.

A purchaser of school land in possession was held entitled to maintain ejectment against a trespasser. This was without regard to plaintiff's title. *Gray v. Thompson*, 5 Tex. Civ. App. 33, 23 S. W. 926.

Vermont.

Actual seisin was held sufficient to recover as well as to defend against a stranger to the title. *Ellithorp v. Dewing*, 1 D. Chip. (Vt.) 141. The court said: "He who is first seized may recover or defend against anyone except him who has a paramount title. If disseised by a stranger, he may maintain an action of ejectment against the disseisor."

And a prior possession under claim of title was held in itself sufficient title in ejectment, unless the premises should be left so long as to raise presumption of abandonment, where the defendant set up no title. *Warner v. Page*, 4 Vt. 291, 24 Am. Dec. 607.

And a mortgagee in possession was held entitled to recover in ejectment against a stranger, until he showed a better title. *Reed v. Shepley*, 6 Vt. 602.

And a possessory right under a deed was held sufficient to enable plaintiff to maintain ejectment against an intruder. *Russell v. Brooks*, 27 Vt. 640.

Virginia.

In ejectment it was held that the party ousted could recover the premises upon his possession merely, and his right to recover could be resisted only by showing that the defendant had title, or authority under the title. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481. This was said to be one of the exceptions to the general rule that the plaintiff in ejectment recovers on the strength of his own title. 46 L.R.A. (N.S.)

And against an intrusion by a stranger without title, on a peaceable possession, such possession was held sufficient to maintain the action of ejectment. *Rhule v. Seaboard Air Line R. Co.* 102 Va. 343, 46 S. E. 331. The court said that this exception to the rule as to proof of title in ejectment was as well established as the rule itself.

And against a mere intruder, an heir was held entitled to rely on the possession of his ancestor, and maintain ejectment. *Tapscott v. Cobbs*, 11 Gratt. 172. It was held no defense to show that title was in a third party.

In *Miller v. Williams*, 15 Gratt. 213, it was said: "If the plaintiffs, holding peaceable possession of the land, had been entered upon and ousted of such possession by the defendants, having neither title to, nor authority to enter upon, the premises, according to a recent decision of this court they could have maintained ejectment upon their possession alone, without showing a legal title."

In *Suttle v. Richmond*, F. & P. R. Co. 76 Va. 284, it was said: "This court also held, in *Lee v. Tapscott*, 2 Wash. (Va.) 276, that a person in peaceable possession of land, who is entered upon and ousted by a stranger without title, may recover in ejectment upon the strength of his mere previous possession. The reason is that actual seisin is evidence of title against all the world except the true owner, and the law will not permit that seisin to be wantonly invaded by one who himself has no title."

In *Suttle v. Richmond*, F. & P. R. Co. supra, it was said: "We do not mean to assert, as is sometimes broadly laid down, that with us ejectment is purely a legal action, and the right of possession essential to sustain it must, in all cases, be such as follows the legal title. Where, however, the title to the land in fee is the foundation upon which a recovery is predicated, the action partakes essentially of the nature of the old writ of right, is a substitute for it, and a recovery is conclusive upon the parties."

claimants, such title constitutes a weapon offensive, as well as defensive; and the fact that this condition has been brought about by the running of the statute does not change its character, or the rights thereunder. Certainly as to title by adverse possession this court is in line with practically all the courts of this country.

In *Wood v. Missouri, K. & T. R. Co.* 11 Kan. 324, and at page 348, it was said: "A mere trespasser, without color of right or title, who has been in the actual possession of real estate for fifteen years, claiming title thereto, becomes the owner of the property by virtue of the statute of limitations, if the property has been owned during all that time by some individual or individuals, and not by the United States."

Wisconsin.

Title by possession was held a degree of title, and sufficient to enable plaintiff to maintain ejectment against an intruder. *Bates v. Campbell*, 25 Wis. 613. This was under Wis. Rev. Stat. chap. 141, §§ 2-4, providing that no person can recover in an action for real estate unless he has, at the time of commencing the action, a valid subsisting interest in the premises and a right to recover, and that the complaint shall set forth that the plaintiff has an estate or interest, stating the same.

And where the defendant was an intruder, and claimed in ejectment under his naked possession only, the prior possession of the plaintiff was held sufficient to recover regardless of whether there was an outstanding title. *Mission of Immaculate Virgin v. Cronin*, 14 Misc. 372, 36 N. Y. Supp. 77.

And actual possession of land was held sufficient to sustain ejectment where the defendant did not show a better title. *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89.

English cases.

In *Allen v. Rivington*, 2 Wms' Saund. 111, it was held that in ejectment, where the plaintiff had priority of possession and the defendant showed no title, the plaintiff should have judgment. In the reporter's note it was said: "This case is evidently in direct contradiction to the well-established rule that the plaintiff in ejectment must recover by the strength of his own title, without any regard to the weakness of the defendant's. The word 'ejectment' was probably used by mistake instead of *ejectione firma*; in fact, in *Siderfin's* report of this case, the action is stated to be the latter."

In *Doe ex dem. Hughes v. Dyball*, 3 Car. & P. 610, *Moody & M.* 346, it was held in ejectment that where the tenant held peaceable possession for about a year, it was sufficient evidence of title against a trespasser.

A special verdict found an entry on the 46 L.R.A. (N.S.)

In *Gildehaus v. Whiting*, 39 Kan. 706, 711, 18 Pac. 916, 919, the following was quoted with approval from *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698: "When the bar of the statute becomes complete, however destitute of the color of title such occupancy may have been under, to the extent that it was actual, visible, and continuous, a title by prescription arises in the adverse occupant. This title is in all respects equal to a conveyance in fee." p. 475.

In *Anderson v. Burnham*, 52 Kan. 454, 34 Pac. 1056, it was held (syllabus, ¶ 1): "Possession of land by an adverse occupant for more than fifteen years, which is actual, notorious, continuous, and exclusive, will give title thereto, although such possession is entirely destitute of color of title."

plaintiff's possession, but did not find that the defendant had the primer possession, nor that he entered in the right or by the command of any who had title. The plaintiff had judgment. *Bateman v. Allen*, Cro. Eliz. 437.

But under 13 Eliz. chap. 20, avoiding a lease of a rectory by eighty days' nonresidence of the rector, it was held that a stranger could rely on this when sued in ejectment by the lessee. *Doe ex dem. Crisp v. Barber*, 2 T. R. 749.

The rule in ejectment was stated, that the plaintiff cannot recover but upon the strength of his own title. *Roe ex dem. Haldane v. Harvey*, 4 Burr. 2484.

b. Trespass to try title.

This action has been used in but few of the states. In South Carolina it seems that a mere possessory title would not be sufficient. In Texas, where this action is most used, it seems that possession would be sufficient title against a trespasser.

Possession was held to be sufficient evidence of title against any wrongdoer, whether he was a trespasser, or whether he claimed title, but did not show it. *Walkins v. Smith*, 91 Tex. 589, 45 S. W. 560.

Prior possession was held to be sufficient title to enable plaintiff to maintain the action of trespass to try title against an intruder. *Alexander v. Gilliam*, 39 Tex. 227. The court said: "The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is title strong enough to enable him to recover from a mere trespasser, without title."

Proof of possession was held to be sufficient title to enable plaintiff to recover in an action of trespass to try title against a trespasser. *Ibid.*; *Parker v. Ft. Worth & D. C. R. Co.* 71 Tex. 132, 8 S. W. 541.

In an action of trespass to try title, it was held that if plaintiff could maintain the action, it would be under three years'

In *Liebheit v. Enright*, 77 Kan. 321, 322, 94 Pac. 203, Enright sued to quiet title on the ground of adverse possession, and also on the strength of a tax deed acquired from another. It was there held that he could not be required to elect, and that he could maintain his action. It was said: "There was no reason why the plaintiff, holding under adverse possession, should not fortify and protect his possession and title thereunder by procuring an outstanding tax title from another party, nor any reason why he might not set up both as against the defendants." The closing paragraph of the opinion (page 323 of 77 Kan.) is in these words: "There being proof of adverse possession sufficient to give title and to sustain the finding and judgment of the court, it

is unnecessary to consider the claim of right under the tax title."

In *Viking Refrigerator & Mfg. Co. v. Crawford*, 84 Kan. 203, 35 L.R.A. (N.S.) 498, 114 Pac. 240, it was again held that one claiming to be the owner by adverse possession can maintain a suit to quiet his title.

1 Cyc. 1135, states that in America the doctrine is almost universal that possession for the statutory period not only bars the remedy of the holder of the paper title, but extinguishes his title, and vests title in fee in the adverse occupant, and cites decisions from twenty-nine states, one territory, and the United States Supreme Court, and proceeds: "The title acquired by adverse possession is a title in fee simple, and is as

possession under color of title. *Scott v. Rhea*, 21 Tex. 709. Section 15, Stat. Limitations, Hart. Dig. art. 2391, provides that any suit to recover real estate as against adverse possession under color of title shall be instituted within three years next after the cause of action accrued.

In *Lea v. Hernandez*, 10 Tex. 137, it was said: "It is true that one in actual, peaceable, and lawful possession of land may maintain an action against a mere trespasser by whom he has been dispossessed, but it is held that, where the plaintiff claims to recover on this ground, the fact of his prior possession must be clearly and unequivocally proved. *Jackson ex dem. Klock v. Hudson*, 3 Johns. 383, 3 Am. Dec. 500. We are of opinion that the evidence did not establish the fact of such possession in the plaintiff."

In *Wilson v. Palmer*, 18 Tex. 592, it was said: "It appears now to be a well-established principle, though once doubted, that a prior occupancy is sufficient title against a wrongdoer." But it was held that the proof did not show a continuous possession, or that it had not been abandoned by plaintiff.

In *Bonner v. Wiggins*, 52 Tex. 125, it was said: "As against a mere trespasser, possession is sufficient title to support an action. *Linard v. Crossland*, 10 Tex. 464, 60 Am. Dec. 213."

In *Caplen v. Drew*, 54 Tex. 493, it was said, in an action of trespass to try title: "What constitutes a sufficient title to make a prima facie case against a defendant in possession is discussed and clearly stated by the present chief justice in the case of *Keys v. Mason*, 44 Tex. 143, wherein it in effect is said, that merely a prior possession to that under which the defendant claims, with a regular claim of title, connecting himself with such prior possession, would overcome the presumption of right arising from the defendant's possession, and throw upon him the burden of disproving the plaintiff's case, or showing a superior title in himself."

But in *Geiger v. Kaigler*, 15 S. C. 262, it was held that in the action of trespass 46 L.R.A. (N.S.)

to try title mere prior possession would not be sufficient without proof of title. The court said: "This action was brought, as stated, expressly to recover the land in dispute, upon the ground that the plaintiffs had title to the same; and even if the old rule as to the necessity of proving title should now be held to be modified so as to allow a person deprived of the possession of land, under proper allegations, to recover that possession without proof of title, it can have no application to this case. Here prior possession cannot stand for title, although it is an action in the form prescribed by the Code, and not technically trespass to try title under the statute."

A possession of sixteen years only was held not to take the place of title. *Young v. Watson*, 1 McMull. L. 449. This was an action of trespass to try title. The possession proved had terminated fifty years before the suit. O'Neill, J., said: "Where the plaintiff's possession, actual or constructive, is entered upon, I think that such possession is evidence of title to put the defendant to prove his title." Referring to this case in *Geiger v. Kaigler*, supra, it was said: "What Judge O'Neill says in the same case most probably had reference to an action of *quare clausum fregit*."

In trespass to try title, it was held that plaintiff could not recover on possession, where there was proof of title in another, under whom defendant claimed. *Hallett v. Eslava*, 2 Stew. (Ala.) 115.

c. Writ of entry.

An entry on public land was held sufficient to maintain a writ of right against all other persons. *Thomas v. Hatch*, 3 Sumn. 170, Fed. Cas. No. 13,899.

Possession under a claim of right was held to constitute legal seisin which would avail in a writ of entry against everyone not having an older and better title. *Pettingell v. Boynton*, 139 Mass. 244, 29 N. E. 655. The court said: "Even if it had been shown that the possession of the demandants was not that of the true owner, as there may be a possession perfectly

perfect a title as one by deed from the original owners, or by patent or grant from the government."

At page 1138 the rule is thus stated: "Where the bar of the statute has become absolute, it is just as available for attaching as for defensive purposes, and its availability in this respect will not depend upon the occupant continuing in the actual possession of the property. He may maintain ejectment against any person acquiring the possession from him by force or fraud, or who has made entry thereon during a tem-

porary absence of the occupant, even though he be the true owner. It is likewise an incident of the completion of the statutory bar that the title thus acquired will be quieted in the adverse holder on a bill in equity for that purpose, even against the holder of the legal title barred, and the defendants will be enjoined from asserting title to the premises from former ownership that has been lost."

To the same effect as the paragraph last quoted is *Jenkins v. Dewey*, 49 Kan. 49, 30 Pac. 114, which was a suit to quiet title

legal and valid against one, and yet wholly insufficient as against another, it was proper to instruct the jury upon this point that, if the demandants had shown a good title as against the tenant, they were entitled to recover."

Prior naked possession was held sufficient title in a writ of right against persons claiming only by a possession subsequently acquired. *Hubbard v. Little*, 9 Cush. 475. The court said: "Actual possession of land gives a good title against a stranger having no title. Nor does this violate the well-established rule that a party is to recover upon the strength of his own title only. A possession, prior in point of time to that of a tenant, who has himself no title, but only a subsequent possession acquired by an ouster of the demandant, is a better title, upon the strength of which a party is entitled to recover."

A demandant was held entitled to maintain a writ of entry if he showed title or possession. *Graves v. Amoskeag Mfg. Co.* 44 N. H. 462. So, prior possession was held sufficient against one who had no title. *Gibson v. Bailey*, 9 N. H. 168; *Straw v. Jones*, 9 N. H. 400.

Where one entered under a warranty deed, it was held that he could maintain a writ of entry, although his title was less than a freehold. *Melcher v. Flanders*, 40 N. H. 139. And possession of the grantor was held sufficient to enable the grantee to maintain the writ against one having no title. *Wells v. Jackson Iron Mfg. Co.* 47 N. H. 235, 90 Am. Dec. 575.

And where a person was in possession of land, claiming to hold in fee simple, it was held that he could maintain a writ of entry against an intruder. *Porter v. Perkins*, 5 Mass. 233, 4 Am. Dec. 52.

A demandant in a writ of entry was held entitled to rely on a possessory title against an intruder who had no title. *Litchfield v. Scituate*, 136 Mass. 39.

In *Christy v. Scott*, 14 How. 283, 14 L. ed. 422, it was said: "But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practised."

But a prior possession was held insufficient where it had been abandoned. *Blaisdell v. Martin*, 9 N. H. 253. 46 L.R.A. (N.S.)

d. Quieting title.

In some states a possessory title is held sufficient to maintain an action to quiet title. But in some states the plaintiff's possession must have been founded upon a legal or equitable title, as in Oregon.

Possession of plaintiff by guardian until majority, claiming as heir of his mother, who claimed under the will of her husband, was held to be a claim and color of title, and was held sufficient to sustain a complaint to quiet title. *Pacheco v. Wilson*, 2 Ariz. 411, 18 Pac. 597.

And possession and occupation of land were held sufficient to enable plaintiff to maintain an action to quiet title against one who was only a trespasser. *McGovern v. Mowry*, 91 Cal. 383, 27 Pac. 746. Cal. Civ. Code, § 1006, provides that occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession.

And an action to quiet title by a person in possession claiming ownership under color of title was held proper. *Mitchell v. Trowbridge*, 47 Colo. 6, 105 Pac. 878.

And prior possession of plaintiff was held sufficient to enable her to maintain an action to quiet title against one who acquired her possession by mere entry. *Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 260. Ga. Civ. Code, § 5008, is the same as § 3366. The defendant had a deed from one who had no title, and the deed was void because the consideration was immoral.

Under Ind. Code, Rev. Stat. 1881, § 1070, providing that an action may be brought by any person, "either in or out of possession," to quiet title, it was held unnecessary to allege that plaintiff was in possession. *McCaslin v. State*, 99 Ind. 428.

And actual possession was held sufficient to give the occupant the right to maintain an action to quiet title against any person claiming an adverse interest. *Brenner v. Bigelow*, 8 Kan. 496. This was under Kan. Civ. Code, § 594, providing that an action may be brought by any person in possession of real property, against any person who claims interest therein, adverse to him, for the purpose of determining such adverse estate.

And under Kan. Civ. Code, § 594, a party in possession had the right to maintain an action to quiet title. *Giltinan v. Lam-*

against a husband who, not having joined with his wife in her conveyance more than fifteen years previously, claimed still to own an interest in the land which had been adversely possessed for the statutory period.

Mr. Justice Field, in *Sharon v. Tucker*, 144 U. S. 533, 544, 36 L. ed. 532, 535, 12 Sup. Ct. Rep. 720, 722, in holding that title can be quieted by one who has acquired it by adverse possession, said: "As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not

seem to be any just reason why the relief prayed for should not be granted." See also *Brown v. Anderson*, 90 Ind. 93, holding that ejectment can be maintained; *Independent Dist. v. Fagen*, 94 Iowa, 676, 63 N. W. 456, and *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306, holding that a grantee is bound to take notice of his grantor's possession and acts of ownership.

Finding no errors in the rulings of the trial court materially prejudicial to the defendant, the judgment is affirmed.

Petition for rehearing denied.

ert, 13 Kan. 476; *Giles v. Ortman*, 11 Kan. 59.

In order to maintain an action to quiet title under Kan. Civ. Code, § 594, it was held that plaintiff must have actual possession. *Douglass v. Nuzum*, 16 Kan. 515; *Douglass v. Bishop*, 24 Kan. 749; *Pierce v. Thompson*, 26 Kan. 714.

Title by naked possession was held sufficient to maintain an action for possession and to quiet title, where the defendant did not show any title. *Asher v. McCarty*, 2 Ky. L. Rep. 218.

To entitle a party to a proceeding under 2 N. Y. Rev. Stat. 321, § 1, similar to § 449 of the Code, to compel the determination of claims to vacant lots, it was held that the plaintiff should have been in the actual possession of the property for three years. *Churchill v. Onderdonk*, 59 N. Y. 134; *Cleveland v. Crawford*, 7 Hun, 619.

Actual possession for three years was held sufficient to entitle plaintiff to maintain an action under N. Y. Code Proc. § 449, providing for the determination of claims. *Ford v. Belmont*, 69 N. Y. 567. Plaintiff was defeated by reason of prior possession of defendant.

And under 3 N. Y. Rev. Stat. 5th ed. p. 600, providing for the determination of a claim to real property where plaintiff has been in the actual possession for three whole years before the service of notice, it was held that where the three years' actual possession did not immediately precede the action, it could not be maintained. *Boylston v. Wheeler*, 61 N. Y. 521.

Under N. Y. Code Civ. Proc. §§ 1638-1639, providing for the determination of a claim to real property where plaintiff has been in possession for three years, it was held that it was not essential that such possession should be adverse for three years to the defendant's claim. *Diefendorf v. Diefendorf*, 132 N. Y. 106, 30 N. E. 375.

Under N. Y. Code Civ. Proc. § 1638, it was held that the possession should be under some claim of title in order to maintain the action. *Bohn v. Hatch*, 133 N. Y. 70, 30 N. E. 659.

Plaintiff in possession under claim of title was held entitled to maintain a suit to quiet title. *Schroeder v. Gurney*, 10 Hun, 413. The court said: "There is a 46 L.R.A. (N.S.)

class of American cases, of highly respectable authority, which hold that the actual possession of land under a claim of title, whether well or ill-founded, proves or constitutes seisin in the sense of the common-law."

But Oregon act, providing that any person in possession of real property may maintain a suit in equity against another, who claims an estate or interest adverse, to determine such claim, was held not to apply where the possession was not founded on a legal or equitable title. *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925. Plaintiff was in possession claiming under a town-site act, which was held to confer no title as against a patent under which defendant claimed.

A party in possession, against whom a judgment in forcible entry and detainer had been rendered, was held not authorized to maintain an action to quiet title under Oregon Code, § 500, providing that a person in possession may bring a suit to quiet title. *Tichenor v. Knapp*, 6 Or. 205.

In *King v. French*, 2 Sawy. 441, Fed. Cas. No. 7,793, which was a suit under Or. Civ. Code, § 500, to quiet title, the court followed the rule of *Stark v. Starr*, 6 Wall. 410, 18 L. ed. 927, as to naked possession being insufficient.

Where there was no adverse possession under color of deed for seven years, or sufficient adverse possession without color of title, it was held that a suit to quiet title should be dismissed. *Baltzell v. McKinnon*, 57 Fla. 355, 49 So. 546; Fla. Gen. Stat. 1906, §§ 1721-22.

And under Wis. Rev. Stat. chap. 141, § 29, authorizing an action to quiet title by one in actual possession, it was held that a complaint was defective in failing to state that plaintiff was in possession, although it stated that plaintiff's grantor was in possession when he made a deed to plaintiff. *Shaffer v. Whelpley*, 37 Wis. 334.

e. Trespass.

A possessory title is held sufficient to sustain a recovery for injuries to the possession. Where the injury is permanent, as in a taking by a railroad, it seems there are some cases which deny the right of

recovery, on a possessory title, of full damages.

Possession was held to be prima facie evidence of title in fee, in an action for injuries to building and ground by a neighbor leaving an excavation so that high water damaged plaintiff. *Rau v. Minnesota Valley R. Co.* 13 Minn. 442, Gil. 407.

And where plaintiff was in possession, and defendant had a good title by paper, but he had lost all title by reason of adverse possession of a third party for fifteen years, it was held that plaintiff could maintain an action of trespass *quare clausum* against defendant. *Hughes v. Graves*, 39 Vt. 359, 94 Am. Dec. 331. The court said: "Quenton had no deed, but his adverse possession for the statutory period gave him an absolute, indefeasible title to the land against the whole world, on which he could either sue or defend as against the former owner. That being the case, is there sufficient virtue left in the defendant's paper title to warrant him in disturbing the plaintiff's possession?"

And naked possession was held sufficient to protect plaintiff against everyone but the true owner. A trespasser could not gainsay his right. *Shumway v. Phillips*, 22 Pa. 151.

And a plaintiff in trespass *quare clausum fregit* was held not required, in order to maintain his action, to show his title so long as he could show a right of possession, either adverse to or consistent with, the title set up by the defendant. *Todd v. Jackson*, 26 N. J. L. 526.

And driving stakes around the corners of unappropriated lands, and erecting salt works thereon, where that was the usual mode of taking possession, was held sufficient to base an action of trespass *quare clausum* thereon. *Cook v. Rider*, 16 Pick. 186.

Plaintiff in trespass *quare clausum fregit* had been in possession of land of the state, exceeding his grant. It was held that he could maintain the action for cutting trees, although the commonwealth, since the trespass, had limited plaintiff's boundaries so as not to include this land. *Cutts v. Spring*, 15 Mass. 135.

In *Slater v. Rawson*, 6 Met. 439, it was said that possession of land without title or color of title was sufficient to enable the plaintiff to recover the land from a trespasser.

And where two locations interlocked, it was held that plaintiff could maintain an action of trespass *quare clausum* upon his prior possessory title. *Spurr v. Bartholomew*, 2 Met. 479. In this case no adverse claim was interposed for nearly thirty years.

If plaintiff proved that at the time of the alleged trespass he was in possession of the place where a hydraulic ram was erected, it was held that he would be entitled to recover damages for the trespass, without further proof of title, unless the defendant proved he had a better title, or a possession in common with plaintiff. 46 L.R.A. (N.S.)

Bartholomew v. Edwards, 1 Houst (Del.) 17.

Possession alone was held sufficient to support an action of trespass *quare clausum fregit*. *Pearson v. Smith*, 1 N. C. pt. 2. p. 444, (Conference, 367); *Lamb v. Swain*, 48 N. C. (3 Jones, L.) 370 (in this case the plaintiff claimed title under his deed); *Myrick v. Bishop*, 8 N. C. (1 Hawks) 485; *Horton v. Hensley*, 23 N. C. (1 Ired. L.) 163; *Smith v. Ingram*, 29 N. C. (7 Ired. L.) 175.

And a person in actual possession of a mining claim before defendant acquired any rights was held entitled to maintain an action against trespassers. *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 503, 11 Fed. 125, 9 Mor. Min. Rep. 524.

In an action for trespass *quare clausum* it was held no defense to plead title in a third party, where plaintiff was in possession under color of title. *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240. The court said: "It must be kept in mind that this is an action of trespass *quare clausum fregit*, and not an action of trespass to try titles; and that there is this fundamental difference between these two actions; *vis.*, that in the former, the object being to recover damages for trespass upon the possession of the land, it is not necessary for the plaintiff to show title himself, but possession merely; while in the latter, the plaintiff, in order to recover, must show title in himself, and must recover upon the strength of his own title, and not upon the weakness of his adversary's title."

And trespass *quare clausum fregit* was held to be an action for the violation of plaintiff's possession; and if he was in the actual occupancy, he could maintain an action without regard to title. *Johnson v. M'Ilwain, Rice*, L. 375.

In *Olinger v. Shepherd*, 12 Gratt. 462, it was said: "The remedy for a forcible or unlawful entry was designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If the defendant enters unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession. His actual possession, of itself, gives him a right of possession against any person not having a right of entry. That the land belongs to the commonwealth will make no difference."

One holding land under a lease that was void was held entitled to maintain trespass *quare clausum fregit* against a trespasser. *Graham v. Peat*, 1 East. 246. *Kenyon, Ch. J.*, said: "There is no doubt that the plaintiff's possession in this case was sufficient to maintain trespass against a wrongdoer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrongdoer."

In *Chambers v. Donaldson*, 11 East, 74, which was an action of trespass, Bayley, J., held: "The question is, whether a mere wrongdoer, when sued for a trespass upon the possession of another, has a right by this mode of pleading to call upon him to set out his title. If the command of the person in whom soil and freehold is pleaded may be traversed, then no other than the person who has the title to the freehold can compel the party in possession to show his own title to that possession; but if the command be not traversable, then every wrongdoer may call on the party in possession to make that disclosure. Trespass is now understood to be a possessory action; but it must cease to be so, if every wrongdoer could in this manner oblige the party in possession to set out his title."

And in trespass *quare clausum fregit*, where the defendant did not claim on prior possession or title, it was held that prior occupancy was a sufficient title for plaintiff. *Catteris v. Cowper*, 4 Taunt. 548, 13 Revised Rep. 682.

In *Lambert v. Stroother*, Willes Rep. 221, it was said that trespass is a possessory action founded merely on the possession, and it is not at all necessary that the right should come in question.

A possessory title was held sufficient to enable the owner to recover damages for discontinuing a highway. *Hawkins v. Berkshire County*, 2 Allen, 254.

And for alteration of a highway. *State Lunatic Hospital v. Worcester County*, 1 Met. 437.

And for taking land by a railroad. *Andrew v. Nantasket Beach R. Co.* 152 Mass. 506, 25 N. E. 966; *Sacramento Valley R. Co. v. Moffatt*, 7 Cal. 577.

And for taking land by an aqueduct company. *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 544.

The title necessary to be proved in an action for injury caused by fire from a railroad train was held to be the same as in an action of trespass *quare clausum fregit*. *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69. The court said: "But if he was in the actual possession and occupancy of the land when the trespass was committed, he may maintain trespass or replevin, according to the exigencies of the case, without making any proof of a paper title, unless the defendant prove an adverse title thereto of a higher character than a mere possessory one."

In an action for damages from a fire by railroad train where the answer put in issue the title of plaintiff, it was held that plaintiff should have been required to prove title by another method than parol evidence, unless such testimony proved title by adverse possession and the statute of limitations. *Mayo v. Spartanburg, U. & C. R. Co.* 40 S. C. 517, 19 S. E. 73.

But in an action by one in possession of land claiming title, against a city, for a nuisance from water, it was held that a recovery could not be had for a permanent injury on proof of possession only. *Winches-* 46 L.R.A. (N.S.)

ter v. Stevens Point, 58 Wis. 350, 17 N. W. 3, 547. In this case the court said: "There are authorities which hold that the seisin of the plaintiff in any real action is proved, prima facie, by evidence of his actual possession under claim of title. That is, these facts afford presumptive evidence of seisin in fee simple, until the contrary appears. But that rule would not save the plaintiff's case, because she offered evidence which disproved or overcame the presumption arising from these facts. She was not content to show actual possession under claim of title, but she undertook to prove title and failed. The evidence was probably offered to prove an adverse possession, under paper title, for ten years. That would have been sufficient had she established the fact of such adverse possession for the requisite time. But she did not; so the question returns, Was not the plaintiff bound, under the circumstances, to prove her title? We think she was."

The plaintiff who was in possession in an action for damages in condemnation was held required to show title. *Robbins v. Milwaukee & H. R. Co.* 6 Wis. 636. The court said: "The party from whom it is taken can, obviously, demand payment for no greater interest than he may have had therein. To enable the plaintiff to recover at all, he must show some title. If it be a bare possession or occupancy, he certainly cannot demand and recover payment for the fee. If his estate be that of a lease for years, he cannot recover as for a freehold estate."

In *Missouri River, Ft. S. & G. R. Co. v. Owen*, 8 Kan. 409, it was said: "We have not failed to notice the case of *Robbins v. Milwaukee & H. R. Co.* supra, where a contrary doctrine is maintained, and perhaps correctly in that state. Certainly it is not convincing to us as applicable to the law of this state; and so far as we can see, the case stands alone, and unsupported by authority. Cases under laws that admit the taking without compensation being first made, and authorize the owner to initiate proceedings to recover damages, are not applicable to our laws."

f. Partition.

The holder of a possessory interest in mining property was held not entitled to maintain a bill in equity for partition in the Federal court. *Strettell v. Ballou*, 3 McCrary, 46, 9 Fed. 256, 11 Mor. Min. Rep. 220. The legal title to this land was held to be in the United States.

g. Injunction.

Where plaintiff had been in possession for three years, it was held that he could have an injunction to prevent interference with the possession pending an action to compel the determination of a claim. *Stamm v. Bostwick*, 30 Hun, 71. This was an action under N. Y. Code Civ. Proc. § 1638, providing for determination of claim.

In *Montgomery v. Robinson*, 4 Del. Ch

490, an injunction was granted against the defendant to prevent him from tearing down a partition wall and encroaching on plaintiff, who had held adverse possession to said wall. The wall was then abandoned by defendant and the bill dismissed by consent.

II. Title by adverse possession.

a. Quieting title.

The weight of authority is to the effect that a title acquired by adverse possession may be quieted, and the cloud on the same removed in an action by the party holding such adverse possession. Such title is held sufficient for offensive as well as defensive purposes.

And in an action to quiet title by one having title by adverse possession and by tax title, it was held that he could not be put to election as to which title he would rely upon. *Liebheit v. Enright*, 77 Kan. 321, 94 Pac. 203. It was held that his title by adverse possession was sufficient.

The plaintiff in a suit to quiet title was held to be entitled to maintain the action, and to relief, where he and his grantors had adverse possession for fifteen years under a claim of ownership. *Viking Refrigerator Mfg. Co. v. Crawford*, 84 Kan. 203, 35 L.R.A.(N.S.) 408, 114 Pac. 240. They had no color of title.

In *Thompson v. Greer*, 62 Kan. 522, 64 Pac. 48, referred to in *FREEMAN v. FUNKE*, the statute of limitation was not asserted. The phrase "sword" and "shield" was on the point of effect of answer with counterclaim giving jurisdiction to court.

Corlett v. Mutual Ben. L. Ins. Co. 60 Kan. 134, 55 Pac. 844, was an action to foreclose a mortgage against a grantee of a mortgagor. The term, "a weapon of resistance, not of attack," was applied because the answer pleading the statute and asking title to be quieted was not a "cause of action," under the statute authorizing a counterclaim and set-off.

In *Burditt v. Burditt*, 62 Kan. 576, 64 Pac. 77, where it is said that the statute of limitations is "a statute of defense, not a weapon of attack," the plaintiff's ancestor was in possession of land, and the defendant held the title and advanced money to pay for the same and to pay taxes, and was to reconvey the land on repayment of the money. The plaintiff pleaded the statute of limitation to the answer, which set forth the items due. But it was held that the statute of limitation did not apply as the property was defendant's security.

In *Capell v. Dill*, 82 Kan. 652, 109 Pac. 286, where the defendants successfully defended against the claim of plaintiff to have his title quieted, but failed in their demand for affirmative relief, because they could not quiet title against an unpaid mortgage, the court said: "The statute of limitations, while a shield for defense, is not a weapon of attack, and cannot be made the basis of affirmative relief." 46 L.R.A.(N.S.)

In *Bowman v. Cockrill*, 6 Kan. 311, the court said: "It is admitted that statutes of limitations can never operate except to bar actions, and can never operate to disturb vested rights. They can never operate where no cause of action exists, and can never operate except when rights have already been disturbed. The effect of the operation of the statute of limitations is not to create a cause of action; its effect is to take away a cause of action already created by acts of one or both of the parties. The effect is not to disturb rights, nor to transfer property; but to leave rights and property just where the parties themselves have voluntarily chosen to leave them during the running of the statute." In this case the defendant in ejectment held under a tax deed which was sustained as a valid deed, and not subject to attack after two years. The statements supra therefore were *dicta*.

A mortgagor was held not entitled to quiet title against the holder of the mortgage on the ground that the right to foreclose was barred by limitation. *Gibson v. Johnson*, 73 Kan. 281. Kan. Gen. Stat. 1901, § 4453, Code Civ. Proc. § 25, provides that when a right of action is barred by limitation, it shall be unavailable either as a cause of action or a ground of defense.

Johnson v. Wynne, 64 Kan. 138, 67 Pac. 549, referred to as a case holding that the statute of limitation is a shield, and not a weapon of offense, was a suit to quiet title brought by a judgment debtor against an execution creditor, claiming the lien was lost by the lapse of one year where an order of revivor was not made.

Adverse possession of land under a bond for title, for more than twenty years, was held sufficient to authorize a suit to quiet title and to remove a cloud on the same. *Marston v. Rowe*, 39 Ala. 722.

And title by adverse possession for twenty years was held sufficient to authorize a suit to quiet title. *Harms v. Kransz*, 167 Ill. 421, 47 N.E. 746. 1 Starr. & C. Anno. Stat. p. 419, chap. 22, § 50, provides that a chancery court may determine bills to quiet title whether the lands are improved and occupied or unoccupied.

And where plaintiffs' adverse possession was sufficient to bar rights of previous owners, it was held they could maintain an action to quiet title. *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; *Stellwagen v. Tucker*, 144 U. S. 548, 36 L. ed. 537, 12 Sup. Ct. Rep. 724; *Alexander v. Pendleton*, 8 Cranch, 462, 3 L. ed. 624.

And title acquired by adverse possession was held sufficient to maintain a suit in equity to remove a cloud on title. *Parker v. Miller-Brent Lumber Co.* 157 Ala. 282, 47 So. 580; *Torrent Fire Engine Co. v. Mobile*, 101 Ala. 559, 14 So. 557.

And possession sufficient to secure title by limitation was held to operate as a complete investiture of title, and to enable plaintiff to maintain an action to enjoin a trespass and to quiet title. *St. Francis*

Levee Dist. v. Fleming, 93 Ark. 490, 125 S. W. 132, 659.

And a party whose adverse possession had ripened into a title was held entitled to all the remedies to quiet his possession that were incident to possessions under written titles. Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722.

In an action to quiet title, the plaintiff proved possession of mining ground. It was held that he made out all the title required to entitle him to the relief demanded. Niagara Consol. Gold Min. Co. v. Bunker Hill Consol. Min. Co. 59 Cal. 612. Plaintiff's title was purely a possessory one.

And title by adverse possession was held sufficient to enable plaintiff to maintain a suit to quiet title. McCormack v. Silsby, 82 Cal. 72, 22 Pac. 874.

In Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370, 12 Mor. Min. Rep. 502, under Nev. Civ. Practice Act, § 256, providing for quieting title against the assertion of a claim to real property prejudicial to the plaintiff, it was held that it was immaterial how the plaintiff acquired possession, and that the defendant should plead and prove a good title or else lose. On this question, Blasdel v. Williams, 9 Nev. 161, to the contrary, was overruled.

Under N. Y. Code Civ. Proc. § 1638, providing for actions to determine claims to real estate, it was held that adverse possession under claim of title by plaintiff, as required by statute, was sufficient to compel the defendant to show his title. Stackhouse v. Stotenbur, 22 App. Div. 312, 47 N. Y. Supp. 940.

And in an action under § 1638, N. Y. Code Civ. Proc., where plaintiff proved possession within the time required, and the defendant did not prove any title, it was held that final judgment should bar the defendant from all claim of title. Merritt v. Smith, 50 App. Div. 350, 63 N. Y. Supp. 1068.

And a suit to quiet title was held proper where plaintiff had acquired title by adverse possession under claim of ownership. Parker v. Metzger, 12 Or. 407, 7 Pac. 518.

In an action to quiet title, it was held that the complainant should show himself to be the owner of the legal title—the thing obscured—before he could have the cloud removed. King v. Coleman, 98 Tenn. 570, 40 S. W. 1082. The court said in regard to the defendants: "If they had no claim whatever but that of mere possession, he would still be required to produce such title before he could have them ejected." This was under Shannon's Code (Tenn.) § 4970, providing that any person having a valid subsisting legal interest in real property, and a right to the immediate possession, may recover in ejectment.

In some states ten years' adverse possession is held sufficient to authorize a suit to quiet title.

So, ten years' adverse possession under claim of title was held sufficient to sustain a suit to quiet title. St. Luke's 46 L.R.A. (N.S.)

Parish v. Miller, — Iowa, —, 84 N. W. 686; Cramer v. Clow, 81 Iowa, 255, 9 L.R.A. 772, 47 N. W. 59; Tourtelotte v. Pearce, 27 Neb. 57, 42 N. W. 915.

And in an action to quiet title, where complainant had been in possession for ten years before defendant entered, and the latter had not been in continuous possession for such a length of time, it was held that plaintiff could maintain the action and was entitled to the relief. Echols v. Hubbard, 90 Ala. 309, 7 So. 817.

And under Cal. Civ. Code, § 1007, it was held that the finding that plaintiff had had adverse possession for more than ten years prior to the commencement of the action established his title. Orack v. Powelson, 3 Cal. App. 282, 85 Pac. 129.

A mortgagee took possession under a void foreclosure. More than ten years thereafter, his grantees brought suit to quiet title. It was held that under N. D. Rev. Code 1899, § 5207, providing that an action for relief not herein provided for must be commenced within ten years, the right of the mortgagor was barred and plaintiff entitled to relief. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792.

A purchaser of land at sheriff's sale after ten years' possession was held entitled to maintain a suit to quiet title, under Ind. Burnes's Rev. Stat. 1894 (§ 293, Rev. Stat. 1881), prohibiting an action for the recovery of property sold on execution, by the debtor after ten years. Marley v. State, 147 Ind. 145, 46 N. E. 466.

Adverse possession of land for ten years under an oral contract of purchase from defendant was held to entitle plaintiff to maintain an action to quiet title. Quinn v. Quinn, 76 Iowa, 565, 41 N. W. 316.

The defendant in a suit to quiet title was held entitled to affirmative relief upon a title by limitation on cross petition, where plaintiff discontinued. Cramer v. Clow, 81 Iowa, 255, 9 L.R.A. 772, 47 N. W. 59. The court said: "It is claimed that, while a defendant in possession may plead the bar of the statute in defense, he has no right to make it the basis of an action to quiet title. The cases cited by counsel to sustain this claim do not, in our opinion, support this position. Actual adverse possession of real estate for ten years creates a title by prescription, and it is well settled that the right is not merely defensive, but is, for all practical purposes, a title, and that an action to quiet title founded upon such possession may be maintained."

Adverse possession by a school district of school land for ten years, under a claim of ownership, was held to entitle occupant to a suit to quiet title. Independent Dist. v. Fagen, 94 Iowa, 676, 63 N. W. 456. This was on the ground that a title created by prescription was available for all practical purposes.

And in an action to quiet title, it was held that the plaintiffs and grantors, having been in the open, notorious, exclusive, continuous adverse possession for more than ten years as owners, could have the

title quieted. *Petersen v. Townsend*, 30 Neb. 373, 46 N. W. 526.

And where plaintiff and his grantors had been in the open, exclusive, and adverse possession of land under claim of title for more than ten years, it was held that he could maintain a suit to quiet title, under Or. Civ. Code, § 504. *Logus v. Hutson*, 24 Or. 528, 34 Pac. 477.

A party in adverse possession of land for ten years was held entitled to maintain an action to quiet title. *Moody v. Holcomb*, 26 Tex. 714. The court said: "Naked possession for the length of time, and with the incidents, enumerated in the statute, invests a party with a title or right to his land as fully and completely as it could be done by a deed or patent."

In an action to quiet title, it was held that thirty years' possession by virtue of a location and survey was sufficient to enable plaintiff to recover. *Turner v. Rogers*, 38 Tex. 582. The court said: "The right of entry to those laboring under no disability was certainly tolled long before the appellants entered upon the land; and under our law the right of entry is not only tolled, but a right of action accrues to one who has been ousted of such a possession. Our statute confers this right after ten years' uninterrupted adverse possession."

Under some statutes seven years' adverse possession will authorize a suit to quiet title.

So, under Ill. Stat. chap. 83, § 7, the same as statute 1839, it was held that where a party was in possession under color of title, and had paid the taxes for ten years, an action could be maintained by a suit to quiet title. *Mickey v. Barton*, 194 Ill. 446, 62 N. E. 802. This statute provides that when a person having color of title, made in good faith to vacant land, shall pay all taxes for seven successive years, he shall be deemed the legal owner; provided that if a person having a better paper title shall during the seven years pay the taxes, the section shall not apply.

In *Ross v. Cobb*, 48 Ill. 111, it was held that a party in possession, claiming title by reason of paying taxes seven years, could not maintain partition without showing that the defendants were not under disability. It was said that they could maintain a suit to quiet title.

And under the Ill. act 1839, it was held that a party in possession who had paid taxes for seven years, claiming title under a tax deed, could maintain a bill to quiet title. *Chicago v. Middlebrooke*, 143 Ill. 265, 32 N. E. 457.

An entry under a tax deed and the payment of taxes for seven years were held sufficient title to enable the party in possession to maintain a suit to quiet title. *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202. This was under Ill. act. 1839.

In *Bellefontaine Improv. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184, the action was one for partition and to quiet title, brought by the party in 46 L.R.A. (N.S.)

possession for seven years under payment of taxes.

b. Ejectment.

1. Generally.

The weight of authority in the United States seems now to be in favor of the doctrine that possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title which may be actively asserted in ejectment in all respects as if acquired by deed.

In *Bunce v. Bidwell*, 43 Mich. 542, 5 N. W. 1023, it was said that adverse possession was not "a right of defense merely, but it is, for all practical purposes, a title, and affirmative remedies might be had upon it as against the original owner, should he afterwards succeed in obtaining possession."

In *Taylor v. Burnside*, 1 Gratt. 165, speaking of the statutes of limitation, the court said: "The effect of these statutes is to render a continued adversary possession, for a sufficient length of time, conclusive in the action of ejectment against the right of possession, and in the writ of right against the right of property. This result is so absolute that such adversary possession is not only a sufficient defense on the part of the defendant or tenant, but, where it has existed on the part of the plaintiff or demandant, is a sufficient ground for recovery against the strongest proof of better title."

In *Stewart v. Harris*, 2 Swan, 656, referring to the statute of limitation, the court said: "This statute, therefore, in the given case, has the effect to vest the legal title in the person in whose favor it may operate; and he may support or defend the action of ejectment, in virtue of such title, in like manner as in the case of a registered deed."

In *Hubbard v. Godfrey*, 100 Tenn. 150, 47 S. W. 81, it was said: "In Tennessee ejectment is, by the act of 1851-52, chap. 152, § 2, distinctively a real action. That act provides, viz.: 'Any person having a valid, subsisting, legal interest in real property, and a right to the immediate possession thereof, may recover the same by an action of ejectment.' Shannon's Code, § 4970."

In *Beale v. Hite*, 35 Or. 176, 57 Pac. 322, 58 Pac. 102, it was said, "But where, as in this state, an adverse possession of real property for the period prescribed by the statute vests a perfect title in the possessor as against the whole world, and gives him all the remedies incident to the possession and ownership under a written title in the title (*Parker v. Metzger*, 12 Or. 407, 7 Pac. 518), it seems to us no other reasonable conclusion can be reached than that such possession must be under a claim of title in the occupant, and with an intention to hold it against all the world."

And in *Reid v. Anderson*, 13 App. D. C. 30, in answer to the question, "What are the essential constituents of adverse pos-

session to make it effectual either as ground for recovery in ejectment, or as a defense to that action?" it was said that the most material element would be continuous adverse possession.

In *Jacks v. Chaffin*, 34 Ark. 534, continuity of possession was held not necessary after the bar of the statute attached.

In *Morris v. Brooke* (Del.) 25 Alb. L. J. 90, an action of ejectment to recover for an alluvial bar attached to plaintiff's island, it was said: "I have no doubt that a grant from the proprietors or the commonwealth may be presumed from a long undisturbed possession."

In ejectment possession was held sufficient title to recover, where it would amount to a bar if in the defendant. *Holtzapple v. Phillibaum*, 4 Wash. C. C. 356, Fed. Cas. No. 6,648. To defeat this right, it was held that the adverse party would have to prove an entry made or a suit brought in time.

A plaintiff in trespass to try title, claiming title through the operation of the statutes of limitations, was held required specifically to plead such title, under Tex. Rev. Stat. 1895, § 3371, providing that the statute of limitation shall not avail in any suit unless it be specifically set forth as a defense in the answer. *Erp v. Tillman*, 103 Tex. 574, 131 S. W. 1057, reversing — Tex. Civ. App. —, 121 S. W. 547.

In an action of trespass to try title, where plaintiff pleaded title by the statute of limitations, it was held that he could also plead and rely on other sources of title. *Mayers v. Paxton*, 78 Tex. 196, 14 S. W. 568.

In *Molino v. Benavides*, 94 Tex. 413, 60 S. W. 875, it was said: "We think it proper to say that we are not inclined to recede from the rule announced in *Mayers v. Paxton*, supra, as to a necessity of pleading specially the statute of limitations, where the plaintiff in an action of trespass to try title seeks to recover upon a title acquired by adverse possession."

And under Or. Civ. Code, § 313, providing that any person who has a legal estate in real property and a present right to the possession may recover such possession by an action at law, it was held that one who had acquired title by adverse possession under a claim of title could maintain this action. *Joy v. Stump*, 14 Or. 361, 12 Pac. 929.

In *Greene v. Couse*, 127 N. Y. 386, 13 L.R.A. 206, 24 Am. St. Rep. 458, 28 N. E. 15, it was said in regard to title by adverse possession: "And title so established may be as effectual as that created in any other manner, for the purpose of remedy or defense founded upon it."

An action of ejectment founded only upon adverse possession was held to be maintainable against the true owner. *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441. The court said: "As the plaintiff's claim of title was not founded upon a written instrument, judgment, or decree, it was necessary for him to show an actual continued occu-

pation of the premises under a claim of title not founded upon written evidence exclusive of any other right. Code Civ. Proc. §§ 370, 371."

And a city in possession of land was held entitled to recover the same in ejectment from an intruder, where there had been no abandonment with the intention not to return. *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55.

In ejectment it was held that if, from the possession proved, title could be inferred, it was competent evidence of title as against the defendant, who was without any claim of title, and the plaintiff should prevail, although title was actually in a third party. *Hensler v. Hartman*, 16 Abb. N. C. 176, note.

And title by possession was held in ejectment to be prima facie evidence of a fee. *Day v. Alverson*, 9 Wend. 223.

Title by prescription was held to be a complete title, and to sustain an action of ejectment as well as a record title. *Dahlem v. Abbott*, 153 Mich. 465, 116 N. W. 1007.

In ejectment under a claim of title and possession for many years, it was held that no presumption against the title could be had by reason of the grant by the state to a third party sixty years prior to the suit. *Bennett v. Horr*, 47 Mich. 221, 10 N. W. 347.

But in *Snowden v. Loree*, 122 Fed. 493, an ejectment case, it was said: "We find no evidence of facts sufficient to vest in the plaintiffs a title by adverse possession for the statutory period. Such title, if proven, has been held sufficient to entitle one to recover in ejectment."

Interruption of possession of plaintiff before the statute of limitation attached was held to give a good defense in ejectment. *Scott v. Mills*, 49 Ark. 266, 4 S. W. 908.

Former possession for seven years was held insufficient to enable the occupant to maintain ejectment against the claim of an older patentee, under Ky. act 1809, providing that possession, to bar actions, must have continued for seven years next preceding the commencement of the action. *Dorch v. Thompson*, 12 B. Mon. 380.

In *Ray v. Sweeney*, 14 Bush, 1, 29 Am. Rep. 388, it was said that adverse possession sufficient to bar the former owner would be sufficient to maintain ejectment in the matter of easements. But in this case the cause of action had not accrued.

And adverse possession was held not to give title where the legal title had not passed out of the United States. After it so passed prior possession could not avail where the occupant was ejected by suit. Adverse possession then ceased. In a subsequent suit prior possession was held of no avail where the defendant claimed under color of title. *Dunn v. Miller*, 75 Mo. 260.

Under statute 20 Car. II. chap. 3, avoiding all future grants of the Forest of Dean by the Crown, it was held that the lessor of the plaintiff could not recover in ejectment against a stranger, as he could recover only on the strength of his own title. *Goodtitle*

v. Baldwin, 11 East, 488, 14 Revised Rep. 674. In this case the lessor's father encroached on the forest sixty years previously, which continued for forty-one years, and continued after his death by possession of his widow for two years, and the defendant had possession for seventeen years.

Adverse possession was held not to create prescription against the state. *Kahoomana v. Moehonua*, 3 Haw. 635.

Where possession was without color of title, it was held that the presumption was that the possession was in subordination to the legal title, until the contrary was shown. *Lund v. Parker*, 3 N. H. 49.

In *Phillips v. Carroll*, 5 Ky. L. Rep. 599, the syllabus of the unreported case says: "The chancellor will not require those holding the legal title to land to surrender it to one whose only claim of title is in an adverse possession, although he might be entitled by reason thereof to retain possession in his own right."

3. Possession twenty years or more.

Twenty years or more is usually held sufficient lapse of time to acquire title by adverse possession commencing under color or claim of title. In some states the time is much shorter under the statute. Where the title is complete, ejectment can be maintained by the holder even against the original owner.

The sufficiency of paper title was held immaterial where both parties claimed under the common source of title, and plaintiffs and their deviser had been in adverse possession for more than forty years under claim of title. *Robinson v. Hillman*, 36 App. D. C. 576.

And the continued adverse possession of land under a deed for more than twenty-five years was held sufficient to authorize a recovery in ejectment. *Orr v. Hollidays*, 9 B. Mon. 60.

And adverse possession under a claim of title for more than thirty years was held to support an action of ejectment. *Rheinfort v. Abel*, — N. J. Eq. —, 80 Atl. 1059.

And adverse possession for over twenty years with claim of title was held sufficient to maintain ejectment against the true owner. *Jackson ex dem. Gee v. Oltz*, 8 Wend. 440, 5 Mor. Min. Rep. 202.

In ejectment, possession for twenty-four years under claim of title was held sufficient to enable plaintiff to maintain the action. *Innis v. Campbell*, 1 Rawle, 373.

And exclusive, peaceable, uninterrupted possession under color of the title for forty-five years was held sufficient to sustain an action of ejectment. *Houx v. Batteen*, 68 Mo. 84.

In *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142, it was said that one of the ways to establish a good title against the world by plaintiff in ejectment was: "Without exhibiting any grant from the state, he may show open, notorious, continuous adverse and unequivocal possession of the land in 46 L.R.A. (N.S.)

controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. . . . He may show, as against the state, possession under known and visible boundaries for thirty years, or as against individuals, for twenty years, before the action was brought. Sections 139 and 144, Code of North Carolina."

In *Fisk v. Hopping*, 169 Ill. 105, 48 N. E. 323, where plaintiffs and their grantors had been in possession forty years, it was said that if a deed in plaintiff's title is insufficient, "the evidence still shows a prima facie title in plaintiff" in ejectment.

If plaintiff entered in possession under a deed, and continued in possession for a period of twenty years, it was held that this constituted title under which he could maintain ejectment against any intruder. *Eddy v. Gage*, 147 Ill. 162, 35 N. E. 347.

And thirty years possession under a claim of right was held to give a good title on which ejectment could be maintained, unless defendant had a better title. *Davis v. Thompson*, 56 Mo. 39.

A possession under a claim of title was held sufficient to maintain an action of trespass to try title. *Smoot v. Lecatt*, 1 Stew. (Ala.) 590. The court said: "The true rule appears to be that twenty years' possession under a claim of right creates a legal presumption of a grant, so that its production may be dispensed with, unless it should be rendered necessary to rebut a paper title adduced by the adverse party; and such was the decision of this court at the last term. . . . This is a lapse of time which, by our statute, is sufficient to toll the right of entry. The adoption of this period may be regarded as a legislative sanction given to the correctness of the above rule. We also hold that a like possession for a shorter period creates a presumption of right less conclusive, but which is legally sufficient to regain or defend possession, unless the adversary can establish an anterior possession without abandonment, or paper evidence of his title."

The holder under a junior patent was held entitled to recover from a holder under a senior patent, by showing continuous possession for more than twenty years. *Chiles v. Jones*, 7 Dana, 529; *Forman v. Ambler*, 2 Dana, 108; *Voorhies v. Graham*, 1 A. K. Marsh. 233.

And possession undisturbed for twenty-five years under a contract to make a deed will raise the presumption that the purchase money had been paid, and sustain ejectment. *Briggs v. Prosser*, 14 Wend. 227.

Under N. C. Code, § 139, providing that possession of land under color of title twenty-one years would bar an action by the state, it was held that where no grant from the state was introduced, the burden of proof would not be shifted to defendant without prima facie proof of possession under color of title for twenty-one years. But if either party showed a patent, seven years' possession of plaintiff made a prima

facie case. *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607.

Twenty years' adverse possession under color of title was held to confer a perfect right of entry and a right to recover in ejectment. *Roberts v. Sanders*, 3 A. K. Marsh. 28.

And adverse continuous possession of land for more than thirty years was held to give perfect title, and the holder might regain possession the same as if he had a perfect paper title. *Sutton v. Pollard*, 96 Ky. 640, 29 S. W. 637.

And twenty years' adverse possession was held sufficient to enable the occupant to maintain ejectment where he had been deprived of possession. *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115.

In *Plummer v. Lane*, 4 Harr. & McH. 72, 1 Am. Dec. 395, it was held that the plaintiff in ejectment, in deducing his title, should show a grant of the land for which the ejectment was brought, and a regular title from the grantee, or seisin of the land, and a dying seised of the person under whom the lessor derived his title, and a regular title from the person dying seised, or twenty years' uninterrupted and exclusive possession of the land.

Open, peaceable, notorious, continuous, adverse, and quiet possession for twenty years was held sufficient to maintain ejectment. *Dalton v. Bank of St. Louis*, 54 Mo. 105.

And the lessor of the plaintiff in ejectment was held required to count upon and show a possession of the land within the time to which the right of entry was limited under the N. J. act of 1798, within twenty years next before the action was brought. But it was held that he need not show a possession of twenty complete years, or of any other number of years, further than necessary to constitute a full and peaceable possession. *Den ex dem. Johnson v. Morris*, 7 N. J. L. 6, 11 Am. Dec. 508.

Under N. J. act 1799, § 9, Gen. Stat. p. 1977, § 23, providing that no person shall hereafter make any entry into any lands, but within twenty years next after his right or title shall first accrue, it was held that where plaintiff had been in possession of land for twenty years subsequently claimed by a railroad as part of its right of way, he could maintain ejectment. *Spottiswoode v. Morris & E. R. Co.* 61 N. J. L. 322, 40 Atl. 505.

N. Y. Code Civ. Proc. § 368, providing that the person who establishes the legal title to the premises is presumed to have been possessed thereof within the time required by law, was held to mean that, in actions for the recovery of real property, while seisin or possession within twenty years was required, at the same time it would be presumed in favor of the person establishing the legal title, unless the premises were held adversely to the legal title for twenty years before the action. *Deering v. Riley*, 38 App. Div. 164, 56 N. Y. Supp. 704.

Undisturbed possession for thirty-eight
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years was held to give plaintiff the right to recover in ejectment, from a party who had recovered in ejectment on a default judgment. *Jackson ex dem. Wright v. Dieffendorf*, 3 Johns. 269. The possession was under a survey that was erroneous.

In *Jackson ex dem. Klock v. Rightmyre*, 16 Johns. 314, it was said: "In *Jackson ex dem. Wright v. Dieffendorf*, supra, a judgment by default in ejectment was not allowed to be a bar to a new ejectment and recovery by the tenant. But what did the tenant show in that case? A previous possession of thirty-eight years under a claim of right, and that was showing an absolute right of possession sufficient to toll an entry."

To entitle the plaintiff to recover in ejectment on the ground of prior possession, it was held that he should prove twenty years' uninterrupted adverse possession on the part of the lessors of the plaintiff, or those under whom they claim, or a right to the possession by the death and seisin, under the statute, of someone under whom they claim. *Moody v. McKim*, 5 Muni. 374.

In ejectment it was held that if the plaintiff proved twenty years possession, it would be sufficient prima facie title. *Hylton v. Brown*, 1 Wash. C. C. 204, Fed. Cas. No. 6,980.

And where no other title was shown, possession in plaintiff for twenty years was held evidence of a fee. *Denn ex dem. Tarzwell v. Barnard*, Cowp. pt. 2, p. 597.

And twenty years possession was held to be as good title for plaintiff in ejectment as though he were a defendant. *Stokes v. Berry*, 2 Salk. 421. It was said: "The same point was ruled by Holt, Ch. J., at Lent assizes for Bucks, 12 Wm. III., because a possession for twenty years is like a descent which tolls entry, and gives a right of possession which is sufficient to maintain ejectment."

In *Federick v. Searle*, 5 Serg. & R. 236, it was said that adverse possession for twenty-one years would be sufficient title to maintain the action of ejectment, and justify a recovery.

And in *Cooke v. Voss*, 1 Cranch, C. C. 25, Fed. Cas. No. 3,179, there was a judgment in ejectment for plaintiff, where he showed a possession of forty-four years, and the defendant failed to pay the annual rent.

In *Chastang v. Chastang*, 141 Ala. 451, 109 Am. St. Rep. 45, 37 So. 799, the title of plaintiff in ejectment was based on a claim of adverse possession of twenty years, and the defendant held a complete paper title from the government.

And in *Smoot v. Lecatt*, 1 Stew. (Ala.) 590, it was said: "What is the shortest prior possession under color of right that can be adjudged sufficient to create a legal presumption of title against one who holds a subsequent naked possession? . . . Perhaps, the subject will not admit of any definite uniform period less than twenty years."

Plaintiff in ejectment was held entitled to recover on proof that claimant and those

under whom he claimed had adverse, exclusive, and continuous possession of the premises for at least twenty years before the commencement of the action. *Willin v. Roe*, — Del. —, 78 Atl. 773.

And where plaintiff in ejectment showed an adverse possession for twenty years, so that entry was barred, it was held that he would be entitled to recover against a defendant whose possession for a less period was lawful. *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65.

The holder of title under the twenty years statute of limitations was held entitled to maintain an action to recover possession of the land, against any person who might enter upon it after the twenty years statute had run. *Sanitary Dist. v. Allen*, 178 Ill. 330, 53 N. E. 109.

And adverse possession for more than twenty years was held sufficient to enable occupant to bring ejectment against the original owner, who had obtained possession after the bar of the statute was complete. *Kepley v. Scully*, 185 Ill. 52, 57 N. E. 187.

Twenty years adverse uninterrupted possession was held sufficient title to maintain ejectment. *Childs v. Jones*, 4 Dana, 479.

But in *Mitchell v. Mitchell*, 1 Md. 44, in ejectment under Md. act 1818, chap. 90, providing that twenty years possession shall be a bar to any claim derived from the state under any patent, provided this should not affect any title under any common or special warrant or warrant of resurvey laid before the act, it was held that plaintiff, in addition to possession, should negative any outstanding title. Plaintiff must recover on the strength of his own title.

In *Bradshaw v. Ashley*, 14 App. D. C. 485, it was said: "It is very true that in the state of Maryland a very different doctrine has been adopted, and consistently adhered to, and the rule of the case of *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338, has been repudiated. *Mitchell v. Mitchell*, supra. And it is likewise true that the doctrine of the courts of Maryland, as expounded in the case just cited, has generally been understood to be the law of this District in reference to actions of ejectment. But whatever may have been the understanding, it must now be regarded as settled law for us, settled by the decision of the Supreme Court of the United States in the case of *Sabariago v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461, that the doctrine announced by Chancellor Kent in the case of *Smith ex dem. Teller v. Lorillard*, supra, must prevail with reference to the class of cases covered by it."

3. Possession fifteen years.

Possession adverse under a claim or color of title, for fifteen years, has been held sufficient to maintain ejectment where such time is fixed by limitation laws.

In ejectment, evidence of possession under claim of title for fifteen years was held

sufficient as against a party claiming an invalid tax deed. *Hollenback v. Eas*, 31 Kan. 87, 1 Pac. 275.

And a party having possession under a claim of ownership was held entitled to maintain ejectment against one who had no title. *Manspeaker v. Pipher*, 5 Kan. App. 879, affirmed in 58 Kan. 788, 51 Pac. 229.

And in an action to recover possession of land, continuous adverse possession for fifteen years under claim of title was held sufficient to maintain the action. It was not necessary to show title from the commonwealth. *Taylor v. Arnold*, 13 Ky. L. Rep. 516, 17 S. W. 361.

The holder of a possessory title to land for fifteen years under claim of title was held entitled to convey, and his grantees could recover the same. *Hamilton v. Hamilton*, 16 Ky. L. Rep. 793, 29 S. W. 876.

And after title is acquired by adverse possession, it was held that the holder thereof may recover the same by suit, in the same manner as if he had perfect paper title. *Sutton v. Pollard*, 96 Ky. 640, 29 S. W. 637.

In ejectment it was held that if the plaintiff entered on the land, claiming and holding the same by a well-defined boundary for fifteen years before the entry by the defendant, he should recover. *Ratcliff v. Elam*, 14 Ky. L. Rep. 772, 21 S. W. 352.

And actual adverse possession of land continuously and uninterruptedly for fifteen years, claiming the same, was held sufficient to authorize a recovery in ejectment. *Louisville & N. R. Co. v. Rayl*, 32 Ky. L. Rep. 870, 107 S. W. 298.

And where plaintiff and those under whom he claimed had been in the uninterrupted possession of land, claiming title for fifteen years, it was held to support an action of ejectment. *Barlow v. Bowne*, *Brayton (Vt.)* 135.

A party in adverse possession of land for fifteen years, under a claim of title, was held entitled to recover in ejectment against a trespasser. *Middleton v. Johns*, 4 Gratt. 129. It did not appear that the land had been granted to anyone by the commonwealth.

And the plaintiff who had adverse possession of land for more than fifteen years was held not required to show title from the commonwealth in order to maintain an action to recover possession. *Warmoth v. Fitchen*, 6 Ky. L. Rep. 584.

Fifteen years adverse possession was held sufficient to sustain ejectment and cut off an adverse title. *Nowlen v. Hall*, 128 Mich. 274, 87 N. W. 222.

In *White v. McNabb*, 140 Ky. 828, 131 S. W. 1021, it was said that adverse possession of land continuously for fifteen years would be sufficient title to enable the owner to maintain an action of ejectment.

In *Chism v. Trent*, 10 Ky. L. Rep. 849, 10 S. W. 648, it was said that a continued adverse and actual possession for fifteen years would not only toll a right of entry, but confer a right of entry and a right of action to recover the possession.

In *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703, it was said: "If Gamsby and the Heatons had acquired title by fifteen years of adverse possession, such title thereby became perfect, and was as good as a paper title by the record from the original proprietors. It was no longer a mere possessory right. It had ripened into a legal estate in fee in the land."

4. Possession for ten years.

Ten years' adverse possession under claim or color of title was held sufficient to give a title on which ejectment could be maintained, where ten years is the limit by statute.

Ten years' adverse possession under a claim of right was held equivalent to a legal title on which ejectment could be maintained, but this only extended to actual possession. If possession was taken under color of title, the claimant would not be limited to the land occupied, but could claim extent of title conveyed to him. *Ryan v. Kilpatrick*, 66 Ala. 332.

A right to lands acquired by ten years' adverse holding, with the exceptions provided in Ala. Code 1876, §§ 3234-3250, was held to arm such holder with all the powers of offense and defense which an unbroken chain of title conferred. *Barclay v. Smith*, 66 Ala. 230.

In ejectment, where the plaintiff relied upon adverse possession, it was held necessary for him to establish all the essential elements,—open, notorious, under claim of right, and continuous for the period prescribed by the statute of limitation. *Bishop v. Truett*, 85 Ala. 376, 5 So. 154.

Adverse possession for the period prescribed by the statute was held not only to give a right of possession, but also a right of entry and of action as plaintiff against the strongest proof of title. *Hackett v. Marmet Co.* 3 C. C. A. 76, 8 U. S. App. 149, 52 Fed. 268. In this case the plaintiff had possession and had paid taxes for ten years, and a tenant refused to surrender.

And to toll entry or perfect title which, by mere possession, would sustain an action of ejectment, it was held that the possession should be actual, public, or notorious, adverse, or in independent right, and continuous. The adverse holder need not cultivate or reside on the land. *Black v. Pratt Coal & Coke Co.* 85 Ala. 504, 5 So. 89.

And where a widow entered on land pursuant to an agreement, defective because not witnessed or acknowledged, and held possession ten years, it was held that she could maintain a suit for possession even against the holder of a perfect paper title. *Hall v. Caperton*, 87 Ala. 285, 6 So. 388.

And actual and continuous possession of land under a claim of ownership, openly and notoriously adverse and hostile to the legal title and all others for the statutory period of ten years, was as good as a deed in fee from the record owner. *Murray v. Hoyle*, 97 Ala. 588, 11 So. 797, first appeal, 92 Ala. 559, 9 So. 368.

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Mississippi Code, p. 829, act 1844, § 1, provides that every possessory, ancestral, mixed, or other action shall be brought in seven years; § 3 provides that an actual adverse possession of ten years vests a full and complete title to the land. It was held that a party in such possession might sue for possession within the time given in § 1, without further evidence of title than possession for ten years. *Ellis v. Murray*, 28 Miss. 129.

Even against the true owner, who was in possession of his own, it was held that a plaintiff might recover by showing that at a time when those having the right of entry were under no disability, he and those under whom he claimed held, for the period prescribed by statute, open, notorious, unbroken, adverse possession, that the land was not voluntarily abandoned, and that the dispossessor has not held long enough to bar. *Jones v. Brandon*, 59 Miss. 585.

In ejectment, if the plaintiff, by himself or tenants, had the visible, notorious, continued, and actual adverse possession for the period of ten years prior to the suit, it was held that he should recover. *Schultz v. Arnot*, 33 Mo. 172.

Ten years' adverse possession, except as against the government and parties under disabilities, was held to create an affirmative title on which ejectment could be maintained. *Barry v. Otto*, 56 Mo. 177.

And adverse possession for ten years under an oral purchase, where the consideration was paid, claiming title, was held sufficient to maintain ejectment. *Ridge-way v. Holliday*, 59 Mo. 445.

In order to recover in ejectment on adverse possession, it was held that something more than mere prior possession should be shown. It was held necessary to show adverse possession for a time long enough to give title, or that possession was prior to that of defendant, or that plaintiff's possession was taken and held under a claim of right, and that he had not abandoned possession. *Alexander v. Campbell*, 74 Mo. 142.

And adverse possession for over ten years was held to give the holder such a title as that he could maintain ejectment. It was further held that a judgment in ejectment against him was no bar to a second action by him. *Ekey v. Inge*, 87 Mo. 493.

Proof of actual adverse possession of land for more than ten consecutive years under color of title was held sufficient to enable plaintiff in ejectment to recover. *Kelley v. Kurz*, 118 Mo. 414, 24 S. W. 171.

A title acquired by adverse possession in Missouri was held to be in every respect as good for purposes of attack or defense as a title by deeds running back to the government. *Scannell v. American Soda Fountain Co.* 161 Mo. 606, 61 S. W. 889.

And adverse possession for ten years under a claim of title was held sufficient to enable plaintiff to maintain an action to remove a cloud on the title. *Merchants' Bank v. Evans*, 51 Mo. 335.

In *Martin v. Bonsack*, 61 Mo. 556, when

plaintiff recovered in ejectment on an adverse possession of ten years under a claim of title, the court said: "The tendency of recent adjudications is to admit explanations of a possessor of property as to his title, not with a view to set up such title, but to show whether his possession was adverse under the statute of limitations or otherwise."

An alien in possession of public lands for eleven years was held entitled to maintain ejectment against a mere intruder. *Courtney v. Turner*, 12 Nev. 345.

A person who has held land adversely for ten years was held to have a good title by virtue of such possession which could be affirmatively asserted in ejectment. *Cave v. Anderson*, 50 S. C. 293, 27 S. E. 693.

And a title acquired by adverse possession under a claim of title was held sufficient to support ejectment. *Harrelson v. Sarvis*, 39 S. C. 15, 17 S. E. 368. The court said: "The statute of limitations has a double aspect; besides affording a shield of defense, it may, under certain circumstances, give title capable of being asserted actively." As was said by Judge Earle in *Young v. Watson*, 1 McMull. L. 449, cited with approbation in the case of *Geiger v. Kaigler*, 15 S. C. 273: "A plaintiff can only make out a perfect title by producing a grant, or by proving such a possession as will give title in himself, or in someone from whom he derives title."

In an action of trespass to try title, it was held that the plaintiff claiming title by adverse possession against the holder of the paper title should show his adverse possession for the full statutory period. *Abel v. Hutto*, 8 Rich. L. 42; *Cantey v. Platt*, 2 McCord, L. 260.

The statute of limitations was held to have a double aspect, besides affording a shield of defense, it can give under certain circumstances a title capable of being asserted actively. *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368. So, it was held that adverse possession for twelve years under partition proceedings was sufficient to sustain suit in ejectment.

And adverse possession for ten years was held to confer a good title, but it was held that plaintiff in ejectment should recover on the strength of his own title, and not on the weakness of his adversary's title,—it was necessary to prove a grant from the state or facts from which a grant would be presumed. *Duren v. Kee*, 50 S. C. 444, 27 S. E. 875.

And adverse possession for fifteen years was held sufficient to maintain ejectment. The fact that plaintiff paid taxes for a number of years was sufficient to raise the presumption that the state had parted with title. *Busby v. Florida C. & P. R. Co.* 45 S. C. 312, 23 S. E. 50.

And adverse possession of land for ten years under color of title was held sufficient to enable plaintiff to recover in ejectment against any title. *Garrett v. Ramsey*, 26 W. Va. 345. The court said: "I have mentioned ten years as the time one must hold 46 L.R.A.(N.S.)

such adversary possession in order to give him a perfect title even against the party who has a perfect written title, because by our statute the right of entry and the right to bring an action to recover land is barred by ten years after the time the right to make such entry or bring such action first accrued. (W. Va. Code, chap. 104, § 1, p. 546.)"

More than thirty years occupancy and possession under a claim of title was held sufficient to maintain ejectment under Wis. Rev. Stat. § 4211, providing that where the occupant enters into possession under a claim of title, exclusive of any other right founding such claim upon deeds, and there has been a continued occupation and possession under such claim for ten years, the premises shall be deemed to have been held adversely. *Hecker v. Horlemus*, 74 Wis. 21, 41 N. W. 966.

Adverse possession for ten years was said to give a title which would sustain ejectment. *Burks v. Mitchell*, 78 Ala. 61.

In *Lucy v. Tennessee & C. R. Co.* 92 Ala. 246, 8 So. 806, it was said: "An adverse possession of land which continues unbroken for ten years will confer a title which will sustain as well as defeat an action of ejectment; and the principle applies alike where possession is held under color or claim of title and where the possession was that of a mere trespasser."

5. Possession for seven years.

In some states the statute fixes the time of seven years' adverse possession under color or claim of title as constituting a defense. This is held to give such a title as will sustain the plaintiff in ejectment.

A defective patent was held sufficient to give color of title and fix the limits of possession, and a continuous adverse possession under it or without any color, when the limits of possession were shown for a period of over seven years, was held to create a title sufficient to maintain ejectment. *Logan v. Jelks*, 34 Ark. 547.

And when the possession of plaintiffs and their grantors was open, notorious, and adverse, and continued for more than seven successive years before defendant entered into possession, this was held sufficient to enable plaintiffs to maintain ejectment. *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196.

An occupant for seven years was held to have an indefeasible title, not only sufficient for protection, but also for recovery against all the world, under Ga. act 1767, providing that all writs, suits, or action shall be taken within seven years next after the cause of action accrues, and no person having any right of entry into lands shall make said entry but within seven years after the right accrues. *Johnson v. Lancaster*, 5 Ga. 39.

And under Ga. act 1767 seven years' possession under color of title was held sufficient to entitle the party having such possession to maintain ejectment against

one claiming under a regular chain of title. *Watkins v. Woolfolk*, 5 Ga. 261.

And possessory title for more than seven years was held sufficient to enable plaintiff in ejectment to recover against a trespasser. *Buckner v. Chambliss*, 30 Ga. 652, the court said: "prior possession will prevail in ejectment over a subsequent one acquired by mere entry, without any lawful right."

Continuous possession for seven years, with color of title, was held sufficient to support ejectment against a tenant in possession. *Davis v. Stripling*, 32 Ga. 656.

And possession for seven years under an agreement to divide a disputed boundary was held sufficient to entitle plaintiff to ejectment. *Shiels v. Lamar*, 58 Ga. 590.

In *Hinchman v. Whetstone*, 23 Ill. 185, it was said: "And it has been uniformly held that after the occupant has acquired the benefit of the bar which a statute of limitations confers, he may recover the possession and also for injuries committed on the premises as against a stranger, by simply proving his occupancy for the period of limitation." Ill. act March 2, 1839, § 2, provides that when any person having color of title in good faith to vacant land shall pay the taxes for seven successive years, he or she shall be deemed the legal owner to the extent of the paper title. In *Paullin v. Hale*, 40 Ill. 274, the above case was noticed, and the difference between that case and *Harding v. Butts*, 18 Ill. 507, said to be that in the *Harding* Case the party never had been in possession and in the *Hinchman* Case he had and recovered on this prior possession.

Under Ill. Rev. Stat. chap. 83, § 7, providing that when a person having color of title to vacant land shall pay all taxes for seven consecutive years he shall be deemed the legal owner, it was held that he could sue for possession. *Gage v. Hampton*, 127 Ill. 87, 2 L.R.A. 512, 20 N. E. 12. This was the same as *Laws* 1839, p. 266.

And under Ill. act 1839, where claim and color of title, payment of taxes, and possession concurred in for seven years, such claim could maintain ejectment against the holder of the original title in fee. *Chiles v. Davis*, 58 Ill. 411.

And under Ill. act March 2, 1839, § 2, it was held that when the bar of the statute attached to the occupant, if he temporarily left the premises, he could recover the same from all persons against whom he could plead the statute as a bar if he had been sued. *Paullin v. Hale*, 40 Ill. 274. The court said a right to land "acquired by limitation is affirmative, and can be enforced."

And under Ill. act 1839, the holder of title acquired by limitation who had once held possession was held entitled to use the statute affirmatively, and he could recover the land from one who claimed to have the paramount title. *Hale v. Gladfelder*, 52 Ill. 91. In this case the plaintiff had agreed to sell the premises to a party who took possession and then abandoned the 46 L.R.A. (N.S.)

same. This possession was held to inure to plaintiff.

Where both the right of entry and the right of action were lost by the statute of limitation, it was held that the party in adverse possession would conclusively be presumed to be the owner, and to be vested with the title, which could not be cut off by the act of the former holder in regaining possession by a tort. *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835.

And after the bar of the statute of limitations had attached and the party claiming thereunder acquired possession, it was held that the statute was as available for attacking as for defensive purposes. *Donahue v. Illinois C. R. Co.* 165 Ill. 640, 47 N. E. 714; *McDuffee v. Sinnott*, 119 Ill. 449, 10 N. E. 385.

In ejectment it was held that the law did not require that the seven years' adverse possession of plaintiff, with color of title, which gave a title under the statute of limitations, should be possession next preceding the commencement of the action. *Christenbury v. King*, 85 N. C. 229. This was on the ground that seven years' adverse possession with color of title, or twenty years' adverse possession without color, gives title where the title is out of the state.

Seven years adverse possession in Tennessee was held sufficient to maintain ejectment. But proof should be made that the state has made a grant to someone; if this is not proved, twenty years' adverse possession will raise the presumption of a grant. *Cannon v. Phillips*, 2 Sneed, 211. The court said: "The doctrine of presumption of title, rests upon the simple fact of long-continued use and enjoyment, and requires no aid from 'color of title.' Possession of land is prima facie evidence of title; the law supposes that it had a legal origin, and, when undisturbed for the period of twenty years, it becomes, in view of the law, an assurance of title of no less force or efficacy than the actual grant, whose place it supplies."

6. Possession over five years.

When a party was in adverse possession for over five years, it was held that he acquired a title; and if, after he was thus vested, he was ousted by the party holding a paper title he could recover in ejectment. *Cannon v. Stockmon*, 36 Cal. 540, 95 Am. Dec. 205; *Langford v. Poppe*, 56 Cal. 73.

c. Specific performance.

Title by adverse possession is generally held sufficient to enable the vendor to maintain an action for specific performance against a purchaser, in the absence of a contract for a perfect record title.

A title by adverse possession for twenty-one years was held sufficient to enable the holder to maintain a suit for specific performance. *Shober v. Dutton*, 6 Phila. 185.

Open notorious adverse possession of land for the term of ten years was held to give the possessor a perfect title, sufficient

for enforcing specific performance for its sale. *Ballow v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131.

And title by adverse possession under claim of title was held sufficient to enforce specific performance of contract of purchase. *Bohm v. Fay*, 18 Abb. N. C. 175. In this case possession was over fifty years and there was an absence of one deed.

Fifty years' undisputed possession under an unbroken chain of title was held to establish title by adverse possession, and to enable the holder to require specific performance of contract of purchase. *Clarke v. Wollpert*, 128 App. Div. 203, 112 N. Y. Supp. 547.

And a title acquired by adverse possession was held sufficient to maintain an action for specific performance. *Ottinger v. Strasburger*, 33 Hun, 466, affirmed in 102 N. Y. 692.

In an action for specific performance of contract to convey, it was held that where the vendor and those under whom he claimed had adverse possession under a claim of title for nearly one hundred years, the title would be sufficient to maintain the action. *Abrams v. Rhoner*, 44 Hun, 507.

And where plaintiff had a good title by adverse possession for more than thirty years, it was held that he could maintain an action for specific performance against a purchaser. *O'Connor v. Huggins*, 16 N. Y. S. R. 130, 1 N. Y. Supp. 377.

And where adverse possession was had for thirty-eight years, under claim of title, and during that time no one made any adverse claim of ownership, it was held that the vendor could enforce the contract of sale and require the purchaser to take the title. *Freedman v. Oppenheim*, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841.

Title by adverse possession was held sufficient to maintain an action for specific performance by a vendor against a vendee. *Pratt v. Eby*, 67 Pa. 396. In this case there was a defect that rendered the title unmarketable.

A deed deficient as to attesting witnesses was held cured by adverse possession for ten years. The plaintiff was held entitled to specific performance of a contract of purchase. *Lyles v. Kirkpatrick*, 9 S. C. 265.

And where the plaintiff had title by adverse possession, it was held that he should have a decree of specific performance against a purchaser. *Scott v. Nixon*, 3 Drury & War. 388. In this case the chancellor said: "What, then, is this law of this court on questions of this kind? The court has to consider, first, whether *de facto* a title has been made out; and, secondly, whether there is sufficient evidence of title to satisfy the court, before it obliges an unwilling purchaser to accept the title. With regard to the first, it is a matter of perfect indifference how the title is made out, provided the purchaser gets a title; whether it be by escheat, abatement, disseisin, intrusion, or possession and non-claim, or destruction of contingent remain- 46 J.R.A.(N.S.)

ders, is a matter of no consequence, provided there be a valid legal title; whether the evidence is sufficient is a different question."

In *Shriver v. Shriver*, 86 N. Y. 575, it was said: "It must not be taken, from anything that we have said, that we do not regard a title good that rests alone upon a clear adverse possession of twenty years: nor that we pronounce the title of the vendors in the case before us as defective. What we hold is, that the vendee has brought such facts and circumstances as call upon the vendors to show how they may be met and nullified before they can compel him to complete his purchase."

In *Ottinger v. Strasburger*, 33 Hun, 466, it was said in *Mott v. Mott*, 68 N. Y. 247, a doubt was expressed whether a purchaser could be compelled to take a title depending upon adverse possession and parol proof to support it, unless in a case beyond all reasonable doubt.

In *Ottinger v. Strasburger*, supra, the court, after referring to *Hartley v. Jamea*, 50 N. Y. 38, "where it was said in a general way, 'the plaintiff was not bound to accept a title resting on adverse possession,'" said: "But this point was not included in the case as it was presented to the court, and the statement made concerning it therefore is not entitled to be followed as authority."

But in an action by a vendor for specific performance, based on title by adverse possession, it was held that in order to make plaintiff's title good, she was bound to show that the defendant could not hereafter be called upon to litigate with strangers to this action who might claim title under some former owner. *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674. In *Freedman v. Oppenheim*, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841, this case was distinguished, the court saying: "In no place in the opinion does it appear that title by adverse possession clearly established does not in some instances furnish a marketable title."

In *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527, it was held in an action for specific performance, that it was not sufficient that the plaintiff had merely held possession undisturbed for twenty years, as this did not show that the possession was adverse.

And where the terms and conditions of a contract of sale showed that the purchaser should have a good title by record, it was held that he would not be compelled to accept a title depending on adverse possession. *Noyes v. Johnson*, 139 Mass. 436, 31 N. E. 767.

d. Trespass.

The holder of title by adverse possession is held entitled to maintain an action of trespass, and trespass *quare clausum*, and for damages in eminent domain proceedings.

In an action of trespass *quare clausum*, by a party in possession for nineteen years under a defective instrument as color of

title, the burden was cast on the defendant to establish a better title. *McInerney v. Irvin*, 90 Ala. 275, 7 So. 841. The court said that ten years of adverse possession under such muniment of title "arms such holder with all the powers of offense and defense."

And possession of land for fifteen years was held sufficient to maintain trespass for cutting timber. *Farmer v. Lyons*, 87 Ky. 421, 9 S. W. 248.

Possession for eight or ten years, claiming title, was held sufficient title in fee simple to enable the occupant to claim the damages caused in eminent domain proceedings. *Missouri River, Ft. S. & G. R. Co. v. Owen*, 8 Kan. 409.

Fifteen years' adverse possession of right of way was held sufficient to enable holder to maintain an action for damages against the railroad attempting to occupy the same under a contract with a prior owner. *Pollock v. Maysville & B. S. R. Co.* 103 Ky. 84, 44 S. W. 359.

Adverse possession of land for ten years under claim of ownership was held to give such title as would sustain a claim for damages from improper construction of an adjacent railroad. *Swenson v. Lexington*, 69 Mo. 157. But a city would not be liable for the negligence of a railroad company.

In *Wadleigh v. Marathon County Bank* 58 Wis. 546, 17 N. W. 314, it was said: "Although the action is in the nature of trespass, it is brought to recover damages for a permanent injury to the freehold. Were no damages claimed other than for the mere invasion of plaintiff's possession, the lands being wild and vacant, it would be incumbent on him to prove his title thereto in order to show a constructive possession in himself. The cause of action being permanent injury to the land, to entitle the plaintiff to recover he must establish his title. The reason of this is, if the plaintiff is not the owner of the land a recovery by him would be no bar to an action for such injury brought against the trespasser by the real owner. The cases which establish these propositions are *Hungerford v. Redford*, 29 Wis. 345; *Austin v. Holt*, 32 Wis. 478."

And in an action of trespass, it was held that the plaintiff made a *prima facie* case by proving his possession under a deed for more than thirty years. *Baier v. Zieglerbauer*, 66 Wis. 524, 29 N. W. 277.

e. Injunctive relief.

The holder of title by adverse possession was held entitled to maintain an action for injunction to prevent the illegal opening of streets through the land. *Schock v. Falls City*, 31 Neb. 599, 48 N. W. 468.

And a landowner inclosing and retaining part of the highway for thirty years was held to be entitled to enjoin a road supervisor from interfering with the same. *Axmear v. Richards*, 112 Iowa, 657, 84 N. W. 686.

I. T.
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ARKANSAS SUPREME COURT.

L. B. POINDEXTER et al., Appts.,

v.

STATE OF ARKANSAS.

(— Ark. —, 159 S. W. 197.)

Contempt — jurisdiction — information on official oath.

1. Jurisdiction of a contempt proceeding is conferred by an information under the official oath of the prosecuting attorney and a citation directed by the judge to be issued by the clerk, setting forth the information, although the information is not specifically verified or supported by affidavit.

Appearance — waiver of delay in serving citation.

2. Appearance in a contempt proceeding waives failure to serve the citation before the return day.

Appeal — contempt — sufficiency of pleading — case made by evidence.

3. In reviewing a conviction for contempt, the question of guilt will be determined from the evidence at the trial, regardless of what was charged in the information.

Contempt — counsel permitting juror to drink liquor in his room.

4. An attorney is not guilty of contempt of court by merely remaining in his room at the hotel when a juror in the case in which he is engaged comes there for a drink upon invitation of his associate counsel, with whom he shares the room, without excluding the juror from the room or reporting the matter to the court, if he had no knowledge of the invitation or who the person was who sought admission to the room.

Note. — Misconduct toward jurors as contempt.

For a discussion as to summoning biased or otherwise improper jurors or talesmen as contempt, see note in 20 L.R.A.(N.S.) 1013.

This note is confined to cases in which it was sought to punish misconduct toward jurors as a contempt of court, and does not include cases in which tampering with jurors was urged as a ground for a new trial and in which it was incidentally said that such conduct amounted to a contempt of court.

The authorities agree that any attempt designed to corruptly influence a juror in the discharge of his duties is punishable as a contempt of court. 9 Cyc. 15.

It is not essential to such an offense that the misconduct should be in the presence of the court or within the courthouse precincts.

Concerning prospective jurors.

Making inquiry concerning one who had been drawn on the jury, for the purpose of ascertaining if there was any reason for challenging him should he be drawn on

Same — furnishing liquor to jurors.

5. The attorney for defendant in a murder case who, without knowing to whom he is speaking, invites the bailiff and one of the jurors in his case to his room to drink liquor, and furnishes it to them upon their calling after he knows who they are, is guilty of contempt of court.

Same — juror and bailiff — drinking with counsel for defendant.

6. A juror in a murder case, and the bailiff having charge of him, who, upon the invitation of counsel for defendant, go to his room to drink intoxicating liquor, are guilty of contempt of court.

Appeal — contempt — modifying sentence.

7. An attorney, a juror, and a bailiff connected with a murder case who have been

the jury in the defendants' case, is not a contempt of court. *Wells v. District Ct. 126 Iowa, 340, 102 N. W. 108.*

In *Ex parte McRae*, 45 Tex. Crim. Rep. 285, 77 S. W. 211, it was held that the mere effort to secure the services of a party to find out how a juror stands in reference to a pending case does not authorize punishment for contempt, where the party so employed neither makes an effort to tamper with the juror, nor holds out any inducement to the juror to decide one way or the other, nor talks with the juror about the case.

And in *United States v. Carroll*, 147 Fed. 947, it was held that an unsuccessful attempt to secure the services of a party to do what he could to influence jurors in favor of a pending case is not punishable as a contempt of court, as it does not obstruct or impede the due administration of justice within the meaning of § 725, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 583, statutes restricting the power of the United States courts to punish for contempt.

But calling attention to a pending suit by a suitor, and discussing it in the presence of some of the jurors who may have to try it, is a contempt of court. *Baker v. State*, 82 Ga. 776, 4 L.R.A. 128, 14 Am. St. Rep. 192, 9 S. E. 743.

So, conversing with a prospective juror who has been summoned for jury service, about the merits of a pending case, and attempting to improperly influence him to render a verdict in the cause, is a contempt of court. *Marvin v. District Ct. 128 Iowa, 355, 102 N. W. 119.* The court said that the essential element of the charge made was an attempt improperly to influence the courts of justice as administered through the medium of a jury trial; that the interest behind the act and the offensiveness thereof were the same, whether the juror had been sworn to try the issues in the case, or was in waiting subject to call for service. To the same effect is *State ex rel. Webb v. District Ct. 37 Mont. 191, 95 Pac. 593, 15 Ann. Cas. 743*, where it was held that one who at 46 L.R.A. (N.S.)

guilty of contempt of court in furnishing and drinking intoxicating liquor in the attorney's room may be relieved of a jail sentence by the appellate court if they have sought in every way to purge themselves of intentional disrespect for the court.

(July 14, 1913.)

APPPEAL by defendants from and certiorari to the Circuit Court for Lawrence County to review judgments punishing them for contempt of court. Reversed as to Poindexter and modified and affirmed as to the others.

Statement by Wood, J.:

On March 11, 1913, one Benningfield was being tried in the circuit court of Lawrence

tempts improperly to influence a juror is guilty of contempt, whether a juror be actually sworn upon a particular case, or is only a member of the panel from which a trial jury is to be selected. And this is the rule recognized in *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703.

In *Coleman v. State*, 121 Tenn. 1, 113 S. W. 1045, it was held that one who conversed with persons summoned for jury service, stating that he was desirous of having them on the jury in his case because of their long acquaintance, complaining that he had no friends on the jury at a former trial, and suggesting that it was not necessary for them to advise the court how long they had known the accused unless they were asked, was guilty of contempt of court, such conduct being an "unlawful interference with the process or proceedings of the court" within the meaning of the statute empowering the court to inflict punishment as contempts of court in such cases.

An attempt to corruptly influence members of the venire of jurors in attendance upon the court, in favor of one of the parties to a pending case, from which a trial jury would be drawn, is punishable as a contempt of court under a statute restricting the power of the United States courts to punish for contempt to cases of misbehavior in the presence of the court" or so near thereto as to obstruct the administration of justice," though the conduct complained of occurred in a saloon several blocks distant from the place where the court was held. *Kirk v. United States*, 112 C. C. A. 531, 192 Fed. 273. To the same effect is *United States v. Carroll*, 147 Fed. 947, where it appeared the conduct complained of occurred on the street several blocks distant from the courthouse.

Concerning jurors selected to try the case.

Attempting to influence and corrupt jurors by bribery is a contempt of court. *Hurley v. Com. 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757; Langdon v. Wayne*

county on an indictment charging him with murder in the first degree. The attorneys present representing the defendant were L. B. Poindexter and Oscar Blackford. L. C. Going, one of the attorneys for the defendant, was not present while the jury was being selected. He arrived at Walnut Ridge about 2 o'clock Thursday morning, March 13, 1913. He found all the rooms of the Rhea Hotel occupied, and there was no other hotel in town. He was assigned to the room in the Rhea Hotel occupied by Poindexter, associate counsel representing the defendant. He continued to occupy this room with Poindexter until the trial of Benningfield was over. When Going arrived, the jury had been impaneled and put in charge of a special officer. The jurors were

instructed, among other things, to remain together during the recess of the court, and to let their conduct be, as it had been in the past, free from any sort of criticism, not to separate from each other unless accompanied by the bailiff, stay as nearly as they could separated from crowds, not to permit anyone to talk to them about the case or talk in their presence or hearing about it, and not to receive any information as to the merits of the case from any source whatever. The jurors, in the instructions, were impressed with the importance of the case, and their duties, and of the necessity of not permitting anyone to approach them concerning it.

Going did not know at that time the juror Moseley, and the bailiff, Freer. On Thurs-

Circuit Judges, 76 Mich. 358, 43 N. W. 310; Gandy v. State, 13 Neb. 445, 14 N. W. 143; Toozer v. State, 5 Neb. (Unof.) 182, 97 N. W. 584; Kirk v. United States, 112 C. C. A. 531, 192 Fed. 273.

In Hurley v. Com. 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757, it was said: "Contempts of this kind are most dangerous assaults upon the integrity of our courts in the trial of cases. It is inconceivable that any court would treat such an offense as anything less than a criminal contempt of the gravest character."

One who has endeavored to bring about a disagreement of the jury by bribery may be punished for contempt of court, under a statute empowering the court to punish any misconduct by which the rights or remedies of a party in a pending civil cause may be defeated, impaired, or prejudiced. Langdon v. Wayne Circuit Judges, 76 Mich. 358, 43 N. W. 310.

A suggestion to the attorney of one of the parties in a pending suit that a certain member of the jury could be approached and illegally influenced in obtaining a verdict or a mistrial, and an offer to do so, constitute a contempt of the court. Bradley v. State, 111 Ga. 168, 50 L.R.A. 691, 78 Am. St. Rep. 157, 36 S. E. 630.

So, one who, for the purpose of securing money for himself, falsely pretends to another interested in the result of a cause that he can corruptly influence with money the jurors trying the cause, to return such a verdict as he desires, is guilty of contempt of court, though he had no intention to bribe and merely intended to cheat the party out of the money. Little v. State, 90 Ind. 338, 46 Am. Rep. 224. The court said that such an act tends to disgrace and degrade the jury in the minds of the person to whom the corrupt proposition is submitted, and that it is the intention of the law that courts shall have the means of commanding merited respect, not only for themselves, but also for all who are engaged in the administration of the law as officers or jurors of the court.

Conversing with a juror during the inter-
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mission of the court about the verdict to be rendered in the case is a contempt of court. Drady v. District Ct. 126 Iowa, 345, 102 N. W. 115; Re Gorham, 129 N. C. 481, 40 S. E. 311.

Requesting a juror to favor one on trial for murder, and to do all he could for him, is evidence of an attempt to improperly influence a juror in the discharge of his duty and conduct, which was calculated to impede and obstruct the proper administration of justice, and as such punishable as contempt of court. Re Moore, 79 S. C. 399, 60 S. E. 947.

So, where it appeared that the defendant was seen in close conversation with a juror during the trial, or after they began to deliberate on their verdict, it was held in Davidson v. Manlove, 2 Coldw. 346, that the circumstance, unexplained, is sufficient to authorize the trial court to grant a new trial and to subject the party to punishment for contempt of court.

To the same effect is Re Odum, 133 N. C. 250, 45 S. E. 569, 14 Am. Crim. Rep. 296, where it was said that a defendant who entertained one of the jurors on his case all night, and who was seen conversing with another juror alone in a secluded spot during a recess of the court, was guilty of contempt of court.

Calling out to the jury in a loud voice, as they were crossing the street from the hotel to the jury room to deliberate upon their verdict, not to convict the defendant, is a contempt of court. Ex parte Creely, 8 Cal. App. 713, 97 Pac. 766.

Passing a note to a juror, after the jury had retired to consider their verdict, requesting him to hold out for defendant, constitutes a contempt of court. Ex parte Smith, 40 Tex. Crim. Rep. 179, 49 S. W. 396.

One who, during the pendency of a trial, publishes a scurrilous article concerning the same and hands a copy of such article to the jurors, is guilty of contempt of court. Field v. Thornell, 106 Iowa, 7, 68 Am. St. Rep. 281, 75 N. W. 685.

One who took a juror to a saloon and approached him on the subject of render-

day he cross-examined the witnesses for the state, but gave no attention to the *personnel* of the jury. During the recess of the court at the noon hour that day, Smith, one of the attorneys for the state, and several others, drank with Going in room No. 24, occupied by him and Poindexter. After court adjourned in the afternoon of that day, Moseley, accompanied by Freer, the bailiff, started down to the office of the hotel to get a cigar, and at the head of the stairs met Going, and someone remarked that he would like to have a drink of Whisky, and Going said that he had some whisky in his room. Thereupon several

persons, including Moseley and Freer, went to room No. 24 with Going and took a drink. Moseley and Freer immediately left the room after getting the drink. Going did not at that time know Moseley and Freer, and said he did not know that one was a juror and the other a bailiff until the bailiff told Going that Moseley was a juror, whereupon Going stated that he might have said something about the case, not knowing Moseley and the bailiff, and Freer replied that he would not have permitted anything to be said about the case. The case was not discussed. Poindexter was not in the room during the occurrence.

ing a verdict is guilty of contempt, though the juror refused to hear anything on the subject and the matter was immediately dropped. *Emery v. State*, 78 Neb. 547, 9 L.R.A.(N.S.) 1124, 111 N. W. 374.

But merely saying to a juror, "You are on the jury next week" to which the juror replied that he knew he was, and it appeared that the parties then separated, does not warrant punishment for contempt of court, where there is no evidence to indicate that defendant undertook to influence him or even talk about the case in any way. *Ex parte Wright*, — Tex. Crim. Rep. —, 141 S. W. 971.

An agent of the defendant is not guilty of contempt of court merely because he ate dinner at the same table, in a crowded lunch room, with jurors impaneled to try the defendant's case, where it appeared that the jurors approached the table on their own motion at which he was already seated with one of the witnesses, because of their inability to find another convenient place. *State ex rel. Kimbrell v. Clark*, 134 Mo. App. 55, 114 S. W. 538.

The mere fact that the defendant's agent accepted an invitation from three of the jurors who were trying the defendant's case to play several games of pool during the noon adjournment, with the result that the jurors lost, and, according to the custom, the losers paid the proprietor the cost of the games and the winner purchased each a cigar, though an impropriety, was not such conduct as to sustain a charge of contempt of court for tampering with the jury, where it appeared that the jurors involved were men of high character and of large business interests, that he was at no time alone with the jurors, and did not discuss the case on trial, and the occurrence did not in anywise affect their action on the case. *Ibid*.

A defendant's agent is not guilty of contempt of court for engaging in a general conversation on the subject of hunting with several jurors, witnesses, and others, including the opposing lawyer. *Ibid*.

It is a contempt of court for one to make an arrangement with a juror to give a signal, after the jury has retired, to indicate whether an agreement is likely, for the purpose of enabling him to make a 46 L.R.A.(N.S.)

bet on the matter of agreement of the jury to better advantage, although he said nothing about the merits of the case or how he wished the jury to decide. *State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671. The court said: "The jury cannot be isolated unless the court is prompt to punish those who infringe in the slightest degree the order directing such isolation. I think public policy requires that no one should escape punishment who is found in any respect invading the privacy of the jury room."

Likewise the act of a newspaper reporter in secreting himself in the jury room, taking notes of the deliberations, and subsequently publishing his recollections of the debate of the jurors, is a contempt of court. *Re Choate*, 24 Abb. N. C. 430, 18 N. Y. Civ. Proc. Rep. 180, 9 N. Y. Supp. 321, affirming 8 N. Y. Crim. Rep. 1.

Obtaining information in regard to a verdict by eavesdropping while the jury were considering their verdict, and reporting the same to a newspaper, was said to be a flagrant contempt of court, and a most reprehensible invasion of the precincts of justice. *Orman v. State*, 24 Tex. App. 495, 6 S. W. 544.

Disrespectful remarks by an attorney to the jury while they were being impaneled, to the effect that he could not win the case in that county, so that his questioning will be very particular, and remarking in his opening address to the jury that lawyers usually close their statements of this kind with the expression that they expect a verdict at the hands of the jury, but that he did not expect more than a hung jury here against the defendant, constitute a contempt of court. *Re Maury*, 205 Fed. 626. The court said: "The fact that they were addressed to the jury does not lessen their objectionable character. In jury trials, the jury is part of the court, so far as the attitude of counsel towards it is concerned, and it is entitled to the same respect, consideration, and protection to which the court itself is entitled."

An unprovoked assault upon the plaintiff's attorney upon the street, because of his argument in the case, in full view of the jury room, where they had retired to deliberate upon their verdict, is a contempt

The next day, Friday, March 14th, Going was about half through with his argument for the defense when the court took a recess for the noon hour, giving cautionary instructions to the jury and the bailiff, as above stated. Going and Poindexter went to their room. Going took a drink of whisky, leaving the bottle on the table in the room. He lay down across the bed, resting and thinking about the remaining portion of his argument to be resumed at the afternoon session of the court. Poindexter was making his toilet and preparing for the noon meal. A knock at this juncture was heard at the closed door, and one

of them said, "Come in;" Moseley and Freer went in. Moseley remarked that if there was any whisky in the room he was going to have it. He picked up the bottle of whisky, and stated that "a man don't have to give a man whisky; when you find it, drink it." Someone spoke about that time, and said, "You boys better shut that door." One of them closed the door. Moseley took a drink, turned to the hydrant for water, and went out. The case was not discussed. Neither Going nor Poindexter knew who was knocking at the door when one of them said, "Come in."

Moseley explained his conduct by saying

of court. *United States v. Barrett*, 187 Fed. 378. In so holding the court said that it may also be the duty of the court to set aside the verdict in such a case, for the reason that a verdict rendered where the parties, in sight of the jury, fight over questions arising in the case, is not in accordance with that serene, pure, and impartial administration of the law.

An attempt corruptly to influence a juror in a pending case may be punished as a contempt of court under a statute restricting the power of the United States courts to punish for contempt to cases of misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice," though the conduct complained of occurred at the defendant's place of business, a half mile distant from the courthouse. *McCauley v. United State*, 25 App. D. C. 404.

Concerning the grand jury.

In *Harwell v. State*, 10 Lea, 544, it was said: "the grand jury is a constitutional part of the court, and any illegal or corrupt interference with them in the discharge of their duties, or attempt by outside influence to control their action, would be a contempt of court, for which the offender should be punished."

But it appeared in the above case that the conversation that took place between an outsider and a grand juror on a matter that was before the grand jury for consideration was not of such a character as to indicate that defendant corruptly sought to interfere with the proceedings, as he said nothing to dissuade the juror from finding a true bill, and seemed to be inspired more by impertinent curiosity than a corrupt purpose or intentional violation of law, and it was accordingly held that the finding that the defendant was guilty of contempt of court should be reversed, as not being supported by the evidence.

Writing and sending an insulting letter to the grand jury, in relation to matters which were the subject of their investigations, in substance, accusing and denouncing many of the jurors of permitting themselves to be corruptly used by a person of wealth for the purpose of making present-

ments and finding indictments against the writers' client upon matters which were the subject of litigation between the parties in the civil courts, is a contempt of court. *Re Tyler*, 64 Cal. 434, 1 Pac. 884.

And, in *Bergh's Case*, 16 Abb. Pr. N. S. 266, it was held that the delivery to the grand jury of a contemptuous and insulting letter constituted a contempt of court within the meaning of the statute providing for the punishment of disorderly, contemptuous, and insolent behavior committed during the sitting of the court. But a letter from the president of the society for the prevention of cruelty to animals to the grand jury, reviewing and expostulating against their action in ignoring a bill founded on a complaint for promoting a dog fight, which had been preferred by an agent of the society, ought not to be construed as designed to interrupt the administration of justice, but rather as an honest endeavor to discharge his official duty, where it appeared that he was at the time authorized by the attorney general of the state and the district attorney of the county to act as a deputy for those officers in all prosecutions within the cognizance of the society, and, as so construed, could not be considered as a contempt.

It is a contempt of court for one to attempt to induce grand jurors to indict persons not under arrest. *Doan's Case*, 17 Pa. Co. Ct. 521.

An attempt to corruptly influence a grand juror may be punished as a contempt of court under the statute restricting the power of the United States courts to punish for contempt to cases of misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice," though the conduct complained of occurred in a saloon several blocks distant from the courthouse. *Pierce v. United States* 37 App. D. C. 582, certiorari denied in 223 U. S. 732, 56 L. ed. 634, 32 Sup. Ct. Rep. 528.

Effect of statute making interference with jury an indictable offense.

The majority of the cases hold that the mere fact that improper interference with a juror may be indictable does not deprive

he was feeling bad, and wanted a drink of whisky. He told the bailiff he "had to have it; he was tired and worn out, and was not used to being penned up like cattle." He went to the room of his own volition. Neither Poindexter nor Going had any knowledge that he was going there at that time. Moseley would not have gone to the room without the bailiff. He was in the custody of the bailiff both times that he got a drink. He had been admonished by the court not to leave the rest of the jury except with the bailiff, and when the bailiff went with him he did not feel that there was any impropriety in taking a drink in the presence of the bailiff. He had not been admonished by the court not to take a drink. Even if an opportunity had been afforded him he would not have discussed the case nor permitted anyone to discuss it in his presence.

Moseley and another juror voted for manslaughter; eight of the jurors stood for murder in the first degree, and two for murder in the second degree. There was a hung jury and a mistrial of the case.

The prosecuting attorney filed his information on his official oath before the judge

of the Lawrence circuit court, accusing the petitioners Poindexter, Going, Moseley, and Freer of contempt of court, which, among other things, alleged that, "after the jury in the Benningfield Case had been impaneled, and had been put in charge of a bailiff to be kept together, and had been instructed to permit no one to talk to them, and not to talk to anyone themselves with reference to the case, and to prevent all improper influences being brought upon them, J. B. Freer, as the bailiff in charge of said jury, took one J. W. Moseley, a member of said jury, to the private room of said Poindexter and Going, attorneys of record for the defendant, where the said Moseley was given whisky to drink in an attempt to improperly influence and corrupt the said J. W. Moseley, and to have him return a verdict for defendant in the cause; that Moseley, as the juror, did unlawfully and corruptly and contemptuously go to the room of the said Poindexter and Going, the said attorneys, and there partake of whisky, in violation of the court's orders and his duty as a juror in said cause; that the said Freer, in violation of the court's instruc-

a court of the power of dealing with it as a contempt of court. *Re Tyler*, 64 Cal. 434, 1 Pac. 884; *Bradley v. State*, 111 Ga. 168, 50 L.R.A. 691, 78 Am. St. Rep. 157, 36 S. E. 630; *Nichols v. Superior Ct. Judge*, 130 Mich. 187, 89 N. W. 691; *Gandy v. State*, 13 Neb. 445, 14 N. W. 143.

On this subject, Judge Seymour D. Thompson, in an article in 5 *Crim. L. Mag.* says (p. 155): "The power of the courts in this regard being founded in the principle of self-preservation, it does not at all go to deprive them of it that the law has provided some other mode for punishing the offender. It is quite immaterial that the offense is indictable. Courts are not obliged to trust the preservation of their dignity and authority to such weak agencies as information, indictment, and trial by jury; it may be before some other tribunal, where the success of the prosecution and the conviction of the offender may depend upon the zeal of a prosecuting witness, of the state's attorney, or upon circumstances purely accidental. Besides, the exigencies may not admit of so tardy a remedy."

And in *Kirk v. United States*, 112 C. C. A. 531, 192 Fed. 273, it was said in this connection: "There is every reason why the court should have the power to deal with such attempts at their very inception, so as to prevent the evil, and should not be confined to the remedy by indictment to punish such acts after the evil has been accomplished."

But in *State v. Blackwell*, 10 S. C. 35, it was held summary proceedings to punish as for contempt are inappropriate where the acts constituting the alleged contempt are made an offense by statute with a prescribed

penalty, but that indictment is the proper remedy.

Accordingly it was held in the above case that one on trial under an indictment could not be punished by rule to show cause as for contempt for furnishing liquor to some of the jurors during the trial of his case, where such acts were made an offense by statute. The court said: "There being a formal remedy in the case, summary proceedings to punish, as for contempt, were inappropriate. Certainly no one can be punished twice for the same offense; and if the defendant should suffer penalties imposed at the discretion of the court, as for contempt, and subsequently be indicted, it would happen that either the summary proceeding must be a bar to the indictment, or the defendant must suffer accumulated penalties. In either case the object of the statute would be defeated. It would be defeated, in the one case, in the respect that it intended to substitute a certain and formal remedy for one deficient in form and the requisite safeguards. It would, in the other case, be defeated in the respect that it intended to subject the punishment imposed to a certain measure, while the punishment resulting from a judgment in contempt is not subject to such standard of measurement."

In the recent case *Re Moore*, 79 S. C. 399, 60 S. E. 947, the court recognized the rule announced in *State v. Blackwell*, as the law in that jurisdiction, but held that the statute was not broad enough to cover the offense charged against the defendants, and that therefore the court could rightfully punish for contempt.

A. L. R.

tions, corruptly and contemptuously took the said juror Moseley to the room of the said Going and Poindexter for the purpose of having him given whisky, and otherwise to act improperly as a juror in the said cause; that each of the defendants corruptly and contemptuously violated the instructions and orders of the court given to said Freer as bailiff and to the jury of which the said Moseley was a member, which instructions were given in the presence and with the knowledge of said defendants Poindexter and Going and Freer and Moseley; that the said room referred to as the room of Poindexter and Going was a room in the Rhea Hotel in the town of Walnut Ridge, Arkansas."

Upon this information the judge made the following order: "It is therefore ordered that the clerk of this court issue a citation against the said Freer, Moseley, Poindexter, and Going, commanding them to appear and show cause on the 28th day of March, 1913, in this court why they should not be dealt with for said contempt." The citation by order of the court was entered upon the record.

The citation was served upon Moseley on the 27th of March, and upon Freer on March 28th, but was not served upon Poindexter or Going until after the return day, but was served upon each of them on March 29th. On the 2d of April, at the same term of court, the information was read by the prosecuting attorney, and the petitioners demurred there to generally for the reason that it did not state a cause of action for contempt, and, specifically, for the reason that it was not verified by oath, and not supported by affidavit. The demurrer was overruled. The evidence was heard, developing the facts substantially as above set forth, and the court entered up a fine of \$50 against each of the petitioners, and adjudged that they be imprisoned in the county jail for five days. The petitioners and appellants filed a motion for a new trial, which was overruled, and they have duly prosecuted their appeal to this court. They, also, have brought up the record for review by certiorari.

Messrs. H. L. Ponder and Rose, Hemingway, Cantrell, & Loughborough, for appellant Poindexter:

Judge Poindexter was not guilty of contempt.

State ex rel. Kimbrell v. Clark, 134 Mo. App. 55, 114 S. W. 538; 12 Cyc. 193; 1 Am. & Eng. Enc. Law, 267; Reg. v. Hansill, 3 Cox, C. C. 597; Wren v. Com. 26 Gratt. 956.

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Mr. S. D. Campbell, for appellant Going:

The citation was not issued by the court. Neel v. State, 9 Ark. 259, 50 Am. Dec. 209.

The purported information was not sworn to nor based upon any affidavit.

State v. Bonner, 178 Mo. 424, 77 S. W. 463; State v. McGee, 181 Mo. 312, 80 S. W. 899; State v. Hannigan, 182 Mo. 15, 81 S. W. 406; State v. Sheridan, 182 Mo. 13, 81 S. W. 410; State v. Decker, 185 Mo. 182, 83 S. W. 1082; State v. Kelly, 188 Mo. 450, 87 S. W. 451; State v. Gutke, 188 Mo. 424, 87 S. W. 503; Semon v. State, 158 Ind. 55, 62 N. E. 625; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; Gandy v. State, 13 Neb. 445, 14 N. W. 143; Rucker v. State, 170 Ind. 635, 85 N. E. 356; 4 Bl. Com. p. 309, 312; 2 Cooley's Bl. Com. pp. 468-470; State v. Ashley, 1 Ark. 279; State v. Graham, 38 Ark. 521, 4 Am. Crim. Rep. 276; State v. Whitlock, 41 Ark. 403; Canthorn v. State, 41 Ark. 488; Haskins v. State, 47 Ark. 243, 1 S. W. 242; York v. State, 89 Ark. 72, 115 S. W. 948; Carl Lee v. State, 102 Ark. 122, 143 S. W. 909; Snyder v. State, 151 Ind. 553, 52 N. E. 152; Back v. State, 75 Neb. 603, 106 N. W. 787; Herdman v. State, 54 Neb. 626, 74 N. W. 1097, 11 Am. Crim. Rep. 298.

Neither the purported information nor the citation stated facts sufficient to constitute any contempt upon the part of Going or Poindexter.

Art. 7, § 26, Const. of 1874; Kirby's Dig. chap. 28, § 720; Ex parte Woodruff, 4 Ark. 630; Neel v. State, 9 Ark. 259, 50 Am. Dec. 209; Cossart v. State, 14 Ark. 538; Bunch v. State, 14 Ark. 544; State v. Morrill, 16 Ark. 384; Binns v. State, 35 Ark. 118; Harrison v. State, 35 Ark. 458; Ex parte Davies, 73 Ark. 358, 84 S. W. 633; Meeks v. State, 80 Ark. 579, 98 S. W. 378; Johnson v. State, 87 Ark. 47, 18 L.R.A. (N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531; York v. State, 89 Ark. 76, 115 S. W. 948; Ex parte Gilbert, 93 Ark. 307, 124 S. W. 762; Ex parte Chastain, 94 Ark. 558, 127 S. W. 973; Carl Lee v. State, 102 Ark. 122, 143 S. W. 909; Ex parte Winn. — Ark. —, 150 S. W. 399; 9 Cyc. 15, 16; People ex rel. Munsell v. Oyer & Terminer Ct. 101 N. Y. 245, 54 Am. Rep. 691, 4 N. E. 259, 6 Am. Crim. Rep. 163; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; Gandy v. State, 13 Neb. 445, 14 N. W. 143; Rucker v. State, 170 Ind. 635, 85 N. E. 356; Freeman v. Huron, 8 S. D. 435, 66 N. W. 928; McConnell v. State, 46 Ind. 298; Worland v. State, 82 Ind. 49; Cooley v. State, 46 Neb. 603, 65 N. W. 799; State v. Sweetland, 3 S. D. 503, 54 N. W. 415; Young v. Cannon, 2 Utah,

560; Acts of the Apostles, chap. 25, verse 27.

If there was anything in the conduct upon the part of Going or Poindexter subject to criticism, it was purged of any contempt.

Bunch v. State, 14 Ark. 544; State v. Morrill, 16 Ark. 384.

Mr. A. S. Irby, for appellant Moseley:

The purported information does not show that the offense was committed within the jurisdiction of the court.

State v. Root, 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590; Sovine v. State, 85 Ind. 576; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; Kern v. State, 7 Ohio St. 411; State v. Elliott, 41 Tex. 224.

The purported information was not sworn to, nor based upon any affidavit.

Rucker v. State, 170 Ind. 635, 85 N. E. 356; Gandy v. State, 13 Neb. 445, 14 N. W. 143; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; Semon v. State, 158 Ind. 55, 62 N. E. 625; State v. Gutke, 188 Mo. 424, 87 S. W. 503; State v. Decker, 185 Mo. 182, 83 S. W. 1082; 4 Bl. Com. p. 309, 312; 2 Cooley's Bl. Com. pp. 468-470; State v. Ashley, 1 Ark. 279; State v. Graham, 38 Ark. 521; State v. Whitlock, 41 Ark. 403; Cant-horn v. State, 41 Ark. 488; Haskins v. State, 47 Ark. 243, 1 S. W. 242; York v. State, 89 Ark. 72, 115 S. W. 948; CarlLee v. State, 102 Ark. 122, 143 S. W. 909.

The purported information failed to state facts sufficient to constitute any contempt upon the part of J. W. Moseley.

Art. 7, § 26, Const. of 1874; Kirby's Dig. chap. 28, § 720; Ex parte Woodruff, 4 Ark. 630; Neel v. State, 9 Ark. 259, 50 Am. Dec. 209; Cossart v. State, 14 Ark. 538; Bunch v. State, 14 Ark. 544; State v. Morrill, 16 Ark. 384; Binns v. State, 35 Ark. 118; Harrison v. State, 35 Ark. 458; Ex parte Davies, 73 Ark. 358, 84 S. W. 633; Meeks v. State, 80 Ark. 579, 98 S. W. 378; Johnson v. State, 87 Ark. 47, 18 L.R.A. (N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531; York v. State, 89 Ark. 76, 115 S. W. 948; Ex parte Gilbert, 93 Ark. 307, 124 S. W. 762; Ex parte Chastain, 94 Ark. 558, 127 S. W. 972; CarlLee v. State, 102 Ark. 122, 143 S. W. 909; Ex parte Winn, — Ark. —, 150 S. W. 399; 9 Cyc. 15, 16; People ex rel. Munsell v. Oyer & Terminer Ct. 101 N. Y. 245, 54 Am. Rep. 691, 4 N. E. 259, 6 Am. Crim. Rep. 163; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; Gandy v. State, 13 Neb. 445, 14 N. W. 143; Rucker v. State, 170 Ind. 635, 85 N. E. 356; McConnell v. State, 46 Ind. 298; Herdman v. State, 54 Neb. 626, 74 N. W. 1097, 11 Am. Crim. Rep. 298; State v. Root, 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590; Hutton v. Superior Ct. 147 Cal. 156, 81 Pac. 409.

Where a party is in contempt through a 46 L.R.A. (N.S.)

misapprehension of his duties, or where it results from a mistake, and a reasonable excuse is presented to the court, ordinarily the party will be discharged upon the payment of the costs and expenses of the proceeding.

9 Cyc. 57; People v. Bouchard, 56 N. Y. S. R. 779, 27 N. Y. Supp. 201; Morss v. Domestic Sewing Mach. Co. 38 Fed. 482; Des Moines Street R. Co. v. Des Moines Broad Gauge Street R. Co. 74 Iowa, 585, 38 N. W. 496.

Messrs. William L. Moose, Attorney General, and John P. Streepey, Assistant Attorney General, for the State:

The information was sufficient.

York v. State, 89 Ark. 72, 115 S. W. 948; Neel v. State, 9 Ark. 259, 50 Am. Dec. 209; Langdon v. Wayne Circuit Judges, 76 Mich. 358, 43 N. W. 310; State ex rel. Crow v. Shepherd, 177 Mo. 220, 99 Am. St. Rep. 624, 76 S. W. 79; Hurley v. Com. 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757; State v. Guglielmo, 46 Or. 250, 69 L.R.A. 466, 79 Pac. 577, 80 Pac. 103, 7 Ann. Cas. 976.

The appellants, should it be held that the verification is not sufficient, have not raised this question in the proper manner.

Allis v. Bender, 14 Ark. 625; Loring v. Flora, 24 Ark. 151; Greenfield v. Carlton, 30 Ark. 547; State v. Speyer, 182 Mo. 77, 81 S. W. 430; State v. Lee, 113 Mo. App. 200, 87 S. W. 527.

The filing of the demurrer entered their appearance.

Miller v. State, 35 Ark. 276.

This was a constructive criminal contempt, and the court itself had power to proceed on its own motion.

Ex parte Wright, 65 Ind. 504; Re Nevitt, 54 C. C. A. 622, 117 Fed. 448; Powers v. People, 114 Ill. App. 323; CarlLee v. State, 102 Ark. 122, 143 S. W. 909; Lyman v. State, 90 Ark. 596, 119 S. W. 1116.

The purported information stated facts sufficient to constitute a contempt.

State ex rel. Hoefs v. District Ct. 113 Minn. 304, 129 N. W. 583; Binns v. State, 35 Ark. 118.

The disclaimer is not sufficient to purge the contempt.

Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; State v. Simmons, 1 Ark. 265.

Wood, J., delivered the opinion of the court:

As we said in Ex parte Winn, — Ark. —, 150 S. W. 399: "No question is raised here . . . as to the form in which a review by this court is sought. Therefore we pretermitt any discussion of that question.

as the case may be treated as being either here on appeal or on writ of certiorari."

The information under the official oath of the prosecuting attorney and the citation directed by the judge to be issued by the clerk, setting forth the information showing the grounds upon which the petitioners were cited to appear and show cause why they should not be dealt with for contempt, were sufficient to give the court jurisdiction. The information made by the prosecuting attorney under his official oath was sufficient, even though not specially verified by him, to meet the requirements of the law, as an accusation setting forth the offense with which the petitioners were charged.

The citation alone, embodying the information which the court ordered to be entered upon its record, was sufficient to meet the requirements of the law, as announced by this court in *Carl Lee v. State*, 102 Ark. 122, 143 S. W. 909, to give the accused petitioners information of the offense with which they were charged.

The citation was duly served upon the petitioners Moseley and Freer before the return day thereof, and, although the appellants Poindexter and Going were not served before the return day, they were served before the cause was heard. All the petitioners appeared and made no objection to the service. They, therefore, cannot now complain that they were not duly served with process.

It is unnecessary to determine as to whether the information and citation stated facts sufficient to constitute a contempt of court; for the whole case was developed on evidence taken before the court, and the question now is as to whether or not the evidence was sufficient to warrant the court in finding the petitioners guilty of contempt.

Treating the testimony bearing upon the case of each petitioner separately, we are of the opinion that there was no evidence to warrant the court in adjudging Poindexter guilty of contempt. There was no testimony to warrant the inference that he was instrumental in inviting the bailiff and the juror to the room he occupied, for the purpose of furnishing liquor to influence the juror in rendering his verdict. His generosity and courtesy in sharing his room, in an emergency, with associate counsel, made him the innocent victim of the unfortunate circumstances, which afterwards developed and over which he had no control, that doubtless caused the trial judge to conclude that he was concerned, or at least acquiesced, in the improper conduct of the other petitioners.

Poindexter did not know that Going had a bottle of liquor, when he consented to 46 L.R.A.(N.S.)

share the room with him. He did not know that Going had invited anyone to go to his room for the purpose of drinking liquor, much less the bailiff and the juror. When the bailiff and the juror knocked at the door of Poindexter's room and were invited to come in, he did not know before their entrance who it was that knocked, nor what their purpose was. The liquor did not belong to him. It was brought to the room without his knowledge. He did not ask them to take a drink, but simply continued making his toilet, as he was doing at the time they entered the room. Instead of inviting the bailiff and the juror to take a drink of liquor, he states that he protested, saying: "You ought not to come here; you are going to get us all into trouble." Poindexter had never taken a drink of liquor in his life, and did not approve of the use of it by others. He had nothing to do whatever with the episode, and should not be censured and held for contempt, merely because he failed to exclude the bailiff and the juror from his room; nor should he be held for contempt because he failed to report the matter to the circuit judge.

The court, from the questions propounded to Poindexter, seems to have considered that it was the duty of Poindexter to have called the matter to his attention as soon as it occurred; but we do not agree with the court, and are of the opinion that Poindexter gives a perfectly reasonable and plausible explanation of why he did not do so, which should have been accepted by the court.

Poindexter testified that had he known, when the door was closed and the knocking was heard at the door, that it was the bailiff and one of the jurors, he would not have said "Come in," and "he would not have stayed in the room, if he had had time to consider the matter; but it was one of those things that comes so suddenly that a person does not have time to make up his mind as to what is best to do." Freer was not a friend of Poindexter, and while the latter fully appreciated the fact that it was improper for Freer and the juror to be in his room under the circumstances, yet he did not feel called upon to give publicity to the matter, because he was in no way responsible for the unfortunate and embarrassing situation, and doubtless felt that if he had reported the matter to the court it might have prejudiced the juror against him, and in some way have jeopardized the interest of his client.

In our opinion the testimony thoroughly exonerates Poindexter from any contemptuous conduct, and the court erred in not so holding.

The cases of Going, Freer, and Moseley

are different from Poindexter's. The testimony of the bailiff, Freer, and the juror Moseley, shows that on the evening after the arrival of Going they met him at the head of the stairs in the hotel, and he invited them to his room to take a drink of whisky. Going testified that he wouldn't invite a juror to his room and would not give him a drink with a view of influencing him, and that he "did not know by what means Freer or Moseley knew that there was whisky in his room, unless one of them spoke to him, and he, not knowing that the bailiff or juror was connected with the court, replied that he had some whisky." Going does not deny that he extended to Freer and Moseley an invitation to take a drink of whisky in his room. He only says that he did not know that the one was the bailiff and the other a juror. He says at that time they were strangers to him. So the testimony shows that he met these men, whom he did not know personally, and of whose official character he was not then advised, and invited them to his room to take a drink of whisky, without first taking the precaution to inquire whether either one had any connection with the trial then in progress. Yet he knew the crowded condition of the hotel, and must have known that the jury in charge of the bailiff was being entertained there. On the second occasion, when the juror and the bailiff went to his room on their own motion to get a drink of whisky, he did know of their relation to the trial, yet he did not admonish them that it would be improper, on account of the connection they all had with the trial, and because of the court's instructions, for them, with or without his invitation, to drink of his liquor in his own room. In explanation of his conduct on this occasion, he says: "I would not knowingly permit a juror to come to my room; but when you have got a man's life on your hands, and a juror comes to your room, the question of what you would do or wouldn't do is a proposition that no man can say until they go through that very experience."

Now, when Senator Going left the Senate to go to the dry town of Walnut Ridge to serve as lawyer in the defense of a client who was on trial for murder, he equipped himself with what he termed a "vial" of liquor, and, being a vial, it was presumably for his own use. But on the evening after his arrival we find him prepared from that "little bottle of medicine" "to give strong drink unto him that is ready to perish and wine to those that be of heavy hearts." Both the Bailiff and the juror Moseley seem to have been in that condition. For the bailiff, after he and the juror were invited, though protesting that the juror "shouldn't

go," that it was "shaky" for him to do so, nevertheless permitted him to go, and went with him and took a drink himself from Going's vial. The juror who "never refused a drink" when asked to take one, and who took it when he found it, whether asked or not said that he "felt bad, he was tired and worn out," "was not used to being penned up like cattle," and "had to have a drink," and was going after it whether the bailiff went with him or not. It should be here remarked that Going's vial contained enough liquor, as shown by his own testimony, to furnish a drink "to several persons" on two occasions, besides the bailiff and juror.

So here we have the spectacle of one of the leading lawyers for the defense in his private room, giving liquor to one of the jurors and also to the bailiff having the jury in charge. The bailiff was shown to be in sympathy with the prosecution, and it was believed that the juror Moseley at that time was also unfavorable to the defendant. But there was no verdict, and after the mistrial it was found that juror Moseley was one of two who voted for a verdict of manslaughter, while eight were for murder in the first degree, and two for murder in the second degree. The defendant, on a second trial, was convicted of murder in the second degree and sentenced to twenty years in the penitentiary.

It occurs to us that the maxim, *Ignorantia legis neminem excusat*, applies with peculiar force to one who, at the time of his alleged offense, was not only a lawyer, but also one of our lawmakers. He should be held to know the law, and also the proprieties of professional conduct, and the rules of court that must obtain in the orderly administration of the law. So far as the bailiff and the juror are concerned, they were under the positive orders of the court "to stay as nearly as you can separated from the crowds around the hotel," and "to let your conduct be free from any sort of criticism." Their conduct, therefore, can only be explained upon the theory that their appetite got control over their judgment, under the insidious influence of the bewitching announcement by Going that the whisky they were invited to drink was "sixteen or twenty years old," and when they took one drink they found it "mighty fine stuff," and "had to have" another.

Courts were created for the purpose of protecting life and property, and preserving all the sacred rights vouchsafed by the Constitution and statutes. The happiness and well-being of society and the perpetuity of our institutions depend upon the integrity, independence, conservatism, and courage of the courts in upholding the majesty of the law. The jury through all the ages since

Magna Charta has been retained as an essential part of the judicial system. It is impossible to keep the fountains of justice clean and pure, unless the jury is free from contaminating influences. Strong drink, therefore, should be neither for judges nor jurors, "lest they drink, and forget the law, and pervert righteous judgment."

What shall the penalty be? The parties have disclaimed any intentional wrongdoing, and we have reached the conclusion that such was the case. Nevertheless, the conduct under review was well calculated in the eyes of the public to bring the law and the tribunal charged with its enforcement in that jurisdiction into contempt. Hence the trial court was correct in calling petitioners Going, Freer, and Moseley to account, and in rebuking and punishing them for contempt. But as they sought in every way to purge themselves of intentional disrespect for the court, and testified that nothing was said concerning the merits of the case, we are of the opinion that justice will be done, and the dignity and authority of the court vindicated when the fine imposed is paid, without imposing the jail sentence, of which petitioners should be relieved.

It is so ordered, and the judgment otherwise affirmed.

GEORGIA SUPREME COURT.

GRACE MACY KEEFER, Plff. in Err.,
v.

DAVID H. KEEFER.

(— Ga. —, 78 S. E. 462.)

Divorce — reconciliation — retention of suit for attorneys' fees.

1. Where a wife brought suit against her husband, alleging a permanent separation on account of misconduct on his part, and praying for permanent alimony and for an allowance as temporary alimony and counsel fees, and pending the case, but before the allowance of temporary alimony or counsel fees, the parties adjusted their differences, resumed cohabitation, and desired that the case be dismissed, it was proper to enter an order of dismissal, and to refuse to permit the attorneys for the wife to intervene and become parties to the case, or to render a judgment in that proceeding for attorneys' fees.

Same — appointment of receiver — effect.

2. The inclusion in the original petition

Headnotes by LUMPKIN, J.

Note. — As to power of court to allow attorneys' fees in divorce suit after reconciliation of parties, see note to *Kiddle v. Kiddle*, 36 L.R.A. (N.S.) 1001. 46 L.R.A. (N.S.)

of a prayer for the appointment of a receiver to hold the property of the husband within the jurisdiction, as a means of realizing on such judgment as the wife might obtain, and the appointment of a temporary receiver, did not alter the case.

(May 14, 1913.)

ERROR to the Superior Court for Fulton County to review a judgment dismissing an action for divorce upon settlement of the parties without providing for payment of the attorneys' fees. Affirmed.

Statement by Lumpkin, J.:

On January 20, 1912, Mrs. Grace Macy Keefer filed in Fulton superior court her petition against D. H. Keefer and others, alleging in substance as follows: On April 11, 1906, she was married to D. H. Keefer in the city of New York. They came almost immediately to the city of Atlanta, where the defendant had previously resided. They lived together as husband and wife until a few months since, with the exception that on several occasions the plaintiff was compelled to live separate from him on account of his cruel and inhuman treatment of her, and also with the exception that the defendant several times absented himself from her without cause or reason. After her separation from him, she went back to live with him on the faith of his promise to treat her with kindness and consideration, and at all times she has been a devoted and faithful wife to him. In July, 1909, he left the plaintiff and took up his residence in the city of New York; and he now claims to be a citizen of the state of New York, though he maintains an office in the city of Atlanta and claims to be a member of the bar of that place. There is no issue of the marriage. The plaintiff has two children by a former marriage. The husband and wife are now living in a bona fide state of separation, and no action for divorce is pending in the state of Georgia. She alleges upon information and belief that since the separation the defendant has been guilty of various acts of adultery. She also alleges upon information and belief that he owns a large amount of real and personal property, of the probable value of \$80,000, and has a large income. He owns certain real estate in Fulton county, of the aggregate value of at least \$30,000, and also a number of shares in certain named corporations. Plaintiff owns certain property (a description of which is omitted from the record), and other than this she has no property which will produce an income, except certain shares of stock, from which she receives \$335 a year. She is dependent upon the defendant for maintenance and support, and a reason-

able sum for that purpose would be \$250 per month. In order to maintain this action, it will be necessary to employ counsel in New York and to take numerous depositions, and a reasonable allowance for these expenses and for the employment of counsel will be \$2,000. The plaintiff is fearful that the defendant may transfer his personal property and convey his real estate, in which event she will be completely at his mercy and without adequate means to compel him to provide for her support and maintenance. She prayed for the appointment of a receiver to take charge of all the property of the defendant to be found within the jurisdiction of the court; that the defendant be enjoined from transferring or encumbering such property; that the corporations named, in which he holds stock, be enjoined from transferring any of it; that she have judgment against the defendant for \$250 per month, and for \$2,000 for counsel fees and expenses incident to this litigation, and that the judgment be satisfied out of the property coming into the hands of the receiver, unless the defendant shall submit himself to the jurisdiction of the court, in which event a general judgment is also prayed against him, and for general relief and process.

A temporary receiver was appointed. On April 19th thereafter the defendant presented his petition to the court, alleging that he and his wife, the plaintiff in the cause, had adjusted their differences and were living together as man and wife; that since such adjustment, and after the renewed cohabitation, the plaintiff had repeatedly directed her counsel to dismiss the case, but such counsel declined to do so. The defendant prayed that an order should be passed calling upon counsel to show cause why the case should not be dismissed and the receiver discharged. An order was granted accordingly. Counsel for the plaintiff filed a response to the rule, alleging in substance as follows: During the latter part of October, 1911, the plaintiff employed them to advise and counsel with her in regard to the differences then existing between her and her husband. At that time the plaintiff and the defendant were living in a state of separation, and the defendant was residing in New York. The plaintiff decided that it was best to obtain an absolute divorce from her husband, and accordingly employed certain named lawyers of the New York bar to co-operate with these respondents in carrying out her wishes. As the defendant was at the time a resident of the state of New York, and the marriage had been performed in that state, its courts had jurisdiction of the suit for divorce, which was accordingly there filed. The

plaintiff and her two children were living in Atlanta, and the property of the defendant was located in Fulton county. In order to procure temporary and permanent alimony it was necessary that the petition should be filed in the superior court of Fulton county. Accordingly these respondents, as attorneys for the plaintiff, prepared and filed such a petition, and upon it an order was passed placing the property in the hands of a receiver. They have faithfully performed all services required of them by the plaintiff, and have advised and counseled her in regard to the suit for divorce pending in New York; but they have received no compensation for their services, nor has she offered to pay them therefor. On February 6, 1912, the plaintiff wrote from New York to her counsel, directing them to dismiss her petition, but declined to state to them at whose cost the proceeding should be dismissed, and refused to make any provision for their compensation. Two thousand dollars is a reasonable amount to be allowed to them as plaintiff's attorneys. The report of the receiver shows that he has abundant property of the defendant in his possession with which to pay all court costs and counsel fees. They prayed that they be made parties plaintiff in the action; that they be allowed \$2,000 as counsel fees, to be recovered out of the property in the hands of the receiver; that the receiver's fees and expenses and all court costs be paid out of the property in his hands; and that the prayer of the petition filed by the defendant be denied.

Upon the hearing of the petition for dismissal of the action and the response thereto, the presiding judge passed this order: "It having been admitted in open court that Mrs. Grace Macy Keefer has, situated in Fulton county, this state, property of the value of \$20,000, and other valuable property not situated in the state of Georgia, the value of which is not stated, it is therefore considered, ordered, and adjudged that the petition to dismiss said cause be and the same is hereby granted, and said case is hereby dismissed." To this order the counsel of the plaintiff excepted. The judge also entered judgment against the plaintiff for the court costs and receiver's fee.

Messrs. Evins & Spence, for plaintiff in error:

Counsel fees allowed to the wife in divorce proceeding are necessities.

Parks v. Parks, 126 Ga. 438, 55 S. E. 176; Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27; 2 Bishop, Marr. & Div. § 973; 2 Nelson, Div. & Sep. § 876; Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637.

The order of dismissal will not be rendered until the attorney is paid.

Dixon v. Dixon, L. R. 2 Prob. 253, 40 L. J. Prob. N. S. 38, 25 L. T. N. S. 135, 19 Week. Rep. 787; *Twistleton v. Twistleton*, L. R. 2 Prob. 339, 26 L. T. N. S. 265, 20 Week. Rep. 448; *Green v. Green*, 40 How. Pr. 465; *Burgess v. Burgess*, 1 Duv. 288; *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *Gregory v. Gregory*, 32 N. J. Eq. 424.

The attorney who appears for the wife, and does not look to her for compensation for his services, has a right to proceed in the case with the assurance that a suitable fee will be awarded to him by the court, unless his case is without merit or probable cause.

Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914; *Aspinwall v. Sabin*, 22 Neb. 73, 3 Am. St. Rep. 258, 34 N. W. 72; *Davis v. Davis*, 141 Ind. 367, 40 N. E. 803; *Thorn-dike v. Thorndike*, 1 Wash. Terr. 176; *Louden v. Loudon*, 65 How. Pr. 411; *Moore v. Moore*, 10 Ont. Rep. 284; *Smith v. Smith*, 35 Hun, 378, affirmed in 99 N. Y. 639; *Lamy v. Catron*, 5 N. M. 373, 23 Pac. 773; *Chase v. Chase*, 65 How. Pr. 306, reversed in 29 Hun, 527; *Wagner v. Wagner*, 34 Minn. 441, 26 N. W. 450; *Newman v. Newman*, 69 Ill. 167; *McCulloch v. Murphy*, 45 Ill. 256; *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *Thompson v. Thompson*, 3 Head, 527; *Roberts v. Roberts*, 115 Ga. 263, 90 Am. St. Rep. 108, 41 S. E. 616; *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *McGee v. McGee*, 10 Ga. 485; *Glenn v. Hill*, 50 Ga. 94.

An attorney has claim upon the husband for services rendered his wife, and such claim can be maintained as for necessities.

McCurley v. Stockbridge, 62 Md. 422; *Conant v. Burnham*, 133 Mass. 505, 43 Am. Rep. 532; *Clyde v. Peavy*, 74 Iowa, 47, 36 N. W. 883; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Read & Read v. Dickinson*, 151 Iowa, 369, 130 N. W. 160; *Hays v. Ledman*, 28 Misc. 575, 59 N. Y. Supp. 687; *Hicks v. Stewart*, 53 Tex. Civ. App. 401, 118 S. W. 206; *Hamilton v. Salisbury*, 133 Mo. App. 718, 114 S. W. 563; *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515; *Gossett v. Patten*, 23 Kan. 340; *Peck v. Marling*, 22 W. Va. 708; *Wood v. Wood*, 30 Misc. 50 62 N. Y. Supp. 854; *Naumer v. Gray*, 28 App. Div. 529, 51 N. Y. Supp. 222; *McDougall v. Campbell*, 41 U. C. Q. B. 332; *McCott v. Patterson*, 100 Mich. 227, 24 L.R.A. 629, 58 N. W. 1006; *Norrell v. Norrell*, 138 Ga. 64, 74 S. E. 757; *Schulz v. Schulz*, 128 Wis. 28, 107 N. W. 302; *Ceccato v. Deutschman*, 19 Tex. Civ. App. 434, 47 S. W. 739; *Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541; *Kellogg v. Stoddard*, 40 Misc. 92, 81 N. Y. Supp. 271, 89 App. Div. 137, 84 46 L.R.A. (N.S.)

N. Y. Supp. 1015; *Naumer v. Gray*, 28 App. Div. 529, 51 N. Y. Supp. 222; *White v. White*, 50 Ill. App. 149; *Miller v. Miller*, 75 N. C. 70; *Hoffman v. Hoffman*, 7 Robt. 474; *Glenn v. Hill*, 50 Ga. 94; *Weaver v. Weaver*, 33 Ga. 172; *Sumner v. Sumner*, 118 Ga. 408, 45 S. E. 315.

Messrs. Rosser & Brandon for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The argument in this case has taken a wide range. It has included, among other things, a discussion of the marital right of the husband as to the wife's property, under the common law, its effect in leaving her practically helpless to bring a divorce suit against her husband or defend one brought by him, unless "suit money" were allowed her, the consequent treating of her attorneys' fees in such cases as in the nature of necessities, where the attorney in good faith and on probable cause prosecuted or defended a wife's divorce suit with her husband, the recognition of that theory in this state (*Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637, decided in 1860, distinguished from a case involving other facts in *Glenn v. Hill*, 50 Ga. 94, decided in 1873), the question of the effect of the adoption of the Code, which first became of force in 1863, and contained express provisions in regard to allowing temporary alimony and attorneys' fees *pendente lite*, and of the enactment of what is commonly called the married woman's act of 1866, preserving her separate property to her. We do not deem it necessary to follow counsel over the entire field covered by their arguments. The case before us is not a suit by the attorneys for the wife against either her or her husband, after the termination of the alimony suit between them; and it would be ranging into the by-paths of *obiter dictum* to determine what might be ruled in such an action. Here the wife sued her husband for permanent alimony, and prayed for the allowance of temporary alimony and attorneys' fees, under the statute; and incidentally a receiver was prayed. The parties settled their differences and desired to dismiss the case. The wife's attorneys objected, so far as it affected the allowance of attorneys' fees, and prayed to be made parties, and to have fees awarded to them in that case.

Upon an application for the allowance of temporary alimony, including counsel fees, pending suit for divorce, or permanent alimony, such allowance is not a matter of arbitrary right, under our statutes, but a matter to be determined by the use of a sound discretion applied to the facts

of the case, the causes of the separation, and the circumstances of the parties. Civ. Code, §§ 2976, 2977, 2979; *Parks v. Parks*, 126 Ga. 437, 55 S. E. 176. In the opinion in the *Parks* Case the expression was used that the allowance of both alimony and counsel fees, or the allowance of one and the disallowance of the other, is a matter addressed to the sound discretion of the judge, after examination into the causes of the separation and the circumstances of the parties. This did not mean that the two things were wholly distinct, with the right to apply for one in the client and the other in the attorney, but that, upon such an application by the wife, the judge might allow a sum for her support and also for counsel fees, one or both, or neither, if the evidence so authorized. This is made evident by considering that opinion in the light of the facts involved, and in connection with other decisions of this court and the language of the statute itself. Civ. Code § 2976; *Sweat v. Sweat*, 123 Ga. 801, 51 S. E. 716; *Hughes v. Hughes*, 133 Ga. 187, 65 S. E. 404. It has been said that the application for temporary alimony, including attorneys' fees, should be made and determined *pendente lite*, but that a judgment for such fees based upon a verdict therefor was not a nullity. *Van Dyke v. Van Dyke*, 125 Ga. 492, 54 S. E. 537. In *Weaver v. Weaver*, 33 Ga. 172, on the hearing of an application therefor, an order was passed directing a husband to pay into court a certain amount to compensate counsel who represented his wife, and also an amount for the maintenance of the wife. After the case had been prepared, but before trial, it was dismissed. It was held that this operated to rescind the order as to the alimony proper allowed to the wife, but not as to the fees of counsel. It was said: "We see no reason for compelling counsel to resort to an independent action when his fees have been already adjudged." In view of this ruling, it was held in *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616, that when an application was made for the grant of alimony and attorneys' fees, counsel for the applicant had such a pecuniary interest in the result that, under our statute, a judge related to him within the fourth degree was disqualified from presiding. What was said in the opinion must be considered in connection with the question before the court.

We are aware that there is some conflict of authority as to whether a court may refuse to dismiss a divorce case without the payment of attorneys' fees to the wife's attorney, or whether an order for such fees may be granted before or in connection with the dismissal. It is unnecessary to discuss the basis of such decisions, or the 46 L.R.A. (N.S.)

English practice of taxing attorneys' fees as costs. We think the decisions which rule that counsel for the wife cannot prolong such a suit against the wishes of their client are the sounder and more applicable to the statutory procedure in this state for obtaining temporary alimony, including counsel fees, as well as more in accord with public policy. There is no law authorizing attorneys, pending a suit for divorce or permanent alimony, to make application for the allowance of temporary alimony. Such allowance is not a matter of course, but a matter to be determined upon a consideration of the facts. After a wife has condoned the misconduct alleged against the husband, and the two have resumed their former relations, and when they desire to stop the legal controversy between them, it would be against sound public policy to say that they could not do so, but must continue their case involuntarily, and display the family skeleton and parade their forgiven grievances, so as to aid the judge to determine whether, in his discretion, he would have granted alimony, and would still award counsel fees.

This public policy in favor of permitting a settlement of matrimonial differences has been declared in other states. In *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826, the court was discussing a contract by a married woman made with her solicitor, in advance of a decree for divorce, to pay to him one-half of what should be awarded to her as alimony. *Champlin, J.*, said: "Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife, by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances which otherwise would pass unnoticed." In *Hillman v. Hillman*, 42 Wash. 595, 114 Am. St. Rep. 135, 85 Pac. 61, it was held that a wife could enter into a stipulation for the dismissal of her action for divorce and a *pendente lite* application for temporary alimony without the consent of her attorneys, and the court could not allow them to intervene in the action, and thereupon enter a judgment in their favor for their

fees and for costs advanced by them. Fullerton, J., said: "It is the policy of the law to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce. Actions for divorce, therefore, which both parties desire dismissed, should not be kept alive merely to settle the claims of counsel for attorneys' fees." In *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480, it was held that if, pending an action for divorce, the parties thereto admit a condonation and ask that the action be dismissed, the court should order a dismissal, and could not thereafter enter judgment against the husband for the counsel fees of the wife. Myrick, J., tersely said: "When the husband and wife forgave and were forgiven, and abandoned their criminalities and recriminations, the attorneys had but to gather up their briefs and retire." See also *Petersen v. Petersen*, 76 Neb. 282, 124 Am. St. Rep. 812, 107 N. W. 391; *Stover v. Stover*, 7 Idaho, 185, 61 Pac. 462; *Carden v. Carden*, — Tenn. —, 37 S. W. 1022; *McCulloch v. Murphy*, 45 Ill. 256, 258.

It may be further mentioned that a failure to pay alimony is enforceable by attachment, and if counsel fees awarded in such an application may be enforced in the same way, we might have the spectacle of a forgiving wife being unwillingly compelled to proceed to obtain a judgment and then enforce it by putting her repentant husband in jail for nonpayment of her attorneys' fees. The exact point as to public policy has not been decided in Georgia. In *Chastain v. Lumpkin & Wright*, 134 Ga. 219, 67 S. E. 818, after a petition by a wife for divorce and for permanent and temporary alimony had been filed, but before it had been served, the parties "resumed their relations to each other as husband and wife," and the plaintiff notified her counsel and the sheriff to proceed no further in the case. It was held that her counsel could not thereafter press the case, over her protest, by having service perfected and obtaining judgment for fees. Had the attorneys in the present case, after service had been perfected, such a lien as gave them a right to prosecute the suit of the wife in spite of her desire to dismiss it? We think not. By Civil Code, § 3364, subs. 2 (the only clause here relevant), an attorney is given a lien upon "all suits, judgments, and decrees for money;" and it is declared that no person shall be at liberty to satisfy such suit, judgment, or decree until the lien of the attorney for his fees is fully satisfied, and further that attorneys shall have the same right and power over such suits, judgments, or decrees, to enforce their liens, "as their clients had or may have for the amount due them thereon." While the language is somewhat broad, we think it was not intended to cover an application for alimony and counsel fees. It refers to suits "for money," and again to "the amounts due" the clients. Applications for alimony are in several respects quite dissimilar from the ordinary suits for money. An order or judgment for the payment of alimony may be enforced by imprisonment, though the Constitution prohibits imprisonment for debt. *Carlton v. Carlton*, 44 Ga. 216; *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918. A decree granting alimony is not a debt "founded on a contract," within the meaning of a statute providing for relief from such debts by a discharge in insolvency. *Noyes v. Hubbard*, 64 Vt. 302, 15 L.R.A. 394, 33 Am. St. Rep. 928, 23 Atl. 727. Alimony has been held not to be assignable in advance of its allowance. *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826, *supra*. Its basis is a duty on the part of the husband, rather than an indebtedness. These illustrations will serve to show that such an action (at least before a judgment fixing a sum as an allowance) is not a suit "for money," or one for an "amount due" a client, within the meaning of the statute regulating attorneys' liens. Certainly the legislature never contemplated that an attorney could insist on continuing to prosecute a wife's suit for divorce after she had condoned the alleged offense, and resumed cohabitation with her husband, and no longer desired a divorce.

The same reason of public policy applies to the cessation of a suit for alimony based on the fact that the husband and wife were living separate at the time of its commencement. The mere addition of a prayer for a receiver to hold the property of the husband to be found within the jurisdiction, as a means of securing payment of such amount of alimony as might be awarded, and the appointment of a temporary receiver, would not change the nature of the action. The situation of the attorneys in this case is not so unfortunate as it might seem at a casual glance. It appears that their client and her husband are both amply solvent, and the ruling here made only goes to the extent of holding that the attorneys cannot intervene in this suit,—or obtain a judgment for fees therein, or prevent its dismissal.

Judgment affirmed.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

DAVID SAUL KLAFTER, Appt.,
v.
STATE BOARD OF EXAMINERS OF
ARCHITECTS.

(259 Ill. 15, 102 N. E. 193.)

License — architect — revocation — trial.

1. The action of a judicial tribunal is not necessary to the revocation of the license of an architect.

Constitutional law — departments of government — judicial power — revocation of license.

2. The revocation of the license of an architect for cause by a state board is not an exercise of judicial power.

Legislature — delegation of power — discretion of state board.

3. There is no delegation of power in conferring upon a state board authority to revoke the license of an architect for gross incompetency or recklessness in the construction of a building.

Statute — revocation of license — uncertainty.

4. A statute authorizing the revocation of an architect's license for gross incompetency or recklessness in the construction of buildings is not void for uncertainty.

License — revocation — sufficiency of charge.

5. If a charge against an architect, under a statute permitting revocation of his license for gross incompetency or recklessness in the construction of buildings, is not sufficiently specific to permit him to prepare properly his defense, it is the duty of the board of examiners, upon his request, to require the charge to be made more specific.

(June 18, 1913.)

APPEAL by complainant from a decree of the Superior Court for Cook County dismissing a bill filed to enjoin defendants from proceeding with complainant's trial upon charges for the revocation of his license as an architect. Affirmed.

The facts are stated in the opinion.

Messrs. LeBosky & Plumb and W. A. Bowles for appellant.

Mr. Henry R. Baldwin, with Messrs. P. J. Lucey, Attorney General, and Charles E. Pope, for appellee.

Note.—Except *KLAFTER v. STATE EXAMINERS*, no case has been found relating to revocation of architect's license. For regulation of architects, see the note to *People ex rel. Laist v. Lower*, 36 L.R.A. (N.S.) 1203.

Generally as to revocation of license from public, see Index to L.R.A. Notes, License, §§ 17 and 18.

40 L.R.A. (N.S.)

Carter, J., delivered the opinion of the court:

This was a bill filed by appellant in the superior court of Cook county, praying for an injunction restraining the state board of examiners of architects from proceeding with his trial upon a citation issued by said board and served upon him, requiring him to appear in open public trial on certain charges on January 24, 1913. An answer was filed, and after a hearing the chancellor dismissed the bill for want of equity, at complainant's costs. The appeal has been brought direct to this court, on the ground that constitutional questions are involved.

The bill alleged that appellant had been engaged in the practice of architecture as a profession in Illinois under a license issued to him in 1907 by said board of examiners and yearly renewals thereof; that § 10 of the act providing for the licensing of architects and regulating the practice of architecture as a profession, in force July 1, 1897, as amended, is void, especially that part which provides that "any license so granted may be revoked by unanimous vote of the state board of examiners of architects for gross incompetency or recklessness in the construction of buildings, or for dishonest practices on the part of the holder thereof," etc. *Hurd's Stat.* 1911, p. 87.

Counsel contend that appellant's right, as a licensed architect, to practise his profession is inherent, protected by the Constitutions of this state and of the United States, and that he cannot be deprived of this right, except by judicial proceedings in a court of competent jurisdiction; that the state board of examiners of architects under said act is not a judicial body. They further argue that the above provision of § 10 of the act is void for uncertainty. Practically every argument urged by counsel on these questions has been passed on, adversely to their contentions by this court, in *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995, where this court held constitutional a provision of the medical practice act authorizing the state board of health to refuse or to revoke licenses to practise medicine. Counsel, however, state that they do not seek to have that opinion overruled, but think it can be fairly distinguished, both on the law and the facts, from the case now under consideration. We do not agree with them on either of these points.

It is conceded that this court, in *People ex rel. Laist v. Lower*, 251 Ill. 527, 36 L.R.A. (N.S.) 1203, 96 N. E. 346, has held this statute is not in violation of the state or Federal Constitution as to due process of law, in requiring an examination and license

before one can practise architecture in this state; but it is argued that the authority to require an examination to obtain a license is entirely different from depriving one of that right after he has been duly licensed; that the latter act is a penalty; and that one cannot be deprived of his right to follow his profession, after he has been once duly licensed, other than by a judgment of forfeiture by a judicial tribunal. The right of the state to provide for the general welfare of its people by prescribing such regulations as will secure or tend to secure them against the consequences of ignorance and incapacity, and to that end to exact in many pursuits and professions a certain degree of skill and learning, is upheld by the great weight of authority as an exercise of the police power of the state. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *People v. Evans*, 247 Ill. 547, 93 N. E. 388.

This court held in *People v. Apfelbaum*, *supra*, that there was no distinction between granting a license and revoking one already granted; that each was the exercise of the police power; that the object in both cases was to exclude an incompetent or unworthy person from the practice of his profession. See also to the same effect, *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *Meffert v. State Bd. of Medical Registration* (*Meffert v. Packer*) 66 Kan. 710, 1 L.R.A. (N.S.) 811, 72 Pac. 247, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790. A license is not revoked as a punishment, but in the exercise of the state's discretion, under its police power, as to whether the person holding the license is properly qualified to continue in his profession. *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.

Appellant's argument that due process of law in revoking a license must necessarily consist of judicial proceedings in a court of competent jurisdiction cannot be sustained. This court said in *People v. Apfelbaum*, *supra*, on page 27: "Due process of law does not necessarily imply judicial proceedings. Orderly proceedings according to established rules which do not violate fundamental right must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law, administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process." The authorities in other jurisdictions are in accord with this holding. "Due process is not necessarily judicial process." *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. 46 L.R.A. (N.S.)

Ct. Rep. 390. "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292. "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Cooley*, Const. Lim. 7th ed. 506. "Due process of law" is equivalent to "the law of the land." The purpose of the constitutional requirement as to due process of law is to protect every person in his personal and property rights against the arbitrary action of any person or authority.

A revocation by the state board of examiners of architects of appellant's license would not be the exercise by that body of judicial power. The authority to ascertain facts and apply the law to the facts when ascertained often devolves upon other departments of government than the judiciary. Judgment and discretion as required often of every public official. It would be difficult to draw the precise line separating the judicial from other departments of government. *France v. State*, 57 Ohio St. 1, 47 N. E. 1041. No one, so far as we are aware, has ever attempted it. Official duties are, in general, classed under three heads: Executive, legislative, and judicial. Such classification is not exact, and the duties of many officers cannot be exclusively arranged under any of these three heads. 2 *Cooley*, Torts, 3d ed. 762. Judicial power does not apply to cases where judgment is exercised as incident to the execution of ministerial power. Owners of *Lands v. People*, 113 Ill. 296. The granting or revocation of a license by a state board similar to the one here in question was held by this court in *People v. Apfelbaum*, *supra*, not to be the exercise of judicial power, as that term is understood in reference to the distribution of the powers of government. See, to the same effect, among many other authorities: *People ex rel. Sheppard v. Illinois State Dental Examiners*, 110 Ill. 180; *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *Kettles v. People*, 221 Ill. 221, 77 N. E. 472; *Douglas v. People*, 225 Ill. 536, 8 L.R.A. (N.S.) 1116, 116 Am. St. Rep. 162, 80 N. E. 341; *Aurora v. Schoeberlein*, 230 Ill. 496, 82 N. E. 860; *People ex rel. Miller v.*

Chicago, 234 Ill. 416, 84 N. E. 1044; *Meffert v. State Bd. of Medical Registration* (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *Kennedy v. State Bd. of Registration*, 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125; *State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928; *People v. Hasbrouck*, 11 Utah, 291, 39 Pac. 918, 10 Am. Crim. Rep. 445; *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228; *Bradley v. Richmond*, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318.

The further argument is made that the statute is void for uncertainty, in that it does not define what is meant by "gross incompetency or recklessness in the construction of buildings," the portion of the statute on which the charge against appellant was founded. It is most earnestly insisted that such a charge is so uncertain as to be void, as it does not advise him so that he can prepare for his defense. This argument finds support in certain decisions of the California and Kentucky courts. The weight of authority, however, in other jurisdictions is in favor of the validity of statutes with wording similar to the one here in question. See review of authorities in note to *Hewitt v. State Medical Examiners*, 7 Ann. Cas. 750. The argument on this point seems to be based partially on the ground that the legislature cannot delegate power to the state board of examiners of architects. We do not think the power to legislate is conferred by this act upon that board. "The true distinction is between the delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Sutherland*, Stat. Const. § 68; *People ex rel. Lockwood & S. Co. v. Grand Trunk Western R. Co.* 232 Ill. 292, 83 N. E. 839; *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424, and note; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718. This court, in *People v. Apfelbaum*, supra, construed a statute practically as general in its wording as not void for uncertainty. This court has held that under the city civil service law it was not required, in advance, to specify in written rules every case which would be deemed cause for removal. *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184; *Kammann v. Chicago*, 222 Ill. 63, 78 N. E. 16. In *People ex rel. Sheppard v. Illinois State Dental Examiners*, 110 Ill. 180, we held that the meaning of the word "reputable" was not so uncertain as to make the law void; that whether a dental college was reputable was a question of fact to be decided by the board. In *People use of State Bd. of Health v. McCoy*, 125 Ill. 289, 46 L.R.A.(N.S.)

17 N. E. 786, in construing a statute regulating the practice of medicine, it was held that the words, "unprofessional or dishonorable conduct," must be construed to mean some act or conduct that would, in the common judgment, be deemed unprofessional or dishonorable. Manifestly the court assumed that those words were not so general as to make the statute void for uncertainty. In *Block v. Chicago*, 239 Ill. 251, page 263, 130 Am. St. Rep. 219, 87 N. E. 1011, it was argued that an ordinance which provided that the chief of police could prohibit the exhibition of any obscene or immoral picture fixed no standard by which the chief of police could act. The court said (p. 263): "Manifestly it would be impossible to specify in an ordinance every picture or particular variety of picture which would be considered immoral or obscene, and no definition could be formulated which would afford a better standard than the words of the ordinance." The same reasoning applies to the words "gross incompetency or recklessness in the construction of buildings." These words clearly imply that the license shall not be revoked for trivial causes. What actions or conduct of an architect will bring him within the meaning of these words must be left to the sound discretion of the state board. It must be some act or conduct that in the common judgment would be considered grossly incompetent or reckless. It is a practical impossibility to set out in a statute, in detail, every act which would justify the revocation of a license. The requirements of the statute can only be stated in general terms, and a reasonable discretion reposed in the officials charged with its enforcement. The statute in question is not void for uncertainty.

The action of the board in revoking a license must not be arbitrary. It must be for cause only, and based upon evidence submitted. *People use of State Bd. of Health v. McCoy*, supra; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995. The statute here requires twenty days' notice to the holder of the license before it is revoked, as to the character of the charge and the time and place of meeting of the board, and he is also entitled to subpoena witnesses and be heard in person or by counsel. If the charge against the holder of a license, on a hearing such as this, is not sufficiently specific to permit him to prepare properly his defense, it is the duty of the board of examiners, on request of the holder of the license or his counsel, to require the charge to be made more specific. If the discretionary power of the board is exercised with manifest injustice, the courts will interfere when it is clearly shown that

the discretion has been abused. *Illinois State Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201; *People ex rel. Raster v. Healy*, 230 Ill. 280, 15 L.R.A.(N.S.) 603, 82 N. E. 599.

Appellant further contends that § 10 is unconstitutional, in that it gives the state board discretion as to whether a new license shall be issued to one whose license has been revoked. That question is not involved in this case, as appellant has no grievance in this respect. Even if, in this particular, the provision could be regarded as unconstitutional, we would not hold the entire act for that reason void. *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *Kettles v. People*, 221 Ill. 221, 77 N. E. 472; *Brand v. Brand*, 252 Ill. 134, 96 N. E. 918. We therefore do not find it necessary to discuss that question.

No reasons have been suggested, and none have occurred to us, which require us to hold that any of the provisions of the statute questioned in this proceeding are in violation of either the state or Federal Constitution. The decree of the Superior Court will therefore be affirmed.

Decree affirmed.

MAINE SUPREME JUDICIAL COURT.

ELVINGTON P. SPINNEY, *Exr.*, etc., of
Charles Oscar Littlefield,

v.

LAURA J. EATON et al.

(— Me. —, 87 Atl. 378.)

Will — demonstrative legacy — shares of stock.

Where a man, having the bulk of his property invested in stock of a certain corporation, gives by will a certain number of shares of the stock to each of his sisters and then divides the remainder of his property between his wife and son, the gift to the sisters will be construed as demonstrative legacies, so that in case he transforms the stock into bonds of the corporation they will not lapse; at least, where holding the legacies to be specific would result in diminishing the interest of the son, which the testator had carefully guarded.

(July 7, 1913.)

Note. — As to whether a bequest of stocks or bonds is general, demonstrative, or specific, see note to *Re Snyder*, 11 L.R.A.(N.S.) 49. And see also the later case of *Gardner v. McNeal*, 40 L.R.A.(N.S.) 553.

The effect of a change in the subject-matter or substitution of other property as an ademption of a specific legacy or devise is treated in the note to *Gardner v. McNeal*, *supra*.

46 L.R.A.(N.S.)

REPORT by the Supreme Judicial Court for York County for the determination by the full court of questions arising in a suit for the construction of the will of Charles Oscar Littlefield, deceased. Decree construing will.

The facts are stated in the opinion.

Mr. E. P. Spinney for plaintiff.

Hanson, J., delivered the opinion of the court:

This is a bill in equity brought by the executor to obtain a judicial construction of the will of Charles Oscar Littlefield, who died September 29, 1911, leaving a widow, a son, and three sisters. The will is dated March 10, 1911.

At the date of the will the testator was the owner of 1,830 shares of the preferred stock of the J. L. Prescott Company, a corporation having a place of business at Passaic, New Jersey, each of the par value of \$100.

The questions submitted for determination arise under the first three paragraphs of the will and the codicil, which are as follows:

"First: I give and bequeath to my sister, Laura J. Eaton of said Wells, wife of Joseph D. Eaton, 50 shares of my preferred stock in the J. L. Prescott Company, a corporation duly created by law and having its place of business at Passaic, New Jersey, and nothing more.

"Second: I give and bequeath to my sister, Alice Littlefield Gray, of said Wells, wife of Edward Gray, 50 shares of my preferred stock in the said J. L. Prescott Company, and nothing more.

"Third: I give, devise, and bequeath to my sister, Julia F. Littlefield, of said Wells, 100 shares of my preferred stock in the said J. L. Prescott Company, and also a home on my homestead farm in said Wells as long as she remains single and unmarried, and if she never marries, said home on my homestead farm to continue during her natural life."

The codicil, which was dated March 15, 1911, provides that, "whereas by my said will I gave and bequeathed to my sister, Julia F. Littlefield, in paragraph 'third' of my said will, 100 shares of my preferred stock in the J. L. Prescott Company, and whereas since the date of my said will and the date of this codicil, to wit, on the 13th day of March, I have in my lifetime transferred to my said sister, Julia F. Littlefield, 100 shares of my preferred stock in the said J. L. Prescott Company, as witnessed by certificate of stock No. 4, dated March 13, 1911; and whereas I desire to make a bequest to my niece, Elva L. Gray, of said Wells, out of the property given my wife

and son by paragraph 'seventh' of my said will, now I do hereby make, publish, and declare this my codicil to my last will and testament, to be annexed to and taken and allowed as a part thereof.

"First: I do revoke the bequest, made in paragraph 'third' of my said will, of said 100 shares of my preferred stock in said J. L. Prescott Company to my sister, Julia F. Littlefield, for the reason above stated, but the remaining part of said paragraph 'third' of my said will, relating to the home for my said sister, I leave and give to her as stated therein.

"Second: I give and bequeath to my niece, Elva L. Gray, above named, \$1,000."

On July 1, 1911, the testator exchanged his 1,730 shares of preferred stock in the J. L. Prescott Company for 173 first mortgage bonds of the same company, the denomination and value of each bond being \$1,000, and bearing date July 1, 1911. On the same day Julia F. Littlefield exchanged her 100 shares of preferred stock for 10 bonds of the same issue.

Six questions are propounded to the court, three of which are upon the character of the bequests in paragraphs first and second, relating to the fifty shares to each of the sisters named therein, viz.: (1) Are the legacies specific? (2) General, without any attempt at a definite description? (3) Demonstrative, payable out of a specific fund primarily, or out of the general estate if the fund does not exist and no such assets belong to said estate? (4) Have the two legacies been adeemed or lost? Questions 5 and 6 ask for direction as to payment, and interest to be allowed if the legatees are entitled to payment in money under said paragraphs.

The answer determining the character of the legacies involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. *Stilphen's Appeal*, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158.

After bequeathing the 200 shares of preferred stock by paragraphs 1, 2, and 3, the testator says in paragraph "fifth," All the rest, residue, and remainder of my shares of the preferred stock in the said J. L. Prescott Company which have not been disposed of by this will, I give and bequeath to my beloved wife, Olive M. Littlefield, and my son, Roland Smith Littlefield, in the following shares, amounts, and proportions, to wit: one third thereof to my said wife, and two thirds thereof to my said son."

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This paragraph was not changed by or referred to in the codicil. Paragraph 7 of the will reads: "All the rest, residue, and remainder of my estate, real, personal, and mixed, of every name and nature, wherever found or situate, not already disposed of, I give, devise, and bequeath in equal shares and amounts to my said wife and son, to them and their assigns forever."

Under the last-named clause the inventory shows about \$12,000 to be distributed.

What, then, was the intention of the testator? His intention must control the disposition of his property, and it is the duty of the court to construe the will so as to carry out the general purposes of the testator. *Demeritt v. Young*, 72 N. H. 202, 55 Atl. 1047.

We think the testator intended to do what the language of paragraphs 1 and 2 plainly indicates, viz., to give to each of his married sisters 50 shares of preferred stock from the 1,830 shares owned by him.

"A specific legacy is a bequest of a specified part of the testator's estate which is so distinguished. A general or demonstrative legacy is not adeemed by the sale or change of the fund; but generally a specific legacy is revoked by a sale or change of form of the thing bequeathed. Courts are averse to construing legacies to be specific, and will not unless it be clear that the testator so intended."

"A legacy is general when it is so given as not to amount to a bequest of a particular thing, or money of the testator, as distinguished from all others of the same kind.

"If made payable primarily out of a specified fund, it is called demonstrative."

Smith's Appeal, 103 Pa. 559.

A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security, and partakes of the nature of a general legacy by bequeathing a specified amount, and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made; but differs from a specific legacy in this particular: that, if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate. *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277, citing *Willard*, Eq. Jur. 502, 503; 2 *Bouvier's Law Dict.* Rawle's ed. 161, and authorities there cited; *Stilphen's Appeal*, supra.

In this case the bequests under consideration are in the nature of a general legacy, and the fund out of which the payment is to be made is pointed out. We think, therefore, they are demonstrative legacies.

Have the legacies been adeemed? A careful reading of the will and codicil leads to but one conclusion as to this question. The

testator evidently desired to place the stock of his unmarried sister where she would have control of the same from that moment, and further desired to give his niece \$1,000. These purposes were stated as the reasons for making the codicil. There is no expression of desire or intent to change paragraphs 1 and 2, or in any manner to affect their force, and there is no ground for an inference of such intent. On the contrary, if the change of securities worked an ademption of the two legacies, whether so intended by the testator or not, then his entire will would be affected, his general purpose frustrated, and the interest of the son, so carefully guarded in the will, would be lessened substantially. Under such construction the provision for distribution of the stock, one third to the wife and two thirds to the son, would be changed to an equal division between them because of such ademption, a result never intended by the testator.

It is apparent that at the date of the codicil the testator had not considered the subject of exchange of stock for bonds, and the exchange taking place three months and fifteen days thereafter affords ample reason for the conclusion that such change was made because the corporation had of its own motion changed the form of its securities, and the testator, in common with other stockholders, assented to the change. The stock was exchanged, not sold, and the security it represented is substantially the same as at the date of the will. It has not lost its identity. It represents the same property, is of the same value substantially, and the bonds in a varied form constitute the same fund.

In *Ford v. Ford*, 23 N. H. 212, a testator, having made a specific bequest of all notes of hand which were then payable to him, and then holding four notes signed by two persons, afterwards, before his death, released one of the signers, and took new notes for the debt from the other signer, secured by a mortgage. Held, that there was no ademption of the legacy. See also *Gardner v. Gardner*, 72 N. H. 257, 56 Atl. 316, and cases cited.

We are therefore of the opinion, and so advise the executor, that there has been no ademption of the legacies mentioned in paragraphs 1 and 2, and that under the will of the testator, Laura J. Eaton and Alice Littlefield Gray are each entitled to \$5,000, the admitted value of the original preferred stock severally bequeathed to them, payable in bonds of the J. L. Prescott Company, together with the interest thereon after September 29, 1911.

Bill sustained. Decree in accordance with this opinion.
46 L.R.A.(N.S.)

MARYLAND COURT OF APPEALS.

ANNIE J. McCANN, Appt.,

v.

SUPREME CONCLAVE, IMPROVED ORDER HEPTASOPHS.

(119 Md. 655, 87 Atl. 383.)

Insurance — mutual benefit — acquiescence in refusal to receive dues — effect.

1. The beneficiary of a mutual benefit certificate cannot insist upon an estoppel against the order because of refusal to accept the dues of a member who is ill, if, upon the representative of the lodge stating that he had information that the member is not fit to be such and should be expelled, and that unless he is permitted to lapse out by nonpayment of dues, he will take the matter before the order and secure the expulsion, he acquiesces in the suggestion without further attempt to pay dues.

Same — insanity of member — effect on nonpayment of dues.

2. That a member of a mutual benefit society is insane does not relieve him of the consequences of neglect to pay dues if there is no provision to that effect in the rules of the order.

Same — sick benefits — application in payment of dues.

3. A local branch of a mutual benefit insurance company which has provided for sick benefits for which the general order has assumed no responsibility has no authority to apply an amount due a member for such benefits in payment of an assessment against him, so as to prevent his

Note. — Effect of incapacitating illness or insanity on failure to pay insurance premium when due.

The early cases upon the question here considered are gathered in the note appended to *Hipp v. Fidelity Mut. L. Ins. Co.* 12 L.R.A.(N.S.) 319.

In accord with the cases in the earlier note it has been held in a subsequent case that the insanity of a member of a mutual benefit association at the time dues and assessments are payable will not excuse their nonpayment, or operate so as to keep his insurance certificate in force during the continuance of his disability. *Scheiber v. Protected Home Circle*, 146 Ill. App. 574. The court said: "Insanity does not relieve the insured from any obligation imposed by the terms of his insurance certificate, with the sole exception of personal attendance in compliance with requisite conditions, that may be done by another for him."

And in *Brotherhood of R. Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396, it was held that the fact that a member of a mutual benefit association was sick and unconscious at the time an assessment was due would not prevent a forfeiture because of its nonpayment.

J. T. W.

certificate from lapsing for nonpayment of dues, where the rules of the order require his dues to be apportioned between the death benefit fund and the general fund of the order.

(Burke, J., dissents.)

(February 15, 1913.)

APPPEAL by plaintiff from a judgment of the Baltimore City Court in defendant's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. O. Parker Baker and George E. Robinson, for appellant:

The alleged suspension of McCann for nonpayment of December, 1910 (monthly), payment was void.

Langnecker v. Grand Lodge, A. O. U. W. 111 Wis. 279, 55 L.R.A. 188, 87 Am. St. Rep. 860, 87 N. W. 293; Supreme Lodge, A. O. U. W. v. Zuhlke, 30 Ill. App. 98.

It is not necessary to appeal or apply for reinstatement from a void suspension or expulsion.

Barrett v. Grand Lodge, A. O. U. W. 63 Misc. 429, 117 N. Y. Supp. 125; 29 Cyc. 178, 179 (note 93); Hall v. Supreme Lodge K. H. 24 Fed. 450; Bacon, Ben. Soc. p. 218, § 107; Mulroy v. Supreme Lodge, K. H. 28 Mo. App. 463; Blumenfeldt v. Korschuck, 43 Ill. App. 434; Hoeffner v. Grand Lodge, G. O. H. 41 Mo. App. 359; Dague v. Grand Lodge, B. R. T. 111 Md. 95, 73 Atl. 735.

After one refusal to accept the premium, the insured is not bound to make formal tenders of subsequent premiums on each pay day.

Bacon, Ben. Soc. 365; Supreme Lodge, K. H. v. Davis, 26 Colo. 252, 58 Pac. 595; Hall v. Supreme Lodge, K. H. 24 Fed. 450; Supreme Council, O. C. F. v. Bailey, 21 Ky. L. Rep. 1627, 55 S. W. 888; Starnes v. Atlanta Police Relief Asso. 2 Ga. App. 237, 58 S. E. 481.

Messrs. Olin Bryan, Albert C. Tolson, and John C. Tolson, for appellee:

There was no legal tender in December, 1910, of McCann's dues and assessments.

If there was a legal tender of the December assessment Joseph A. McCann, Jr., was suspended, *ipso facto*, on midnight of January 31, 1911, for nonpayment of the January assessment, and was therefore under suspension at time of his death, in February, 1911.

Ipso facto laws are valid.

United Order, G. C. v. Hooser, 160 Ala. 334, 49 So. 354; Odd Fellows' Ben. Asso. v. Burton, 83 Ark. 631, 104 S. W. 163; Marshall v. Grand Lodge, A. O. U. W. 133 Cal. 686, 66 Pac. 25; Head Camp, P. J. W. W. v. 46 L.R.A.(N.S.)

Woods, 34 Colo. 1, 81 Pac. 261; Tibbitts v. Mutual Ben. L. Ins. Co. 159 Ind. 671, 65 N. E. 1033; Modern Woodmen v. Breckenridge, 75 Kan. 373, 10 L.R.A.(N.S.) 136, 89 Pac. 661, 12 Ann. Cas. 636; Gifford v. Workmen's Benefit Asso. 105 Me. 17, 72 Atl. 680, 17 Ann. Cas. 1173; Smith v. Sovereign Camp, W. W. 179 Mo. 119, 77 S. W. 862; Gruwell v. National Council, K. L. S. 126 Mo. App. 496, 104 S. W. 884; Kennedy v. Grand Fraternity, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 773; Giniiso's Calabrian American Citizens' Mut. Ben. Asso. 66 Misc. 162, 121 N. Y. Supp. 209; Riddick v. Farmers' Life Asso. 132 N. C. 118, 43 S. E. 544; Beeman v. Supreme Lodge, S. H. 215 Pa. 627, 64 Atl. 792; Joye v. South Carolina Mut. Ins. Co. 54 S. C. 371, 32 S. E. 446; Brown v. Sovereign Camp, W. W. 20 Tex. Civ. App. 373, 49 S. W. 893; Toelle v. Central Verein, 97 Wis. 322, 72 N. W. 630. Subordinate conclaves officers cannot change laws.

Borgraefe v. Supreme Lodge, K. L. H. 22 Mo. App. 127; Lyon v. Supreme Assembly, R. S. G. F. 153 Mass. 83, 26 N. E. 236; Kocher v. Supreme Council, C. B. L. 65 N. J. L. 649, 52 L.R.A. 861, 86 Am. St. Rep. 687, 48 Atl. 544; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Showalter v. Modern Woodmen, 156 Mich. 390, 120 N. W. 995; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Driscoll v. Modern Brotherhood, 77 Neb. 282, 109 N. W. 158; Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N. E. 82; Lathrop v. Modern Woodmen, 56 Or. 440, 106 Pac. 328, 109 Pac. 81; Sterling v. Woodmen of World, 28 Utah, 505, 80 Pac. 375; Morris v. Dutchess Ins. Co. 67 W. Va. 368, 68 S. E. 22; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Burbank v. Boston Police Relief Asso. 144 Mass. 434, 11 N. E. 691; Grand Lodge, A. O. U. W. v. Jesse, 50 Ill. App. 101; Harvey v. Grand Lodge, A. O. U. W. 50 Mo. App. 472; McCoy v. Roman Catholic Mut. Ins. Co. 152 Mass. 272, 25 N. E. 289; State ex rel. Young v. Temperance Benev. Asso. 42 Mo. App. 485; Karcher v. Supreme Lodge, K. H. 137 Mass. 369; Hall v. Supreme Lodge, K. H. 24 Fed. 450; Chamberlain v. Lincoln, 129 Mass. 70; Rood v. Railway Pass. & F. C. Mut. Ben. Asso. 31 Fed. 62; Hale v. Mechanics' Mut. F. Ins. Co. 6 Gray, 169, 66 Am. Dec. 410; Baxter v. Chelsea Mut. F. Ins. Co. 1 Allen, 294, 79 Am. Dec. 730; Hall v. Merrill, 47 Minn. 260, 49 N. W. 980; Manhattan L. Ins. Co. v. Myers, 109 Ky. 372, 59 S. W. 30; Bacon, Ben. Soc. § 147; Evans v. Trimountain Mut. F. Ins. Co. 9 Allen, 329.

Neither insanity nor sickness will excuse nonpayment of assessment at time due.

Hawkshaw v. Supreme Lodge, K. H. 29 Fed. 773; *Carpenter v. Centennial Mut. Life Asso.* 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456; *Yoe v. Benjamin C. Howard Masonic Mut. Benev. Asso.* 63 Md. 86; *Smith v. Sovereign Camp*, W. W. 179 Mo. 119, 77 S. W. 862; *Leffingwell v. Grand Lodge*, A. O. U. W. 86 Iowa, 279, 53 N. W. 243; *Hansen v. Supreme Lodge*, K. H. 140 Ill. 301, 29 N. E. 1121; *Ancient Order United Workmen v. Moore*, 1 Ky. L. Rep. 93.

Thomas, J., delivered the opinion of the court:

This suit was brought by the widow of Joseph A. McCann, Jr., of Baltimore city, on a benefit certificate issued to him on the 25th of May, 1908, by the Supreme Conclave, Improved Order Heptasophs, of Baltimore city. This certificate, which is set out in the declaration, after reciting that it "is issued to Bro. Joseph A. McCann, Jr., a member of Eutaw Conclave, No. 276, Improved Order Heptasophs, located at Baltimore, Maryland, upon evidence received from said conclave that he is a first-rate contributor to the benefit fund of this order, and upon the express condition that the statements made by him in his application for membership in said conclave, and the statements certified by him to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and, upon condition that the said member complies with, is bound by, and subject to all and every provision of the laws, rules, and regulations now governing said conclave and fund," etc., then provides: "These conditions being complied with, the Supreme Conclave, Improved Order Heptasophs, hereby promises and binds itself to pay out of its benefit fund to wife Annie J. McCann within sixty days from receipt of satisfactory proof of death, the sum of \$1,000 not more than the amount of one assessment in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate, provided that said member is in good standing in this order at the time of his death. If death occurs within one year from date of admission, only 50 per centum of said sum shall be paid, if within two years only 60 per centum of said sum shall be paid, if within three years only 80 per centum of said sum shall be paid, provided death was not caused by suicide." The narr. further alleges: "That the said Joseph A. McCann, Jr., faithfully complied with and performed all and singular the agreements, obligations, and under-

takings of the said benefit certificate on his part to be kept and performed, and was a member in good standing in the said body corporate at the time of his death;" that he died on the 2d day of February, 1911, and that his death was not caused by suicide; that he complied with all the provisions of the constitution and laws of the order up to the time of his death, "except so far as compliance therewith was prevented by the defendant;" that after his death the plaintiff, his widow, "duly made application to the defendant, as required by the laws of said order, for blanks upon which to make and furnish to the defendant satisfactory proofs of" his death, but that said defendant, "by its supreme secretary, refused to furnish to the said plaintiff such blanks, claiming that the said Joseph A. McCann, Jr., was not in good standing at the time of his death," whereas the said McCann "was entitled to be on the books of the said order, and, in contemplation of law, was in good standing in said order at the time of his death."

The defendant pleaded "that it was never indebted as alleged," and "that it did not promise as alleged," and for a third plea alleged that the said Joseph A. McCann, Jr., did at one time hold a benefit certificate, which was issued to him on the 25th of May, 1908, "but that he (the said Joseph A. McCann), having failed to comply with the constitution and laws of the said defendant as embraced in § 357, law 15, of the general laws of the defendant society, which said section reads as follows: 'Section 357. Any member failing to pay his regular monthly or extra payment within the time prescribed for the payment thereof shall thereby suspend himself *ipso facto* from all the rights and benefits of the order, as well as the rights and benefits of his beneficiaries, and such suspension shall be complete without any notice or action on the part of this conclave or any officer thereof, or of any officer of the Supreme Conclave; and such person shall continue under suspension until he is reinstated by the payment of all arrearages and compliance with all the other requirements for reinstatement, as provided by the laws of the order;'—was *ipso facto* suspended from membership in Eutaw Conclave No. 276, one of the subordinate conclaves of the defendant society, and from the defendant society, and that he was never thereafter reinstated to membership in said defendant society, and therefore there is no liability to the plaintiff on account of said alleged membership in said defendant society, as said McCann was not a member of said defendant society at the time of his alleged death." For a fourth plea the defendant

alleged, in substance, that § 248 of the general laws of the defendant provides that "each member of the order shall pay to the financier of his conclave, without notice, twelve regular payments in each calendar year, each of which shall be due on the first day and payable on or before the last day of each calendar month, and in addition to such regular monthly payments such extra payments as may from time to time be required and laid," and that the said Joseph A. McCann, Jr., failed to pay the December payment for 1910 on or before the last day of the said month, and by reason thereof he was at the expiration of said last day of said month "*ipso facto* suspended from all the rights and benefits of the order;" that he was never reinstated in accordance with the laws of said order, and that his suspension "continued to exist from the 1st day of January, 1911;" and that at the time of his death he was not in good standing in the "defendant society," and his beneficiary is not entitled to any "benefit or benefits on account of" said benefit certificate.

In reply to these pleas the plaintiff alleged that the defendant refused to receive from the said Joseph A. McCann, Jr., the regular monthly and extra payments within the time prescribed for the payment thereof, and notified him that it would not receive any further payments from him on account of same; that the said Joseph A. McCann, Jr., was not therefore lawfully suspended from the defendant society; and that the defendant, by its said refusal to receive said payment from the said Joseph A. McCann, Jr., waived the provisions of § 357 of its general laws. The defendant traversed these replications and joined issue on the first replication, alleging that McCann had complied with all the laws of the defendant and was a member thereof at the time of his death, and the case was tried upon issue joined on the first and second pleas, on the first replication, and on the rejoinders. At the conclusion of the plaintiff's testimony the court below granted an instruction that under the pleadings the plaintiff had offered no evidence legally sufficient to entitle her to recover, and from the judgment in favor of the defendant she appealed.

It appears from the evidence that the deceased became a member of the Eutaw Conclave and of the defendant on May 25, 1908; that some months thereafter he was confined to the Baltimore city jail at the instance of the plaintiff and remained there until he was removed to the Springfield Hospital, where he died about eight or nine months later. She says in her testimony: "Before I had him locked up, I noticed he

acted queerly; he would come downstairs without any underwear, just a little shirt on;" that she would speak to him about it, and he would not be conscious that there was anything wrong with him, and she had him locked up because she did not want him to expose himself to the children; she did not know what was wrong with him; he was sent to the city jail, and after he had been there about four or five months they sent her word that his mind was bad, and after they found his mind was bad (at the jail) they took him to Springfield Hospital, which is a hospital in Carroll county for the insane, maintained by the state of Maryland; and that he died there about eight months thereafter, in February, 1911.

John M. Kennedy, a brother-in-law of the deceased, testified that he was a member of Eutaw Conclave No. 276; that he attended the meetings regularly and generally paid McCann's dues and assessments for him when due, and that they were paid up to November 30, 1910, but that those due after that time were not paid; that the plaintiff gave him the money to pay McCann's assessment due in December; that he attended a meeting of the conclave in December, and that as he approached the desk of the financial officer of the conclave, Albert H. Hock, the officer authorized to collect dues and assessments, to pay McCann's dues for December, 1910, "before he had time to make his business known" Hock said to him, "I want to see you; that man Joseph A. McCann, Jr., you have out there in the hospital is not fit to be a member of this conclave;" that Hock had a letter making certain charges against McCann and told witness the contents thereof; that he asked Hock to give him the letter, which he refused to do, stating that it was the property of the Supreme Conclave, and that he then said to witness, "This man will get no more benefits from this conclave, and the Supreme body will not pay him any insurance even if he dies; we have been informed that he will not live long; that he is an epileptic; he was born crazy and was an imbecile;" that witness replied that he did not think there was anything wrong with his mind until he was incarcerated, and that the officer replied, "Oh, that boy at twelve years old who would attempt an assault upon his mother is certainly an imbecile;" that he "attempted to reason the matter out with" Hock and told him that the plaintiff had given him the money to pay McCann's dues, etc., but that he replied, "We will take no more; . . . that he would not get up in the conclave and have him expelled, but he would let him lapse out and ignore him entirely, and not take any more money from him." On cross-ex-

amination this witness further stated that McCann's monthly payment was \$1.23; that the Eutaw Conclave had paid McCann thirteen sick benefits for the first year; that the first benefit was \$2.50 and others were \$5 each, making a total of \$62.50; and that his wife received the same. In reply to the question, "Did or not Hock tell you that you had introduced a man into the conclave who was suffering from epileptic attacks and who was a cocaine fiend, and that it was the safer and better plan for them simply to drop the matter rather than have it come up before the conclave, as he was going to prefer charges against him, and did you [meaning witness] not consent to that action with Hock in Eutaw Conclave in December, 1910?" the witness replied, "He told me some of those things, but I never made any consent to anything." Witness further stated that Hock read to him the letter referred to, in which it was stated that McCann was a cocaine fiend; that he had been confined in the penitentiary twice; that he was an imbecile; that he was born crazy; and that he had attempted an assault upon his mother, and said for these reasons he ought to be expelled and driven out of the lodge, and told witness if he protested against such action he would take the matter up in the conclave and have him expelled, and that he (witness) said: "Well, I will communicate with his wife and make known to her the circumstances." Witness states that he did report the matter to the plaintiff, and that they concluded "that they would await developments as to whether they (the lodge) were going to recognize him any further as a member;" that the plaintiff never received any more assessment cards, and that they were convinced by that fact that the conclave intended to dismiss him; that in the conversation referred to witness told Hock that he would report the matter to the plaintiff and see what action she would take; that he never made any further effort to pay McCann's December dues or January dues, never took the matter up again with the financial officer, and never made any demand for sick benefits.

It does not appear from the record that any action was ever taken by the Eutaw Conclave or by the Supreme Conclave with reference to suspending or expelling McCann, but, as we have seen, § 357 of the general laws of the defendant provides that "any member failing to pay his regular monthly or extra payment within the time prescribed for the payment thereof shall thereby suspend himself *ipso facto* from all rights and benefits, as well as the rights and benefits of his beneficiaries;" and it is conceded in this case that McCann's dues

for December, 1910, and for January, 1911, were never paid at all.

The appellant contends, however, that the defendant was estopped from relying upon § 357 by the refusal of the financial officer of the Eutaw Conclave to receive, when tendered to him, McCann's dues for December, 1910, and that McCann and those acting for him, by such refusal, were relieved from any obligation to make a further offer of payment of his December dues or those payable after that date, and counsel for the appellant rely upon the cases of *Schlosser v. Grand Lodge*, B. R. T. 94 Md. 362, 50 Atl. 1048; *Dague v. Grand Lodge*, B. R. T. 111 Md. 95, 73 Atl. 735; and *Camp No. 6, P. O. S. A. v. Arrington*, 107 Md. 319, 68 Atl. 548. In those cases the court held that where the failure to pay was not due to the neglect of the plaintiff or the person to whom the certificate was issued, but to the conduct of the defendant or its agent, it could not be relied upon as a defense; and in the case of *Camp No. 6, P. O. S. A. v. Arrington*, supra, Chief Judge Boyd said: "If the appellee is finally restored to the rights of a member, as they existed prior to his expulsion, the appellant could not escape liability on the ground that his dues had not been paid, if it refused to receive them. It cannot be supposed that a respectable order would assume such a position; but, if it be attempted on that ground alone, no court of justice would permit it, as it would be a manifest fraud." But it is quite apparent, we think, that those cases have no application to the facts of this case.

It is declared in the printed and published copy of the constitution and laws of the defendant that the object of the order is "to unite fraternally all white male persons of sound health and good moral character, who are socially acceptable, between eighteen and fifty years of age," and "to create and maintain, by stated and fixed contributions, a benefit and special fund, from which, on satisfactory evidence of the death of a member who has complied with all the lawful requirements of the order, a special sum shall be paid to his beneficiary or beneficiaries as designated in conformity with the laws of the order."

Section 241 of the law provides: "A person to be eligible to membership in the Improved Order of Heptasophs shall be a white male, between the ages of eighteen and fifty years, of sound health, of good moral character, competent to earn a livelihood for himself and family, and a believer in a Supreme Being."

The letter which Hock, the financier, read to Kennedy belonged to the defendant, and if the defendant or the financial officer (financier) of Eutaw Conclave, the agent of

the defendant for the collection of the monthly payments, discovered that McCann had been improperly admitted as a member of the order, and that his admission had been secured or procured by false or fraudulent representations, it was his manifest duty not to accept from him any further payments on account of his membership until the matter could be reported to, investigated, and acted upon by the Eutaw Conclave, or the defendant, in accordance with the laws of the defendant. Hock, therefore, told McCann's brother-in-law, when he offered to pay McCann's dues for December, 1910, what he had learned, and that in his judgment McCann was not a proper person to be a member of said conclave and should be expelled; that the better course to pursue was not to take any more money from him and "let him lapse out," but that if he (Kennedy) protested against that course he would take the matter up in the conclave and have him expelled, and then Kennedy said to him that he would report the matter to McCann's wife (the plaintiff) to see what action she would take. Hock was never afterwards approached about the matter by either the plaintiff or her brother, and no further effort was ever made by either of them to pay McCann's December or subsequent dues to the defendant or to the Eutaw Conclave. Under such circumstances, if the plaintiff did not assent to the course proposed by the financier of Eutaw Conclave, she should have protested and insisted upon paying McCann's monthly payments in order that the defendant or the Eutaw Conclave might have had the opportunity to take such action as would have relieved the defendant of an obligation that the officer claimed was improperly and unlawfully imposed upon it. On the other hand, if the plaintiff acquiesced in the course suggested by the financier, she cannot now complain of the consequences of her own election. To permit her now to protest against the course advised by the officer of Eutaw Conclave and adopted by her would result in a great wrong to the defendant and to those who would be required to contribute to the fund out of which her claim would be paid.

The facts of the case are not disputed. McCann failed to pay the monthly payments due in December, 1910, and January, 1911, and thereby, under the laws of the order, "suspended himself from all the rights and benefits of the order, as well as the rights" of his beneficiary.

The fact that McCann was sick or insane does not relieve the plaintiff of the consequences of his neglect. The laws of the defendant do not make exceptions of such cases, and his beneficiary is bound by 46 L.R.A. (N.S.)

the terms of his contract. *Yoe v. Benjamin C. Howard Mut. Benev. Assn.* 63 Md. 86; *Hawkshaw v. Supreme Lodge, K. H. (C. C.)* 29 Fed. 773. In *Yoe's Case* the court said: "The member failing in his lifetime to make payment, and the thirty days having expired before his death, and no one being authorized to make it after his death, to hold the association liable, notwithstanding no payment of the assessment has been made, would be to disregard the mutuality of obligation of members, as well as do violence to the terms and plain intent of the article of the association which we have quoted. . . . And the fact that he was part of the time sick and wholly unable to attend to business constitutes no sufficient legal excuse for the default whereby this consequence was produced."

It is also urged by the appellant that, as there was some evidence to show that in December, 1910, there was a further amount due McCann on account of sick benefits, it should, as far as necessary, have been applied by the Eutaw Conclave to the payment of his monthly payments due in December, 1910, and January, 1911. But § 307 of the laws of the order declares that "93 per centum of each regular monthly payment levied and called shall be paid into the benefit fund, and shall not be appropriated for any other purpose than the payment of death benefits, or placed in the special fund. The balance, being 7 per centum of each monthly payment, shall be paid into the general fund, as provided in the Supreme Conclave constitution," and § 395 provides: "Conclaves may, in their discretion, provide for the payment of sick benefits. The Supreme Conclave assumes no responsibility for sick-benefit regulations adopted by any subordinate conclave." These funds are therefore distinct, and the Eutaw Conclave was not authorized to apply any part of the sick-benefit fund to the payment of amounts due the "benefit fund."

In the case of *Hansen v. Supreme Lodge, K. H.* 140 Ill. 301, 29 N. E. 1121, where the subordinate lodges were authorized to provide for sick benefits, the court held, quoting from the syllabus: "That under these laws the sickness of a member, and his right to weekly benefits, did not relieve him from his obligation to pay assessments by the Supreme Grand Lodge, and that his sick benefits could not be applied to their payment; such application being confined to the dues and fines of the subordinate lodge." See also *Hawkshaw v. Supreme Lodge, K. H. supra*.

It follows from what we have said that there was no error in the ruling of the court below withdrawing the case from the

jury, and the judgment appealed from must be affirmed.

Judgment affirmed, with costs.

Burke, J., dissents.

Petition for rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANNIE R. BOHAKER
v.

TRAVELERS' INSURANCE COMPANY.

(215 Mass. 32, 102 N. E. 342.)

Insurance — accident — person found dead.

1. The court cannot say as matter of law that a fever patient who, upon his attendant's return to the room after a moment's absence therefrom, was found to

have fallen to the ground from a window from which the screen had been torn, and killed himself, did not die by accident or committed suicide, so that no recovery can be had on a policy insuring him against bodily injury caused by accidental means except suicide.

Same — delirious patient — accident — approximate cause.

2. That a person is delirious from fever when he falls from a window to his death does not prevent the death from being effected directly or independently of all other causes, through external, violent, and accidental means, within the meaning of a policy insuring against death so caused.

Evidence — death — fall from window — suicide.

3. That a person delirious from fever fell from a window to his death does not establish suicide as matter of law, since the presumption against self-destruction is sufficient to sustain a finding that the fall was accidental, and not intentional.

(May 24, 1913.)

Note. — Liability under accident policy for death during delirium.

Generally as effect of words "sane or insane" or other words relating to mental condition in suicide clause in life insurance policy, see *Cady v. Fidelity & C. Co.* 17 L.R.A.(N.S.) 260.

As to liability under accident policy for death by drowning, including instances where the drowning was brought about by fainting and unconsciousness, see note to *Clark v. Iowa State Travelling Men's Asso.* 42 L.R.A.(N.S.) 631.

As to death from suicide as one caused through external, violent, and accidental means, including cases where the insured was insane when he took his life, see note to *Tuttle v. Iowa State Travelling Men's Asso.* 7 L.R.A.(N.S.) 223.

The authority upon the question of the liability under accident policies for death occurring during delirium is meager.

The facts in *Cady v. Fidelity & C. Co.* 134 Wis. 322, 17 L.R.A.(N.S.) 260, 113 N. W. 967, are similar to those involved in *BOHAKER v. TRAVELERS' INS. CO.* In the case referred to, which was an action on an accident policy excluding liability in case of death by suicide, sane or insane, it was held that suicide, sane or insane, involved an executed purpose to take one's own life; and that if the insured, during the absence of his nurse, jumped into a shaft, from the fifth floor of a building, while in a fit of delirium, without any intention of taking his life, and was killed, his death did not occur by suicide within the meaning of the policy.

And it was held that the court did not err in failing to direct a verdict for the defendant, or in refusing to set aside a verdict in favor of the insured, on the ground that the evidence would not reasonably admit of any other inference than that the 46 L.R.A.(N.S.)

insured intentionally threw himself into the shaft, where there was evidence that he was in a hospital and had been delirious at times the day before his death, and that he was much depressed on that day, and that, after his nurse had left the room for a moment, he got up, ran up two flights of stairs to a part of the building he had never been in before, and upon seeing that he was pursued by a nurse he increased his speed and threw himself over a railing into a shaft and was killed; since it was held that from such evidence there was room for belief that he was not conscious of the nature of his act. *Ibid.*

In *Travelers' Ins. Co. v. Melick*, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178, it was held that a pistol wound causing tetanus with great bodily pain and delirium or fever might be found to be the proximate cause of death, where a person, insured against accidents, excluding suicide, sane or insane, and intentional injuries, cut his throat in a period of delirium or state of frenzy which was uncontrollable.

In *Carr v. Pacific Mut. L. Ins. Co.* 100 Mo. App. 602, 75 S. W. 180, it was held that under a policy exempting the insurer from liability for injuries "resulting directly or indirectly in whole or in part . . . from any disease, or bodily infirmity," the insured's injury was the direct, or at least indirect, result of his sickness, where the evidence showed that he was confined in a hospital by a high fever, which rendered him delirious to such an extent that he had to be restrained by force at times, and that during the temporary absence of his nurse he left his bed, and upon the nurse's return she saw him falling from a window, and the insured, upon gaining consciousness, was unable to state the circumstances as to how or what caused him to get out of the window. J. T. W.

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover on a policy of accident insurance which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Walter I. Badger and William Harold Hitchcock, for defendant:

Plaintiff in order to recover must show that the injuries were "effected directly and independently of all other causes, through accidental means."

Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774.

If the agreed facts leave it open to conjecture whether those injuries were so effected or not, she cannot recover. The court may draw reasonable inferences, but it cannot guess as between two or more equally probable inferences.

Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Kendall v. Boston, 118 Mass. 234, 19 Am. Rep. 446; Williams v. Citizens' Electric Street R. Co. 184 Mass. 437, 68 N. E. 840.

The insured's death was not effected through accidental means.

United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Southard v. Railway Pass. Assur. Co. 34 Conn. 574, Fed. Cas. No. 13,182; Burkhard v. Travellers' Ins. Co. 102 Pa. 262, 48 Am. Rep. 205; Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157; 7 Am. Neg. Cas. 174; Hamlyn v. Crown Acci. Ins. Co. [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663; Re Scarr [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787; Aetna L. Ins. Co. v. Vandecar, 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 282; Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347.

The insured's death was not effected, directly and independently of all other causes, through means within the scope of the policy.

Daniels v. New York, N. H. & H. R. Co. 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424; Carr v. Pacific Mut. L. Ins. Co. 100 Mo. App. 602, 75 S. W. 180; Clark v. Employers' Liability Assur. Co. 72 Vt. 458, 48 Atl. 639; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 46 L.R.A. (N.S.)

83; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; Aetna L. Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N. E. 254; Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423.

The insured's death was the result of suicide, either sane or insane, within the meaning of this policy.

Fidelity & C. Co. v. Weise, 182 Ill. 496, 55 N. E. 540; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Cooper v. Massachusetts Mut. L. Ins. Co. 102 Mass. 227, 3 Am. Rep. 451; Dean v. American Mut. L. Ins. Co. 4 Allen, 96; Cooper v. Massachusetts Mut. L. Ins. Co. 102 Mass. 227, 3 Am. Rep. 451; Daniels v. New York, N. H. & H. R. Co. 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424; Moore v. Northwestern Mut. L. Ins. Co. 192 Mass. 468, 78 N. E. 488, 7 Ann. Cas. 656; De Gogorza v. Knickerbocker L. Ins. Co. 65 N. Y. 232; Billings v. Accident Ins. Co. 64 Vt. 78, 17 L.R.A. 89, 33 Am. St. Rep. 913, 24 Atl. 656; Clarke v. Equitable Life Assur. Soc. 55 C. C. A. 200, 118 Fed. 374; Scarth v. Security Mut. Life Soc. 75 Iowa, 346, 39 N. W. 658; Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 N. E. 478; Pierce v. Travelers' L. Ins. Co. 34 Wis. 389; Haynie v. Knights Templars & M. Life Indemnity Co. 139 Mo. 416, 41 S. W. 461; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360.

Mr. Alonzo E. Yont, for plaintiff:

The insured was found underneath the window, suffering from injuries evidently produced by a fall, which injuries were sufficient to produce his death. The plaintiff has here sustained the burden of proof, and the burden is on the defendant to show that the death was caused by some means not coming within the terms of the policy.

Beard v. Indemnity Ins. Co. 65 W. Va. 283, 64 S. E. 119, 21 Am. Neg. Rep. 371; Noyes v. Commercial Travellers' Eastern Acci. Asso. 190 Mass. 183, 76 N. E. 665; Larkin v. Inter-State Casualty Co. 43 App. Div. 365, 60 N. Y. Supp. 205; Walden v. Banker's Life Asso. 89 Neb. 546, 131 N. W. 962; Beile v. Travelers' Protective Asso. 155 Mo. App. 629, 135 S. W. 497; Freeman v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372; Badenfeld v. Massachusetts Mut. Acci. Asso. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; Keene v. New England Mut. Acci. Asso. 161 Mass. 150, 36 N. E. 891; Modern Woodmen v. Craiger, — Ind. —, 90 N. E. 84; Cooper v. Massachusetts Mut. L. Ins. Co. 102 Mass. 227, 3 Am. Rep. 451; Travelers'

Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Bouvier's Law Dict.* p. 1064.

Even although it may be found that Babson, in his delirium, threw himself out of the window, the plaintiff is entitled to recover. The sickness is merely a condition, and not a cause.

MacGilvray, Ins. 1912, p. 922; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 50 L. J. Q. B. N. S. 292, 43 L. T. N. S. 459, 29 Week. Rep. 116, 45 J. P. 110; *Wicks v. Dowell*, [1905] 2 K. B. 225, 2 Ann. Cas. 732; *Lawrence v. Accident Ins. Co.* L. R. 7 Q. B. Div. 216, 50 L. J. Q. B. N. S. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781; *Reynolds v. Accident Ins. Co.* 22 L. T. N. S. 820, 18 Week. Rep. 1141; *Beile v. Travelers' Protective Assn.* 155 Mo. App. 629, 135 S. W. 497; *Ludwig v. Preferred Acci. Ins. Co.* 113 Minn. 510, 130 N. W. 5; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; *Meyer v. Fidelity & C. Co.* 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328; *Larkin v. Inter-State Casualty Co.* 43 App. Div. 365, 60 N. Y. Supp. 205; *Ætna L. Ins. Co. v. Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; *Preferred Acci. Ins. Co. v. Muir*, 61 C. C. A. 456, 126 Fed. 926; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *Travelers' Ins. Co. v. Melick*, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Hamlyn v. Crown Acci. Ins. Co.* [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663; *Isitt v. Railway Pass. Assur. Co.* L. R. 22 Q. B. Div. 504, 58 L. J. Q. B. N. S. 191, 60 L. T. N. S. 297, 37 Week. Rep. 477; *Equitable Acci. Ins. Co. v. Osborne*, 90 Ala. 201, 13 L.R.A. 267, 9 So. 869; *Western Commercial Travelers' Asso. v. Smith*, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592.

Rugg, Ch. J., delivered the opinion of the court:

This is an action of contract to recover upon a policy of accident insurance for the death of the insured, John M. Babson. The circumstances under which the insured lost his life were these: He was delirious by reason of severe typhoid fever, in a room with a single window, which was covered by a screen, and its sill was 28 inches above the floor. Along the outside of the building,

slightly below the window, was a balcony 5 feet wide with a protecting railing about 30 feet above the rough and stony ground beneath. He was left alone momentarily on an August evening by his attendant, who on returning found the room vacant, and the screen, which had been whole and in position when he left the room, torn from the window. On immediate investigation, the insured was found on the ground under the room unconscious, with severe injuries, which, according to physicians, probably would have caused his death, even if he had not been suffering from typhoid fever. The policy insured "against bodily injuries, effected directly and independently of all other causes, through external, violent, and accidental means (suicide, whether sane or insane, is not covered), as specified in" a schedule annexed.

The case was tried without a jury before a judge, who found for the plaintiff after refusing to rule as requested by the defendant: (1) That the plaintiff was not entitled to recover as matter of law; (2) that the death of the insured was not effected, directly and independently of all other causes, through external, violent, and accidental means; and (3) that the death of the insured was the result of suicide, sane or insane, and hence not covered by the policy.

1. The defendant's first request was denied rightly. "Accidental means" is used in the contract of insurance in its common significance of happening unexpectedly, without intention or design. *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755. The cause of injuries was not wholly conjectural as matter of law. It is plain that the immediate cause was the fall. This manifested itself in evidence which was violent and external. There was basis for the inference that it was accidental, as we have defined that word. It may have been that the deceased, in the heat of his fever and the warm season, in an effort to reach fresh air, went to the balcony just outside his window, and there without premeditation or purpose or delirium, but only through weakness, lost his balance and went over the low railing, and received mortal harm. Cases where it has been necessary for a plaintiff to show negligence of some person as the cause, and where it has been said that the cause was conjectural, are clearly distinguishable. Accident is a far more comprehensive term than negligence. *Noyes v. Commercial Travelers' Eastern Acci. Asso.* 190 Mass. 171, 76 N. E. 665; *Wicks v. Dowell*, [1905] 2 K. B. 225, 2 Ann. Cas. 732.

2. It would have been error to rule as matter of law that the insured's death was

not effected "directly and independently of all other causes" through accidental means. The point of difficulty in this connection is whether the disease did not contribute to the injuries, or at least was it not a cause co-operating with the fall in inducing the result. But the disease may have been found to have been simply a condition, and not a moving cause of the fatal injuries. A sick man may be the subject of an accident, which but for his sickness would not have befallen him. One may meet his death by falling into imminent danger in a faint or in an attack of epilepsy. But such an event commonly has been held to be the result of accident, rather than of disease.

In *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, at page 625, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945, it was said by Taft, J., at 590: "If the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause." To the same effect in substance are *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 50 L. J. Q. B. N. S. 292, 43 L. T. N. S. 459, 29 Week. Rep. 116, 45 J. P. 110; *Lawrence v. Accidental Ins. Co. L. R. 7 Q. B. Div. 216*, 50 L. J. Q. B. N. S. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781; *Ludwig v. Preferred Acci. Ins. Co.* 113 Minn. 510, 130 N. W. 5; *Preferred Acci. Ins. Co. v. Muir*, 61 C. C. A. 456, 126 Fed. 928. The language of this contract, to the effect that the "accidental means" must have operated "independently of all other causes" to produce the death, does not change the general rule of law, that the proximate and not a remote cause is the one to which the law looks. Many instances are found where two equally dominant causes co-operate or concur in producing a result. The very numerous cases arising out of joint or simultaneous torts are illustrations. Two or more causes, each proximate in character and only one of which is accidental, may co-operate in producing an injury. In such cases the limiting language of the policy would apply.

The present policy does not stipulate that there shall be no recovery, if any other circumstance than the accident, directly or indirectly, wholly or in part, proximately or remotely, contribute to the injury, as do some insurance contracts which have come before the courts. The policy in the case 46 L.R.A. (N.S.)

at bar does not go so far as to require the court to search beyond the active, efficient, procuring cause to a cause of a cause. When one single predominant agency is disclosed, directly producing as a natural and probable result the injury, which is accidental, and which operates independently of other like causes, then the effectual means required by the policy have been found. This contract does not require a further and nicer analysis to ascertain whether in the chain of causation another source less demonstrative, and more attenuated in its effect or more ulterior in its origin, may be found which may more indirectly have a causal connection with injury. *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; *Daniels v. New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424. See *Newton v. Worcester*, 174 Mass. 181, 187, 54 N. E. 521.

The single operating, proximate cause, therefore, might have been found to be the fall, and not the fever. *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Isitt v. Railway Pass. Assur. Co. L. R. 22 Q. B. Div. 504*, 58 L. J. Q. B. N. S. 191, 60 L. T. N. S. 297, 37 Week. Rep. 477; *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 59, 73 N. E. 824; *Modern Woodman Acci. Asso. v. Shryock*, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592. This having been found as a fact, and there being some supporting evidence, the finding of the trial judge will not be disturbed.

3. The defendant urges strongly that the death of the insured was the result of suicide, sane or insane, and hence there could be no recovery. But while that might have been found as a fact, it could not have been ruled as matter of law. Suicide is a crime, and involves a high degree of moral turpitude. *Com. v. Mink*, 123 Mass. 422, 25 Am. Rep. 109. It cannot be assumed without clear proof. The presumption is that one does not commit suicide. Such a presumption, being one of fact, stands until overthrown by evidence. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360. If it be assumed in favor of the defendant that the burden was on the plaintiff to prove that death was not due to suicide, the presumption against self-destruction, in the absence of compelling circumstances, sustains this burden. Even though the insured was suffering from delirium, as it is agreed that he was, the facts do not require the inference that he jumped to the ground. It

was open to the trial judge to find that it was through weakness or otherwise, and not through conscious adaptation of means to an end by a mind unbalanced by fever, that he fell to the earth.

Exceptions overruled.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

KATHERINE MCLEOD

v.

SARAH RAWSON.

(215 Mass. 257, 102 N. E. 429.)

Negligence — defective premises — attendant on householder — liability of wife.

1. A nurse called by a physician to attend a sick householder cannot hold the latter's wife liable for injuries caused by a defective condition of the premises.

Same — absence of light — breach of contract — liability.

2. A woman who promises a nurse attending her sick husband, that a light will be kept burning during the night, may be liable in damages in case of injury to the nurse through the absence of the light.

(June 17, 1913.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Court after directing a verdict for defendant in an action brought to recover damages for personal injuries which were alleged to have been caused by defendant's negligence. Judgment for plaintiff.

The facts are stated in the opinion.

Note. — *MCLEOD v. RAWSON* seems to be a case of first impression upon the point as to the liability, by reason merely of the relation of the parties, of one not the householder or the owner of the house, but a member of the household, for personal injuries sustained by another person therein. The case most nearly in point which has been found is *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15, in which a painter employed upon a house built by a man upon land owned by his wife had been injured by the giving way of a scaffold, and it was held that under no view of the facts could the wife be made liable, she having been merely the owner of the land, and having had nothing to do with the building, which was carried on and paid for by her husband.

In *Toomey v. Sanborn*, 146 Mass. 28, 14 N. E. 921, however, where the defendant, while personally supervising repairs which were being made upon a house owned by his

Messrs. Dana B. Gove, Frederick J. Daggett, and Francis P. Garland, for plaintiff:

The question of the defendant's negligence was for the jury.

Wills v. Taylor, 193 Mass. 113, 78 N. E. 774; *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 502; *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328, 18 Am. Neg. Rep. 461; *Faxon v. Butler*, 206 Mass. 500, 138 Am. St. Rep. 405, 92 N. E. 707, 19 Ann. Cas. 666.

Messrs. Guy A. Ham and Walter F. Frederick, for defendant:

The defendant, under the circumstances in this case, owed the plaintiff no duty other than one of refraining from any wilful act that would result in an injury to the plaintiff.

Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644.

Even assuming that the plaintiff was a licensee as to the defendant, the plaintiff, under the authorities, took the premises as she found them.

Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; *Campbell v. Abbott*, 176 Mass. 246, 57 N. E. 462; *Daley v. Kinsman*, 182 Mass. 306, 65 N. E. 385, 13 Am. Neg. Rep. 95; *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233.

De Courcy, J., delivered the opinion of the court:

It was incumbent on the plaintiff to show that her injury was due to some undischarged duty that the defendant owed to her. The house in which the accident occurred was not owned or controlled by the defendant, but by Warren W. Rawson, her husband, since deceased; and the plaintiff was called to the premises by his physician. There was no invitation, express or implied, extended to her by the defendant, and no relation existed between them that

wife, and occupied by a tenant with whom he and his wife boarded and lived, had directed a plank to be removed from the floor of a passageway affording a back entrance to the house, thus creating a dangerous hole, which was left unguarded and into which a servant of the city fell and was injured, while rightfully using the passageway with due care for the purpose of removing ashes and garbage from the house,—it was held that the trial court rightly refused to rule that on the whole evidence the injured person was not entitled to recover against the defendant.

Generally, as to the liability of the owner of a private residence for injury to a person invited therein, see note to *Clark v. Fehlhaber*, 13 L.R.A. (N.S.) 442.

As to the liability of a married woman for the use and safety of premises owned by her, see note to *Graham v. Tucker*, 19 L.R.A. (N.S.) 531.

A. C. W.

imposed upon the defendant a duty of keeping the premises reasonably safe for the plaintiff. The cases cited, such as those involving the duty of a landlord to his tenants and persons on his premises in the tenant's right, and those of a shopkeeper to customers who visit him on business, are not in point. *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978; *Toland v. Paine Furniture Co.* 179 Mass. 501, 61 N. E. 52; *Wills v. Taylor*, 193 Mass. 113, 78 N. E. 774; *McGowan v. Monahan*, 199 Mass. 296, 17 L.R.A. (N.S.) 928, 127 Am. St. Rep. 501, 85 N. E. 105; *Marston v. Reynolds*, 211 Mass. 590, 98 N. E. 601.

But although the defendant was under no obligation founded merely on the relation of the parties, to maintain a light that would enable the plaintiff to move about the upper hall in safety, yet if she promised the plaintiff to do so, and was negligent in the manner of performing that undertaking, she thereby became liable to the plaintiff, if the latter, while relying on the promise, was injured by the defendant's misfeasance. *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Riley v. Lissner*, 160 Mass. 330, 35 N. E. 1130; *Buldra v. Henin*, 212 Mass. 275, 98 N. E. 863; *Wilkinson v. Coverdale*, 1 Esp. 75; *Hyde v. Moffat*, 16 Vt. 271; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108.

The case is here on a report. On the testimony of the plaintiff, the jury could find that on the night before the accident, during a conversation with the defendant with reference to the electric light at the foot of the back stairs, the plaintiff said, among other things: "You must not put out that light; you must leave that light burning at night always, while I am taking care of Mr. Rawson. . . . I have to be up and down these stairs, and I am absolutely dependent upon that light going into the little room, or I may fall down these stairs,—the two passages are so near together;" that Mrs. Rawson replied, "All right then, I will leave it burning." They could further find that, soon after the accident, the defendant said: "You fell down those stairs, and I am so sorry I put out that light. What did I put out that light for?"

It was necessary for the plaintiff to use the hall during the night in going to and from the bathroom; and opposite the door of the bathroom, and only 3 feet from the opening of the back stairs, was the door of the anteroom, which was connected with the room of the patient. The plaintiff testified that she depended absolutely upon the reflection of the light at the foot of the back stairs to show her the entrance from the hall to the anteroom, and that the rest of

the hall was pitch dark, and that such was the condition as to light when the defendant conversed with her at 11 o'clock, before retiring. On these facts it was for the jury to decide whether the defendant had undertaken to keep burning the electric light referred to, whether she was negligent in extinguishing it, and whether that was the cause of the plaintiff's injury.

The question whether the plaintiff herself was in the exercise of due care is not free from difficulty, but we are of opinion that this also was for the jury. It could be found that she was justified in entering the anteroom from the hall instead of from Mr. Rawson's room, because it was important in his critical condition not to arouse him. And we cannot say as matter of law that she was careless in relying on the light in question to indicate the location of the stairway, especially after the assurance given by the defendant, who apparently was in charge of the premises during her husband's illness. She had safely relied on this light several times during the night, the last time being less than an hour before the accident, and although its reflection was not distinct until she reached the door leading from the hall to the anteroom, she well might assume that as it was left burning by the defendant when retiring for the night, no one would be likely to extinguish it before daylight. In brief, it was for them to determine whether her conduct, as they found it to be on the evidence, measured up to the standard of reasonable prudence under the circumstances in which she was placed. *Faxon v. Butler*, 206 Mass. 500, 138 Am. St. Rep. 405, 92 N. E. 707, 19 Ann. Cas. 666.

In accordance with the report, judgment is to be entered for the plaintiff for \$3,000. So ordered.

MINNESOTA SUPREME COURT.

MARY E. MCINERNY, Resp't.,
v.

ST. LUKE'S HOSPITAL ASSOCIATION
OF DULUTH, Appt.

(122 Minn. 10, 141 N. W. 837.)

Master and servant — guarding machinery — charities.

1. Section 1813, Rev. Laws 1905, imposing upon all persons and corporations own-

Headnotes by BROWN, Ch. J.

Note. — As to the liability of charitable institutions for personal injuries, see note to *Basabo v. Salvation Army*, 42 L.R.A. (N.S.) 1144, and the earlier notes there referred to.

ing or operating dangerous machinery the duty to cover or guard the dangerous parts thereof, so far as practicable, applies to charitable associations owning and operating such machinery, as well as to all other persons or corporations similarly situated. Same — duty nondelegable.

2. The duty thus imposed is absolute and nondelegable, and a failure to discharge the same renders the charitable association liable to its servants and employees who are injured in consequence of the neglect.

Charity — exemption from employer's liability statutes.

3. If public policy requires that such associations be excluded from the operation of the statute, it should be so declared by the legislature, and not by the *dictum* of the courts.

(May 29, 1913.)

APPEAL by defendant from an order of the District Court for St. Louis County denying a motion for judgment *non obstante veredicto* or a new trial in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Baldwin & Baldwin for appellant.

Messrs. John Jenswold, Jr., and C. R. Magney, for respondent:

Defendant was negligent in not providing the mangle with strings and a guard.

Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340.

Charitable institutions are not liable for injuries sustained through the negligence of servants, on the ground that the relation of benefactor and beneficiary exists and therefore an implied agreement that the corporation be held harmless, yet such corporation may be held liable to patients if there has been negligence in the original selection of its servants, which is a branch of a nondelegable duty.

Powers v. Massachusetts Homeopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Cunningham v. Sheltering Arms, 61 Misc. 501, 115 N. Y. Supp. 576; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909; Ward v. St. Vincent's Hospital, 23 Misc. 91, 50 N. Y. Supp. 466; Farrigan v. Pevear, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109.

Charitable hospital corporations and other charitable corporations are held liable for an injury negligently inflicted by serv

ants, and are not immune from the rule of *respondet superior*.

Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566; Gartland v. New York Zoological Soc. 135 App. Div. 163, 120 N. Y. Supp. 24; Gallon v. House of Good Shepherd, 158 Mich. 361, 24 L.R.A. (N.S.) 286, 133 Am. St. Rep. 387, 122 N. W. 631; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Basabo v. Salvation Army, — R. I. —, 42 L.R.A. (N.S.) 1144, 85 Atl. 120.

Recovery is allowed to a servant against a master, though said master may be a charitable institution, if said institution is negligent.

Mulchey v. Methodist Religious Soc. 125 Mass. 487; Hordern v. Salvation Army, 199 N. Y. 233, 32 L.R.A. (N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 Atl. 190; Armendarez v. Hotel Dieu, — Tex. Civ. App. —, 145 S. W. 1030; Basabo v. Salvation Army, — R. I. —, 42 L.R.A. (N.S.) 1144, 85 Atl. 120.

Brown, Ch. J., delivered the opinion of the court:

Defendant is a corporation organized in the year 1883, under the provisions of title 3, chapter 34, Gen. Stat. 1878, now §§ 3102 et seq., Rev. Laws 1905. The articles of association declare that the general purpose of the corporation "is to establish and maintain at Duluth, Minnesota, a hospital which shall be free to persons needing care and medical or surgical treatment, and who are indigent and have no means with which to pay for such care and treatment, and also to furnish care at reasonable rates to such as desire it and are able to pay for the same; the association is purely eleemosynary, no member thereof to receive any pecuniary profit from his or her membership, and all sums received by the association from any source to be applied to the purposes of the association."

Subsequent to the organization of the association, buildings were acquired and equipped for hospital purposes, and the association entered upon and has since continued the discharge of the powers and duties conferred by its incorporation. It has accumulated property of considerable value, principally from donations made to it by charitably disposed persons. It receives and cares for indigent patients, and others who are able to pay for the accommodations given them; the great majority of its patients, being of ability to pay, are charged

for services rendered. Its expenses are paid out of receipts from patients and donations received. There was installed in one of its buildings a laundry department, equipped with necessary machinery and utensils, including an ironing mangle. This mangle was of the ordinary type of such devices for ironing household linen, and was supplied with the usual heated rollers. The rollers were not guarded as required by § 1813, Rev. Laws 1905, though it appears that it was practicable to so guard the same. Plaintiff was in the employ of defendant as housekeeper, with general supervision and charge of the household affairs of the hospital. On October 21, 1910, while plaintiff was engaged in ironing some window curtains, in doing which she operated the mangle, one of her hands was caught between the heated rollers thereof, and burned to such an extent as to necessitate the amputation of the greater part thereof. She thereafter brought this action to recover for such injury, charging in her complaint that the same was caused by reason of the negligent failure of defendant to guard the mangle rollers as required by law, and negligence in failing to keep and maintain the mangle in a safe and suitable condition for use. She had a verdict in the court below, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

It is contended that plaintiff failed to show a right of action against defendant, for the reasons: (1) That at the time plaintiff was injured she was engaged in work outside of and beyond the scope of her employment, and was guilty of contributory negligence in attempting to operate the mangle; and (2) that, since defendant is a charitable corporation, it is not liable in damages for the negligence charged. Our examination of the record leads to the conclusion that the evidence fully justified the jury in finding that plaintiff was at the time of her injury within the general scope of her employment, and that she was not guilty of contributory negligence. The facts bring the case within the rule of *Carlin v. Kennedy*, 97 Minn. 141, 106 N. W. 340. We therefore pass that branch of the case, and come directly to the question whether defendant is responsible to its servants and employees for injuries resulting from its negligence. This is the principal and controlling issue in the case. And in considering the question it may be conceded for the purposes of the case that defendant is a charitable corporation, within the doctrine of many of the courts under which such associations are held immune from liability from their negligence. It conducts its affairs without profit to its mem-

bers, and cares for without charge all indigent persons applying for treatment at the hospital. The fact that a fixed charge is made to those who are able to pay does not necessarily deprive the corporation of its eleemosynary character. *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42.

We have made no attempt to discover the origin of the rule of nonliability applied by many of the courts to such associations, nor to trace the development of the law upon the subject. The rule probably originated in a purpose to foster and encourage such associations, for the benefit of the poor, and at a time when they were purely and wholly charitable, and supported exclusively by donations from the philanthropist and charitably disposed person. Associations of that character are necessarily purely charitable, performing a public function in caring for and extending aid, treatment, and comfort to the indigent and poor. It was undoubtedly thought wise to treat them as agencies of the government, and to extend them immunity from the charge of negligence, precisely as though created and operated by the government. As to associations established and operated by the state, it has often been held that no liability for negligence exists in favor either of patients, employees, or strangers. *Maia v. Eastern State Hospital*, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617; *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109. The courts are not, however, in harmony upon the general question of liability. In the following cases recovery was allowed against private charitable associations: *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621.

The rule exonerating the private association is founded upon various theories, namely, that the rule of *respondet superior* has no application; that the funds of the association are in the nature of trust funds, and cannot be diverted from the purposes of the trust; that the payment of damages for personal injuries would constitute such a diversion, and be unlawful. The trust-fund theory, and the inapplicability of the rule of *respondet superior*, in actions for injuries to employees, has been repudiated by some of the later decisions (*Kellogg v.*

Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566; *Basabo v. Salvation Army*, — R. I. —, 42 L.R.A.(N.S.) 1144, 85 Atl. 120), but is adhered to in those states holding the rule of nonliability. And while the general rule of immunity, in cases where the negligence of servants and employees is the basis of the action, wholly disconnected with any claim of negligence on the part of the association itself, and where the association appears to have exercised reasonable care in their selection, is upheld by many courts, there is a sharp conflict in the later decisions when injury to servants or employees has been caused by the negligent failure of the association to perform some absolute or nondelegable duty imposed by general law upon all masters for the protection of their servants. In such cases the weight of reason, in the absence of some express statutory exemption, sustains the rule of liability. In *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621, and *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626, the question is fully and ably discussed and the rule of liability affirmed. A large number of authorities will be found cited in the note to the above decision in 32 L.R.A.(N.S.) 62, and 7 L.R.A.(N.S.) 481. But, passing these general observations, we come directly to the question before us.

In this action plaintiff was in the employ of defendant as housekeeper, and she was injured while in the line of her employment by reason of the failure of defendant to supply the mangle with a guard as required by law. It was undoubtedly the common-law duty of defendant to guard this dangerous part of the machine, at least to exercise reasonable care to maintain it in reasonably safe and suitable condition for use. The duty to guard was made absolute by § 1813, Rev. Laws 1905, wherein all dangerous parts of machinery, including ironing mangles, are expressly required, so far as practicable, to be guarded, to the end that those engaged in their operation may be protected from injury. The statutory duty applies equally to all persons or corporations operating such machinery, is absolute and nondelegable, and a failure to perform the same is evidence of negligence, for which recovery may be had. To say that a charitable association is exempt from the rule finds no basis save the *dictum* of the courts, and results in placing such associations above the law. We have no difficulty in the case at bar, one of master and servant, 46 L.R.A.(N.S.)

in applying the rule of the Michigan, New York, New Hampshire, and other courts, where the association has been held liable for the nonperformance of its absolute duties when injury to the servant results therefrom. Under nearly all the authorities liability exists for the negligence of employees in cases where there appears to have been a failure to exercise reasonable care in their selection. Note in 4 Ann. Cas. 103. The requirement of reasonable care in the selection of servants is a personal nondelegable duty of the master, and if liability exists for a failure of its performance, then equally a liability should exist for the negligent failure to perform any of the other absolute duties imposed upon the master, either statutory or at common law. In fact, it seems clear, under the modern trend of judicial opinion, that a failure to discharge any nondelegable duty creates, in the absence of express statutory exemption, a liability on the part of associations of this kind. In this view nearly all the courts could well unite, though the reasoning of some of them, based upon the trust-fund theory, would probably lead to an adherence to the rule of nonliability in all cases.

We adopt the view of liability stated, and hold that, since plaintiff's injury was the result of a failure of defendant to comply with the statutory obligation to guard the mangle in question, the verdict must be sustained.

In reaching this conclusion we are not to be understood as underestimating, or failing to appreciate to its fullest extent, the blessings bestowed upon the destitute, and the poverty-burdened applicant for help. Our view is that the duty created by law for the protection of servants is absolute, and no employer should be exempt therefrom, except by action of the legislature. No public good can come from permitting one charitable corporation, by the failure of a duty imposed by law, to maim and disfigure its servants and employees, when, depending upon the nature of the injury, their future welfare must of necessity be looked after by some other charitable association, public or private, or by already overburdened or poverty-stricken relatives and friends. No such situation should be brought about by an arbitrary rule of immunity from liability, applicable only to one class of persons, unless deemed by the legislature necessary to the existence and life of charitable associations. Nor are we to be understood as holding that the trust funds of the defendant may be applied to the payment of this verdict. The question is not involved. Defendant is not supported exclusively from such funds; on the

contrary, its maintenance would seem from the evidence to come principally from patients who pay for services rendered them.

Order affirmed.

MISSISSIPPI SUPREME COURT.

MARY LOU ARMSTRONG, Appt.,
v.
HARRIETT ARMSTRONG WALTON et al.

(— Miss. —, 62 So. 173.)

Will — signature — name at beginning.

Under a statute requiring a will to be signed by the testator, or some other person in his presence and by his express direction, a blank will on a mutual benefit certificate, intended to pass the right to the proceeds, is sufficiently signed by placing the testator's name in the blank at the beginning of the instrument, without placing the signature at the end of it, if the intention was to execute the will thereby.

(June 2, 1913.)

APPEAL by defendant from a judgment of the Chancery Court for Monroe County in plaintiff's favor in a suit to set aside an alleged will which consisted of filling a form on the back of a mutual benefit certificate. Reversed.

The facts are stated in the opinion.

Note.— *Wills: writing name in body of will as a signature thereto.*

This note is intended to include only cases which have been decided since the note covering the same question attached to *Meads v. Earle*, 29 L.R.A.(N.S.) 63.

In *Re Phelan*, — N. J. —, 87 Atl. 625, the court said that a last will need not be expressed in any particular formula. It must be signed, but the signature may be at the beginning, middle, or end, or on the side. If a testator writes his name in, on, or under the testament, with the intention to make that name his signature, even if expressed in the third person, and the witnesses see him write, and it is duly executed in other respects, the testament is valid. And so it was held that, under a statute which requires that all testaments shall be signed by the testator, which signature shall be made, or the making thereof acknowledged, by him, and the writing declared to be his last will in the presence of two witnesses,—the name in the attestation clause of an holographic will which read as follows, "signed, sealed, published, and declared by the said Cornelius or Corniel F. Phelan to be his last will and testament in the presence of, as witnesses," was sufficient as the signature of the will; the clause having been written in the presence of the attesting witnesses, and, there being extrinsic evi-

Messrs. Paine & Paine for appellant.
Messrs. D. W. Houston, Sr. and Jr.,
for appellees:

The paper was an incomplete will, or a futile attempt to execute a will.

The name of a testator at the commencement of a holograph will is an equivocal act, and unless it appear affirmatively from something on the face of the paper that it was intended as his signature, it is not a sufficient signing under the statute.

Ramsey v. Ramsey, 13 Gratt. 664, 70 Am. Dec. 438; *Re Booth*, 127 N. Y. 109, 12 L.R.A. 452, 24 Am. St. Rep. 429, 27 N. E. 826; *Everhart v. Everhart*, 34 Fed. 85; 29 Am. & Eng. Enc. Law, 169, note 1; 30 Am. & Eng. Enc. Law, 586; *Sheehan v. Kearney*, 82 Miss. 688, 35 L.R.A. 102, 21 So. 41; 40 Cyc. 1105; *Baker v. Brown*, 83 Miss. 797, 36 So. 539, 1 Ann. Cas. 371; *Re Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Warwick v. Warwick*, 86 Va. 602, 6 L.R.A. 775, 10 S. E. 843.

Reed, J., delivered the opinion of the court:

This appeal was a controversy between the widow of a deceased member of the Masonic Benefit Association, claiming to be his designated beneficiary, and his children by a former marriage, over the proceeds of an insurance certificate. John Armstrong, at the date of his death, May 3, 1911, was a

dence of an intention that it should be testator's signature. The court stated that the name written in the caption of the same will as follows, "I, Cornelius or Corniel F. Phelan, . . . do make, publish, and declare this my last will and testament," was insufficient as a signature, as it was not written in the presence of witnesses nor acknowledged before them to be his signature. The court stated that the words composing his name were merely *designatio personæ*, and said that the same would be true as to the name in the attestation clause, were it not for the extrinsic evidence of a contrary intent.

And also in *Murguiondo v. Nowlan* — Va. —, 78 S. E. 600, the signature of testatrix to an attested holographic will, written upon the margin of the will, was held to be such a signature as is contemplated by a statute providing that wills be signed "in such manner as to make it manifest that the name is intended as a signature," where the testatrix signed in the presence of the attesting witnesses as and for her signature, and at the same time declared the instrument to be her last will and testament.

As to when a will is deemed to have been signed or subscribed at the end, see notes to *Sears v. Sears*, 17 L.R.A.(N.S.) 353; *Mader v. Apple*, 23 L.R.A.(N.S.) 515; and *Re Stinson*, 30 L.R.A.(N.S.) 1173.

J. H. B.

member in good standing of the Masonic Benefit Association. The certificate of insurance, dated May 27, 1905, was made payable to him upon his death, and was for \$500. The amount of this insurance was afterwards, by properly adopted order of the association, increased to \$700. On December 3, 1906, John Armstrong designated his wife, Mary L. Armstrong, appellant herein, as his beneficiary in the insurance certificate. The instrument by which this designation is made is called a will. It is claimed that it was not sufficiently executed by John Armstrong, by reason of his signature not being placed on the line at the end thereof. The following is the benefit certificate and the so-called will:

No. 4,522.

Masonic Benefit Association
(Organized 1880)

of the Deum servamus, nostras
M. W. Stringer viduas et orphanos sus-
Grand Lodge tinebimus.
Office of the Treasurer.

Will pay to Bro. John Armstrong, of Sesostria Lodge No. 14, at Aberdeen, Mississippi, who is a member of the
Masonic Benefit Association.

This certificate witnesseth: That the Masonic Benefit Association of the M. W. Stringer Grand Lodge of F. & A. M., of Mississippi, will pay to John Armstrong, upon his death, five hundred dollars (\$500), provided he is in good financial standing with the Masonic Benefit Association, and in good standing with his local lodge at the time of his death.

Any failure to comply strictly with the laws and regulations of the Masonic Benefit Association, as prescribed by the aforesaid Grand Lodge, causes forfeiture in the membership represented by this certificate.

No suit shall be maintained on this claim unless instituted within one year after the member's death.

Proof of death must be filed in the M. B. A. within thirty days after the death of member.

Given under my hand and official seal at Edwards, Mississippi, this 27th day of May, 1905.

[Signed] E. E. Perkins,
[Seal.] Sec'y & Treas.

I, John Armstrong, of Aberdeen, Mississippi, age forty-nine years, being of sound and disposing mind, give and bequeath the money due to me by virtue of the certificate upon which this, my last will, is indorsed, unto my wife, Mary L. Armstrong.

In witness whereof, I, this the 3d day of December, 1906, sign, publish, and declare this instrument as my will, so far as the money is concerned which is due me after 46 L.R.A. (N.S.)

my death from the Masonic Benefit Association. I appoint Mary L. Armstrong as my executor.

State of Mississippi, Monroe County.

The said John Armstrong, on the 3d day of December, 1906, signed the foregoing instrument, and published and declared the same in our presence, and in the presence of each other, as his last will, and we, at his request, and in his presence, and in the presence of each other, on said date, have hereunto written our names as subscribing witnesses thereof.

[Signed] F. N. B. Ward, W. M.
R. E. Ward, S. D.

The form of the certificate and the will is on one page. There is only a line dividing the instruments. From the appearance of the form, it seems that the certificate and the will, when executed, were intended to be considered and read together and as one.

The will contains the statement that it is indorsed upon the certificate. It is shown therein that its only purpose is to dispose of the money to be due to the member on the certificate, from the association, at the time of his death. The form of the certificate indicates that it should be made payable to the member "upon his death . . . provided he is in good financial standing." The form excludes the idea that it was meant to have the certificate made payable, upon its original issuance, to some other person than the member. It appears to be the plan of the association that the certificate should be made payable to the member to whom it is issued, and that the member should afterwards designate his beneficiary in the instrument called a will, which follows immediately the certificate and together occupies the face of the sheet which is known as the benefit certificate.

We have carefully examined the rules and regulations of the Masonic Benefit Association. These are called the constitution and by-laws. The only provision we find relative to the issuance of the benefit certificate and the designation of the beneficiary is the form of the policy, and thereunder the form of the instrument, which is stated to be a will. Therefore, with the exception of prescribing a form for the certificate and for the designation of the beneficiary, there is nothing in the rules and regulations of the association to control the manner in which the beneficiary shall be named.

It will be noted that John Armstrong's name is not written on the line at the end of the instrument which he denominates his will, and in which he gives the proceeds of the benefit certificate to his wife. It is shown by the testimony that he was a colored man, unable to read or write; that he

went to F. N. B. Ward, one of the attesting witness to the will, and who was the worshipful master of the local lodge of the association, and requested him to make out his will, and make it payable to his wife, Mary Lou Armstrong. Thereupon Ward filled out all the blanks in the instrument in the presence of John Armstrong and his son, R. E. Ward, who was senior deacon. The two Wards then signed the attestation to the will. F. N. B. Ward wrote down the name of Armstrong in two places, at the beginning of the will, and in the certificate of attestation. This was done because he was requested by Armstrong to fill out his will, and that meant the writing of all necessary words to make out and complete the execution of the will. The paper was then handed to Armstrong, who delivered it to his wife; and upon his death it was found in her bedroom, framed and hanging on the wall. F. N. B. Ward testified that he signed John Armstrong's name to the will.

It appears to be settled that the right of a member of a benefit society in the amount agreed to be paid in the certificate at his death is simply the power to appoint a beneficiary, and that the rules and regulations of such society, such as may be contained in the constitution or charter and by-laws, are the foundation and source of such power. 1 Bacon, Ben. Soc. § 237. But we find no requirement in the rules and regulations of the Masonic Benefit Association, relative to the execution of the power to name the beneficiary, except the form of the will set out in the constitution and used in this case. This formality was intended to be complied with by the member, John Armstrong. We understand that the designation of a beneficiary may be made by will. This seems to be the plan of this association.

Has the instrument purporting to be a will been sufficiently executed? It is contended by appellees that it was necessary for the paper to have been signed at the end thereof. The statute of this state (§ 5078 of the Code of 1906) provides that a will must be signed by the testator, or some other person in his presence and by his express direction, and if the will is not wholly written and subscribed by the testator, then it shall be attested by two or more credible witnesses in the presence of the testator or the testatrix.

Now, as to the place of signature: We find in American & English Encyclopedia of Law, 2d ed. vol. 30, p. 582, the following: "Under the English statute of frauds, a will was held to be sufficiently 'signed' if the testator wrote his name at the beginning or in the body of the will with in-

tent thus to sign the instrument; and this rule has been followed in those jurisdictions wherein the statute is silent as to the place of signature, with the modification, in some instances, that the intent to sign must appear upon the face of the will." In 40 Cyc. 1104, is the following: "Where the statute relating to signing requires no more than the statute of frauds,—merely that the will shall be in writing, and be signed,—it is immaterial where the testator's signature was placed, if it was placed there with the intention of authenticating the instrument." It is stated to be the general rule applicable to the signature to writings of various kinds, that "it is now almost universally held that, if the name of the party to be charged is written by himself or his representative anywhere in the body of the instrument, with intent thereby to authenticate it and render himself bound, it is a good signature." *Lampkin v. State*, 105 Ala. 1, 16 So. 575; *Re Camp*, 134 Cal. 233, 66 Pac. 227; *Cunningham v. Hawkins*, 163 Mich. 317, 128 N. W. 223.

In the case of *Armstrong v. Armstrong*, 29 Ala. 538, wherein it was held that the writing of the name of the testator at the beginning of the will was sufficient, Rice, Ch. J., said in delivering the opinion of the court: "It is not essential that the testator should write his own name. The British statute, as well as our own, allows a will to be signed for him by another; and his name, when written by another for him, in his presence, and by his direction, will have the same effect as if it had been written by himself. Although his name is not written by himself nor subscribed to the will, yet, if it be written in the beginning of the will, by another, in his presence and under his direction, and if it be acknowledged by him to the attesting witnesses at the time he calls on them to attest and subscribe it, it will be as effectual as if with his own pen he had written it."

It seems that a distinction has been made between the meaning of the words "sign" and "subscribe." In the case of *Missouri, K. & T. R. Co. v. Denton*, 29 Tex. Civ. App. 284, 68 S. W. 336, the court, in holding a signature in the body of an instrument good, called attention to the fact that the statute requiring such signature provided that such instrument should be "signed" and not that it be "subscribed." It will be noticed that the statute in Mississippi prescribes that the will shall be signed by the testator, or some other person at his direction, where it is not wholly written by him, and that, when it is wholly written by him, it shall also be subscribed by him.

We do not find any decision of this court

wherein the question of the location of a signature to a will has been passed on. In reference to the location of the signature of the witness attesting the will, it has been decided in the case of *Fatheree v. Lawrence*, 33 Miss. 585, that the purpose of attestation is to identify the instrument signed and published by the testator, and that no particular form of words is necessary to constitute an attestation. In the case of *Murray v. Murphy*, 39 Miss. 214, it is decided that it is immaterial as to what particular part of a will is located the name of the attesting witness. It is settled under the laws of this state that a signature to a will may be made for a testator by another party writing his name (*Watson v. Pipes*, 32 Miss. 451), and a testator may be assisted in signing his will by having his hand steadied by another party, and can also sign by his mark (*Sheehan v. Kearney*, 82 Miss. 688, 35 L.R.A. 102, 21 So. 41).

We find from the testimony in this case that John Armstrong had the purpose definitely in mind to make his will so that his wife could be designated as the beneficiary in his insurance certificate. He went to an officer of the local lodge, the person who had full information on the subject and knew how to write the paper in the proper manner and in conformity with the prescribed form of the association; and he directed that his will be made out, and that the insurance should be given to his wife. The officer wrote out the instrument as directed. In compliance with our statute, it was written in the presence of the testator, and at his express direction. Such express direction followed and was obedient to the request by Armstrong contained in the words, "Fill out my will to my wife."

Armstrong could neither read nor write. This was known to Ward, and Ward intended to write every word necessary in the blank form in the will, including the signature of Armstrong. He knew that this was contained in the request made of him to fill out the will. Armstrong gave him all necessary information to enable him to prepare the paper. It is hardly possible that Armstrong knew the meaning of all the formal words used in making the bequest. It was sufficient for him to know that he was designating his wife as beneficiary in the will. He depended upon the man, the officer of the association, who had superior knowledge, and who had special capacity to do what he desired. The will was properly attested by the witnesses, when it was then handed back to Armstrong. All the parties, the testator and the witnesses, understood that it was a completed and executed instrument, and it was so afterwards dealt with. Armstrong delivered it to his wife,

the beneficiary. She had it in her possession and before her in her room, so that it could be easily seen by all. No one afterwards questioned the sufficiency of the execution of the paper. In fact, the record discloses that it was duly proved by the testimony of the subscribing witnesses, and admitted to probate in accordance with the provisions of the statute. The execution further complied with the provisions of the statute, by the attestation by two witnesses in the presence of the testator.

The Mississippi statute does not state where the signature of a testator to a will shall be located. It does not say that the will shall be signed or subscribed at the end thereof. As the statute is silent as to the place of signature, and merely provides that the will shall be in writing and signed, we believe the rule that it is immaterial where the signature of the testator should be placed on the instrument should be followed in this state. It seems clear that it was the intent of the testator to make and execute this instrument as his will, for the purpose of designating his wife as the beneficiary in his insurance certificate. We therefore decide that the instrument is sufficiently executed, and is a valid will under the law.

We have not entered into any statement or discussion of the pleadings in this case, as we have not deemed it necessary to do so. The Masonic Benefit Association, by an interpleader, admitted its indebtedness under said insurance certificate, in the sum of \$700. It is contended by the appellees that the will was not sufficiently executed, and therefore invalid, and that the amount due under the benefit certificate descended to the heirs at law of John Armstrong, who are the appellant, his widow, and the appellees, his children by former marriage. The chancellor decided this issue in favor of the appellees, holding that the will was not the true and last will of John Armstrong. We conclude that the court erred in doing this.

The case is therefore reversed, and judgment entered here in favor of the appellant, and dismissing the original bill of the appellees.

MISSOURI SUPREME COURT.
(Division No. 2.)

LUCY E. COUCH, Resp't.,
v.

KANSAS CITY SOUTHERN RAILWAY
COMPANY, Appt.

(— Mo. — , 158 S. W. 347.)

Damages — destruction of meadow.
The measure of damages for destruction

of a meadow by fire is the cost of reseeding it plus the rental value of the property during the time its owner is deprived of crops therefrom by reason of the fire.

(June 28, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Vernon County in plaintiff's favor in an action brought to recover damages for the destruction of plaintiff's meadow by fire set out by defendant. Affirmed.

Statement by Brown, P. J.:

Plaintiff recovered a judgment for \$193.50 for 22 acres of meadow and 27 rods of fence which defendant destroyed by permitting fire to be communicated from its engines to said meadow. The evidence quite clearly proves the quantity and value of the meadow and fence destroyed, and that the defendant's agents caused the fire by permitting sparks to escape from its engines. The roots of the meadow were destroyed so that it became necessary to reseed same. There was some evidence tending to prove that a reseeded meadow would not yield a full crop of hay the first season after such reseeding. The only issue urged here for reversal of the judgment is the instructions of the trial court which authorized a recovery for the expense of reseeding the meadow and the rental value of the land during the time plaintiff was or will be deprived of crops of hay therefrom by reason of the fire. The appellant contends that the real measure of plaintiff's damages is the depreciation in the value of her land (the injury to the inheritance) caused by burning her meadow.

Messrs. Cyrus Crane and H. C. Clark, for appellant:

Where grass roots are destroyed, the injury is to the inheritance; the measure of damages being the difference in the value of the land before and after the fire.

Wiggins v. St. Louis, M. & S. E. R. Co. 119 Mo. App. 492, 95 S. W. 311, 129 Mo. App. 369, 108 S. W. 574; *Carter v. Wabash R. Co.* 128 Mo. App. 57, 106 S. W. 611; *Gates v. Chicago & A. R. Co.* 44 Mo. App.

Note.—As to measure of damages for injury to, or destruction of, growing crops, see notes to *Teller v. Bay & R. Dredging Co.* 12 L.R.A.(N.S.) 267; *Missouri P. R. Co. v. Sayers*, 27 L.R.A.(N.S.) 168; and *United States Smelting Co. v. Sisam*, 37 L.R.A.(N.S.) 976.

Specifically as to measure of damages for destruction of perennial crops, see note to *Thompson v. Chicago, B. & Q. R. Co.* 23 L.R.A.(N.S.) 310, which is supplemented in 37 L.R.A.(N.S.) 976. 46 L.R.A.(N.S.)

488; *Knight Bros. v. Chicago, R. I. & P. R. Co.* 122 Mo. App. 38, 98 S. W. 81.

Messrs. Scott & Bowker for respondent.

Brown, P. J., delivered the opinion of the court:

This appeal was submitted to the Kansas City court of appeals, which affirmed the judgment of the trial court through an able opinion by Broadbudd, Judge. 141 Mo. App. 256, 124 S. W. 1077. The case was, however, transferred to this court because the opinion filed therein conflicts with several opinions of the St. Louis court of appeals prescribing a different rule for ascertaining damages of this character.

The decision of the Kansas City court of appeals affirming the judgment is well sustained by its own prior rulings. *Adam v. Chicago, B. & Q. R. Co.* 139 Mo. App. 204, 122 S. W. 1136; *Doty v. Quincy, O. & K. C. R. Co.* 136 Mo. App. 254, 116 S. W. 1126; *Knight Bros. v. Chicago, R. I. & P. R. Co.* 122 Mo. App. 38, 98 S. W. 81; and *Mattis v. St. Louis & S. F. R. Co.* 138 Mo. App. 61, 119 S. W. 998. While, on the other hand, the views of appellant are ably supported by the St. Louis court of appeals. *Wiggins v. St. Louis, M. & S. E. R. Co.* 119 Mo. App. 492, 95 S. W. 311; *Wiggins v. St. Louis, M. & S. E. R. Co.* 129 Mo. App. 369, 108 S. W. 574; and *Carter v. Wabash R. Co.* 128 Mo. App. 57, 106 S. W. 611. So it becomes our duty to finally determine what shall be the rule throughout the state for measuring damages caused by the burning of meadows.

Something could be said in favor of each method of ascertaining such damages. The appellant insists that the method adopted by the trial court, and sanctioned by the Kansas City court of appeals, for ascertaining damages in this class of cases, is too much a matter of conjecture or speculation.

It is a cardinal rule that when damages are awarded against anyone such damages must be actual and real,—not conjectural or speculative. This, however, is only an abstract rule of law; a general guide to be followed so long as it promotes justice, and to be put aside when it leads in the opposite direction. It would be difficult, indeed, to find a rule of law upon which the courts have not found it necessary to ingraft some modification or exception. It is a settled rule of law that, in actions for personal injuries, recoveries may be had for loss of time and physical pain which a plaintiff will suffer after the trial and judgment. *Sotabier v. St. Louis Transit Co.* 203 Mo. 702, 102 S. W. 651. Such future suffering is usually proven by expert medical testimony, which, experience has taught us, is

not infallible, but sometimes amounts only to conjecture or speculation. Other incidents of the allowance of speculative or uncertain damages could be cited if necessary. *Smith v. Sedalia*, 244 Mo. 107, 149 S. W. 597.

It is true no one can examine a meadow in October, or even in March, and determine how much hay it will yield the following season. A drought (and in some cases a flood) may destroy it entirely. This does not signify that because a meadow, like most any other crop, is uncertain, it has no standard of value, and that one who negligently destroys same cannot be made to respond in damages.

Men are willing to rent meadows or buy the product thereof before any hay is in sight, the same as they are willing to buy young pigs and assume the risk of such animals growing to a size when they will be suitable for food. Therefore the fact that people are willing to and do rent meadows when there is no matured hay thereon gives them a rental value, though their real value is only prospective or speculative.

The rule for measuring the damages adopted by the trial court in this case should not be condemned because it possesses some elements of uncertainty.

The rule announced by the St. Louis court of appeals for ascertaining the value of meadows may, and no doubt usually does, promote justice; but we consider it more cumbersome and more likely to cause a miscarriage of justice than the other rule.

To ascertain the damage to the inheritance by the burning of a meadow, it is necessary to find out what the land was worth with the meadow, and then ascertain what its value is after the meadow is destroyed. A meadow may possess several elements of value to the owner thereof. Just how many, we do not judicially know; but we do take judicial notice that meadows are sometimes valuable to prevent the soil from washing and also to give the soil a rest from grain crops. Therefore farmers incur an expense in growing meadows which they would not incur for the hay crop alone.

The value of farm land can be ascertained with a fair degree of certainty, provided there are any such lands for sale in the locality where it becomes judicially necessary to find out their value; but the number of persons in a given locality who possess a correct knowledge of the value of lands is insignificant compared with those who know the value of meadows or the rental value of meadows, for the simple reason that nearly every farmer has some meadow and knows the market value of the product thereof. Why investigate the value of the 46 L.R.A. (N.S.)

land when only the value of a natural product thereof—something that can soon be reproduced—is in issue? Placing in evidence the value of the land upon which a meadow grew tends, to some extent, to inject a collateral issue into the case and thereby befog the minds of the triers of fact. *State v. Reed*, — Mo. —, 157 S. W. 316.

The rule announced by the Kansas City court of appeals for measuring the value of meadows recommends itself to us, because under that rule the evidence of the value or lack of value of such property is more readily obtainable, and we believe it is more likely to produce actual justice than the rule announced by the St. Louis court of appeals.

The appellant complains that the plaintiff was not restricted by the instructions to such damages as she would sustain by the loss of one hay crop through the burning of her meadow. No error was committed on that point. Some of the meadow was burned in the fall and some of it in March. There was evidence tending to prove that it was usually impossible to secure a full crop of hay the first season after reseeding a meadow. The defendant introduced no evidence.

There is nothing in this record which indicates that the verdict was excessive.

The judgment is affirmed.

Faris and Walker, J. J., concur.

MONTANA SUPREME COURT.

AMERICAN BONDING COMPANY OF
BALTIMORE, Appt.,

v.

STATE SAVINGS BANK, Respnt.

(47 —) Mont. —, 133 Pac. 367.)

Subrogation — defalcation by officer — right of surety.

The surety on the bond of a court clerk, who is compelled to reimburse the county for money paid out on fictitious jurors' certificates which the clerk has issued, is not entitled to subrogation to the right of the county to compel a bona fide holder to

Note. — Right of sureties of public officer who made good a loss occasioned by their principal's default or misconduct to be subrogated to the rights of the obligee or beneficiary of the bond against a third person.

This note is supplemental to one covering the same subject attached to National Surety Co. v. State Sav. Bank, 14 L.R.A. (N.S.) 155.

The principal case, in holding that a

which it paid the certificates to return the amount paid, because the certificates were void.

(May 7, 1913.)

APPEAL by plaintiff from a judgment of District Court for Silver Bow County in defendant's favor in an action brought to recover an amount received by defend-

ant from the county upon fictitious jurors' certificates held by it. Affirmed.

The facts are stated in the opinion.

Messrs. Walsh, Nolan & Scallion, for appellant:

The county could have recovered from the bank every dollar paid to it upon the certificates.

3 Randolph, Com. Paper, 1486; Hathaway v. Delaware County, 185 N. Y. 368, 13 L.R.A.

surety on the bond of the county clerk, who was compelled to reimburse the county for money paid out on fictitious jurors' certificates which the clerk had issued, was not entitled to subrogation to the right of the county to compel a bona fide holder to which it paid the certificates to return the amount paid, because the certificates were void, finds support in *National Surety Co. v. Arosin*, 117 C. C. A. 313, 198 Fed. 605, where it was held that the surety on the bond of a county auditor which paid to the county the amount which it had paid upon non-negotiable tax refunding certificates issued by the deputy auditor in favor of fictitious payees and sold by him to a bank was not entitled to be subrogated to the right of the county to maintain an action for money had and received against the bank, to recover the amount so paid, where there was nothing in the transaction to excite the suspicion of the bank.

This is a later appeal in *National Surety Co. v. State Sav. Bank*, to which the former note was attached, where it was held that the surety was entitled to subrogation on the theory that the bank was grossly negligence in failing to inquire as to the genuineness of the certificates and indorsement; but at a subsequent trial it appeared, for the first time, that no negligence could be charged to the bank in failing to make such inquiry.

And the right of subrogation was also denied in *American Bonding Co. v. Welts*, 113 C. C. A. 598, 193 Fed. 978, where a bonding company which was surety upon the bond of a county auditor who became a defaulter and embezzler to the county's loss sought to be subrogated to the county's rights and remedies against the treasurer and county commissioner, on the alleged ground that the loss was occasioned by their negligence. By the statute under which the bond was given the obligation assumed by the bonding company for the faithful and honest acts of the auditor was not only for the benefit and protection of the county, but also for that of all others who might be injured by the breach of the conditions of the bond, and among such ones were the treasurer and commissioners; and the court held that to permit the bonding company to be subrogated to the county's rights against them would be to permit the surety to recoup a loss out of those for whose benefit in part the surety company assumed the obligation, which, the court said, would be to put the doctrine of subro-

gation to a case wholly foreign to its nature.

But where a deputy sheriff failed to account to the state and county for taxes collected by him, a surety, upon payment of his defalcation, was held in *Hill v. Fleming*, 128 Ky. 201, 107 S. W. 764, 16 Ann. Cas. 840, to be subrogated to the rights of the state and county, and of the sheriff, against a fund impressed with a trust in favor of the county or state. In this case the deputy sheriff deposited the taxes collected and drew a check on that account in payment of personal indebtedness, signing the check with his name followed by the words "deputy sheriff;" and it was held that the surety company was entitled to pursue and reclaim the proceeds of this check. The court stated that the check itself gave payee notice of the drawer's official position, and it further notified him that the funds upon which the check was drawn were deposited to the drawer's credit as deputy sheriff, and it therefore considered that it was the payee's duty to make inquiry for the purpose of ascertaining whether or not the funds transferred by the check belonged to the drawer individually or to the state and county. Failing to do this, the amount of the check was received and impressed with a trust in favor of the state and county.

And the surety on a bond of the county treasurer, which pays the amount of such treasurer's defalcation, is subrogated to every right that the county has to bring suit against the bank to recover the amounts of checks upon funds of the county, signed in the name of the county, which were paid upon the treasurer's personal indebtedness to the bank. *Northern Trust Co. v. First Nat. Bank*, — N. D. —, 140 N. W. 705. The court stated that there was no escaping the presumption that the bank, in receiving these checks, knew it was receiving the county's money unlawfully.

And also in *Boaz v. Ferrell* — Tex. Civ. App. —, 152 S. W. 200, where a tax collector commingled the tax money of the state and county and embezzled a part and paid the balance to the county, it was held that surety on the collector's bond to the state could, upon payment of the amount of the state's money embezzled, pursue the confused funds in the possession of the county, on the familiar principle that where the surety pays a debt of his principal the surety is entitled, on equitable principles, to all the securities and rights of the creditor.

J. H. B.

(N.S.) 273, 113 Am. St. Rep. 909, 78 N. E. 153.

The parties who actually got the money out of the treasury without any just right to it, are the ones who may be said to be primarily liable for the return of it, and the surety paying is unquestionably subrogated.

National Surety Co. v. State Sav. Bank, 14 L.R.A.(N.S.) 155, 84 C. C. A. 187, 156 Fed. 21, 13 Ann. Cas. 421; National Surety Co. v. Arosin, 117 C. C. A. 313, 198 Fed. 605.

A third party holding an instrument for the payment of money or the legal title to property must plead his good faith and payment of value when fraud is alleged in the inception of the instrument, or in the acquisition of title, by a predecessor in interest.

Thambling v. Duffey, 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866; Rossiter v. Loeber, 18 Mont. 372, 45 Pac. 560; Harrington v. Butte & B. Min. Co. 27 Mont. 12, 69 Pac. 102; Lewis v. Lindley, 19 Mont. 422, 48 Pac. 765; Pom. Eq. Jur. § 784; 6 Enc. Ev. 14; Coombs v. Barker, 31 Mont. 526, 79 Pac. 1; 23 Am. & Eng. Enc. Law, 523; 2 Pom. Eq. Jur. § 762.

Mr. C. M. Parr also for appellant.

Messrs. W. D. Kyle, Frank C. Walker, and Charles R. Leonard, for respondent:

The county is not liable to the bank for the misconduct of Deputy Farrell, whereas the plaintiff expressly obligated and bound itself to indemnify not only the county, but any other party, against loss caused by the act of its principal or any of his deputies.

Sievers v. San Francisco, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687, 1 Am. Neg. Rep. 5.

Parties in the course of dealings with each other can establish a usage or custom affecting their rights which will be recognized by the courts even though it conflict with some fixed principle of law.

Dickinson v. Gay, 7 Allen, 29, 83 Am. Dec. 656; Governor v. Withers, 5 Gratt. 24, 50 Am. Dec. 95; Geyser-Marion Gold Min. Co. v. Stark, 53 L.R.A. 684, 45 C. C. A. 467, 106 Fed. 564, 21 Mor. Min. Rep. 220; 29 Am. & Eng. Enc. Law, 2d ed. 380.

The complaint is insufficient to state facts authorizing the granting of any relief to the plaintiff as against the defendant.

6 Pom. Eq. Jur. 3d ed. § 923, p. 1507; Pierson v. Haddonfield, 66 N. J. Eq. 180, 57 Atl. 471.

Holloway, J., delivered the opinion of the court:

From the first Monday of January, 1905, to the first Monday in January, 1909, W. E. 46 L.R.A.(N.S.)

Davies was the duly elected, qualified, and acting clerk of the district court of Silver Bow county. During a portion of that period W. P. Farrell was his chief deputy. The American Bonding Company of Baltimore was the surety on Davies' official bond. During the time Farrell was acting as deputy clerk he issued false and fictitious jurors' certificates, none of which bore the imprint of the official seal, and these certificates to the amount of \$2,076 came into the possession of the State Savings Bank of Butte, and were by it presented to the county treasurer and paid. The fraudulent character of the certificates having been discovered, the county made demand upon the clerk of the district court and the bonding company, his surety, to repay the amounts which the county had paid out on such certificates, and, this demand having been refused, action was commenced by the county and prosecuted to favorable judgment, which judgment was affirmed on appeal by this court. Silver Bow County v. Davies, 40 Mont. 418, 107 Pac. 81. The bonding company having paid the judgment, which included the amount received by the State Savings Bank, took an assignment of any right of action which the county may have had against the bank, and thereupon commenced this action to recover from the bank the \$2,076 which the bank had received from the county upon the fictitious certificates held by it. The complaint sets forth the foregoing facts somewhat more in detail, and concludes by alleging that the bank has not repaid or returned to the county or to the bonding company the \$2,076 or any part thereof. To this complaint a demurrer was interposed and sustained, and plaintiff, electing to stand upon its complaint, suffered judgment to be entered against it and appealed. The only question presented for our determination is: Does the complaint state a cause of action in favor of the bonding company and against the bank?

The facts concerning Farrell's speculations and the character of the instruments which he issued will be found detailed at length in Re Farrell, 36 Mont. 254, 92 Pac. 785, and in Silver Bow County v. Davies, referred to in the statement above. Appellant insists that the certificates held by the bank were void, citing Re Farrell, above, and therefore the bank had no just claim against the county for their payment; that, having paid the bank the face value of the certificates, the county could have recovered back the money so paid in an action for money paid by mistake. To this extent appellant's contention may be conceded for the purposes of this appeal. It is further insisted that, since the county chose to pro-

ceed against the district clerk and the surety company, the surety on his official bond, to compel them to make good the county's loss, the surety company, upon paying the amount which the bank had received from the county, thereby became subrogated to the right which the county had to compel the bank to repay the amount which it had received. With this contention we do not agree. Furthermore, it must be conceded that, if the bank would have had a cause of action against the bonding company in case the county had refused to pay the fictitious certificates, then the bonding company cannot have a cause of action against the bank in this instance.

1. Assuming that the county of Silver Bow had a cause of action against the bank to recover back the money it paid out on the spurious certificates, it does not follow that by paying the county's loss the surety on the clerk's official bond became subrogated to the county's right. The doctrine of subrogation had its origin in the civil law. It has been adopted and invoked by courts of equity in order that justice may be done as nearly as possible. The application of the doctrine must therefore depend upon the circumstances of each particular case. When, therefore, this surety company seeks to be subrogated to the right which the county may have had against the State Savings Bank, it is necessary that something more be made to appear than that the bank could have been made to repay to the county the amount which it received upon the spurious certificates which it held. The surety company must show that as between it and the State Savings Bank, if either must suffer loss because of Farrell's peculations, in equity and good conscience the bank should be the one to lose. This is the rule recognized with practical unanimity. *American Bonding Co. v. Welts*, 113 C. C. A. 598, 193 Fed. 978; *United States Fidelity & G. Co. v. Title Guaranty & Surety Co.* (D. C.) 200 Fed. 443. Does this complaint show such a state of facts? We think not. There is not any charge of negligence or wrongdoing on the part of the bank in purchasing the certificates. So far as the complaint discloses, the bank acted in perfect good faith and was following a common custom in dealing in these certificates without their bearing the impress of the official seal. Some one must suffer now for Farrell's official misconduct. Shall it be the bank, which acted in good faith and parted with its money for the spurious certificates issued by Farrell, or shall it be the surety company, which for a compensation undertook to be responsible for Farrell's official delinquencies, not only to the state and to Silver Bow county, 46 L.R.A. (N.S.)

but to this bank as well? To such an inquiry a court of conscience can make but one answer. Upon the showing made in its complaint, the surety company has failed to show itself entitled to be subrogated to the right which the county may have had. *Stewart v. Com.* 104 Ky. 489, 47 S. W. 332. For this reason the complaint does not state a cause of action.

2. According to the allegations of this complaint, the State Savings Bank is in possession of and holds the legal title to the money which it secured from the county upon the fictitious certificates. At law this surety company would not have any right of action against the bank; but, to state a cause of action at all, it must allege such facts as will appeal to the conscience of a court of equity. If the equities of the respective parties are equally balanced, the position of the defendant, the possessor of the thing in controversy, is the better; in other words, the legal title added to its equity prevails over an equal equity which has no legal title to support it. 2 Pom. Eq. Jur. 3d ed. §§ 727, 768; *Fidelity Mut. L. Ins. Co. v. Clark*, 203 U. S. 64, 51 L. ed. 91, 27 Sup. Ct. Rep. 19.

3. If the county had refused to pay the certificates held by the bank, would the bank have had a cause of action against the surety company for its loss? The surety company was responsible for Farrell's official misconduct (Rev. Codes, § 384) to any party injured thereby, and such party could maintain an action for his damages (§ 398). That it was Farrell's official misconduct which caused the county's loss has been judicially determined. *Silver Bow County v. Davies*, above; *Ramsey County v. Sullivan*, 89 Minn. 68, 93 N. W. 1056. If the county had refused to pay the certificates, the resulting loss to the bank would have been occasioned by the same acts of official misconduct (*Stewart v. Com.* above), and it is not any defense that, by omitting to stamp the impress of the seal upon the certificates, Farrell avoided punishment or set afloat securities which were invalid. *Silver Bow County v. Davies*, above. It would seem to follow, as of course, that the bank's right of action against the surety company under such circumstances would be absolute.

To sustain their contentions, counsel for appellant rely upon the decision in *National Surety Co. v. State Sav. Bank*, 14 L.R.A. (N.S.) 155, 84 C. C. A. 187, 156 Fed. 21, 13 Ann. Cas. 421. Bourne, the deputy auditor of Ramsey county, Minnesota, fraudulently issued spurious refunding orders on the county treasurer, procured the chairman of the board of county commissioners to authenticate them, indorsed the names of

the fictitious payees, and then sold the orders to the State Savings Bank. The bank presented them for payment and received from the county their face value, with accrued interest. The fraud having been discovered, the county brought action against the auditor and the surety company, the surety on his official bond, and recovered. The surety company, having paid the county, commenced an action against the bank to recover the amount which the bank had collected from the county. A general demurrer to the bill was sustained. The surety company appealed to the circuit court of appeals for the eighth circuit. The majority of the court held that Bourne's personal, as distinguished from his official, misconduct would have been the proximate cause of the bank's loss had the county refused to pay the orders, and therefore the surety on the auditor's official bond could not be held responsible for such personal misconduct. But it was Bourne's official misconduct which called the spurious orders into existence. *Ramsey County v. Sullivan*, above. If he had issued them to real persons, but to persons not entitled to them, and such persons had negotiated them to the bank, there is not any question that the bonding company would have been liable to the bank for the injury sustained. Now by just what species of legal legerdemain Bourne's forgeries of the indorsements of fictitious payees, added to his wrongful act in issuing the spurious orders, could operate to relieve the surety company, is beyond our comprehension. It was further held that, since the orders were non-negotiable,—made so by statute for the very purpose of preventing misuse of them,—the bank was guilty of gross negligence in purchasing them without inquiry, and for that reason it could not have recovered from the surety company if the county had refused payment. But, as pointed out in the dissenting opinion of Judge Hook, there was not anything before the court to justify it in assuming the existence of such a state of facts. It was further decided that, since the bank had procured from the county upon these fictitious certificates money to which it was not entitled as against the county, the county might have recovered it back, and, since the county proceeded against the surety on the auditor's official bond and enforced payment, the surety company became thereby subrogated to the right which the county might have exercised, to proceed against the bank, and this, too, without any apparent consideration of the relative equities of the respective parties. Upon each of the questions decided Judge Hook dissented, and in our opinion his position upon each question is unassailable. It

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is also worthy of note that this case was remanded to the district court for further proceedings; that answer was filed, issues joined, the cause tried, and judgment rendered in favor of the bank on the merits. The surety company again appealed; but this time the same circuit court of appeals (two of the judges being different persons) affirmed the judgment (*National Surety Co. v. Arosin*, 117 C. C. A. 313, 198 Fed. 605), and held that the bank was not guilty of negligence in purchasing the orders, and that it was Bourne's official misconduct in manufacturing the orders which was the primary cause of the loss. Nothing is said upon the question of subrogation. In our opinion there is not any substantial difference in the facts disclosed upon the trial and those appearing upon the face of the bill in the first appeal, and that the decision upon the second appeal ought to be treated as overruling the decision of the majority upon the first appeal. But, whether it be so considered or not, we decline to follow the majority opinion upon the first appeal as unsound and as opposed to the decided weight of authority.

The complaint does not state a cause of action, and the judgment of the District Court is affirmed.

Brantly, Ch. J., and Sanner, J., concur.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

SOLOMON M. ROSENTHAL et al., Respts.,
v.
AMERICAN BONDING COMPANY OF
BALTIMORE, Appt.

(207 N. Y. 162, 100 N. E. 716.)

Insurance — burglary — absence of marks — liability.

Entering and leaving a storeroom through an unlocked door, and feloniously carrying away property therefrom by the intimidation of the occupants with deadly weapons.

Note. — Burglary and theft insurance.

- I. Introduction, 562.
- II. Indemnity against theft or burglary as insurance, 562.
- III. Power to issue burglary insurance, 562.
- IV. Right to do business in foreign states, 563.
- V. Making contract, 564.
- VI. Property covered, 564.
- VII. Conditions and warranties.
 - a. In general, 564.
 - b. Other applications or losses, 565.

is not within a policy insuring against loss by burglary by persons who have made forcible and violent entrance upon the premises or exit therefrom, of which force and violence there shall be visible evidence, and relieving the insurer from liability unless there are visible marks upon the premises of the actual force and violence used in making the entrance or exit.

(Cullen, Ch. J., and Haight, J., dissent.)

(December 31, 1912.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part 16, for New York County, in plaintiffs' favor in

an action brought to recover the amount alleged to be due on a burglary insurance policy. Reversed.

The facts are stated in the opinion.

Mr. John Ewen, for appellant:

There was no proof of loss by burglary committed by persons "who have made forcible and violent entrance upon the premises or exit therefrom."

Bridgewater & U. Pl. Road Co. v. Robbins, 22 Barb. 662; People v. Quinn, 50 Barb. 128; Bradshaw v. Mutual L. Ins. Co. 187 N. Y. 347, 80 N. E. 203, 10 Ann. Cas. 266; Nelson v. Traders' Ins. Co. 181 N. Y. 472, 74 N. E. 421; Janneck v. Metropolitan L. Ins. Co. 162 N. Y. 574, 57 N. E. 182; Re George [1899] 1 Q. B. 595, 68 L. J. Q. B. N. S. 365, 47 Week. Rep. 474, 80 L. T. N. S.

VII. Continued.

c. Protection of property, 565.

d. Change in risk, 565.

e. Keeping books, 566.

f. Warrant of arrest, 567.

VIII. Manner of loss and proof thereof.

a. Absence of proof showing manner of loss, 567.

b. Entries by the use of tools or explosives upon safes, 569.

c. Entering outer door without use of force, 570.

d. Entering through collusion of insured's employee, 570.

IX. Notice and proofs of loss, 571.

X. Necessity of showing plaintiff's interest in property lost, 572.

XI. Insurer's right to replace property, 572.

XII. Amount of loss and recovery and proof thereof, 572.

XIII. Estoppel and waiver, 573.

Scope.

This note does not include cases of fire and marine insurance policies which incidentally insure against loss by thieves, etc.

As to loss by theft during fire, see note to *Farmers' & M. Ins. Co. v. Cuff*, 35 L.R.A. (N.S.) 892.

As to insurance covering automobiles, including risks on account of theft, see note accompanying *Harris v. American Casualty Co.* 44 L.R.A. (N.S.) 70.

It has been thought that it would be useful to collect all the cases dealing with insurance against burglary and theft, whether the questions involved related distinctively to this point of insurance, or depended upon principles and rules relating to insurance in general. Many of these principles and rules are treated in their relation to other kinds of insurance in notes referred to in the index to notes, under the title "Insurance."

I. Introduction.

With the enlarging of the scope of the insurance business and its branches, policies indemnifying against losses by bur-

glary, theft, and larceny have become common. And such policies are upheld and given effect by all courts.

In the construction of such policies the general principle that contracts of insurance will be liberally construed in favor of the insured is applied. *Bankers' Mut. Casualty Co. v. State Bank*, 80 C. C. A. 32, 150 Fed. 78; *Casner v. New Amsterdam Casualty Co.* 161 Mo. App. 354, 91 S. W. 1001; *Duschenes v. National Surety Co.* 79 Misc. 232, 139 N. Y. Supp. 881.

II. Indemnity against theft or burglary as insurance.

In *Re Solebury Mut. Protective Soc.* 3 Del. Co. Rep. 139, it was held that the concern for which a charter was sought was an insurance company where the application set forth that its purpose was "the recovery of property that may be stolen from its members, and, in the event of a failure to recover such property, to pay to the loser such part of the value thereof as the company may hereafter determine and set forth in its by-laws. If a member may meet with loss for which the company is liable, and the property shall not be found and returned to the owner, a tax sufficient to raise the required amount shall be assessed equally upon the members."

And it has been held that a company formed to afford mutual indemnity and protection to its members in case of loss by accidents, death, and theft of horses, mules, jacks, and jennies used for private purposes carries on an insurance business, although one of its circulars states that it does not sell insurance or receive premiums, and there is no accumulated fund out of which to pay losses, but assessments are relied upon for this purpose and that of keeping up the organization, and no persons but members are entitled to share in the benefits. *State v. Vigilant Ins. Co.* 30 Kan. 585, 2 Pac. 840.

III. Power to issue burglary insurance.

Insurance against burglary is impliedly authorized under § 1695 of McClain's Code,

248, 15 Times L. R. 230; Maryland Casualty Co. v. Ballard County Bank, 134 Ky. 354, 120 S. W. 301; First Nat. Bank v. Maryland Casualty Co. 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913 C, 1170.

Where the policy applies only to cases where entrance to a safe is made by tools or explosives, the limitation is one as to liability, and recovery cannot be had if the entry was effected by other means, even although there is no question of the fact of the burglary.

Maryland Casualty Co. v. Ballard County Bank, 134 Ky. 354, 120 S. W. 301; First Nat. Bank v. Maryland Casualty Co. 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913 C,

authorizing companies to insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty. Bankers' Mut. Casualty Co. v. First Nat. Bank, 131 Iowa, 456, 108 N. W. 1046. The court said: "As will be noticed the effect of the statute, as applied to this case, will be determined very largely on the scope of the meaning we may give to the words 'other casualty.' 'Casualty' and 'casualty insurance' are words of quite frequent use, yet it cannot be said that their definition has been very accurately settled by the courts. Strictly and literally 'casualty' is perhaps to be limited to injuries which arise solely from accident, without any element of conscious human design or intentional human agency; or, as it is sometimes expressed, inevitable accident,—something not to be foreseen or guarded against. (Standard Dictionary.) But in ordinary usage, 'casualty,' like 'accident,' is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on the part of the person suffering from the injury. Nor does the fact that the conscious or intended act of some other person produces it take from such injury its character as an accident or casualty."

And it was held in this case that where the language employed in a statute authorizing insurance is ambiguous, the contemporaneous construction placed thereon by the executive and administrative authorities who are charged with the duty of applying and enforcing it should be given weight, and in holding that the statute in question authorized insurance against loss by burglary, the court took into account the fact that the state auditor had issued a certificate to the insurer under the authority of the statute, in which it was recited that the company was given authority to transact a burglary insurance business. *Ibid.*

It has been held that a corporation whose purpose is limited to the recovery of or payment for stolen property, without any avowed purpose for the punishment of the

1170; Brill v. Metropolitan Surety Co. 113 N. Y. Supp. 476.

Mr. Ernest Hall, for respondents:

The visible evidence required by the policy was the opening of the door, which was seen by the plaintiffs' clerks.

Tickner v. People, 6 Hun, 657; McCourt v. People, 64 N. Y. 583; People v. Bush, 3 Park. Crim. Rep. 552; People v. Gartland, 30 App. Div. 534, 52 N. Y. Supp. 352.

When a policy is written and prepared by an insurer, and it had its choice of language in stating the contract, it must be held to the rule common in construing all contracts, that the terms thereof are to be

perpetrators of the crime, is against public policy. *Re Solebury Mut. Protective Soc.* 3 Del. Co. Rep. 139. The court said: "The court would be placed in the attitude of incorporating a society, the object of which would be a return of stolen property to the owner, at the expense to the public of permitting a thief to escape punishment. It would be construed an invitation to the worst classes to prey upon the community which fostered a corporate organization with powers extending no farther than to recover property stolen from its members, or reimburse them for the loss, regardless of the apprehension and punishment of the thieves. Under the proposed charter, the company would not be authorized to assess its members to pay a reward for the arrest of a horse thief, nor to bear the expenses of his prosecution in the criminal courts. We do not believe the petitioners themselves intend to form such an easy-going corporation, or that they would be content with such a charter. The proposal does violence to our notions of the old-fashioned horse companies organized for the 'pursuit of horse thieves and other villains.'"

The power to issue a policy of burglary insurance cannot be challenged in an action on a premium note, where the company has adopted articles of incorporation expressly assumed to transact the business of burglary insurance, and has secured from the proper authority a finding that such business is authorized by statute, and that its organization is sufficient for such purpose. *Bankers' Mut. Casualty Co. v. First Nat. Bank*, 131 Iowa, 456, 108 N. W. 1046.

IV. Right to do business in foreign states.

Where there is no legislation prohibiting a foreign insurance company from carrying on the business of a surety company and that of burglary insurance, it may by comity engage in these lines of insurance, restricted only by its charter provisions and such regulations or conditions as the legislature has enacted relating to

construed strictly against the person whose language is used in expressing it.

Schumacher v. Great Eastern Casualty & I. Co. 197 N. Y. 58, 27 L.R.A.(N.S.) 480, 90 N. E. 353; Rickerson v. Hartford F. Ins. Co. 149 N. Y. 307, 43 N. E. 856; May, Ins. § 175.

If a provision in a policy is susceptible of two constructions, that most favorable to the assured must be adopted; particularly where the liability is general, and the cause of loss is sought to be brought within an exception to discharge the insurer.

Preston v. Aetna Ins. Co. 118 App. Div. 784, 103 N. Y. Supp. 638; Preston v. Union Assur. Soc. 118 App. Div. 788, 103 N. Y. Supp. 640; Rickerson v. Hartford F. Ins.

Co. 149 N. Y. 307, 43 N. E. 856; Michael v. Prussian Nat. Ins. Co. 171 N. Y. 25, 63 N. E. 810; Herrman v. Merchants' Ins. Co. 81 N. Y. 184, 37 Am. Rep. 488; Merchants' Ins. Co. v. Edmond Davenport & Co. 17 Gratt. 138; Crane v. City Ins. Co. 2 Flipp. 576, 3 Fed. 558; Reynolds v. Commerce F. Ins. Co. 47 N. Y. 597.

There were visible signs in this case.

Gale v. Mutual Aid & Acci. Asso. 66 Hun, 600, 21 N. Y. Supp. 893; Root v. London Guarantee & Acci. Co. 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed in 180 N. Y. 527, 72 N. E. 1150, Menneiley v. Employers' Liability Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755;

the business of insurance. United States Fidelity & G. Co. v. Linehan, 73 N. H. 41, 58 Atl. 956.

And the court in this case held that under Pub. Stat. chap. 169, § 6, providing that if "the commissioner is satisfied that the company has the requisite capital and assets, and that it is a safe, reliable company, entitled to confidence, he shall grant a license to it to do insurance business by authorized agents within the state," where the commissioner finds that a company combining the business of a surety company and that of a burglary insurance company has complied with the requirements of the statute, and is satisfied that it has the requisite capital and assets, and is a safe, reliable company, entitled to confidence, he cannot refuse to grant a license on the ground that he believes that such combinations of risks as a general rule are opposed to the public interest. *Ibid.*

It was held in this case that the duty of the commissioner to perform the ministerial duty of issuing the license might be enforced by a petition for mandamus. *Ibid.*

See also Fidelity & C. Co. v. Sanders, *infra*, IX.

V. Making contract.

While the effect of the acceptance of a policy of burglary insurance is a question of law, the question whether one has or has not been accepted is a question of fact for the jury. *Manson v. Metropolitan Surety Co.* 128 App. Div. 577, 112 N. Y. Supp. 886, affirmed without opinion in 199 N. Y. 590, 93 N. E. 1124.

So the question of whether a policy of burglary insurance has been accepted by the plaintiffs is for the jury, where the defendant's agent testified in effect that the plaintiffs continually asserted that they had not made up their minds whether they would accept the policy, and the plaintiffs' evidence was that the defendant's agent was told by them that unless he heard from them after they had received a letter instructing them in regard to mak-

ing proofs of loss, he could rest assured that the policy was all right, and it appeared that the policy had remained in the plaintiffs' possession for over two months and until a loss occurred. *Ibid.*

In *Roberts v. Security Co.* [1897] 1 Q. B. 111, 66 L. J. B. N. S. 119, 75 L. T. N. S. 531, 45 Week. Rep. 214, where, in pursuance of a proposal for burglary insurance, a policy was duly executed by sealing and the attaching of the signatures of the directors and secretary, and the policy expressly stated that the premium had been paid, it was held that a completed contract resulted, although the policy at the date a loss occurred remained in the insurer's possession and the premium had not been paid, and although the policy contained a provision that no insurance, by way of renewal or otherwise, should be held to be effected until the premium due should have been paid.

VI. Property covered.

It has been held that where a policy expressly insures the plaintiff's jewelry, including her rings and money, a recovery may be had in case the property is taken from a safe, although the policy contained a schedule for a statement of the amount of insurance carried on property contained in a safe, which the parties had left blank. *Caser v. New Amsterdam Casualty Co.* 116 Mo. App. 354, 91 S. W. 1001.

VII. Conditions and warranties.

a. In general.

It was held in *Springarn v. National Surety Co.* 76 Misc. 248, 134 N. Y. Supp. 817, that a plea of due performance of the conditions of the policy in a complaint in an action based on a burglary policy could not be considered as a plea of non-violation of any of the prohibitory clauses of the policy.

It has been held that a policy of burglary insurance issued to a trucking company is rendered void by the insured's false warranty that the men in charge of

Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347.

Hiscock, J., delivered the opinion of the court:

This action was brought to recover under a so-called burglary insurance policy for loss of goods stolen from plaintiffs. Concededly the policy extended insurance upon the goods in question against burglary under certain conditions; and it will only be necessary to give close consideration to two clauses for the purpose of determining whether those conditions have been complied with. The first of these sets forth that the indemnity was granted "for direct loss by burglary of any of the merchandise described in the schedule . . . oc-

casioned by its felonious abstraction from the store, warehouse, office, loft, or rooms, . . . occupied by the assured in the manner set forth in the schedule, by any person or persons who have made forcible and violent entrance upon the premises, or exit therefrom, of which force and violence there shall be visible evidence." The second clause, found among the so-called "special agreements," provides: "The company shall not be liable (1) unless there are visible marks upon the premises of the actual force and violence used in making entry into the said premises or exit therefrom."

The facts leading up to and constituting the alleged burglary, for which, thus far, a recovery has been allowed, were as follows: At about 7:30 in the morning, two of plain-

its conveyances were bonded by a fidelity company. Orr Trucking & Forwarding Co. v. Metropolitan Surety Co. 77 N. J. L. 749, 73 Atl. 541.

b. Other applications or losses.

It has been held that in an action on a burglary policy in which the insured warranted that he had never been refused burglary insurance, and had applied for none other than as stated, evidence is admissible on behalf of the insurer that the broker authorized by the insured to obtain insurance had, on the latter's account, previous to the issuing of the policy in question, applied for and had been refused similar insurance by other companies, although the insured personally had no knowledge of these facts. Wolowitch v. National Surety Co. 152 App. Div. 14, 136 N. Y. Supp. 793. The court said: "It may seem hard to hold an applicant as upon a warranty of a statement which, at the time he made it, was true, and of the falsity of which at the time of the issuance of the policy he had no knowledge. But want of knowledge does not relieve against a warranty. It imputes absolute verity at the time that the policy is issued. It is on the faith thereof that the company acts. In this particular branch of insurance, embracing really a moral risk, this warranty is especially a material one. The insurance broker was clearly the agent of the plaintiff for the purpose of obtaining insurance from any company he could. Acting for his principal, he was bound to disclose to defendant company the truth as he knew it as to this very material representation. I think that, notwithstanding the fact that the plaintiff may have known nothing of these rejections, as the company issued its policy relying upon the truth of the warranty, based upon the application to it, presented by the plaintiff's agent, he was bound. His agent was fully and duly authorized to obtain insurance. Therefore his acts and conduct in the prosecution of the precise agency which he was authorized to con-

duct, the obtaining of the policy at bar, were plaintiffs. It follows that the refusal to admit the evidence of prior rejections was error requiring reversal."

A claim by the insurer in an action on a burglary policy that the insured had made an incorrect statement in answer to the question whether any burglary or theft had been suffered by him is purely defensive, and the insured is not compelled to meet it at any earlier stage of the pleadings than the filing of his reply. Kandar v. Etna Indemnity Co. 30 Ohio C. C. 260.

See also Bacouby v. United States Fidelity & G. Co. *infra*, XIII.

c. Protection of property.

In *Axe v. Fidelity & C. Co.* 239 Pa. 569, 86 Atl. 1095, it was held that a provision in a policy of insurance against burglary of the occupants of the fourth floor of a building, which stipulated for the employment of a private watchman within the premises when not open for the transaction of business, required a watchman on the floor occupied by the assured; and it was held that the maintenance of a watchman in the building who had no direct access to the room where the insured property was situated was insufficient.

In *Bankers' Mut. Casualty Co. v. State Bank*, 80 C. C. A. 32, 150 Fed. 78, it was held that the evidence was sufficient to sustain a finding that there was no breach of the warranty in a burglary policy that the door of a safe was 5 inches thick, where there was testimony that the door, considered with certain rings, might properly enough be spoken of as a 5 inch door by one who was not an expert, although an expert would not reach such a conclusion.

d. Change in risk.

No change in "the conditions or circumstances of the risk" within the meaning of a burglary insurance policy results from the insured permitting workmen in his house for the purpose of painting and relaying floors, without first obtaining the insurer's written consent, where tried serv-

tiffs' employees went to plaintiffs' warehouse or loft for the purpose of opening the same and preparing for the day's business. They unlocked and opened the outer door, and, after entering, closed the same, but did not lock it, and thus left it so that it could be opened by merely turning the knob. While they were engaged in their duties, two persons opened the door with pistols in their hands, and, after assaulting the employees, took and carried away a large amount of silks. It does not appear whether the wrongdoers closed the door behind them as they entered; but they did so close it when they left. The question, of course, is whether these wrongful acts constituted a burglary or offense which satisfied the requirements of the policy, and I shall con-

sider them simply in connection with the two provisions which have been quoted.

Taking up the first one, I doubt whether the words "forcible and violent entrance upon the premises, or exit therefrom," were intended merely to define an element in the crime of burglary, as it has been defined by the common law and by various statutes, and whether, therefore, their meaning is to be measured by reference to the meaning of such words as "break" and "forcibly break," as these words have been construed in such definitions of this crime, and which construction demanded only a very small degree of force in entering premises. The clause, which we have before us, first enumerates direct loss by "burglary,"—a crime fully described by that single word,—

ants remained in the house, and the insured or some member of his family slept there except on Saturday and Sunday nights, when they were in the country. *Graf v. National Surety Co.* 146 App. Div. 782, 131 N. Y. Supp. 548, reversing 70 Misc. 243, 126 N. Y. Supp. 616. The court said: "There can be, we think, but one answer to this proposition, and that is the negative. If it appeared that the plaintiff had wholly turned the house over to workmen, a different question might be presented; but that was not the case made by the evidence. The plaintiff's tried servants remained in the house, and plaintiff himself or some member of his family slept in the house except on Saturday and Sunday nights, when they were in the country. To apply the rule contended for by the defendant would amount to holding that in the case of burglary insurance upon a dwelling house, the policy would be avoided whenever any workman such as a plumber or gas fitter was called in to make repairs."

e. Keeping books.

It is a common provision of burglary policies that no recovery can be had thereon if the books and accounts of the insured are not so kept that the loss can be accurately determined therefrom.

The purpose of such a clause is to protect the insurer against an excessive claim; and it is not available to defeat a claim the amount of which is not in dispute. *Leiman v. Metropolitan Surety Co.* 111 N. Y. Supp. 536.

In determining whether "the books and accounts" kept are of the character required by a burglary insurance policy stipulating that it should be void if the books and accounts of the insured were not so kept that the actual loss might be determined therefrom, both the books of account and the invoices of the insured should be considered, and if the actual loss can be ascertained from these, the condition is satisfied. *Schwarz v. Metropolitan Surety Co.* 113 N. Y. Supp. 66.
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So, where there is no question but that the accounts of the insured, together with certain invoices, constitute a compliance with the terms of a burglary policy requiring the keeping of books of account, the fact that the invoices mentioned were destroyed by fire after the burglary complained of will not preclude a recovery. *Leiman v. Metropolitan Surety Co.* supra. The court said: "It would be unreasonable so to hold. Suppose the burglars had stolen the books of account and invoices; could it be argued that the plaintiff could not recover upon his policy of burglary insurance? The law does not require that the insurance should be held to 'strict' compliance, but to such a compliance as is fair and reasonable under the circumstances."

But no recovery can be had under a burglary policy stipulating that the insurer should not be liable "if the books and accounts of the assured are not so kept that the actual loss may be accurately determined therefrom," where there is no evidence that the assured kept such books and accounts as this provision called for. *Rosenberg v. People's Surety Co.* 140 App. Div. 436, 125 N. Y. Supp. 257.

Or where it is impossible to determine from the insured's books the amount of a loss. *Wolowitch v. National Surety Co.* 152 App. Div. 14, 136 N. Y. Supp. 793; *Pearlman v. Metropolitan Surety Co.* 127 App. Div. 539, 111 N. Y. Supp. 882.

Where the complaint in an action on a burglary policy alleges that the plaintiff duly performed all the covenants and conditions on his part to be performed, he is not bound to reply to the insurer's answer alleging that the insured failed to keep books and accounts as required by the terms and conditions of the policy, since this is equivalent merely to a denial of the allegations of the complaint; but he is bound to reply to another answer setting up an avoidance by the fraud of the insured in exaggerating his claim by false answers. *Eagle Waist Co. v. Ocean Acci. & G. Corp.* 133 N. Y. Supp. 1031.

and it then adds that such burglary must have been committed in a certain way; namely, by a person who has made "forcible and violent" entrance upon the premises or exit therefrom. In thus specifying the particular manner in which the burglary must be committed, it seems to me that the language of the policy should receive its ordinary and common meaning, and that, in order to constitute burglary under this clause, there must be an entrance or an exit upon or from the premises, which is accompanied by such acts as would constitute force or violence in the ordinary acceptance of those words, rather than the somewhat technical force or breaking which would satisfy legal definitions. This view, however, is only of importance, if at all, as

bearing upon the interpretation of the other clause to which attention has been called, because I shall assume, without consideration for the purposes of this discussion, that the wrongdoers did commit burglary, and that their entrance upon, and exit from, the premises, was accompanied by force and violence within the meaning of the policy, and that there was "visible evidence" thereof.

This brings us to the second provision, and which, as already stated, exempts the defendant from liability in the case of a burglary, "unless there are visible marks upon the premises of the actual force and violence used in making entry into said premises or exit therefrom." The language used in this clause emphasizes the idea al-

f. Warrant of arrest.

It has been held that the swearing out of a warrant is not a condition precedent under the provisions of a burglary policy stipulating that the assured shall, at the request of the insurer, swear out a warrant for the arrest of the offenders, since such action is obligatory only after request. *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.* 77 N. J. L. 749, 73 Atl. 541.

And it was held that where a plea of the defendant in an action on such policy averred a request and refusal, and concluded to the contrary, it precluded a reply which it was the insured's right to make, and that such plea, being informal, did not prevent his proving an excuse in avoidance of the provision. *Ibid.*

VIII. Manner of loss and proof thereof.

a. Absence of proof showing manner of loss.

As a rule, no recovery can be had upon policies indemnifying against loss by burglary, theft, or larceny where the evidence merely shows that property covered by the policy is missing.

Thus, the evidence in an action on a policy insuring against "direct loss by burglary, larceny, or theft," has been held insufficient to warrant a recovery where it showed only that on the morning of the date of the loss the plaintiff's wife placed a bag containing jewelry in a closet, locked the door, leaving the key therein, that she was absent until about 4:30 or 5 o'clock P. M.; that the plaintiff's servant was also out during the afternoon, and returned about half an hour before his wife; and that his wife went out again about 8 o'clock in the evening, and upon her return found the bag of jewelry missing, but there was nothing to show the manner in which the loss occurred. *Schindler v. United States Fidelity & G. Co.* 58 Misc. 532, 109 N. Y. Supp. 723.

This case was followed in *Gordon v. Aetna Indemnity Co.* 116 N. Y. Supp. 558, where it was held that no recovery could be had

under a policy insuring against burglary upon evidence that the owner placed a locket under a pillow in an upper bedroom in a house occupied by her family and two servants, and went downstairs and remained the entire day, and upon looking under the pillow at night, found it missing, and that the next morning the police, who were notified, searched the servants and their belongings, but were unable to find the property, and that it was still missing.

And a judgment for the plaintiff in an action on a burglary policy to recover for an earring claimed to have been stolen is not sustained by testimony that she was washing the earring when it slipped into the wash basin and disappeared through a hole which led into the drain pipe, that an employee of the apartment building was sent for, who opened the pipe in her presence, but was unable to find the earring, and that the next day plumbers were brought in, who opened the pipe on the floor below, but did not find the property, and one witness testified that there was a sieve in the pipe through which the earring could not fall, but also stated that it could not have gotten as far as the sieve, since such evidence merely shows the loss of the property, and not a larceny of it. *Hart v. American Fidelity Co.* 121 N. Y. Supp. 605.

And where a policy insuring against direct loss by "burglary, theft, or larceny" provided that the insured should produce direct and affirmative evidence that the loss of the property for which a claim was made was due to the commission of a burglary, theft, or larceny, and that its disappearance should not be deemed such evidence, no recovery can be had upon proof that the jewelry for which a recovery is sought was placed on the plaintiff's dresser in a hotel at night, that her husband left in the morning before she was awake, and that after she went to her room after breakfast she missed the jewelry, and had her apartment searched, but the property was not found. *Duschenes v. National Surety Co.* 79 Misc. 232, 139 N. Y. Supp. 881. The court said: "While the policy is to be construed liberally in favor of the

ready suggested of real, rather than technical, force in breaking into the premises. When it speaks of the "actual force or violence" used in making entry into or exit from the premises, it employs words whose meaning is not easily satisfied by that somewhat theoretical force which has been held to meet the demands of legal definitions of burglary, but which rather requires substantial violence. Frequently, if not generally, the employment of such a degree of force and violence, in effecting an entry into premises, would leave traces upon the building which had been entered; and proceeding, perhaps on this theory, the clause exacts that that which might be a frequent occurrence shall be an indispensable basis of recovery, and formulates the requirement that

there must be "visible marks upon the premises" of the force and violence which have been used, thus reaching and prescribing the condition which, in my opinion, stands as an effective bar to plaintiffs' recovery.

It is hardly claimed that there were left upon the building any visible marks, within the ordinary, common meaning of the words which have been quoted. It could not well be claimed that there were such. While, in a general sense, the entrance and exit of the wrongdoers were accompanied by force and violence, this force and violence were not manifested in the precise act of making an entry into, or departure from, the premises, but rather characterized what was done after the men had entered. All that it was necessary for them to do in entering the

assured, I do not think that we can affirm this judgment without entirely disregarding this clause of the policy. No direct or affirmative evidence has been presented of any theft or larceny. We are asked to infer theft or larceny merely from the disappearance of the article from a place to which nobody but the plaintiff had lawful access. The purpose of the insurance was to provide only against loss by burglary, theft, or larceny, and the liability of the defendant was confined to reimbursement for such loss. In order to protect itself from claims under the policy for loss of the articles covered by the policy for reason of some other cause than burglary, theft, or larceny, the company has provided that the insured must produce not circumstantial but direct and affirmative evidence of the wrong. Parties may be mistaken in their recollection of where they placed a piece of jewelry, but they are not apt to be mistaken in recollection as to matters directly and affirmatively showing a felony, and the defendant could reasonably provide that there could be no recovery unless, in addition to the testimony of the disappearance of the jewelry, the insured should produce testimony of a direct and affirmative kind that there has been a felony."

In *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.* 77 N. J. L. 749, 73 Atl. 541, it was held that a motion for a nonsuit in an action on a burglary policy on the ground "that there was not sufficient evidence from which the jury could conclude that the loss happened in any manner covered by the policy" did not sufficiently bring the attention of the court to the contention of counsel that one of the cases claimed to have been lost was left unguarded on the sidewalk, in violation of the conditions of the contract.

b. Entries by the use of tools or explosives upon safes.

Another fact which must generally be established in an action for loss through the taking of property from safes is that the entry into the safe itself or the inner

chest was accomplished by the use of tools or explosives thereon, since these policies ordinarily so limit the insurer's liability.

Thus, in *Maryland Casualty Co. v. Ballard County Bank*, 134 Ky. 354, 120 S. W. 301, it was held that a finding that an entry into the safe and inner chest was by tools directly applied thereto was not justified where the undisputed evidence was that access was had by taking employees to the bank at night, and compelling them at the point of a revolver to open the safe and inner chest, and the policy sued upon provided for liability only in case of entry to the safe or inner chest by the use of tools or explosives directly thereupon, or for loss by robbery from the part of the bank partitioned off when the regular working force was at work in the bank. The court said: "It is true that the word 'tool' has several meanings, and in one sense one person may be the tool of another. In this sense the cashier, in opening the safe and in opening the inner chest, was the tool of the robbers; but, when we read the whole policy, it is manifest that this is not the kind of tool that the policy contemplates. It is a burglary policy. The indemnity is for all loss by burglary of money, bullion, etc., by any person who shall have made entry into the safe by the use of tools or explosives directly thereon. Burglars' tools and explosives are evidently what the policy refers to. The insurance is in effect of the sufficiency of the safe against the tools and explosives of burglars. That it was not contemplated that the company should be liable where an officer of the bank was held up, as was done here, and no violence was done, is shown by the provision that the company is not to be liable for any robbery by hold-up unless the regular working force is at work in the bank. The insurance was not against all loss at the hands of burglars and robbers. The money was required to be put in the inner safe or chest, and the insurance company was not to be responsible unless there was a forcible entry by tools or explosives, not only into the safe, but also into the inner chest. Fairly construed, this policy does not cover a

premises was to turn the knob and open the door, and when they left this was closed. There was no forcing of locks or doors, or any other act which left any mark upon the premises, unless the temporary and ordinary condition of an open door during business hours would constitute such mark, and this is not claimed. While it might be interesting to speculate on the exact nature of the signs of burglary which would satisfy the ordinary meaning of this clause, it is hardly useful to indulge in this speculation; but it is sufficient to say that in this case no such marks are found.

It is, however, urged that this requirement is of evidentiary facts which might be a protection against fraudulent claims, and that there is no necessity for such safe-

loss by hold-up, where, after the money is put in the safe, and the working force of the bank has left, an officer of the bank is held up and required to open the bank and the safe."

So, where a policy undertakes to indemnify for loss from a burglar-proof safe containing an inner steel burglar-proof chest only when entry to the chest is effected by the use of tools or explosives, no recovery can be had where the evidence shows that entry to the inner steel chest was obtained by use of the combination, which had been secretly secured, although the outer safe was entered by the use of tools. *First Nat. Bank v. Maryland Casualty Co.* 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913 C 1170.

And evidence that there were some marks made with a file or some other instrument on the inside of the inner steel chest which would enable one to line up the dial on the inside of the chest does not show that an entry into the chest, accomplished through the working of the combination, was accomplished by the use of tools directly thereon, especially where it does not appear by whom such marks were made, or that they were used to obtain access to the chest. *Ibid.*

So, where a policy undertakes to indemnify against loss of money, etc., "in consequence of the felonious abstraction of the same by burglars from the safe or safes described in said schedule . . . after entry into such safe or safes by such burglars, effected by the use of tools or explosives directly thereupon," a complaint is sufficient which alleges that burglars broke into the building "and did then and there break into said safe by working the combination and lock on the outer door of said safe, and did then and there, by the use of tools and force, break into the money drawer on the inside of said safe, breaking the lock therefrom, and extracting said drawer from said safe," taking therefrom money, etc. *Fidelity & C. Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167.

And a judgment for the insured is against the weight of evidence where the policy sued upon undertook to indemnify the plaintiff against the direct loss of property by its

guard in the case of a claim whose merits are supported by ample testimony of another character; that the interpretation urged by appellant would prevent recovery in many meritorious cases; and therefore it should be rejected and some other one be adopted which will serve the insured. Doubtless the justice of the provision would be a subject for debate and disagreement between the parties to the contract. Quite possibly the interpretation which has been outlined might prevent recovery at times on bona fide losses. On the other hand, quite commonly an entrance into a building for burglarious purposes, which was accompanied by "actual force and violence," would not be made during business hours by opening an unlocked door, but would be

felonious abstraction from a safe by persons who made a forcible or violent entrance into it by the use of tools or explosives directly thereupon and on the outside thereof, and further provided that the insured should not be liable for loss by burglary if there were no visible marks caused by the force and violence used in making an entrance or exit, and the evidence showed that the inner and outer doors of a safe which contained the money lost were properly locked on Saturday night, and that on Monday morning the handles on the outer and inner doors were turned and a false key was inserted in the lock of the inner door, and the money was gone, but there were no visible marks of force or violence except some scratches on the outside of the safe which the witness could not state were made in the forcible entrance of it, and, on the other hand, there was evidence showing that the combination was pasted on the front of the insured's desk. *Brill v. Metropolitan Surety Co.* 113 N. Y. Supp. 476.

And a finding for the insurer is properly directed in an action on a policy insuring against loss of property from safes which had been entered by the use of tools or explosives thereon, and also against damage done to the safes and furniture, caused by such an attempted entry, where there is nothing in the evidence to show that the person who broke into the bank intended to enter the vault or safe, and the only tool used was a hatchet to force a window, and there was nothing indicating that an attempt had been made to get into the vault, and no money or property was taken, although a fire had been set which burned a hole in the floor and destroyed the office furniture and fixtures, but was so far removed from the vault as to lead to the impression that it was not intended to be used to gain access to the vault. *Mt. Eden Bank v. Ocean Acci. & G. Co.* 29 Ky. L. Rep. 765, 96 S. W. 450.

The insurer in an action on a policy indemnifying only where the entry into the outer safe and the inside chest is obtained by the use of tools thereon is not estopped from claiming on appeal that the finding

effected by methods which would leave marks upon the premises, which would be quite respectable evidence that a burglary had been committed within the indemnity of the policy. But these considerations on one side or the other are not before us in this case. If the parties to a contract adopt a provision which contravenes no principle of public policy, and contains no element of ambiguity, the courts have no right to relieve one of them from disadvantageous terms, which he has actually made, by a process of interpretation. It may be conceded that, if a policy of insurance is of doubtful tenor, the courts should employ that interpretation which is the more exacting against the insurer, who has prepared the contract. But if the contract is

not of uncertain meaning, as has often been said, the courts may not make a new one under the guise of construction.

In this instance the insurer had a perfect right, if it saw fit, to require proof even of so-called evidentiary facts as an indispensable basis for recovery. The only inquiry can be whether the parties have assented to the incorporation in their agreement of a provision which clearly calls for such proofs of their alleged loss, which the plaintiffs have not furnished. We think they have. We believe that the requirement that the violence and force employed in effecting a burglarious entry into premises must produce "visible marks upon the premises" thus entered is plain beyond the need of argument, and that it means that

that the inner chest was so entered is unsupported by the evidence because at the trial he did not object to evidence offered to show an entry into the "safe" or "safes," or ask for a nonsuit on the ground that the entry into the chest was the vital issue, or because no finding was asked for to distinguish between a safe and an inner chest, nor because the pleadings described the things burglarized as "safes." *First Nat. Bank v. Maryland Casualty Co.* 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913 C, 1170.

And the fact that the insurer questioned or disputed the method by which an entrance to the safe was effected, in an effort to show that even the entry into that was not effected by the use of tools, does not preclude it from insisting that even if entry into the safe itself was so effected, still, as it only assumed the risk of loss of money from the inner steel chest "after entry into such chest effected by the use of tools directly thereupon," it was not liable, as the entry into the chest was not so made. *Ibid.*

Where the object is first raised on appeal, an allegation that the "safes" of the insured were burglariously entered by the use of tools directly thereupon sufficiently alleges that the insured's "chest" was so entered, although the policy undertook to indemnify the insured for loss by burglary from the safe or safes described in the schedule, when entry into such safe or safes was by the use of tools or explosives directly thereupon, but stipulated that the insurer should not be liable for loss of property "from a burglar-proof safe containing an inner steel burglar-proof chest unless the same shall have been abstracted from the chest after entry also into the said chest, effected by the use of tools or explosives directly thereupon." *Ibid.*

c. Entering outer door without use of force.

In *Re George* [1899] 1 Q. B. 595, 68 L. J. Q. B. N. S. 365, 47 Week. Rep. 474, 80 L. T. N. S. 248, 15 Times L. R. 230, re-
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versing [1898] 2 Q. B. 136, 67 L. J. Q. B. N. S. 807, 46 Week. Rep. 557, 78 L. T. N. S. 813, 14 Times L. R. 435, where a policy undertook to insure against loss or damage by burglary and housebreaking "as hereinafter defined," and subsequently provided that the insured was to be protected against loss "by theft following upon actual forcible and violent entry upon the premises," it was held that the insurer was not liable for a loss which occurred by a thief turning the handle of the front door of the insured's store while his servant was temporarily absent, and entering and breaking open a locked show case, and taking property covered by the policy, since there was not an actual forcible and violent entry by the mere opening of the outer door, and the breaking open of the locked show case was not an entry upon the premises within the meaning of the policy.

In an action on a burglary policy in which it is claimed that the burglar entered by means of the transom over the door, evidence that other stores on the same street had been so entered at various times is irrelevant and inadmissible. *Rosenberg v. People's Surety Co.* 140 App. Div. 436, 125 N. Y. Supp. 257.

See also *Rosenthal v. American Bonding Co.* 143 App. Div. 362, 128 N. Y. Supp. 553, which affirmed 124 N. Y. Supp. 905, and which was reversed in *ROSENTHAL v. AMERICAN BONDING CO.*

d. Entering through collusion of insured's employee.

In *Saqui v. Stearns* [1910] W. N. 257, 27 Times L. R. 105, 55 Sol. Jo. 91, 103 L. T. N. S. 583, where a burglary policy provided that there should be no claim made for loss by theft, robbery, or misappropriation by members of the insured's household, business staff, or other inmates of his premises, it was held that no recovery could be had on account of goods stolen by thieves who gained admittance to the premises through the agency of a porter in the assured's employ, since the loss was held to be one

the force and violence in "making entry" must create visible traces upon the premises themselves, which survive the act that produces them, and which, being seen, are evidence of a burglary; that it would be a distortion of the meaning of language to hold, as argued, that this provision is satisfied, under the circumstances of this case, by proof of acts performed by wrongdoers after entry, in assaulting occupants and carrying away the contents of a building which leave no marks "upon" the premises, and which are only visible to one who happens to be watching at the instant they are performed.

Various decisions have been called to our attention as authorities opposed to the construction which we feel obliged to adopt. They are decisions relating to life or acci-

dent-insurance policies; and, while it will not be desirable to review all of them, I shall briefly call attention to some of those most relied on by respondents, for the purpose of showing that they do not sustain their contention. *Root v. London Guarantee & Acci. Co.* 92 App. Div. 578, 86 N. Y. Supp. 1055, was an action to recover a death loss under an accident insurance policy excluding injuries "of which there was no physical mark on the body." The insured received injuries which produced no immediate outward signs upon the surface of his person, but subsequently he developed a pallor, emaciation, and physical decay; and it was held, as it seems to me very reasonably, that these visible, external signs of the accident satisfied the requirement of the

by theft by a member of the assured's business staff.

IX. Notice and proofs of loss.

The provision of a burglary policy requiring proof of loss in writing, setting out the manner in which the loss occurred, and giving a detailed statement of the articles taken, is a material requirement, and where the pleadings put the making of such proof in issue, no recovery can be had in the absence of evidence that this provision was complied with. *Reich v. Maryland Casualty Co.* 54 Misc. 585, 104 N. Y. Supp. 984.

And the notices required by a burglary policy stipulating that the insured, upon the discovery of loss, shall give immediate notice thereof by letter and also by telegram to the company at the city where the policy was countersigned, and also immediate notice to the company's local authorized agent, and the nearest public police authorities, are distinct from the formal proofs of loss to be made out on the company's blanks, and where it is for the interest of the insurer to apprehend and punish the criminal, such provisions are valid, and render it incumbent upon the plaintiff in an action on the policy to prove compliance with them. *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.* 77 N. J. L. 749, 73 Atl. 541.

And under a policy insuring against "direct loss by burglary, larceny, or theft," and stipulating that upon the happening of a loss immediate notice shall be given the company or its agent and to the police, and that the insured shall forthwith present an itemized claim, and that the policy shall be void if the circumstances of the risk be materially changed without the written consent of the insurer, no recovery can be had where the evidence shows that certain property disappeared in the insured's absence while extensive alterations were being made, and that no notice of the changed conditions was given to the insurer, and no notice of the loss was given for over a month, when a meager proof of

loss was filed and no information of the loss was given to the police for about three months. *Katzenstein v. Fidelity & C. Co.* 48 Misc. 496, 96 N. Y. Supp. 183.

Where a statute relating to foreign insurance companies prohibits the insertion of conditions requiring notice of loss forthwith or within less than five days after its occurrence, and stipulates that such conditions shall be void, provisions of a burglary policy stipulating for immediate notice of a burglary and for the furnishing of proofs forthwith are invalid, and the insured is bound only to use reasonable diligence in giving notice and furnishing proofs of loss. *Fidelity & C. Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167.

In this case the following provisions were held to be conditions precedent, *i. e.*, that the insured, upon the occurrence of a burglary, should give immediate notice to the insurer's agent or to the home office and to the police authorities; that in the event of a claim it should be made forthwith in writing, setting forth a particular account of the manner in which the burglary was committed, and the date the damage done to the property insured, the assured's interest in the property, and other concurrent or similar insurance. *Ibid.*

And it was also held that where the insured is required to give notice of a burglary and furnish proof of loss within a reasonable time after it occurs, his complaint should show that this was done, or an excuse for not so doing, and it was held that a complaint reciting the facts of the burglary, and averring that it occurred on a certain date, and "that afterwards" the insured gave notice of the loss, was insufficient where there was nothing in the pleading to indicate at what time between the occurrence of the burglary and the date of the bringing of the suit (about ten months afterward) the notice was given. *Ibid.*

And it was held that the statement that "afterwards the plaintiff duly notified the said defendant of said loss," even if it could be said to include both the notice of the burglary and the proof of loss, was no

policy. *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, was an action to recover a death loss under an accident policy of insurance, which provided for payment of a certain sum per week in case the insured was disabled from prosecuting his business, and also for the payment of a specified sum in case of death. The policy provided that the insurance should "not extend to any bodily injury of which there should be no external and visible sign upon the body of the insured." It was distinctly held, in upholding a recovery for death, that this proviso clearly had reference to a claim under the policy for a weekly indemnity, and therefore, of course, it had no application to the action at bar. *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, was a case involving facts largely similar to those in the one last referred to, and the policy contained a provision that it did not

"insure against death or disablement . . . from accidents that shall bear no external or visible marks." It will be noted that this requirement was not for external and visible marks on the body of the deceased; and the court, after stating that it was somewhat difficult to understand precisely what was intended by the clause, adopted the view that it should be construed as requiring some external or visible evidence that the death or injury was accidental; and, inasmuch as the facts appearing in that action amply satisfied this requirement, a recovery was upheld.

I think the judgment must be reversed, and a new trial granted; costs to abide event.

Vann, Willard Bartlett, Chase, and Collin, JJ., concur.

Cullen, Ch. J., and Haight, J., dissent.

more than the conclusion of the pleader that the notice and proof made were such as the policy required, and was therefore insufficient. *Ibid.*

And it was further held that such complaint was insufficient on the ground that it failed to show that the insurer's refusal to pay was not after the contract was forfeited because of the insured's failure to give notice and file proofs within a reasonable time after the happening of the burglary. *Ibid.*

See also *Monahan v. Metropolitan Surety Co.*; *Reich v. Maryland Casualty Co.*; *Fidelity & C. Co. v. Sanders*; and *Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.* *infra*, XIII.

X. Necessity of showing plaintiff's interest in property lost.

No recovery can be had where the pleadings in an action on a burglary policy allege that the policy was issued to a third party, and was subsequently, with the consent of the insurer, transferred to the plaintiff, and that, on a certain date, property of the kind mentioned in the policy was stolen from the premises named therein, but no allegation is made that the goods stolen were the property of the plaintiff, or that he had possession of them or an insurable interest therein. *Pearlman v. Metropolitan Surety Co.* 127 App. Div. 539, 111 N. Y. Supp. 882.

XI. Insurer's right to replace property.

Under a policy undertaking to indemnify a bank against loss of money stolen from its safe, damage done to the safe, damage to premises, and loss of money violently taken from the bank in the daytime, in the aggregate sum of \$3,000, although the insurer reserved the right to repair any damage to property, and replace any dam-

aged article with one of like quality and value instead of paying for same in money, it cannot replace the damaged safe of the bank as part payment of its liability, where it appears that the safe was blown open and more than \$3,000 was taken, and the bank made no claim for the damage done to the safe, but entered its claim for the loss of the money alone, since, by the terms of the contract, there was no provision made for apportioning the indemnity to the several subjects of the loss. *Bankers' Mut. Casualty Co. v. State Bank*, 80 C. C. A. 32, 150 Fed. 78.

XII. Amount of loss and recovery and proof thereof.

In an action on a policy issued to an express company, undertaking to indemnify it for the value of goods lost, the insurer cannot show the settlement made by the company with the one whose goods were stolen, since the benefit of such arrangement cannot accrue to the insurer. *Monahan v. Metropolitan Surety Co.* 114 N. Y. Supp. 862.

And where a burglary policy confines the insurer's liability to "the cash or market value of property at the time of the loss," it is error to admit in evidence a bill rendered to the insured for the loss of part of the property by the owner as proof of its value. *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.* 77 N. J. L. 749, 73 Atl. 541.

And where a burglary policy under an item marked "A" insured "\$6,000 on gold and sterling silverware, watches, jewelry," etc., with a proviso that the liability "for the loss on jewelry and precious stones shall not exceed, under policies of this corporation, separately or together, the sum of \$1,000 of the insurance attached specifically to item A," and by a special agree-

ment it was further provided that the insurer should not be liable "for loss in excess of \$250 on any one article unless otherwise indorsed on this policy," a recovery of only \$250 can be had on account of the loss by the insured by burglary of a jeweled scarf pin worth \$5,000, since, although it be assumed that the words "separately or together," in the clause limiting liability to \$1,000, applies to "jewelry and precious stones," yet the loss for any one article is limited to \$250 by the special agreement. *Wormser v. General Acci. Assur. Corp.* 94 App. Div. 213, 87 N. Y. Supp. 974.

It has been held that a clause in a policy insuring against loss by burglary, providing that "if the assured is the occupant of an apartment or flat house this insurance covers goods in a locked storeroom provided for the exclusive use of the assured by the landlord in the same house, to the extent of \$50, and no more," does not limit the insured's right of recovery for goods packed and stored in the laundry assigned to him with his flat, and which was used for laundry purposes, and to some extent for cooking. *Michaels v. Fidelity & C. Co.* 128 Mo. App. 18, 105 S. W. 783.

Where the plaintiff's actual loss in an action on a burglary policy is not clearly shown, the amount of the loss is a question of fact for the jury; and it is erroneous to instruct that, if a finding was made for the plaintiff, it must be for a stated figure. *Rosenberg v. People's Surety Co.* 140 App. Div. 436, 125 N. Y. Supp. 257.

But a verdict of \$100 in an action on a burglary policy cannot be justified on any ground where the uncontradicted evidence shows a loss of upward of \$120 worth of certain goods, and a loss of other goods to a large amount. *Ingersoll v. United Surety Co.* 141 App. Div. 527, 126 N. Y. Supp. 391.

The amount of loss in an action on a policy of burglary insurance is properly proved by adding to the insured's last inventory all subsequent purchases, and from the result subtracting all the sales made and the actual inventory of the goods remaining after the burglary, and by subtracting the estimated profit in calculating the value. *Ibid.*

It is erroneous, however, to allow the plaintiff in an action on a burglary policy to read in evidence a carbon copy of a list of property claimed to have been taken, without producing or accounting for the original list of which the carbon purported to be a copy. *Rosenberg v. People's Surety Co.* *supra*.

In *Manson v. Metropolitan Surety Co.* 128 App. Div. 577, 112 N. Y. Supp. 886, affirmed without opinion in 199 N. Y. 590, 93 N. E. 1124, it was held that any error in permitting computation of the loss under a burglary policy from unverified figures on certain wrappers was cured where the plaintiff, without objection, showed on rebuttal that all the markings on the wrappers were absolutely correct.

In *Springarn v. National Surety Co.* 76 46 L.R.A. (N.S.)

Misc. 248, 134 N. Y. Supp. 817, it was held that an allegation in defendant's answer in an action on a burglary insurance policy that the insurer was relieved from liability by the insured's attempt to cheat and defraud by exaggerating his claim stated a valid defense.

XIII. Estoppel and waiver.

Generally as to estoppel and waiver, see Index to L.R.A. notes, "Insurance," §§ 130-144.

A company which has issued a burglary policy cannot escape liability in an action based thereon on the ground that the insured failed to disclose in his application that he had suffered a previous loss from a burglary at his warehouse, where the insurer's agent inquired only as to burglaries which had occurred at his residence, and stated that such losses were all that it was necessary for him to disclose. *Kandar v. Etna Indemnity Co.* 30 Ohio C. C. 280.

The insurer, by retaining the proofs of loss furnished under a burglary and larceny policy, and passing some of the claims for payment without objecting to the sufficiency of the proofs of loss, thereby waives their insufficiency. *Monahan v. Metropolitan Surety Co.* 114 N. Y. Supp. 862.

And in this case it was held that a provision requiring suit to be brought within a certain time was waived where the insurer had passed upon the claims and agreed to pay them.

And there is a waiver of defects in proofs of loss under a burglary policy where they are returned to the insured for correction, and, after receipt, are retained without objection, especially when the insurer denied liability on other grounds. *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.* 77 N. J. L. 749, 73 Atl. 541.

But an averment in an action on a burglary policy that "the defendant sent an adjuster to adjust the same, but said defendant refused to pay and indemnify the plaintiff for such loss," does not show a waiver of conditions requiring notice and proof of loss. *Fidelity & Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167.

And a breach of warranty that the insured had never, prior to the issuance of the policy sued on, suffered loss by burglary, theft, or larceny, nor received indemnity therefor, is not waived because the insurer, after the insured had admitted the facts of the alleged loss, continued the examination, but did nothing to lead the insured to suppose that it did not intend to rely upon the breach, and the policy stipulated that the insured should submit himself to examination, and that the insurer should not be held to have waived any provision or condition by any act taken in connection with the investigation of any claim. *Bacouby v. United States Fidelity & G. Co.* 61 Misc. 75, 113 N. Y. Supp. 20.

Where the plaintiff's pleadings in an action on a burglary policy allege a performance of all the conditions of the policy

on their part, evidence to establish a waiver of the condition requiring proofs of loss is inadmissible. *Reich v. Maryland Casualty Co.* 54 Misc. 585, 104 N. Y. Supp. 984.

J. T. W.

PENNSYLVANIA SUPREME COURT.

BURNEY AXE, Appt.,
v.

FIDELITY & CASUALTY COMPANY OF
NEW YORK.

(239 Pa. 569, 86 Atl. 1095.)

Insurance — against burglary — requirement of watchman on premises.

A provision in a policy of insurance against burglary of the occupant of the fourth floor of a building, which requires the employment of a private watchman within the premises when not open for the transaction of business, requires a watchman on the floor occupied by assured, and the maintenance of a watchman in the building who has no direct access to the room where the insured property is situated is not sufficient.

(March 17, 1913.)

APPPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County, in defendant's favor notwithstanding a verdict in favor of plaintiff in an action brought to recover the amount alleged to be due on a burglary insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Julius C. Levi and David Mandel, Jr., for appellant:

The word "premises," as used in the contract sued upon, means, in its relation to the provision for a watchman, not the fourth floor of the building mentioned in the policy, but the building itself.

Bole v. New Hampshire F. Ins. Co. 159 Pa. 53, 28 Atl. 205; *Watertown F. Ins. Co. v. Simons*, 96 Pa. 520; *Grandin v. Rochester German Ins. Co.* 107 Pa. 26; *Reynolds v. Maryland Casualty Co.* 30 Pa. Super. Ct. 456; *Frick v. United Firemen's Ins. Co.* 218 Pa. 409, 67 Atl. 743; *Meadowcraft v. Standard F. Ins. Co.* 61 Pa. 91; *Carpenter v. Allemannia F. Ins. Co.* 156 Pa. 37, 26 Atl. 781; *Cummins v. German American Ins. Co.* 192 Pa. 359, 43 Atl. 1016; *Bankers' Mut. Casualty Co. v. State Bank*, 80 C. C. A. 32, 150 Fed. 78; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019.

The word "employed" does not mean that

Note. — The subject of burglary and theft insurance is covered in the note accompanying *Rosenthal v. American Bonding Co.* ante, 561.
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every minute during the whole time there must be somebody there.

United States v. Catharine, 2 Paine, 721, Fed. Cas. No. 14,755.

The word "watchman," as used in the contract sued upon, does not mean one personally present at the premises at all times.

City F. Ins. Co. v. Power, 21 Pittsb. L. J. 70; *King Brick Mfg. Co. v. Phoenix Ins. Co.* 164 Mass. 291, 41 N. E. 277; *McGannon v. Millers' Nat. Ins. Co.* 171 Mo. 143, 94 Am. St. Rep. 778, 71 S. W. 160; *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375.

Mr. William G. Wright, for appellee:

The word "premises" in the policy means "the store or rooms actually occupied by the assured."

Allemannia F. Ins. Co. v. Pittsburgh Exposition Soc. 8 Sadler (Pa.) 424, 11 Atl. 572; *Sexton v. Hawkeys Ins. Co.* 69 Iowa, 99, 28 N. W. 462; *Thomas v. Hartford F. Ins. Co.* 21 Ky. L. Rep. 914, 53 S. W. 297; *Rau v. Westchester F. Ins. Co.* 36 App. Div. 179, 55 N. Y. Supp. 459; *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440; *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.* 40 Wis. 446; *La Force v. Williams City F. Ins. Co.* 43 Mo. App. 518; *Firemen's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 343, 50 S. W. 598.

The requirement that a watchman be within the premises when not open for the transaction of business was not complied with by employing a watchman to spend half his time in the building.

Glendale Woolen Mfg. Co. v. Protection Ins. Co. 21 Conn. 19, 54 Am. Dec. 309; *Sheldon v. Hartford F. Ins. Co.* 22 Conn. 235, 58 Am. Dec. 420; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *First Nat. Bank v. Insurance Co. of N. A.* 50 N. Y. 45; *Brooks v. Standard F. Ins. Co.* 11 Mo. App. 349; *Blumer v. Phoenix Ins. Co.* 45 Wis. 622; *Whealton Packing Co. v. Aetna Ins. Co.* 34 L.R.A.(N.S.) 563, 107 C. C. A. 113, 185 Fed. 108; *Snyder v. Home Ins. Co.* 133 Fed. 848, affirmed in 79 C. C. A. 536, 148 Fed. 1021; *Manheim Ins. Co. v. Tyner*, 142 Ky. 22, 133 S. W. 1000; *Shoshone Concentrating Co. v. Hamburg-Bremen F. Ins. Co.* 64 Wash. 638, 117 Pac. 500; *McKenzie v. Scottish Union & Nat. Ins. Co.* 112 Cal. 548, 44 Pac. 922.

The absence of the watchman from midnight until 5 A. M. was a material change of the conditions and circumstances of the risk.

Whealton Packing Co. v. Aetna Ins. Co. 34 L.R.A.(N.S.) 563, 107 C. C. A. 113, 185 Fed. 108; *Snyder v. Home Ins. Co.* 133 Fed. 848, affirmed in 79 C. C. A. 536, 148 Fed. 1021; *Manheim Ins. Co. v. Tyner*, 142 Ky. 22, 133 S. W. 1000; *Ripley v. Aetna*

Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; Blumer v. Phenix Ins. Co. 45 Wis. 622; Lutz v. Metropolitan L. Ins. Co. 186 Pa. 527, 40 Atl. 1104; March v. Metropolitan L. Ins. Co. 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100; Murphy v. Prudential Ins. Co. 205 Pa. 444, 55 Atl. 19.

Mestrezat, J., delivered the opinion of the court:

This is an action of assumpsit on a burglary insurance policy issued by the defendant company to the plaintiff to insure him to the extent of \$2,000 against direct loss by burglary of merchandise between April 29, 1910, and April 29, 1911, occasioned by its felonious abstraction from the premises occupied by him in the building known as 1023, 1025, and 1027 Race street, in the city of Philadelphia. The case was submitted to the jury and a verdict was returned for the plaintiff. On motion of counsel the court below entered judgment for the defendant *non obstante veredicto*. The plaintiff has taken this appeal.

The first clause of the policy provides that "in consideration of \$50 premium, and of the statements in the schedule hereinafter contained, which statements the assured makes on the acceptance of this policy and warrants to be true," the company agrees to insure him against direct loss by burglary of merchandise occasioned by its abstraction "from the store or rooms actually occupied by the assured, and described in the said schedule (hereinafter called the premises)." Clause C of the "special agreements" provides that "the company shall not be liable . . . for loss or damage if the premises are occupied for any other purpose than that stated in the schedule." The "schedule" consists of a series of questions propounded by the company, with answers by the assured. Those material to the present issue are as follows: "(2) Location of building. 1023-25-27 Race street, Philadelphia, Pennsylvania. (3) The premises occupied by the assured are as follows: Fourth floor. (4) The business carried on by the assured in the said premises is: Manufacturing shirt waists and ladies' skirts. (5) No other business than that of the assured is carried on within the premises, except as follows: No exceptions. . . . (7) A private watchman is employed within the premises when not open for the transaction of business: Yes; Fox police lock. . . . (10) The service declared under each of the above heads (7, 8, 9) will be continued during the currency of this policy: Yes."

Clause 8 of the "general agreements" provides: "This policy shall be void of the conditions or circumstances of the risk are 46 L.R.A.(N.S.)

materially changed without the written consent of the company, or if the assured attempts in any way to defraud the company, or if the policy is assigned without the written consent of the company."

The facts are undisputed. The plaintiff is a manufacturer of shirt waists and ladies' skirts, and carries on the business on the fourth floor of the six-story building used for various purposes, at 1023, 1025, and 1027 Race street, in the city of Philadelphia. The owner of the building employed a watchman to take care of this and another building at 1012 Race street. The watchman had been made assistant engineer the week before the burglary, and the chief engineer did whatever watching was done on the premises during the whole week in which the burglary occurred. The plaintiff did not employ any watchman, and had no personal knowledge of the temporary arrangement made by the owner of the building for the services of a watchman during the week the burglary was committed. The engineer undertook to perform the duties of watchman while taking steps to get another watchman. On the night of the burglary he examined the premises and saw that all the doors were locked and that the bottom step of the fire escape was pulled up. He did not go into the plaintiff's rooms, as the watchman never had keys to enter them. The plaintiff's rooms were entered by the door leading out therefrom to the fire escape between midnight on May 12, 1910, and 5 o'clock of the morning of May 13, 1910, and merchandise to the value of more than \$2,300 was taken therefrom. This action was brought to recover the loss sustained by the burglary.

The defendant relied on a breach of the warranties contained in the policy to prevent a recovery for the loss. The learned court submitted to the jury to determine whether the plaintiff had complied with the conditions of the policy requiring him to employ a private watchman on the premises. The engineer who acted as watchman testified that on the night of the burglary he left the building about midnight and did not return until 5 in the morning, and that his absence was due to the fact that it was necessary for him to work during part of the day because he had to be with the new engineer, and that he went away to get some rest during the hours indicated.

The defense interposed by the defendant, and sustained by the learned court below was that (a) there had been a breach of warranty on the part of the plaintiff in not employing a private watchman on his premises as required by the policy; and (b) that at the time the burglary was committed the watchman was not present, either within the

rooms of the fourth floor or within the building. In reply to this position the plaintiff, appellant here, contends that the word "premises," as used in the policy, means, in its relation to the provision for a watchman, not the fourth floor of the building, but the building itself; that the word "employed," as used in the policy, that a private watchman shall be employed, does not mean that the watchman shall be present during the entire time; and that the word "watchman," as used in the policy, does not mean one person personally present at the premises at all times, but means a person engaged in guarding the premises with the care usually exercised in fulfilling the duty of one looking after the premises. These are the questions which have been argued by counsel, and are now for consideration. The view we take of the case does not require us to discuss the second and third propositions suggested by counsel for the appellant.

We are of the opinion that the word "premises" means the fourth floor of the building, and not the building itself, and that the policy required a watchman to be kept within the premises when not open for the transaction of business.

The language of the policy defines the word "premises" so clearly and distinctly that there is no doubt or uncertainty as to the meaning with which the parties used it in the contract. The plaintiff occupied the fourth floor of the building; the other five floors being occupied by other tenants. The policy indemnifies the assured for "direct loss by burglary of merchandise . . . occasioned by its felonious abstraction from the store or rooms actually occupied by the assured, and described in the said schedule (hereinafter called the premises)." In the schedule the third statement is: "The premises occupied by the assured are as follows: Fourth floor." The second statement in the schedule: "Location of building: 1023-25-27 Race street, Philadelphia, Pennsylvania." This clearly distinguishes the "building" from the "premises," as used in the policy. As further showing that the word "premises" meant the fourth floor of the building, and not the building itself, the fifth statement is: "No other business than that of the assured is carried on within the premises except as follows: No exceptions." There were many tenants occupying other parts of the building, but there was no other tenant occupying or carrying on business on any part of the fourth floor. The parties, therefore, have definitely settled by their own agreement the construction of the word "premises," and have applied it to "the store or rooms actually occupied by the assured," which is

the fourth floor of the building on Race street. There is nothing in the case that will warrant any other construction. There being no ambiguity as to the meaning of the word as used in the policy, there is no occasion for applying any rules of construction in ascertaining its meaning.

Was there a private watchman employed within the premises when not open for the transaction of business at the time the agreement was entered into, or subsequently during the currency of the policy, as required by the contract? The policy stipulated that a private watchman "is employed within the premises when not open for the transaction of business," and that such service should "be continued during the currency of this policy." It will be observed that there were both an affirmative and a promissory warranty. If the word "premises" means the fourth floor of the building, and not the building itself, neither of these stipulations was complied with by the assured. We have already stated the undisputed facts from which it appears that, while the owner of the building employed a watchman for it and another building some distance away, there was no watchman employed within the fourth floor of the building. In fact, the watchman employed by the owner did not have keys to the doors entering the fourth floor, and hence did not have access to the premises occupied by the assured. There is no ground for the contention that the watchman provided by the owner of the building was a compliance with the provision in the contract that "a private watchman is employed within the premises." This provision was manifestly material to the risk. The evident purpose was that the assured should have a watchman whose services should be performed within the rooms on the fourth floor of the building occupied by him in his manufacturing business. Whether a watchman for the whole building was sufficient for the purpose of protecting every part of it or not is wholly immaterial. It is sufficient to say that the parties have clearly and distinctly stipulated that, as a part of the consideration for the contract between them, a watchman should be employed "within the premises" which the assured occupied in carrying on his business. What the language means is not open to conjecture. There is no ambiguity about it, and, unless the court undertakes to construe it in direct opposition to its plain and unequivocal meaning, we must hold the policy required a private watchman to be employed within the fourth floor of the building. That was not done, and the plaintiff cannot recover.

The judgment is affirmed.

NEW YORK COURT OF APPEALS.

CONSTANTINE J. McGUIRE, Appt.,
v.
MARGARET E. HUGHES, Resp't.

(207 N. Y. 516, 101 N. E. 460.)

Physician — request for services — liability for payment.

No promise is implied on the part of a woman to pay a physician for professional services rendered to her daughter, who was living with her husband, and not dependent on the mother for support, from the fact that the services were rendered upon the mother's request or importunity.

(March 11, 1913.)

Note. — Liability of one who solicits the services of a physician or surgeon for another.

The function of this note being to collect the decisions as to whether, and under what circumstances, the summoning of a physician or surgeon to attend another will render the person acting in the matter personally liable for the services rendered, it has been necessary to exclude therefrom certain cases which, although kindred in respect of many of the circumstances involved, present distinctive questions. Among these are decisions as to the personal liability of a physician who has called another in consultation (*e. g.*, *Fitzgerald v. Hanson*, 16 Mont. 474, 41 Pac. 230); or to assist in performing an operation (*e. g.*, *Gilday v. Hennen*, 79 Misc. 252, 139 N. Y. Supp. 934); cases where the question is as to whether one who has sent a telegram or letter requesting that an injured person, who is being cared for, be shown every attention, thereby renders himself liable for such person's expenses (*e. g.*, *White v. Mastin*, 38 Ala. 147; *Hall v. Allen*, 46 Colo. 355, 104 Pac. 489; and *Brosius v. Barker*, 154 Mo. App. 657, 136 S. W. 18); and cases (of which *Dale v. Donaldson Lumber Co.* 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703, may be cited as an example) in which the liability of the person soliciting the services of the physician does not rest upon the existence of an implied contract on his part to compensate the physician, but upon his implied warranty of authority to pledge the credit of another which he does not, in fact, possess. Nor does it include decisions as to the effect of acquiescence in the attendance of a physician who was not summoned by the party sought to be charged, to render him liable for the services rendered. It is perhaps scarcely necessary to add that cases where it has been sought to hold the head of a family liable for services rendered to a member of his household, not upon his solicitation, or in which liability has been based upon the existence of a duty to provide medical attendance, do not fall within the scope of the present note. 46 L.R.A.(N.S.)

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming an order of the Appellate Term which in turn affirmed the judgment of the New York City Court dismissing a complaint filed to recover compensation for services rendered as a physician at defendant's request. Affirmed.

The facts are stated in the opinion.

Messrs. McGuire, Delany, Niper, & Connolly, for appellant:

The contract by which liability could be incurred might be either express or implied, and could be made in any way, by word or act, indicative of such intention.

Edson v. Hammond, 142 App. Div. 697, 127 N. Y. Supp. 359.

For other annotation of collateral interest, see note to *Cotnam v. Wisdom*, 12 L.R.A.(N.S.) 1090, on "Right of physician to recover for emergency services rendered unconscious person;" note to *The Kenilworth*, 4 L.R.A.(N.S.) 49, on "Master's duty to provide medical assistance for his servant;" note to *Norton v. Rourke*, 18 L.R.A.(N.S.) 173, on "Liability of master for services of physician whom he summons to care for employee;" note to *Atlantic Ref. Co. v. Leffingwell*, 34 L.R.A.(N.S.) 351, on "Implied power of employee to employ physician to attend injured employee;" note to *Jackson v. Pacific Coast Condensed Milk Co.* 37 L.R.A.(N.S.) 757, on "Liability of master for medical attendance engaged by employee who, by the contract of employment, was entitled to such attendance;" and note to *Bonnette v. St. Louis, I. M. & S. R. Co.* 16 L.R.A.(N.S.) 1081, on "Power of conductor to hire physician to treat person injured by train."

Generally.

In *Starrett v. Miley*, 79 Ill. App. 658, it was said that there is a well-defined exception to the general rule that when services are performed on request, and no agreement is made in respect to them, the law raises an implied promise to pay so much as the person performing the service reasonably deserves to have; such exception being to the effect that when one summons a physician to care for another rendered, by sudden injury, unable to act for himself, as to whom he stands in no relationship which creates any obligation to furnish proper medical attention, and no express undertaking is entered into, then, from the mere summoning of the physician and requesting him to care for the injured person, the law does not presume any implied promise by the one so acting, to pay for the services of the physician summoned.

And see also, to the same effect, *Meisenbach v. Southern Co.* 45 Mo. App. 232; and *Edson v. Hammond*, 142 App. Div. 693, 127 N. Y. Supp. 359.

Whether the contract was made is for a jury.

Fay v. Brooklyn Heights R. 69 App. Div. 563, 75 N. Y. Supp. 113; McDonald v. Metropolitan Street R. Co. 167 N. Y. 66, 60 N. E. 282.

No prescribed form of words is necessary to constitute a contract.

Bradley v. Dodge, 45 How. Pr. 57; Foster v. Meeks, 18 Misc. 461, 41 N. Y. Supp. 950.

The plaintiff was justified in believing that it was defendant who was to pay.

Buck v. Amidon, 4 Daly, 126, 41 How. Pr. 370; Mauri v. Heffernan, 13 Johns. 58.

Messrs. Charles Strauss and Eugene D. Boyer, with Messrs. Strauss, Reich, & Boyer, for respondent:

Defendant's daughter lived with her hus-

band, separate and apart from her mother, and the latter is under no legal obligation for her debts.

Crane v. Boudouine, 55 N. Y. 256; Young v. Valentine, 177 N. Y. 347, 69 N. E. 643.

A mere request upon a physician by a person that he perform services for a patient whom such person is under no obligation to support does not give rise to an obligation on the part of that person to pay the physician for such services.

Veitch v. Russell, 3 Q. B. 928, 3 Gale & D. 198, Car. & M. 362, 12 L. J. Q. B. N. S. 13; Boyd v. Sappington, 4 Watts, 247; Crane v. Boudouine, 55 N. Y. 256; Voorhees v. New York C. & H. R. R. Co. 129 App. Div. 780, 114 N. Y. Supp. 242, affirmed in 198 N. Y. 558, 92 N. E. 1105; Van Gaas-

The rule is somewhat differently stated and the exception broadened in MacGuire v. Hughes, 126 App. Div. 637, 111 N. Y. Supp. 153. The court, alluding to some of the cases which hold that a contract to compensate a physician for attendance upon a third person cannot be implied from a request for his attendance, said: "The principle established in these cases, which is a simple restatement of the common law, is that a simple request to perform services for another to whom there exists no obligation of any kind to furnish the services does not create an implied obligation to pay for such services by the person making the request, and that a promise to pay cannot be implied from a simple request that the services be rendered; and I apprehend that this principle is not peculiar to the relation of a physician and his patients, but extends to all cases where services, personal in their character, are rendered by one person to another."

When a person requests a physician to perform services for a patient, the law does not raise an implied promise to pay the reasonable value of the services so rendered, unless the relation of the person making the request to the patient is such as raises a legal obligation on his part to call in a physician and pay for his services. Jesserich v. Walruff, 51 Mo. App. 270; Weinsberg v. St. Louis Cordage Co. 135 Mo. App. 553, 116 S. W. 461.

One who merely summons a surgeon does not thereby render himself liable for the value of his services. Kearnes v. Caldwell, 7 Ky. L. Rep. 449.

As remarked in Boyd v. Sappington, 4 Watts, 247, a different principle would be very pernicious, as few would be willing to run the risk of calling in the aid of a physician where the patient was a stranger, or of doubtful ability to pay.

"Every person who may go for the regular attending physician when needed by his patient, or who, from considerations of friendship or humanity, may request him not to discontinue his attendance, does not render himself responsible for the services of the physician. Whether he does or not 46 L.R.A. (N.S.)

depends upon the attendant circumstances." Curry v. Shelby, 90 Ala. 277, 7 So. 722.

One who, in an emergency, causes a doctor to be summoned to attend the victim of an accident, is not necessarily personally liable; but the jury ought to consider all the circumstances, and determine whether the plaintiff believed and had a right to believe that the defendant was offering his own credit. Raoul v. Newman, 59 Ga. 408.

A promise to pay the bill is not implied from the fact that a father calls a physician to attend his sick son, who is a man of mature age; but the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered. Morrell v. Lawrence, 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650.

The request of a married woman for the rendition of services to members of her family does not raise any implied promise on her part to pay for the same, in the absence of any evidence tending to show that the services were rendered upon her personal credit, or that the physician, when rendering them, told her that he would look to her for payment. Hazard v. Potts, 40 Misc. 365, 82 N. Y. Supp. 246; Richards v. Young, 84 N. Y. Supp. 265.

One who sends for a physician in an emergency to attend the victim of an accident may be liable to the physician for answering the summons if he came upon a bare message without being advised of the circumstances under which it was sent; but he will not be liable for anything done after the physician became enlightened as to the true situation. Raoul v. Newman, 59 Ga. 408.

But a physician cannot recover compensation for so much of his first visit as consists in responding to the call, where he elects not to divide the charge, but renders his services on the credit of the patient. Shaw v. Graves, 79 Me. 106, 8 Atl. 884.

A doctor summoned by defendant to attend the victim of an accident does not, even though both parties understood that

beck v. United States Lace Curtain Mills, 132 App. Div. 595, 116 N. Y. Supp. 776; Hazard v. Potts, 40 Misc. 365, 82 N. Y. Supp. 246; Richards v. Young, 84 N. Y. Supp. 266; Edson v. Hammond, 142 App. Div. 693, 127 N. Y. Supp. 359; Meisenbach v. Southern Cooperage Co. 45 Mo. App. 232; Rankin v. Beale, 68 Mo. App. 325; Dorion v. Jacobson, 113 Ill. App. 563; Smith v. Watson, 14 Vt. 332; Norton v. Rourke, 130 Ga. 600, 18 L.R.A.(N.S.) 173, 124 Am. St. Rep. 187, 61 S. E. 478; Churchill v. Hebden, 32 R. I. 34, 78 Atl. 337.

Gray, J., delivered the opinion of the court:

This action was brought to recover the reasonable value of services rendered by the

employment was on the defendant's responsibility and personal credit, have a right to render any more service than the pressing emergency of the case requires. Raoul v. Newman, *supra*.

Circumstances under which the existence of an implied contract may or may not be inferred.

As above stated, the circumstances may be such as to warrant or require the inference of the existence of an implied contract; and this aspect of the question is dealt with in the following decisions:

A mere request from a father to a physician to attend a child of full age for whom he is not bound to provide, though sick at the father's house, raises no implied promise upon his part to pay for such medical services. Crane v. Baudouine, 55 N. Y. 256; Rankin v. Beale, 68 Mo. App. 325.

In Crane v. Baudouine, *supra*, it was held that testimony showing that plaintiff was summoned by the defendant's son-in-law, assuming to act therein for the defendant, though apparently without authority, to attend defendant's daughter, a married woman thirty years of age, having a home of her own, but who had been brought to her father's house that she might have the immediate care and attention of her mother; that defendant gave plaintiff a history of her case; that he was present when plaintiff made his professional calls; that he received plaintiff's directions as to treatment; that he recited to others plaintiff's opinion of the patient's condition; that he at no time during the attendance disclaimed liability; that he assented to the calling of another doctor in consultation; that he had employed other physicians to attend upon his daughter; and that he had made declarations showing that he had some idea of sending for the plaintiff,—was not sufficient, as a matter of law, from which to imply a promise on defendant's part to pay for the services.

In Morrell v. Lawrence, 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650, it appeared that the relation of physician and patient had existed 46 L.R.A.(N.S.)

plaintiff as a physician, at the request of the defendant, to the latter's daughter, a married woman living with her husband. The plaintiff was nonsuited at the trial, which was had in the city court of the city of New York, and the judgment entered in favor of the defendant, dismissing the complaint, has been affirmed by the appellate term and by the appellate division of the supreme court. Leave was then given to the plaintiff to further appeal to this court.

The plaintiff did not allege, nor does he pretend, that there was any express promise by the defendant to pay him for his services; but relies upon the facts as raising an implied agreement on her part to do so. These facts, taking them, as we should, in their most favorable light upon the plain-

between plaintiff and defendant's son for several years, and that plaintiff's bills for medical services rendered to the son were presented to and paid by the son; that three years prior to the transaction in suit plaintiff received a telegram from defendant, asking him to go to another place where his son then was sick to minister to him as a physician, and plaintiff was on the eve of going when he received another telegram stating that the son had already started for his home; and that on his arrival plaintiff rendered him medical services and he paid the bill. The following year plaintiff went to Europe with the son as his attending physician at the request both of the son and of the defendant, who promised plaintiff that he would pay him or see him well remunerated for his services, but after their return from Europe defendant repudiated the contract, and all the pay plaintiff received for his services on that trip was a sum of money paid by the son. At the time of the transaction in question the son, then a man of forty-two years of age, of considerable means, and carrying on a business of his own, was not living with his father, but at a hotel in New York city. Defendant sent a telegram to plaintiff in St. Louis: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday via Big Four. Answer at once." Plaintiff accordingly responded and remained in constant attendance on the son until his death. It was held that the telegram was to be interpreted in the light of the relations of the parties and of their past transactions with each other; and that whether in that light the defendant had reason to believe that the plaintiff would understand the telegram to imply an agreement to pay, and whether plaintiff did so understand, were questions for the jury, the court saying: "We think the evidence for the plaintiff in this case tends to prove a condition of affairs from which the triers of the fact, if they should see fit to draw the inference, might with reason do so that Dr. Lawrence intended the plaintiff to understand, and the plaintiff did understand.

tiff's case, show that, on November 1st, the defendant called the plaintiff upon the telephone, informed him that her daughter was seriously ill, and asked him to see her. He told her that he "could not go without the consent of the daughter's husband." Subsequently, on November 12th, the plaintiff had an interview, at his office, with the defendant and her son-in-law, Mr. Bradley. The defendant introduced her son-in-law and, in his presence, asked him if he would go up and see her daughter. Plaintiff said he was satisfied to go. To quote his testimony with respect to that interview, he said "that the introduction of Mr. Bradley by Mrs. Hughes was giving the consent to my going to see his wife." He had no conversation with Mr. Bradley, who thereupon

left. Plaintiff then went with the defendant and made an examination of the patient, as the result of which he informed Mrs. Hughes that he would like to withdraw from the case, because of the particularly grave condition of her daughter. To this she replied by appealing to him to stay in the case, saying: "Doctor, you have been my friend; you have attended my family; you have attended my husband and our children; and I beg of you, for God's sake, don't desert Maude." (Maude being the name of the patient.) The plaintiff had been the defendant's family physician; but he had never attended the Bradleys. He continued in attendance upon the patient, rendering professional services, until some time in January, when she died. Nothing

that he would pay for the services which the telegram called the plaintiff to render. This was not a call on the plaintiff for services in the field of his daily work. It called him away from his established field of action, it called him in effect to resign his practice, to dedicate himself for the time being solely to the service of the defendant's son, whatever the consequence might be to his general practice. This is altogether outside of the category of the cases above referred to. The patient was not one of twenty or more for whom the physician might prescribe in a day, he was one for whom the physician must give up all other patients. The call was a very unusual one and it involved unusual financial consequences."

In *Edelman v. McDonnell*, 126 Cal. 210, 58 Pac. 528, an action for medical services rendered to defendant's son, who was not shown to have been living with his father or to have been supported by him, it was found that the son contracted for the services and that plaintiff undertook the treatment on that employment; and that afterward defendant made statements which caused the plaintiff to believe that he would pay; but it was not shown that such statements were made as would justify such belief, or that defendant intended that they should be so understood, or that plaintiff would not have rendered the service had not such been made, and there was no finding that the services would have been discontinued but for the promises; it was held that a judgment in favor of the father must be affirmed.

In *Boyd v. Sappington*, 4 Watts, 247, a witness for the plaintiff testified in substance that defendant came to his house, where the plaintiff then was, and requested him to attend his son, a single man above the age of twenty-one, who was lying very ill at defendant's house, where he resided; that the doctor hesitated, but finally agreed to come; and that the defendant said that it was the wish of his son. On the trial the court refused to permit defendant to prove that the son was in business for himself and had property of his own. It was held 46 L.R.A. (N.S.)

that, taken in connection with the testimony which was rejected, there was no ground for the presumption that the services were rendered on the credit of the defendant, and no reason to believe that the request was the inducement to the services, and that without this the son would not have been trusted.

In *Crowell v. Donoho*, 168 Mo. App. 305, 153 S. W. 1082, where it appeared that plaintiff was summoned to attend defendant's adult unmarried daughter, who was living at home and who had an interest in her father's estate then in course of administration by defendant, and that on other occasions he had been paid for his visits to the daughter by defendant's check, who testified, and the court found, that such payments, though made out of defendant's funds, were made for the patient at her request and were charged against her inheritance, it was held that the evidence did not require a judgment for plaintiff.

It is not possible to say whether the decision in *Deane v. Annis*, 14 Me. 26, turned on the theory that it was the duty of the father to provide medical attendance, or on the theory that he had impliedly contracted therefor. It there appeared that the defendant's minor son had left home against his father's wishes, but on being taken sick returned to his father's house; that the father went with the son to plaintiff's house to obtain medical assistance, and it was then understood by them that the plaintiff was to visit the boy at his father's house. No express promise by the father in words was proved, to pay the plaintiff, nor that the father notified the plaintiff that he did not expect to pay him. The court held that a verdict in favor of the father should be reversed, saying: "After the son surrendered himself to his father and sought his aid and assistance, we entertain no doubt he became liable for the medicine and advice furnished by plaintiff; more especially as he went with his son and was active in consulting the plaintiff as a physician."

In *Best v. McAuslan*, 27 R. I. 107, 60 Atl. 774, it appeared that at the time of the

appears to have been said, at any time, with reference to the payment for plaintiff's services.

The only question upon this appeal is whether the defendant came under any obligation to the plaintiff. That turns upon whether the law will imply a promise on her part to compensate him. If we might assume the existence of a moral obligation, that would not determine that a legal or enforceable obligation existed. The rule in the United States has generally been that a physician is entitled to recover for his services, if not under an express contract therefor, then under an implied agreement to pay *quantum meruit*, differing, in earlier times, from the rule at common law, which, in England, before the passage of the medi-

cal act of 1858, in the absence of a special agreement, denied to the physician the right to sue for his professional services: the theory of any payment to him being that of an honorarium. *Gibbon v. Budd*, 2 Hurlst. & C. 92, 32 L. J. Exch. N. S. 182, 9 Jur. N. S. 525, 8 L. T. N. S. 321, 11 Week. Rep. 626; *Battersby v. Lawrence*, Crompt. & M. 277.

The general rule that, where a person requests of another the performance of services, which are performed, the law implies a promise by the former to pay their reasonable value, has no application in the case of a physician, rendering professional services to a third person, if the relation to the patient of the person who requests them be not such as imports the legal obligation to

plaintiff's employment, the patient, a son of the defendant, although of full age, was living in defendant's family; and that the defendant was the only person who had anything to do with the original employment of the plaintiff. It did not anywhere appear that the patient had anything to do with such employment other than, being very ill and in great danger, to submit to a surgical operation and subsequent attendance and care; nor that he at any time made any express contract with the plaintiff, or promised to pay him. It further appeared that, upon plaintiff's rendering a bill to defendant, she did not then repudiate the obligation, but gave him to understand that it would be settled, her only objection being as to its amount; that plaintiff made the original charge upon his books to the defendant; and that the property of the defendant and her sons derived from the defendant's deceased husband had never been divided, and that it was customary in the family to charge any bills which should be paid for the benefit of either of them to the share of the income belonging to the one for whose account the payment was made. It was held that in view of all these facts the defendant had made herself liable for the payment of a proper and just bill for the services of the plaintiff.

In *Foster v. Meeks*, 18 Misc. 461, 41 N. Y. Supp. 950, it was held that testimony that defendant called upon plaintiff and said: "Doctor, I want you to come and attend my father: he had a doctor who was not satisfactory;" and that the doctor thereupon visited the father and rendered services,—was sufficient to warrant a finding in favor of the plaintiff, there being no evidence that the father ever directed the defendant to go for the doctor, and nothing from which it might be inferred that defendant acted merely as a messenger.

In *Hentig v. Kernke*, 25 Kan. 559, it was held that testimony on the part of plaintiff, showing that the defendant came to the plaintiff and called for his services without specifically stating to whom or to whose account they were to be rendered; 46 L.R.A. (N.S.)

that upon such call plaintiff went to the house of defendant and rendered services to one who was then a member of the defendant's family, looking all the while to defendant for his compensation; that after the services were rendered he presented his bill to defendant, who did not disclaim his liability therefor, but on the contrary promised to pay it,—was sufficient to support a verdict for the plaintiff, though it appeared that the person to whom the services were rendered was the father of defendant and only temporarily a member of his family.

A man is liable for the services of the physician whom he calls in to attend his reputed wife, though their marriage may not have been legal, and though he informs the doctor that the woman is not legally his wife, where he does not at the time plainly and unequivocally put an end to the original employment. *Gerlach v. Turner*, 89 Cal. 446, 26 Pac. 870.

A husband who places his wife under the care of a surgeon is liable for an operation performed on her, though without his knowledge or assent; and it is therefore not necessary for the physician to prove to the satisfaction of the jury that the operation was necessary and proper under the circumstances, or that he, before he performed it, gave notice to the husband, or that it would be dangerous to the wife, to wait, before he performed it, till such notice could be given. *McClallen v. Adams*, 19 Pick. 333, 31 Am. Dec. 140.

In *Churchill v. Hebden*, 32 R. I. 34, 78 Atl. 337, it was held that where all that appeared to charge the defendant with liability was that he requested a physician to attend his sick brother, a verdict was properly directed for the defendant.

In *Smith v. Watson*, 14 Vt. 332, where it appeared that defendant, accompanied by his father, visited plaintiff and requested him to take under his care an insane brother, for whom defendant was under no obligation to provide, and who had made his home with the father; and, further, that plaintiff had made inquiries as to whether a demand could be secured against the

provide them. The courts below have followed the authority of *Crane v. Baudouine*, 55 N. Y. 256, though there was a division in opinion at the appellate division as to its application.

I think that it has been correctly held to be decisive of the question before us. In that case the plaintiff, a physician, was called in to attend the daughter of the defendant, who was lying ill at the latter's house. She was of age, married, and living with her husband, and had been brought there at her mother's request. There being no proof of any express promise to pay the plaintiff for his services, the question of a

promise to be implied from the facts was considered by Judge Folger, who spoke for the court. He observed that "the relations between the defendant and her [his daughter] were not such as that there was upon him such obligation. She was much past her majority; . . . she had lived with her husband and their children, separately from her father, in a house of their own; she was, at the time, living with her husband and their children. Her husband was bound primarily to supply for her all that she needed. . . . The interest exhibited in the case by the defendant to the plaintiff; . . . his presence when the plain-

father or the insane person before resorting to defendant for payment,—it was held that the facts would not warrant the inference of an implied contract.

In *Veitch v. Russell*, 3 Q. B. 928, it appeared that defendant, a lady, had written to plaintiff, describing her brother's symptoms and requesting the plaintiff to visit him. In one of her letters she made statements which showed that she was bearing the expenses of her brother's illness. On a subsequent occasion she wrote, stating that her brother had again been taken ill, saying, "I am anxious to apprise you of this sad affliction, believing you to be the only medical friend who can restore him. A medical gentleman was sent for: the result of his opinion I know not. Pray go and see him. . . . I am fearful of sending any physician from town, as they might not understand him as you do." Thereafter she again wrote: "As your account against me for attendance on my brother must be rather a formidable one, you will oblige me by letting me have it up to his removal to town." In another letter she said: "I have thought a great deal upon the subject of our conversation on Monday last; and the more I think of it, the more perplexed I feel as to what I should do. My wish is to present you with such a sum as you would call upon me to pay you. Now, as this can only be done by your telling me what that sum should be, I shall feel greatly obliged to you by your doing so. I really do not see how I can spare you this trouble; for I do not know what expenses you have incurred, or what you would deem, under the circumstances a suitable acknowledgment of your great professional skill and attention. Having thus explained to you my feelings on this subject, I hope that you will at once tell me what sum will be agreeable to you to accept from me." It was held that although, had the letters passed between parties in other relations, they would undoubtedly have had a strong effect, yet in view of the general understanding that physicians usually perform their duties without having a legal title to remuneration, the jury was warranted in finding that there was no actual contract on the part of defendant to make himself le-

gally liable for plaintiff's professional charges. It will be perceived that as the foregoing decision was put expressly upon the ground that the compensation of a physician was merely honorary, so that he had no legal right to recover in the absence of an express contract, it cannot be regarded, in jurisdictions where the legal right of a physician to compensation is recognized, as authorizing a like conclusion upon a similar state of facts.

In *Dorion v. Jacobson*, 113 Ill. App. 563, it was held that something more than a mere request to a physician to render services to a daughter-in-law is necessary to render the father-in-law liable.

In *Curry v. Shelby*, 90 Ala. 277, 7 So. 922, it was held that an agreement on the part of defendant to pay for medical services rendered to his father-in-law, who, having met with an accident, had been carried to defendant's house, would be clearly implied from the facts that defendant went for plaintiff two or three times to go and see the father-in-law, which he did; that on two occasions he proposed to discontinue his attendance, when defendant requested him to continue his visits, and that after the father-in-law died he presented his bill to defendant as a claim against him individually, and asked its payment, when defendant did not deny his responsibility, but objected to the amount. But it further appearing that, immediately upon hearing of the accident, plaintiff went to see the patient and rendered medical assistance without request by defendant, who was not at home, and was visiting him when defendant came to him to go and see the patient, that when he proposed to discontinue his visits the patient and the wife of the defendant united in a request not to do so; and that the account for services was charged on plaintiff's books to the patient,—it was held to be a question for the jury as to whether there was an agreement on the part of defendant to become responsible for the services rendered after plaintiff proposed to discontinue his visits.

In *Thomas v. Leavy*, 62 Ill. App. 34, it was held that where the plaintiff testified that, before meeting defendant, he had been attending his wife's sister for about ten days, having been called by her uncle,

tiff made his professional calls, alone and in consultation; his receiving directions as to treatment,— . . . are relied upon as circumstances making a basis for an implication." p. 259. He held that, "so far as legal responsibility was concerned, the defendant, though the father of the patient, was a stranger to her and to her necessities." There was a question upon the evidence, whether the defendant had, in fact, sent for the plaintiff, and it was said that, "even had he gone himself and requested the plaintiff to come, we have seen above that the law will not therefrom raise an implied promise to pay for the services." It

was reasoned that, while a person may not avail himself of the benefit of services done for him "without coming into an obligation to reward them with a reasonable recompense," he cannot be said, "in the meaning of the law, to avail himself of services as so done, when they are not for his individual benefit, nor for that of anyone for whom he is bound to furnish them." The court in *Crane v. Baudouine*, applied the doctrine of the cases of *Veitch v. Russell*, 3 Q. B. 928, 3 Gale & D. 198, Car. & M. 362, 12 L. J. Q. B. N. S. 13, 7 Jur. 60, and of *Boyd v. Sappington*, 4 Watts, 247, that the fact of a request to a physician to attend a patient

at whose house she was stopping; that on an occasion of one of his professional calls he met defendant, who said to him: "Doctor, you take care of the girls and attend to them, and I will pay you for your entire services, for those you have rendered heretofore and what you may hereafter render. There is my card. Send the bill to me, and I will pay all expenses," and defendant testifies that all he said to the doctor was: "Give this girl the attention she requires, and I will see that she has some money to pay her bills,"—the jury were warranted in rendering a verdict for services rendered after the conversation.

In *Swan v. Warner*, 197 N. Y. 190, 90 N. E. 430, it was held that, in an action brought to recover for professional services of a physician, items in his books of account which explicitly indicated that the services charged therein were rendered to a nephew of the defendant were improperly received in evidence, in the absence of any showing of express authority to charge such services to the defendant, or of proof of any circumstances which without express authority warranted such a charge.

No implied promise on the part of a husband or his wife to pay for medical services rendered to a third person making her home with them can be inferred where the most that can be pretended to fix any liability on the wife is that she knew that the plaintiff had been sent for, not directly by her but without any objection on her part; and the case shows that when plaintiff first came to the house he was met by the husband, who forbade him rendering any services on their account. *Shaw v. Graves*, 79 Me. 166, 8 Atl. 884.

In *Grattop v. Rowheder*, 1 Neb. (Unof.) 660, 95 N. W. 679, it was held that one who called a physician for one who was a member of his family, though not a relative, a lady about seventy years of age, was liable for the physician's services rendered without notice that the party calling him did not intend to make himself liable therefore.

In *Clark v. Waterman*, 7 Vt. 76, 29 Am. Dec. 150, where it appeared that defendant in person called upon one of the plaintiffs and requested him to go and see a girl who had been brought up as a member 46 L.R.A. (N.S.)

of his household and who, after having become of age, had the control of her time, but was then residing in his family as a servant without any stipulated wages; that defendant, subsequently becoming dissatisfied, called in the other of the plaintiffs; and that not far from the time the girl died defendant had called on plaintiffs for the amount of their account, saying he wanted to lay it before the town to see if they would assist him,—it was held that the proof was sufficient to authorize the triers of fact to find that the defendant intended and gave the plaintiffs so to understand that he was himself the employer. The court said: "We do not mean by this determination to intimate that a man who, by himself or another, happens to go for a doctor to attend a hired man or maid or sister or friend in his house, is of course liable to pay the bill. In many and perhaps most of these cases, the person going or sending might be regarded as a mere medium of intelligence that a physician was wanted; but where the proof in the case is sufficient as we think it was in this case, to authorize the triers to find that the defendant intended, and gave the plaintiffs so to understand, that he was himself the employer, then the original credit was given to him; then he is liable upon general principles, and, it not being the debt of another, is not affected by the statute of frauds."

An employer who merely summons a physician, and requests him to care for an employee who has suddenly become ill while engaged in his duties and has been thereby rendered incapable of acting for himself, is not, in the absence of an express stipulation between the employer and the employee that the former shall furnish medical aid to the latter, liable for the services of the physician, rendered under such circumstances. *Norton v. Rourke*, 130 Ga. 600, 18 L.R.A. (N.S.) 173, 124 Am. St. Rep. 187, 61 S. E. 478.

In *McEwen v. Hoffman*, 42 Ind. App. 202, 85 N. E. 364, a complaint alleging that defendants sent an injured employee to plaintiff for immediate attention and, for the immediate performance of an operation to remove a piece of steel from his eye, and that plaintiff "relied on the represen-

is not, alone, sufficient for the inference of an agreement to pay for the services rendered. The doctrine, which *Crane v. Baudouine* adopted, has influenced the decisions of the courts of other states (see *Smith v.*

Watson, 14 Vt. 332; *Raoul v. Newman*, 59 Ga. 408; *Meisenbach v. Southern Cooperage Co.* 45 Mo. App. 232; *Dorion v. Jacobson*, 113 Ill. App. 563; the two latter cases citing *Crane v. Baudouine*), and the case was

tations of said defendants and tendered the credit to them, and thereupon on said date performed" the services in question, was held demurrable on the ground that it did not show with reasonable certainty facts constituting a contract, express or implied.

In *Cheek v. Boyd* — Tex. Civ. App. —, 134 S. W. 252, it was held that where there was testimony on behalf of the plaintiff that he had been called on the telephone by one who said that a certain person had been injured and he wanted to send him over to plaintiff's sanitarium, and that the defendant said he would be responsible for the bill, and that in a subsequent conversation with the defendant the latter stated that he had ordered the man sent and that he would pay the bill himself, the question of the defendant's liability should have been left with the jury.

In *Hasler v. Ozark Land & Lumber Co.* 101 Mo. App. 136, 74 S. W. 465, where the testimony disclosed that the plaintiff had declined attendance upon defendant's employee until the vice president or general manager had directed him to render the services and agreed to pay him therefor; that plaintiff had received \$40, which he claimed was in part payment, but which defendant claimed was a personal loan by defendant's official advancing it, though it was conceded to have been paid from defendant's funds, and without any knowledge or obligation therefor given back by plaintiff, it was held to be a question for the jury whether there was an implied contract to pay the physician.

In *Weinsberg v. St. Louis Cordage Co.* 135 Mo. App. 553, 116 S. W. 461, where it appeared that the court found not only that the president of the defendant corporation requested the plaintiff to attend an injured employee, but that he intended that the defendant should pay therefor, and it conclusively appeared that plaintiff intended to charge defendant, the fact of a contract between the parties was established by testimony, although there was no express promise.

In *Michigan College v. Charlesworth*, 54 Mich. 522, 20 N. W. 566, where a doctor, upon being informed of an injury to a tramp in a railroad yard, telephoned to the division superintendent of the railroad, asking if he should attend him, and whether he should take him to a hospital, to which the superintendent responded in the affirmative and added further, "it will not do to let the man suffer," or something of that kind, it was held that there being nothing in the language employed by the doctor to intimate to the superintendent that he was engaging his professional services to him, and nothing having been said, or implied from what was said, about pay or recom-

pense, there was not sufficient, under the circumstances and the conversation, to raise an agreement by implication that the superintendent would pay the doctor for services by him to be performed, and the hospital for board, nursing, care, etc.

In *Chicago Consol. Traction Co. v. Mathews*, 117 Ill. App. 174, it was held that when a street railway company injures a stranger and then requests a physician to care for him, or with knowledge of the facts ratifies the act of its conductor in employing him, or with like knowledge fails and neglects to countermand such employment, the company is liable to such physician in a reasonable amount for his services.

In *Starrett v. Miley*, 79 Ill. App. 658, defendant sent for a physician to attend a woman who was, so far as the evidence disclosed, a stranger to him, and who ran into his home wounded and bleeding, and had fallen there unconscious. When the physician arrived, defendant directed him to the injured woman, told him to care for her, and had her carried to a room in the house. It was held that defendant did not thereby become liable.

In *Smith v. Riddick*, 50 N. C. (5 Jones, L.) 342, where it appeared that defendant, having been sent for a certain physician to assist in a surgical operation, and, not finding him, applied to plaintiff, saying: "I have come after you to go and see a sick man,"—it was held that the court properly charged the jury that if they believed that the plaintiff had been informed beforehand of the circumstances, defendant, being a mere messenger, was not liable.

The sending of the following telegram by one who is the manager of a hotel at a public watering place, the agent of the stockholders, and himself a stockholder, to a friend in a neighboring city: "There are many cases of yellow fever at the Well; send out a physician this afternoon without fail,"—does not render the sender liable for services of a physician who comes in consequence. *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

In *Bradley v. Dodge*, 45 How. Pr. 57, it was held that where it appeared that defendant called at the plaintiff's office and, finding him absent, wrote on his own card the words: "Call on Mrs. Day, at No. 769 Broadway," requesting that it be given to the plaintiff, and that he should come as soon as possible, and there was nothing to indicate to the plaintiff, before he rendered the services in question, that the defendant had called at his office at Mrs. Day's request, and that he was therefore only acting as her messenger,—a verdict for the plaintiff would not be disturbed. E. S. O.

followed by the appellate division in *Voorhees v. New York C. & H. R. R. Co.* 129 App. Div. 780, 114 N. Y. Supp. 242, and in *Van Gaasbeek v. United States Lace Curtain Mills*, 132 App. Div. 595, 116 N. Y. Supp. 776.

I am therefore of the opinion that it should be taken as the rule of law, too well settled upon authority to be now questioned, that a physician, in the absence of a special contract, may recover upon an implied agreement to pay for his services *quantum meruit*, when they have been rendered at the request of the patient, or of a person who, in the eye of the law, is regarded as being under a legal obligation to provide such professional services for the patient; such as a husband, or the parent of a minor child. In the present case, notwithstanding the anxiety, the importunity, and the prayers of the defendant, how was the legal obligation of the husband shifted to, or assumed by, the defendant? According to the plaintiff's testimony, he refused to attend the patient until the husband had consented; which may be said to be a recognition, at least, of the marital relation, with its consequent responsibility or liability. It certainly followed that, when the husband's consent was given, an obligation arose on his part to pay the reasonable value of the services which the plaintiff might render. As there was no express promise by the defendant to pay, can we hold, upon the facts disclosed by the plaintiff's evidence, that there was also an implied promise on her part? It would be a simple matter, in cases where the physician is called upon to attend a person, at the instance of someone not standing in a responsible relation to the patient, to inform himself as to whom he shall look for his compensation.

For these reasons, I advise that the order of the Appellate Division be affirmed.

Cullen, Ch. J., and Willard Bartlett, Chase, Cuddeback, and Hogan, JJ., concur. Miller, J., not sitting.

NEW YORK COURT OF APPEALS.

UNITED STATES RADIATOR CORPORATION, Appt.,
v.

STATE OF NEW YORK, Resp't.

(208 N. Y. 144, 101 N. E. 783.)

Tax — stock transfer — distribution of stock owned by corporation among shareholders.

1. The distribution by a trust company to which was delivered for the purpose of 46 L.R.A. (N.S.)

a voting trust stock of a corporation which purchased the assets of other corporations in consideration of shares of its stock of certificates among the stockholders of the selling corporation, showing that they were the owners of a number of shares of the buying corporation, equal to their respective interests in the selling corporation, is a transfer of stock within the meaning of a statute imposing a tax upon all sales or agreements to sell, or memoranda of sales, or transfers of shares, or certificates of stock.

Corporation — shares.

2. Shares of the capital stock of a corporation, and their ownership, are created by the payment or agreement to pay for stock accepted by the corporation.

Same — sale of assets — title to consideration — division among stockholders.

3. The sale of its assets by a corporation to another corporation for stock of the latter vests title to the stock in the selling corporation, which cannot be placed in its own stockholders without a transfer, which may be subject to taxation.

(Gray and Hiscock, JJ., dissent.)

(April 15, 1913.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the Court of Claims which dismissed a claim filed to recover an amount paid under protest as a stock transfer tax. Affirmed.

The facts are stated in the opinion.

Mr. E. W. Personius, with Messrs. Herendeen & Mandeville, for appellant:

There must be a sale or agreement to sell in connection with a transfer or delivery of capital stock to make the transaction taxable; and it is the transaction of sale, rather than the stock itself, that is subjected by the statute to a tax.

People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A. (N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

The transaction involved in the case at bar was not a sale, but the original issuance, of stock.

People v. Duffy-McInnerney Co. 122 App. Div. 336, 106 N. Y. Supp. 878.

Note. — What constitutes a transfer of stock within statutes taxing stock transfers.

No cases are included herein except those considering the question with reference to statutes expressly imposing a tax upon transfers of shares of stock in corporations, as distinguished from statutes taxing transfers of property generally and inheritance and succession tax statutes.

If the vendor's shares were owned by the original corporations, then the stockholders had a beneficial interest therein, and the issuance of these certificates, therefore, is a division among the true owners of their property, and not a taxable sale or transfer.

Cook, Corp. 6th ed. pp. 444, 445; *Beal v. Essex Sav. Bank*, 15 C. C. A. 128, 33 U. S. App. 101, 67 Fed. 816; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Martin v. Niagara Falls Paper Mfg. Co.* 122 N. Y. 165, 25 N. E. 303; *Burr v. Wilcox*, 22 N. Y. 551; *Howland v. Edmonds*, 24 N. Y. 307; *Ashley v. Quintard*, 90 Fed. 84.

Mr. Henry Selden Bacon, with Mr. Thomas Carmody, Attorney General, for the State.

Collin, J., delivered the opinion of the court:

The action is to recover from the state of New York a sum paid by the plaintiff, under protest and without prejudice to its rights, for stock transfer stamps.

The facts were agreed upon by the parties for submission to the court of claims. The plaintiff, a corporation, purchased certain assets of each of four corporations. Under the contracts of purchase, each of the four corporations was entitled to a designated number of shares of the capital stock of the plaintiff as a consideration for the sale.

A transfer of stock certificates issued by a foreign corporation owned by a nonresident, where made within the state, is a transfer within the provisions of a statute imposing an excise tax on all sales, or agreements to sell, or memoranda of sales, or deliveries or transfers, of shares or certificates of stock in any domestic or foreign association, etc., within the state; since the tax is not on property, but on the sale of property, or on a particular kind of contract when made within the state. *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515, affirmed in 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

A transfer of shares of stock takes place at the time a contract for their sale is delivered, although the sale is for shares to be delivered in instalments, where in the meantime and until default, the certificates are to be indorsed in blank and delivered in escrow and the transfer tax stamps must be affixed to the certificates of stock at the time of their delivery in escrow. *Phillips v. Grossman*, 76 Misc. 497, 135 N. Y. Supp. 567.

A sale of shares of stock under a mortgage foreclosure proceeding, by a referee appointed for that purpose, is a transfer within the statute imposing a tax on transfers 46 L.R.A.(N.S.)

Each of the four corporations and a trust company entered into a lawful voting trust agreement, which provided that the trust company as voting trustee should hold and vote for a designated period the full number of the shares of stock to which the four corporations were so entitled, and a certificate for those shares was issued by the plaintiff, upon the request of each of the four corporations, to the trust company, which thus became the record owner of the shares for voting purposes. Each of the four corporations (no condition forbidding) requested the issue to each stockholder therein by the trust company of a certificate for the number of shares proportionate to the number of the shares of its stock owned by him, and thereupon the trust company issued to each stockholder of the four corporations a certificate that he, the stockholder, was the owner of a designated number of shares of the capital stock of the plaintiff, deposited with and to be held by the trust company under the agreement as voting trustee, and might transfer the certificate, and that all dividends received by the trust company should be paid to the holder of the certificate, who should at the termination of the voting trust agreement, upon surrender of the certificate, be entitled to receive a certificate or certificates of the plaintiff for said shares of capital stock. Pursuant to the decision of the comptroller of the state that the certificates of the trust company were

of stock in a corporation, although the sale is a judicial sale; since the transaction is essentially the same as if the mortgagee, without invoking the court's assistance to enforce the mortgage, had sold the stocks by virtue of a power contained in the mortgage, or as if the mortgagor had voluntarily released his equity in the mortgaged stocks. *Glynn v. Conklin*, 127 App. Div. 473, 111 N. Y. Supp. 111.

An original issuance of stock in a corporation is not a transfer thereof within the terms of the act imposing a tax on all sales, or agreements to sell, or memoranda of sales, or deliveries or transfers, of shares or certificates of stock in any domestic or foreign association, etc. *People v. Duffy-McInerney Co.* 122 App. Div. 336, 106 N. Y. Supp. 878, affirmed in 193 N. Y. 636, 86 N. E. 1129.

Compare with *UNITED STATES RADIATOR CORP. v. STATE*, holding it to be a transfer of shares where different corporations sold property to another corporation and the latter issued capital stock to a trust company to hold as a voting trust, and to be voted as directed by the former, where the trust company, at the request of the selling corporations, issued trust certificates for the stock to individual stockholders in proportion to their holdings. A. G. S.

taxable under § 270 of the tax law (Consol. Laws 1909, chap. 60), the plaintiff paid for the transfer stamps without prejudice to its rights, and brings this action to recover the sum paid.

The statutory provisions authorizing and regulating the procedure in the action are: Section 276 of the tax law empowers the state comptroller to ascertain whether any stock transfer tax imposed is unpaid, and, if unpaid, to enforce the recovery of it and any penalty incurred by the nonpayment. Section 280 (added by chap. 186, Laws 1910) empowers him to pay to a person the amount erroneously paid as the tax, and authorizes the taxpayer to file with the court of claims a claim rejected by the comptroller, "which shall constitute a private claim against the state, and shall be subject to all the provisions of law governing such claims, except" the provisions relating to the time within which it shall be filed. The action was commenced "under the provisions of law governing such claims," which are familiar and do not require a particular reference. Section 62 of the executive law (Consol. Laws 1909, chap. 18) authorizes the attorney general, on behalf of the state, to "agree upon a case containing a statement of the facts, and submit a controversy for decision to a court of record which would have jurisdiction of an action brought on the same case, pursuant to the provisions of" §§ 1279-1281 of the Code of Civil Procedure, authorizing the submission to a court of record of a controversy upon facts submitted. The court of claims was a court of record. Judiciary law (Consol. Laws 1909, chap. 30) § 2.

At the time of the transactions under consideration, § 270 of the tax law (Consol. Laws 1909, chap. 60) contained the following provisions: "There is hereby imposed and there shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales, or deliveries or transfers, of shares or certificates of stock in any domestic or foreign association, company, or corporation, . . . whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each share of \$100 of face value or fraction thereof, two cents. . . . The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In a case where the evidence of

transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer of a certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell, or where the transfer is by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers, and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale."

The section imposes the tax upon all agreements or instruments for the transfer of shares of corporate stock. It is in the nature of an excise tax on the transfer. *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515. The language expresses clearly the intention of the legislature that every transfer of or agreement to transfer a share in the capital stock of a corporation, or, in other and definitive words, a right to share in the dividends declared by the directors of a corporation from its surplus profits and in the assets upon the distribution of them *pro rata* among the shareholders at its dissolution, shall be subject to the tax.

A share of corporate stock is the right which the shareholder has to participate according to the number of shares in the surplus profits of the corporation on a division, and in the assets or capital stock remaining after payment of its debts on its dissolution or the termination of its active existence and operation. *Plimpton v. Bigelow*, 93 N. Y. 592; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483. It is created by the joint action of the corporation and the shareholder. It imports a contribution to the capital stock made by the shareholder and accepted by the corporation. When a corporation has agreed that a person shall be entitled to a certain number of shares for a consideration permitted by law and executed by the person, those shares come into existence and are owned by him.

The statement in the certificate of incorporation or charter of the corporation that the capital stock is a designated amount divided into a certain number of shares, each of a named value, creates neither shares nor capital stock. It ex-

presses the power of the corporation to acquire a capital stock. It creates potential shares which, transferred into actual shares by the acquisition of members and their payments, produce the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the corporate business is undertaken and in which are the shares. It also fixes the sum of the payment necessary to create a share.

The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of those facts. It expresses the contract between the shareholder and the corporation and his co-shareholders. But it is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership. *Burrall v. Bushwick R. Co.* 75 N. Y. 211; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Southworth v. Morgan*, 205 N. Y. 293, — L.R.A. (N.S.) —, 98 N. E. 490; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Dayton v. Borst*, 31 N. Y. 435; *Flour City Nat. Bank v. Shire*, 88 App. Div. 401, 84 N. Y. Supp. 810, affirmed in 179 N. Y. 587, 72 N. E. 1141. In the last case cited, Judge Hiscock, then Justice Hiscock, writing for the court, said: "The company having thus acquired property under an agreement to give therefor to various people certain interests or shares in its capital stock, we think that such latter persons, immediately upon the acceptance of transfers by the corporation, became entitled to and vested with said interests or shares, and that no further steps were necessary to accomplish this latter result. It may be admitted at once that ordinarily the corporation would issue certificates for these shares of capital stock, but it is too well settled to permit of doubt that said certificates would be merely representative of, and not the real interest in, the property and assets of the corporation constituting its actual capital stock."

Each of the four corporations became, upon the transfer of its assets to the plaintiff, the owner of the shares of the capital stock of the plaintiff, which were the consideration for it. The transaction did not involve a transfer of those shares. The shares were not transferred to the vendor corporation by plaintiff; they were created by the transaction. At no time were they owned by the plaintiff. At the instant of their creation they were owned by the vendor corporation, which might at any time thereafter transfer them, and any transfer of them by it would be subject to the tax imposed by said § 270.

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The four corporations did not transfer the shares owned by them to the trust company. They caused the record title to them to be placed in the trust company temporarily and for an expressed and limited purpose. They remained the owners of the stock. Their ownership was subject to the right of the trust company to vote the shares at corporate elections; but the power to transfer the shares, subject to the right of the trust company to vote them, remained in the corporations. The trust company could not sell or agree to sell the shares. It had no assignable interest in them. It had evidence in the certificate that it as trustee held the legal title, but this was notice of the existence of the trust agreement which disclosed the ownership of the corporations.

The valid request of each of the four corporations to the trust company, that it issue its certificate to each of the holders of shares of the stock of those corporations for shares of the stock of the plaintiff proportionate to his holding, and the compliance of the trust company, was a transfer of the shares by the corporations to their shareholders. Upon the completion of those acts, the corporations ceased having the right to receive the dividends declared upon those shares, and the shareholders acquired it. The ownership of the shares is in their stockholders severally, as certified by the trust company, by virtue of the assignment of it, inherent in the request and the execution of the request by the trust company. The appellant does not assert or claim that the corporations own the shares. It, on the contrary, concedes that their shareholders are the owners, but asserts that they were such through and from the time of the purchase by the plaintiff of the assets of the corporations, and therefore there was no transfer of the shares from the corporations to them,—an assertion erroneous, as already stated.

The appellant urges, with ability and earnestness, that if the four corporations did in the first instance own the shares, the transfer of them to the shareholders was a division among the true owners of their own property, and therefore not a taxable transfer. Without deciding whether or not the conclusion correctly expresses the law, it suffices in this case to point out that the premise given for its support is fallacious. While conditions may exist under which equity will consider the shareholders as the proprietors and the ultimate beneficiaries of the corporate interests, the fact is that a corporation is an individual being, incapacitated through statutory powers to acquire the title to, own, and dispose of real and personal property, enter into contracts, engage in business, sue and be sued and

taxed. It is the owner of all the corporate property, real and personal, and within the powers conferred upon it by the charter can deal with it as absolutely as a private individual can with his own. The whole title to it is in the corporation, and the shareholders are neither tenants in common nor in any legal sense the owners of it. *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Lowry v. Farmers' Loan & T. Co.* 172 N. Y. 137, 64 N. E. 796; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *Buffalo L. T. & S. D. Co. v. Medina Gas & Electric Light Co.* 162 N. Y. 67, 56 N. E. 505. A shareholder cannot acquire title to any of the property of the corporation through the operation of the law as an administrator acquires the title to the personal property of his intestate. A corporate act alone can effect that result. When the act, as did the act in the present case, transfers to the shareholders shares of the capital stock of another corporation, it is taxable under said § 270.

The judgment should be affirmed, without costs.

Cullen, Ch. J., and Werner, Cuddeback, and Miller, JJ., concur.

Gray and Hiscock, JJ., dissent.

NORTH DAKOTA SUPREME COURT.

GEORGE HOUSTON, Respt.,
v.

MINNEAPOLIS, ST. PAUL, & SAULT
STE. MARIE RAILWAY COMPANY,
Appt.

(— N. D. —, 141 N. W. 994.)

Appeal — denying judgment non ob- stante.

1. An order denying a motion for judgment *non obstante* is nonappealable.

Same — power to order judgment non obstante.

2. Held, construing § 7044, Rev. Codes 1905, that this court in a proper case has power on appeal to order judgment *non obstante veredicto*, although no motion was made in the lower court for judgment notwithstanding the verdict, or for a new trial.

Headnotes by FISK, J.

Note. — As to liability of private person or corporation for acts of special police officer appointed by public authority, see notes to *McKain v. Baltimore & O. R. Co.* 23 L.R.A.(N.S.) 289; *Pennsylvania R. Co. v. Kelly*, 30 L.R.A.(N.S.) 481; *Taylor v. 46 L.R.A.(N.S.)*

Same — motion to dismiss — failure to narrate testimony.

3. Where, as in this case, the testimony is very brief and consists of but a few printed pages, a motion to strike the statement from the abstract for failure to conform strictly to rule 7 of this court, requiring such testimony to be reduced to the narrative form, will be denied.

Master and servant — arrest by serv- ant — liability of master.

4. Plaintiff, who was a passenger on defendant's train from B. to M., was wrongfully arrested, at the instance of defendant's conductor, about five minutes after alighting from the train at M., and while standing on the depot platform conversing with his companions. Held, for reasons stated in the opinion, that whether, at the time of such arrest, plaintiff's status as a passenger had ceased so as to exonerate the company from any duty as a carrier towards him, was, under the facts disclosed by the evidence, not material or controlling, as such conductor was not at the time acting for the company, but as a policeman for the state, pursuant to the duty imposed upon him under the provisions of chapter 228, Laws 1911, and the company is not liable for his acts.

(May 3, 1913.)

APPEAL by defendant from a judgment of the Ward County Court in plaintiff's favor in an action brought to recover damages for wrongful arrest for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Alfred H. Bright and John L. Erdall, with Messrs. Palda, Aaker, & Greene, for appellant:

Plaintiff was not a passenger.

Ware v. Barataria & L. Canal Co. 15 La. 169, 35 Am. Dec. 201; 2 *Hutchinson*, Carr. § 1099; 4 *Elliott*, Railroads, ¶ 1592; *Glenn v. Lake Erie & W. R. Co.* 165 Ind. 659, 2 L.R.A.(N.S.) 872, 112 Am. St. Rep. 255, 75 N. E. 282, 6 Ann. Cas. 1032, 19 Am. Neg. Rep. 7; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; *Chicago, R. I. & P. R. Co. v. Wood*, 44 C. C. A. 118, 104 Fed. 663.

Mr. E. R. Sinkler, for respondent:

The company is liable for the wrongful acts of its agents acting as peace officers.

King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42; *Gillingham v. Ohio River R. Co.* 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; *Schmidt v. New*

York & L. B. R. Co. 39 L.R.A.(N.S.) 122, and *New York C. & St. L. R. Co. v. Fieback*, 43 L.R.A.(N.S.) 1164.

Generally, as to liability of carrier for arrest of passenger, see Index to L.R.A. Notes, Carriers, §§ 15, 15a.

Orleans R. Co. 116 La. 311, 7 L.R.A. (N.S.) 162, 40 So. 714; Elser v. Southern P. R. Co. 7 Cal. App. 493, 94 Pac. 852; Eichen-green v. Louisville & N. R. Co. 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219; Palmeri v. Manhattan R. Co. 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; Krulevitz v. Eastern R. Co. 143 Mass. 228, 9 N. E. 613; Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 77, 43 Am. Rep. 141; Rown v. Christopher & Tenth Street R. Co. 34 Hun, 471.

If, at the time of the arrest of plaintiff, the relationship of carrier and passenger existed, then the defendant would be liable. The relationship of passenger and carrier existed at the time of the arrest.

Powell v. Philadelphia & R. R. Co. 220 Pa. 638, 20 L.R.A. (N.S.) 1019, 70 Atl. 268; Houston & T. C. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902; Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A. (N.S.) 881, 128 N. W. 1023; Hodges v. Southern P. R. Co. 3 Cal. App. 307, 86 Pac. 620; Chicago, R. I. & P. R. Co. v. Wood, 44 C. C. A. 118, 104 Fed. 663; Texas & P. R. Co. v. Dick, 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196; St. Louis South Western R. Co. v. Wallace, 32 Tex. Civ. App. 312, 74 S. W. 586; McDade v. Norfolk & W. R. Co. 67 W. Va. 582, 68 S. E. 378.

On rehearing.

If the conductor was not acting as an officer of the state, then the unlawful arrest of plaintiff at the instigation of the conductor while the relationship of passenger and carrier existed, created a liability on the part of the defendant.

Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 800, 29 Am. St. Rep. 827, 14 S. E. 243.

Revised Codes, § 9755, makes the company liable for all acts of peace officers.

One of the purposes of § 9755 was to do away with the doubt and confusion as to where the line of demarcation lay between when the conductor is acting for the state, and when he is acting for the company.

McKain v. Baltimore & O. R. Co. 65 W. Va. 233, 23 L.R.A. (N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634; King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42.

Fisk, J., delivered the opinion of the court:

This action was tried in the county court of Ward county before a jury, and resulted in a verdict in plaintiff's favor for the sum of \$750, on October 31, 1911. Thereafter, 46 L.R.A. (N.S.)

and on December 28th, judgment was duly rendered on such verdict. On December 4th counsel for defendant served upon plaintiff's attorneys a notice that on December 12th they would make a motion for judgment in favor of defendant notwithstanding the verdict, and for an order granting a new trial, in the event such motion for judgment should be denied. Such motion designated but one ground thereof, to wit, insufficiency of the evidence to justify the verdict. On January 12, 1912, the parties appeared before the court, whereupon counsel for defendant moved the court for judgment notwithstanding the verdict, without incorporating therewith a motion for a new trial. Objections were filed by plaintiff's counsel to the hearing of such motion, upon the ground that it came too late, and that no notice of intention to move for a new trial was ever served. Thereupon the trial judge made an order denying the motion, and the defendant attempts to appeal from such order, as well as from the judgment.

The order, if treated merely as an order denying the motion for judgment notwithstanding the verdict, is nonappealable, as we have recently held in *Turner v. Crumpton*, — N. D. —, 141 N. W. 209.

It is unnecessary, however, to waste any time upon such question of practice, for the only propositions attempted to be urged by appellant by its motion are raised on the appeal from the judgment, namely, that the court erred in denying defendant's motion for a directed verdict at the close of the testimony. If the trial court should have directed a verdict, this court has the power to do so on the appeal from the judgment, even though no motion was made in the lower court for judgment notwithstanding the verdict, or for a new trial. Such appears to be the plain provision of § 7044, Rev. Codes 1905.

This brings us to a consideration of the appeal from the judgment. Respondent has made a motion in this court to strike out the statement of the case for failure to comply with rule 7 of this court (10 N. D. xli., 91 N. W. vi.), which requires the testimony to be reduced to narrative form. While this court will ordinarily require a strict compliance with such rule, as held in numerous cases, yet, owing to the exceptionally short record, the testimony in which comprises but a few pages, we have concluded not to enforce such strict compliance in the case at bar. The only testimony introduced is that of the plaintiff, defendant offering no testimony whatever; and the only specifications of error incorporated in the settled statement are predicated upon the rulings of the court in denying defendant's motions for a directed verdict.

Plaintiff testifies, in substance, that on July 22, 1911, he was a passenger on one of defendant's passenger trains en route from Burlington to Minot, having purchased a ticket at Burlington entitling him to ride on such train to Minot. During such trip one Ole Johnson, also a passenger on said train, approached plaintiff and offered him a drink, which plaintiff declined, whereupon the conductor of the train jumped up and grabbed the bottle from Johnson and kept it, saying at the same time, "When I get to Minot I will have you fellows arrested." He also testified that, upon the arrival of the train at Minot, he and his companions alighted from the train to the depot platform, but saw no officer there at the time. A few minutes thereafter an officer arrived, and the conductor pointed to plaintiff and two companions, saying, "That is them there;" whereupon the officer said to plaintiff and such companions, "Come with me;" and they were arrested and taken to jail. While the officer was taking these parties away from the depot, said conductor, holding the bottle in his hand, said, "Here is enough to convict the boys." Upon arrival at the jail plaintiff and his companions were incarcerated therein, where they were confined from about 1 o'clock P. M. until about 7 P. M., when they were released. On cross-examination plaintiff testified that it was about five minutes, as near as he could judge, from the time he left the train until the arrest was made, and that he had no business which detained him, or kept him waiting on the depot platform during such interval of five minutes, and the only reason he gave for remaining there was that he and his companions were "just talking back and forth is all I know." The cross-examination of plaintiff discloses that the bottle in question contained whisky.

The foregoing is all the testimony which is material to the question involved. At the close of such testimony, the defendant's counsel moved for a directed verdict upon the ground "that the testimony on the part of the plaintiff is wholly insufficient to establish a cause of action, the issue as alleged in the complaint, or otherwise; it appearing from the testimony that no officer or employee in charge of the train, or in the employ of the defendant, arrested, in the course of the discharge of any duty or obligation of his to the company, the plaintiff in this case, or that he arrested him at all. The complaint charges that the defendant, through its servants and employees on the occasion described, did wrongfully assault and arrest the plaintiff and deprive him of his liberty, which allegation is wholly unsupported by any evidence so far offered or by any evidence offered by the plaintiff."

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Such motion was denied and an exception taken, and this ruling is the sole error specified in the settled statement of the case. While one of the assignments of error in appellant's brief is that the court erred in overruling appellant's motion for judgment notwithstanding the verdict, such assignment is not properly before us for reasons heretofore stated.

Was it error to deny defendant's motion for a directed verdict? This is the sole question in the case. Counsel for appellant argue that the proof discloses that prior to the arrest the relation of carrier and passenger between defendant and plaintiff had ceased, and consequently that defendant owed plaintiff no duty which such a relation might impose upon it. That any act of the conductor performed towards or connected with such arrest five minutes after plaintiff alighted from the train, and while he was on the depot platform, was without the scope of his duty as defendant's servant, and consequently defendant is in no manner accountable therefor. They, of course, concede the general rule of liability of a master for the wrongful acts of its servants when performed within the scope of such servants' employment. The crucial question on this appeal, therefore, is whether defendant is responsible for the acts of its conductor of which plaintiff complains. The appellant contends that no such responsibility exists if plaintiff, at the time of the arrest, had ceased to be a passenger, and further that the right of action alleged is founded upon such relation, and no recovery can be sustained if such relation had ceased at the time of the acts complained of. While, on the contrary, plaintiff contends that such is not a necessary or proper test of liability, and that defendant is liable under the undisputed facts, even though the court should hold, as a matter of law, that the relation of carrier and passenger had ceased at the time of such wrongful arrest.

As we view the matter, it is not material whether at the time of the arrest the status of plaintiff as a passenger had ceased, or had not ceased, for, under the plaintiff's own version of the facts, the company on no theory can be held liable for such arrest, for the obvious reason that such conductor, in doing what he did, was not acting for the company, but was discharging a duty imposed upon him by law. The acts complained of were not done within the real or apparent scope of the master's business, and consequently the latter cannot be held responsible for such acts, under any rule known to the law. Instead of acting, or assuming to act, for the company, such conductor was manifestly attempting to discharge what he deemed a duty imposed upon him by chap-

ter 228, Laws 1911. Section 1 of this law makes it a crime to publicly drink or offer to another any intoxicating beverage upon a train carrying passengers in this state, with certain enumerated exceptions. Section 2 confers police powers upon every passenger conductor, and makes it his duty, while thus engaged, to arrest any person who shall, in his presence or to his knowledge, violate the provisions of § 1, and to deliver such person to any policeman, constable, or other peace officer to be by him informed against and prosecuted. Is it possible that the common carrier can be held responsible for the faithful and proper discharge of such statutory duty thus imposed upon its servant? We think not, nor has the legislature by such act attempted to impose any such burden upon it. While acting in obedience to such statute, it cannot be said that the conductor is acting for the railway company at all. Such company has no control over him whatsoever while he is in the discharge of the duty thus imposed upon him by the sovereign power of the state. The authorities relied on the respondent are clearly distinguishable from the case at bar. They are cases where the servant, in doing the act complained of, was acting for the master, either within the actual or implied scope of his employment, or such acts were violative of the implied contract of the master for the protection of its passengers.

In announcing the foregoing conclusion, we are not unmindful of the numerous authorities holding a railway company liable for the acts of its servants committed within the scope of their authority, or even for acts which are done not for the benefit of the master or within the scope of authority, provided such acts are violative of the master's implied contract of protection and proper treatment of its passengers at the hands of its servants, which the courts generally hold is a part of the contract of carriage. The latter liability did not exist at common law; the rule formerly being that the master was not liable for the torts of a servant committed wilfully and not for the benefit of the master. This added responsibility of the carrier is not unjust or intrinsically harsh, for the carrier has a measure of protection by using due care in the selection of its servants. A very different situation, however, is presented in the case at bar. Chapter 228, Laws 1911, creates a new offense, a new *malum prohibitum*, as above stated, which makes it unlawful to publicly drink or offer another an intoxicating beverage upon a railway train. It imposes no duty upon the railway company, but confers police power upon every conductor, and imposes a specific duty upon him with reference to the enforcement of

such law. In discharging such duty the conductor does so, not in order to protect the other passengers, nor to carry out the master's implied contract to protect such passengers, nor in violation of the protection which the company owes to the particular passenger, but, as before stated, at the behest and command of the sovereign state. He acts for the state, not the railway company, and the former's interests alone are controlling of his acts. The legislature, in its wisdom, saw fit to place the duty to enforce this law, not upon the railway companies, but upon their conductors. Their responsibility and duty in such cases is not to their companies, but to the state. It logically follows that the companies have no voice in the matter, and, even though deemed detrimental to their interest, the enforcement of said statute cannot in any legal manner be controlled by them. Manifestly, therefore, the framers of the statute in question never intended to impose a liability on the railway companies in such cases; it being clearly their intention that, in the enforcement of such statute, the conductor should be deemed an officer of the state, and not of the company.

There is no difference between this case and one where a constable or sheriff makes an arrest upon a railway train or at a railway station. In such a case it is clear that the railway company would not be liable for an abuse or an improper exercise of such official duty. It is very doubtful, indeed, whether the carrier could be legally subjected to such responsibility, but it is not necessary for us to determine such question, as by such statute the legislature has not attempted to do this. It would be different, as held in numerous cases, if the conductor had been vested merely with police powers to be exercised at his own or the company's behest, and for the benefit of the company. See 3 Elliott, Railroads, § 1265, and cases cited; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1. But it is held that where he may act in either one of two capacities, as a policeman for the state, or as a servant for the master, the presumption would be that he acted in the former capacity. Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479. See also Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188.

In Jardine v. Cornell, supra, we quote the following: "The act of the police in removing the plaintiff from the train to the station house was a continuous one; it was

their duty as officers of the law to do so, and it was not within the scope of their employment in enforcing the regulations of the railroad company. Upon an undisputed state of the facts, the question presented is for the court. Where a police officer takes a disorderly person from the scene of his disorder to the police station, it will be presumed to have been done in his official character, unless such presumption is repugnant to some rule of law, or is rebutted by the facts of the case."

Counsel for respondent calls our attention to § 9755 of the Revised Codes, which makes railroad companies responsible for the acts of its conductors or other persons employed by it while acting as peace officers under the provisions of article 8 of chapter 6 of the Code of Criminal Procedure. Such article authorizes railway companies, at their own expense, to employ persons as peace officers for the protection of their property or the preservation of order on their premises, etc., and it is perfectly proper that the legislature should have imposed upon the companies the responsibility for the acts of such peace officers. Manifestly, however, the provisions of article 8 aforesaid can have no application to the case at bar, for reasons which we think are made plain in a prior portion of this opinion.

We are agreed that, under the undisputed facts as narrated by the plaintiff, the recovery cannot be upheld, and that it was the duty of the court to have granted defendant's motion for a directed verdict.

The judgment is reversed, and the lower court will vacate the same and enter a judgment dismissing the action.

Petition for rehearing denied May 13, 1913.

OKLAHOMA COURT OF CRIMINAL APPEALS.

MRS. B. PUTMAN, Appt.,

v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 132 Pac. 916.)

Evidence — bawdyhouse — reputation.

1. In prosecutions for keeping a house of

Headnotes by FURMAN, J.

Note. — Necessity of corroborating evidence as to reputation of house to support a conviction of keeping a disorderly house.

As to the admissibility of reputation of a house upon the issue as to whether it is a disorderly house, there is a conflict of 46 L.R.A. (N.S.)

ill fame, it is competent to introduce evidence of the general reputation of the house in the neighborhood in which it is situated as to its being a place where lewd and lascivious persons of both sexes congregate for the purpose of unlawful cohabitation or sexual intercourse. But such evidence alone will not support a verdict. It must be corroborated by some other fact or circumstance tending to prove the character of the house.

Same — sufficiency.

2. For testimony which supports a verdict of guilty of keeping a house to which lewd and lascivious persons of both sexes congregate for the purpose of unlawful cohabitation, see opinion.

(June 7, 1913.)

A PPEAL by defendant from a judgment of the Garfield County Court convicting her of maintaining a bawdyhouse. Affirmed.

Statement by Furman, J.:

John H. Burford testified for the state that he, in company with H. L. Reynolds, visited the house kept by appellant in the city of Enid on the 2d day of July, 1911, about a quarter after 9 o'clock at night.

Witness then testified as follows:

A. Well, we walked up the stairway into this building, and at the head of the stairs this lady came and met us. She met us at the head of the stairs. I asked her if she was the proprietor, and she said, "Yes." I asked her if she knew of any rooming house for sale, and she said "Yes," and mentioned among them the Grand avenue and one right next to the postoffice. I believe that I will have to look at my notes in order to remember the name of it; anyhow, she mentioned the two, and then I asked her as to her house, if she would like to sell it, and she said, "No," and I asked her if she was doing well with it, and she said, "Yes." I asked her, "How do you manage to make it pay? Do you keep any girls?" She said "Yes." She pointed back to the front end of the hallway and invited us to go back. I says, "They seem to have company; I see a gentleman back there, a man or somebody." She said, "That's all right; that doesn't make any difference; go back." I walked back and had a seat, and so did Mr. Reynolds, and this gentleman

opinion, though the weight of authority favors its admission. See 14 Cyc. 504. But where such evidence is held to be admissible, the general rule is that such evidence is not alone sufficient to determine its character, although there are a few cases which hold the contrary.

In adhering to the general rule PUTMAN

that was sitting there got up and went into the room just across the way, on the southeast corner; it was the same room I had seen this woman go into.

Q. What woman are you speaking about?

A. I mean the one here. We sat and talked for some little bit. There was a small girl that I was talking to, and the girl that Mr. Reynolds was talking to was rather small. While we were talking, I overheard the girl that was talking to Mr. Reynolds insisting on him going to the room with her, and heard him ask her how much she wanted to charge him, and she said, "\$3," and they were jolly about

the price; that is about all I heard of their conversation.

Q. Well, what happened to them?

A. Well, after a little they got up and left and went into the second room from the front on the north side, near the head of the stairway.

Q. With reference to the room on the southeast side in which Mrs. Putman entered, how far was this room in which they entered?

A. Well, it was diagonally across the hall from where Mr. Reynolds and this girl entered, and was facing in the direction of that, and I should judge about—I should

v. STATE has the support of the following authorities:

Botts v. United States, 83 C. C. A. 646, 155 Fed. 50, 12 Ann. Cas. 271; *Hall v. United States*, 84 C. C. A. 215, 155 Fed. 52; *Lismore v. State*, 94 Ark. 207, 126 S. W. 853; *Cadwell v. State*, 17 Conn. 467; *State v. Blakesley*, 38 Conn. 523; *Jones v. State*, 2 Ga. App. 433, 58 S. E. 559; *McConnell v. State*, 2 Ga. App. 445, 58 S. E. 546; *Fitzgerald v. State*, 10 Ga. App. 70, 72 S. E. 541; *Watson v. State*, 10 Ga. App. 794, 74 S. E. 89; *Betts v. State*, 93 Ind. 375; *State v. Haberle*, 72 Iowa, 138, 33 N. W. 461; *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401, 45 N. W. 545; *O'Brien v. People*, 28 Mich. 213; *People v. Wheeler*, 142 Mich. 212, 105 N. W. 607; *State v. Hendricks*, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93; *Drake v. State*, 14 Neb. 535, 17 N. W. 117; *Nelson v. Territory*, 5 Okla. 512, 49 Pac. 920; *State v. Brunell*, 29 Wis. 435; *Rex v. Osberg*, 15 Manitoba L. Rep. 147, 1 West. L. Rep. (Can.) 121.

And in *State v. Bresland*, 59 Minn. 281, 61 N. W. 450, it was held admissible in corroboration of other evidence.

In *Botts v. United States*, 83 C. C. A. 646, 155 Fed. 50, 12 Ann. Cas. 271, and *Hall v. United States*, 84 C. C. A. 215, 155 Fed. 52, the general reputation was held to be insufficient, although by the Alaska Code "common fame is expressly made competent evidence in support of an indictment for keeping of a bawdyhouse for purposes of prostitution."

In the *Botts Case*, it was said: "If reputation alone is enough, then one may be tried and convicted of keeping a house commonly said to be a bawdyhouse for purposes of prostitution, regardless of the question whether or not the house involved in the inquiry is in fact bawdy and used for such immoral purposes. On principle such a rule would be dangerous, and we must decline to approve it. There should be some additional evidence of the immoral purposes for which the house is kept; and, while it may not seem always easy to obtain testimony of such purposes, as a practical affair it ought not to be difficult, provided the reputation is based upon facts. The very same circumstances that have given a place its ill repute would ordinarily

be ample additional evidence of the uses made of the house and the purposes for which it is kept. If men are seen going at unusual hours into a house where only women live; if obscene language and profanity are heard in the house; if drinking and boisterous conduct occur therein; if women clad in an unseemly way are about the premises; and if the women who live in the house are themselves reputed to be prostitutes,—these are all circumstances which, when considered with the general reputation of the place, justify the conclusion that such a house is kept for purposes of prostitution."

And a good reason for requiring corroboration of such evidence was stated in *Reg. v. St. Clair*, 3 Can. Crim. Cas. 557, 27 Ont. App. Rep. 308, that witnesses who speak simply to a general reputation, without being able to point to anything bad, may easily attribute the character of a common bawdyhouse or house of ill fame to a house to which, however irregular may be the life of its inmates, the law does not affix that character. The court further said that though the evidence of general reputation of a house is admissible, it was not prepared to say that such evidence alone would be sufficient to convict; that such a reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred; such as the character of the women as being common prostitutes, and the fact of men visiting the house at all hours, and dissolute and disorderly behavior there.

And so, in *State v. Anderson*, 82 Conn. 111, 72 Atl. 640, upon prosecution for keeping "a house which was, and was reputed to be, a house of ill fame," under chap. 122 of Public Acts of 1907 of Connecticut, which provides that anyone who shall "keep a house which is reputed to be a house of ill fame shall," etc., an instruction was held erroneous which in effect stated that it was a criminal offense and an offense charged in the information to keep a house which had a reputation, based upon the honest opinion of the neighborhood, that it was a house of prostitution; and that the accused could be convicted of that distinct offense, although the evidence including the reputation might not be sufficient to prove that.

judge, going diagonally, it must have been pretty nearly the width of two ordinary rooms or something like that, I would judge.

Q. What was the condition of her door with reference as to whether or not it was open at this time?

A. I noticed—

By Mr. Glasser: If the court please, the defendant objects to that question for the reason that it is a trifle leading and suggestive, incompetent, irrelevant, and immaterial.

By the Court: The question is leading.

Q. What was the condition of that door?

the house was in fact of the character it was reputed to be. The court said: "Upon such proof of reputation, in the absence of any other evidence of the true character of the place, the jury may convict the accused of keeping a house or place which is in fact of the character that it is reputed to be. When such evidence of reputation is offered, it must, either by itself or in connection with other evidence, be sufficient to satisfy the jury beyond reasonable doubt that the reputed character of the house or place in question was its true character. When evidence of the reputed character of the place is offered, it may always be met by evidence that such is not the real character of the place; and however complete may be the proof of reputation, there can be no conviction if it appears that the house or place is not in fact kept or used for the reputed immoral or unlawful purposes."

Some cases, however, hold that a conviction may rest upon evidence of the character of the house, without corroboration:

People v. Buchanan, 1 Idaho, 681; *Teritory v. Bowen*, 2 Idaho, 640, 23 Pac. 82; *State v. McDowell*, Dud. L. 346; *Morris v. State*, 38 Tex. 604; *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585; *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749; *Sara v. State*, 22 Tex. App. 639, 3 S. W. 339; *Forbes v. State*, 35 Tex. Crim. Rep. 24, 29 S. W. 784; *Ramey v. State*, 39 Tex. Crim. Rep. 200, 45 S. W. 489; *Moore v. State*, 53 Tex. Crim. Rep. 559, 110 S. W. 911 (*dictum*); *Owens v. State*, 53 Tex. Crim. Rep. 1, 108 S. W. 379 (*dictum*); *Burton v. State*, 16 Tex. App. 156 (*dictum*).

And *State v. Ballew*, 26 S. D. 494, 128 N. W. 716, prosecution for keeping house of ill fame, may perhaps be authority for the sufficiency of general reputation to characterize a house as a house of ill fame, as the court said that it was clearly shown by the evidence in that case that the house kept by accused was a house of ill fame, as a number of witnesses on the part of the state had testified that the house had the general reputation of being such a place.

In *Allen v. State*, 15 Tex. App. 320, in an *obiter* statement as to the admissibility and sufficiency of reputation to establish the character of a house as disorderly, it 46 L.R.A. (N.S.)

By Mr. Glasser: If the court please, I object to the form of the question, unless he states the condition with reference to what.

Q. What was the condition of that door with reference to whether or not it was open or shut?

By Mr. Glasser: The defendant objects to the question put in that form, for the reason it is leading.

By the Court: The objection is overruled.

By Mr. Glasser: To which ruling defendant excepts.

Q. State, if you know?

A. The door was standing open every time

was said: "It has been held time and again that proof by general reputation that the house is kept for prostitution is both admissible and sufficient to establish its character as a disorderly house," and cites among other cases, *State v. Smith*, 29 Minn. 193, 12 N. W. 524. An examination of that case will disclose that, while holding such evidence admissible, the court expressly stated: "We do not hold, however, that evidence of general reputation alone would be sufficient to establish the character of the place."

It will be noted that most of the cases which hold contrary to the general rule are Texas cases, and it would seem that many of them are decided on the principle of *stare decisis*; for in *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585, the court said that it is the settled doctrine in that state that the character of a house alleged to be disorderly house may be established by proof of its general reputation as such, and that it has been held that such proof is sufficient to warrant the jury in finding the house to be disorderly; and stated that, while this doctrine may be against the weight of authority, it is the established rule in that state, and it can see no good reason why it should be changed. The court based its reason for holding such evidence sufficient upon the fact that all the authorities hold it competent to prove the character of a house by proving the general reputation of its occupants for lewdness, and that it seemed to them that there is no material difference between proof of the character of the house and proof of the character of the occupants of the house. That the proof of one establishes the other.

But the court in this case did hold that an instruction that "proof of the general reputation of the house is sufficient to establish the character of the house," while correct in the abstract, was error as a charge upon the weight of evidence; that it was the province of the court to admit the evidence and of the jury to determine the sufficiency thereof. And in *Forbes v. State*, 35 Tex. Crim. Rep. 24, 29 S. W. 784, a similar charge was said to be obnoxious as a charge upon the evidence. J. H. B.

I saw it, but at the time he went in there I wasn't sitting where I could see.

Q. All right. Go ahead and tell what next happened.

A. They stayed in the room, I suppose, for twenty or thirty minutes and came out, and Mr. Reynolds came back and sat down, and the girl came out directly with either a slop bucket, or something with water in it, or something like that. During the time they were away, this little girl insisted on my going to room with her. Before they came back, the little girl went back up the hallway, and there was a girl and a man that entered the northeast room; that door was open all the while I was there.

Q. Do you remember in what position they were when you saw them?

A. I wouldn't say that the man was sitting down or standing up. I rather think that he was standing up dressing, and in his shirt sleeves; anyhow, he passed out of the room and I wouldn't say where he went; anyhow, this little girl walked down the hallway while Mr. Reynolds was in the room with the other girl, and she said to me, "Why don't you go on and spend some money with the little girl?" I says, "Well, I am not feeling very well this evening," or something like that; I don't know just what it was that I said. Now, I believe that that is about all that I do know about it.

Q. Did you see that girl again who was in company with a strange man who was dressing and who departed? Did you see her later, after he departed?

A. After the man departed?

Q. Yes, after he left.

A. Well, that is when I was sitting there talking to her and while the little girl was gone, she asked me why I didn't take the girl and spend some money with her; it was this little girl; she was sitting in a chair, as I remember, just inside the door; the woman was sitting, and I think the man was standing when we came up.

Q. Where did she go? Where did the girl go?

A. The little girl— I don't know other than she went— Let me see. I was trying to get at the direction.

Q. Do you know where she went?

A. Yes, sir; I do.

Q. Where did she go?

A. She went west; she went in the opposite direction from the front, down the hallway; I don't know where she went.

Q. Was she the girl who was in the room with the strange man?

A. The little girl was not; this larger girl was; the one that I talked to while the little girl was gone was the girl with the

man; she was sitting inside the door, and when the man left, and this little girl walked up the hallway, she talked to me.

Q. What did she say to you?

A. She said to me, among other things, "Why don't you take the little girl and spend some money?"

Q. Who said that?

A. This big girl that was in this room with this man.

Q. Who had left?

A. Yes, sir.

By Mr. Glasser: I think that this examination is as leading as it can be; this witness can tell what is necessary.

By the Court: Tell what happened there and relate the conversation as near as you can.

A. In our conversation, she remarked she was from Oklahoma City.

Q. Did you have any further conversation?

A. Yes, sir; we did.

Q. Can you remember what it was?

A. I can; yes, sir.

Q. What was that conversation?

A. I says, "Well, how do you find business up here to, or how is business here compared to what it is in Oklahoma City? Are you making much money up here?" She says, "I made something over \$60 this past month."

Q. This happened in what county?

A. It happened in Garfield county.

Q. In what state did it happen?

A. It happened in the state of Oklahoma.

Q. Do you remember the date?

A. I do remember it, yes.

Q. What was the date?

A. It was on the 2d day of July.

Q. Of what year was it?

A. Of the year of 1911.

Q. About what time that day was it?

A. It was about 9:15 o'clock in the afternoon.

H. L. Reynolds testified for the state as follows:

A. Mr. Burford and I went up the stairs which went through the center of the house, and at the head of the stairs we met the defendant, and Mr. Burford engaged her in conversation. I heard Mr. Burford ask her if she knew of any rooming houses for sale, and she answered that there were one or two, she thought; she named several, I think.

Q. Do you remember what next was said?

A. Yes, I remember about all the conversation that took place at that time.

Q. What was the next thing that was said?

A. He asked her if her rooming house was for sale.

Q. Did she reply to that?

A. She did.

Q. What did she say in reply to that?

A. She said, "No;" that she was doing a pretty good business.

Q. What was the next that was said between them?

A. Mr. Burford asked her if she depended upon her rooms for keeping up her house, or whether she kept some girls; she said, "Yes;" she had three girls, and she asked us if we wouldn't go back and talk with them. We went to the front of the building, and Mr. Burford, I think, was in the lead; there were two girls sitting there, and another man, and the man and Mrs. Putman went into the room to the south of the front there, and left Mr. Burford and I there with these two girls. In a few minutes another girl came out from the north room in front and sat down, and there were the three of us there and Mr. Burford, and I was talking to one girl there and Mr. Burford was talking to the other two; I don't know just what his conversation was with them; I was pretty busy myself, but some time during my conversation with the girl that I was talking to we were talking about Oklahoma City and different places and things in that place, and she asked me if I wouldn't go to bed with her and go to a room with her, and I asked her how much she wanted. We finally agreed upon the price.

Q. What was that price you agreed on?

A. It was \$2; we went to the room; this room was situated just west of the north room on the east side, and we used the second room on the north side from this end of the building.

Q. Did you both go in the room together?

A. Yes, sir; we did.

Q. What did you do while you two were in there?

A. While we were in there we had sexual intercourse and we came out; Mr. Burford and I left the building.

Q. What took place in that room?

A. Why, we had sexual intercourse.

Q. Do you remember any conversation which she had with you at that time?

A. I couldn't state just the conversation; I think she intimated that she had seen me in Oklahoma City, and I may have stated that I had been there.

Q. She said she thought she had seen you there?

A. She said, anyhow, that she thought she had seen me down there. As we were going out of the door, she said, "You are not a gentleman if you turn me in."

Q. Where did you go next?

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A. Well, do you mean after I left the room? Do you mean where I went next after I left the room?

Q. Yes. Where did you next go after leaving the room?

A. Well, I entered the hall and called for Mr. Burford.

Q. Then what did you do?

A. We then left the building.

Q. This happened in what county, Mr. Reynolds?

A. It happened in Garfield county.

Q. In what state did it happen?

A. In the state of Oklahoma.

Q. On what date did it take place?

A. The date was the 2d day of July.

Q. Now, about what time did it happen?

A. It happened about 9:15 o'clock P. M.

P. Chaney testified for the state that he resided in the city of Enid for eighteen years, and that he was acquainted with the house kept by appellant, and that it had the general reputation in that community of being a place where lewd and lascivious persons of both sexes congregated for the purpose of unlawful cohabitation or sexual intercourse. To this counsel for appellant objected upon the ground that the evidence was incompetent, irrelevant, and immaterial, and for the further reason that a house cannot have a reputation; which objection was by the court overruled, to which action of the court appellant excepted.

W. J. Roberts testified for the state that he had lived in the city of Enid between thirteen and fourteen years, and knew the house kept by appellant and that it had the general reputation in that community of being a house where lewd and lascivious persons of both sexes congregated for unlawful cohabitation or sexual intercourse, to which evidence appellant objected upon the ground that it was incompetent, irrelevant, and immaterial, and for the further reason that a house cannot have a reputation, which objection was overruled by the court, to which action of the court counsel for appellant excepted. The state here rested.

Appellant testified in her own behalf that she was keeper of the house in question and had kept said house for about a year, and that on the night when the house was visited by Burford and Reynolds there were only three girls there. One was named Clara Brown, who said she was from Oklahoma City; the other was a Mrs. Farris, who claimed to live in El Reno, and who said she was in Enid for the purpose of visiting her husband, who was also in the house at that time; and the other girl was named Maud, who had been in the employ of appellant several months as a chambermaid; that Clara Brown had previously been at the

house of appellant two weeks and had come back that way on her way from Oklahoma City to Joplin, Missouri; that appellant was a married woman, who was divorced from her husband, and that she had been operating and managing rooming houses in the city of Enid for eight years; that, if any of the girls stopping at the house of appellant had ever been guilty of immoral practices there, she did not know it. Appellant did not deny the conversation of the witnesses Burford and Reynolds, as testified to by them. Appellant did not offer any evidence as to the reputation of the house or as to the character or business of the persons who patronized it.

Mr. Harry O. Glasser for appellant.

Messrs. Smith C. Matson and Joseph L. Hull for the State.

Furman, J., delivered the opinion of the court:

Upon the authority of *Carroll v. State*, 4 Okla. Crim. Rep. 242, 111 Pac. 1021, and *Smith v. State*, 6 Okla. Crim. Rep. 380, 118 Pac. 1003, the judgment of conviction in this case should be affirmed without a written opinion. But as a matter of respect for the earnestness and zeal which counsel for appellant has manifested in this cause, and the courtesy and ability with which he has presented his contention before the court, we will treat the questions involved as though they were of first impression.

The arguments advanced by counsel for appellant may be grouped under the general objection that the verdict of the jury is contrary to the law and the evidence. The legal question presented in the language of counsel for appellant is "that a house itself cannot have a reputation," and that therefore the court erred in admitting the testimony that the house kept by appellant had the general reputation in that community of being a house where lewd and lascivious persons of both sexes congregated for unlawful cohabitation or sexual intercourse. We concede that the position assumed by counsel for appellant is plausible upon its face, and that it is supported by respectable authorities. Upon an examination it will be found that the cases supporting this contention are all from states in which the common-law doctrine of a strict construction of penal laws is in force, which compels a very narrow view of such matters. But this doctrine is not in force in Oklahoma. On the contrary, it is repealed by the express language of our statute, which requires that all statutes shall "be liberally construed with a view to effect their objects and to promote justice." Rev. Stat. 1910, § 2948. It was in obedience to this statute

that in the case of *Buchanan v. State*, 4 Okla. Crim. Rep. 645, 36 L.R.A.(N.S.) 83, 112 Pac. 32, this court disregarded the great weight of common-law authorities upon the question of construing statutes. Under this statute we have repeatedly held that the *corpus delicti* may be proven by circumstantial evidence. See *George v. United States*, 1 Okla. Crim. Rep. 307, 97 Pac. 1052, 100 Pac. 46; *Brown v. State*, — Okla. Crim. Rep. —, 132 Pac. 359.

In the case of *Stewart v. State*, 4 Okla. Crim. Rep. 564, 32 L.R.A.(N.S.) 505, 109 Pac. 243, and in the case of *State v. Coyle*, 7 Okla. Crim. Rep. 50, 122 Pac. 243, and in the same case on motion for rehearing, 8 Okla. Crim. Rep. 686, 130 Pac. 316, this court held that an offense may be created by defining it by a particular description of the act or acts constituting it, or by defining it as any act which produces, or is reasonably calculated to produce, certain defined or described results. In fact, without a single exception, this court has always held that the penal laws of this state are to be given that reasonable and liberal construction which will enable them to reach and destroy the evils at which they are aimed. For these reasons the authorities cited by counsel for appellant are not applicable to the question now before us. But, even if they were based upon statutes in all respects similar to ours, we would not feel disposed to follow them, unless we understood and approved the principles upon which they are based. In the early case of *Slater v. United States*, 1 Okla. Crim. Rep. 275, 98 Pac. 110, this court said: "Precedents should be weighed, and not counted," and "a multiplicity of errors does not make right that which is predicated upon false premises, and which was therefore wrong at its inception." We then declared that we would not follow any precedents, it mattered not by what court established, unless they met with our approval, as a matter of principle. The habit of blindly following and parrot-like repeating precedents without reference to the principles upon which they are based is the cause of most of the confusion and conflicts which now exist among the decisions of the American appellate courts. One practical illustration is worth a thousand theories. Experience is the acid test of any theory.

A few illustrations will demonstrate the fallacy in the reasoning of the cases relied upon by counsel for appellant. What is known as the social evil is the greatest danger which now threatens the integrity of society and the purity of the home. It presents itself in many different forms. At first the evil was local in its character and was confined to ordinary bawdyhouses kept

by individual proprietors. Then the rule contended for by counsel for appellant might have been sufficient. But in the development of crime it has gone far beyond this. In the underworld to-day it is recognized as a regular matter of commerce, and trusts are organized for its exploitation, and immense sums of money are made thereby. Thus it has grown to become the infamy of the infamous. The greatest states in the Union and the Congress of the United States have been compelled recently to pass stringent legislation against the spread of this vice and its attending enormity, the white slave trade. The old doctrine of the common law, that the reputation of a house could not be proved, will not begin to meet and check the evil as it presents itself to-day. It is a fact so well known in all large cities that courts take judicial knowledge of it that houses of ill fame are established and kept where notoriously lewd persons of either sex are permitted to remain. These establishments are exclusive in their character, and present an air of gentility and imminent respectability. They are patronized only by persons of both sexes who live double lives and against whose virtue nothing is publicly known. Eminent and unsuspecting girls are inveigled into such establishments, and their ruin is accomplished. Men and women of supposed respectability and virtue, and against whose reputation no legal evidence could be obtained, visit these houses for the purpose of indulging in unlawful sexual intercourse. This is really the most insidious and dangerous form in which the social evil presents itself. It is more dangerous to a community than a pesthouse of leprosy would be. If the general reputation of such a house is not admissible in evidence against its keeper, it would be almost impossible for the state to secure a conviction, and a community in which it was established would be unable to relieve itself of this airhole of hell and recruiting office for perdition. The men who patronize such houses generally occupy respectable positions in society. The women who accompany them are generally so heavily veiled as to make recognition impossible; but, if recognized, many, if not all of them, will be found to occupy respectable positions in society. So the state would be forced to rely largely upon the reputation of such a house to support a prosecution. The practical effect of the position of counsel for appellant would be to grant immunity to the keepers of such houses, it matters not where located. But again, if we recognize the doctrine contended for by counsel for appellant, it would place it in the power of those who control these houses to organize a vice trust in Oklahoma, and

by changing the women kept in ordinary bawdyhouses from one town to another, and not allowing them to remain in one place long enough for their true character to become generally known, and thereby the evidence which the authorities relied upon by counsel for appellant recognize as proper could not be obtained by the state. Again, in the case of *Nelson v. Territory*, 5 Okla. 512, 49 Pac. 920, relied upon by counsel for appellant, it is expressly stated: "It is competent for the prosecution to show that the house is resorted to by people of both sexes who are reputed to be of lewd and lascivious character. From evidence of the general reputation of the inmates and persons who resort thereto, as being of lewd and lascivious character, the law will infer that such characters resort thereto for lewd and immoral purposes."

If the reputation of those who resort to the house may be proven, why may not the reputation of the house itself be proven? If this inference can be drawn from the character of the persons who resort to such houses, why can it not be drawn from the character of the house to which they resort? If children go to a building which has the reputation of being a schoolhouse, does not this raise the inference that they are going there for the purpose of being educated? If entire strangers are seen to enter a house on Sunday which has the general reputation of being a church, would this not raise the inference that they were going there for the purpose of engaging in religious services? Do ladies go to drug stores to purchase millinery, or go to millinery stores to purchase drugs? As a matter of principle, we are unable to recognize the doctrine established in the authorities relied upon by counsel for appellant. But we are gravely told that the character of a house of ill fame can be established by proving that the inmates have been fined in the police courts as prostitutes. In police courts the fact that a woman resides in or resorts to a house of ill fame is conclusive of the character of the woman. According to the position of counsel for appellant, while the reputation of a house may not be admissible in the first instance, yet, after it has received the seal of approval of the police court, it then becomes competent in a court of record. If this court refuses to blindly follow the decisions of the appellate courts of other states, we would instantly assume a ridiculous position if we allowed ourselves to be bound by the decisions of a police court. So as a matter of principle we submit the cases relied upon by counsel for appellant will not stand the test of reason.

But we are told that the character of a defendant is never admissible in evidence

unless he first raises this issue. There are two conclusive answers to be made to this objection: First. The evidence in question does not go as to the personal character of the defendant, but goes alone to the reputation of the house she is charged with keeping, and this is the essence of the crime alleged, without reference to her personal character. It is true that the character of a defendant cannot be attacked, as a general rule of law, unless it is first placed in issue by the defendant; but like all other general rules this has its exceptions.

Mr. Wigmore, in the second volume of his work on Evidence, § 1620, under the head of "Keeping a House of Ill Fame, or a Disorderly House," says: "Having regard to the circumstances from which such a reputation arises, and the difficulty in obtaining other evidence in the ordinary way from unimpeachable witnesses, it seems unquestionable that reputation should be admitted as trustworthy and necessary evidence."

We find the following in the Encyclopedia of Evidence, vol. 4, p. 725: "Whether reputation is admissible to prove that a house is disorderly is a question concerning which the cases are conflicting. But the weight of authority seems to be that evidence of reputation is admissible to prove the character of a house, and particular acts of lewdness or prostitution need not be proved. California.—*Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207. Connecticut.—*State v. Main*, 31 Conn. 572; *State v. Morgan*, 40 Conn. 46; *Cadwell v. State*, 17 Conn. 467. Dakota.—*Territory v. Stone*, 2 Dak. 155, 4 N. W. 397; *Territory v. Chartrand*, 1 Dak. 379, 46 N. W. 583. Florida.—*King v. State*, 17 Fla. 183. Georgia.—*Hogan v. State*, 76 Ga. 82. Idaho.—*People v. Buchanan*, 1 Idaho, 681; *Territory v. Bowen*, 2 Idaho, 640, 23 Pac. 82. Indiana.—*Detts v. State*, 93 Ind. 375; *Whitlock v. State*, 4 Ind. App. 432, 30 N. E. 934; *Grater v. State*, 105 Ind. 271, 4 N. E. 461. . . . Massachusetts.—*Com. v. Kimball*, 7 Gray, 328; *Com. v. Cardoze*, 119 Mass. 210. Michigan.—*O'Brien v. People*, 28 Mich. 213. Minnesota.—*State v. Bresland*, 59 Minn. 281, 61 N. W. 450; *State v. Rockards*, 21 Minn. 47; *State v. Smith*, 29 Minn. 193, 12 N. W. 524. Montana.—*State v. Hendricks*, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93. Nebraska.—*Drake v. State*, 14 Neb. 535, 17 N. W. 117. New Jersey.—*Jannone v. State*, — N. J. L. —, 45 Ala. 1032. Rhode Island.—*State v. Hull*, 18 R. I. 207, 20 L.R.A. 609, 26 Atl. 191, 10 Am. Crim. Rep. 427; *State v. Towler*, 13 R. I. 661. South Carolina.—*State v. McDowell*, Dud. L. 346. Texas.—*Sara v. State*, 22 Tex. App. 639, 3 S. W. 339; *Harkey v. State*, 33 Tex. Crim. Rep. 100, 47 Am. St. Rep. 19, 25 S. W. 291; *Golden v. State*, 34 46 L.R.A. (N.S.)

Tex. Crim. Rep. 143, 29 S. W. 779; *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749; *Sylvester v. State*, 42 Tex. 496, 1 Am. Crim. Rep. 350; *Morris v. State*, 38 Tex. 604; *Allen v. State*, 15 Tex. App. 320; *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585. Wisconsin.—*State v. Brunell*, 29 Wis. 435." On the same subject under the head of bawdyhouses, on page 503 in volume 14 of Cyc., we find the following: "Under common-law principles it would seem that evidence of the general reputation of a house would be inadmissible upon the issue of whether it is a bawdyhouse, and so quite a number of authorities hold; but very many authorities hold that the reputation of the house is admissible."

The terms "bawdyhouse" and "disorderly house" are used interchangeably and mean the same thing.

In the case of *State v. Main*, 31 Conn. 572, that court said: "3. Evidence of the reputation of the house prior to the discontinuance of the first prosecution was properly received. In the case of *Cadwell v. State*, 17 Conn. 467, it was held that evidence of the reputation of the house prior to the commission of the offense as charged in the information, and even prior to the enactment of the statute on which that prosecution was founded, was admissible to prove its reputation at the time of the offense committed, because, as remarked by Judge Storrs, 'evidence of the reputation of the house previous to a particular time fairly conduced to show its reputation afterwards.'"

In the case of *Territory v. Chartrand*, 1 Dak. 383, 46 N. W. 584, the court said: "The first error assigned is this: That the court erred in admitting evidence to show the general reputation of character of the house kept by defendant. In disposing of this question, it is understood, as the fact appears, that the defendant was the proprietor or keeper of the house in question. That fact being established, both upon principle and authority, we think the testimony competent. Acts of adultery, acts of lewdness, acts of prostitution, are not acts to which the perpetrators give publicity or notoriety. Shameless and degraded indeed must this class of criminals be who will not by all the means within their power conceal and hide their shame. Nor is it a crime which ordinarily will be attended with such circumstances as is calculated to lead to exposure and detection. No immediate death or fatal shot will invite public attention to criminals. From the necessity of the case, therefore, we are unanimously of the opinion that this testimony was properly received."

In the case of *King v. State*, 17 Fla. 191, the court said: "We are aware that the

courts of some of the states have held that evidence of reputation of the house as a house of ill fame is not admissible, but believe the better rule to be that adopted in Connecticut. In that state the language of the statute is precisely similar to our own, 'keeping a house of ill fame resorted to for the purposes of prostitution or lewdness;' and the courts of that state have held that by force of these particular words, it is both permissible and necessary to prove the reputation of the house."

In the case of *Betts v. State*, 93 Ind. 376, that court said: "Bouvier, in his Law Dictionary, defines a 'bawdyhouse' as being 'a house of ill fame, kept for the resort and unlawful commerce of lewd people of both sexes;' and other law dictionaries and law-writers give substantially the same definition. Accepting this definition as sufficient, it has been held, and we have no doubt correctly, that the terms 'bawdyhouse' and 'house of ill fame' are synonymous. *State v. Boardman*, 64 Me. 523, 1 Am. Crim. Rep. 351. Webster's Dictionary, in giving the meaning of 'bawdyhouse' treats the term 'house of ill fame' as its synonym. A 'house of ill fame' may therefore be said to be a 'bawdyhouse kept for the resort and unlawful commerce of lewd people of both sexes.' The words 'house of ill fame' has consequently a well-defined legal, as well as generally accepted, meaning. We see no objection to the sufficiency of the indictment. At the trial one Miller was examined as a witness for the state. He stated that he had been acquainted with the defendants since about the 1st of April, 1882; also with the house in which they had lived, as well as the reputation of that house during that period. Over the objection of the defendants, he was permitted to further state that 'the general reputation of that house was that it was a house of ill fame, a house of prostitution,' and complaint is made that this evidence ought to have been excluded. The authorities are not entirely in accord upon the admissibility of such evidence in a case like this, but we think the decided weight of authority is in favor of its admissibility. Moore's Criminal Law states the rule to be that 'a house of ill fame may be proved to be such by direct evidence, or by reputation, or by circumstances; as, that the inmates were reputed to be prostitutes, or that prostitutes and libertines frequented it, or that lewdness took place therein;' and numerous authorities are cited in support of these several propositions. See Moore, Crim. Law, § 1072, and notes. *State v. Brunell*, 29 Wis. 435, one of the cases cited by Moore, holds that, in a prosecution for keeping a house of ill fame, the state must first prove that the person charged kept the

house in question; that the general reputation of the house, and of its frequenters and the defendant, may then be shown, and, if these satisfy the jury that the house was kept and resorted to for the purposes of prostitution and lewdness, they may so find without proof of particular acts of prostitution or lewdness occurring in the house. But that proof that the house was reputed to be a house of ill fame, or that its frequenters and the defendant were persons of bad character for chastity and virtue, is not conclusive of the defendant's guilt. Such facts constitute only circumstances proper to be considered by the jury. That case impresses us as one that may be safely followed in this state, and fully sustains the admissibility of the evidence of Miller, objected to as above."

In the case of *State v. McDowell*, Dud. L. 346, the supreme court of South Carolina, in an opinion by Justice O'Neal, said: "When it is shown that their houses were notorious—that is, known to the whole community—as common bawdyhouses, it is the same thing as if it was proved that over the door of each house was written in the abominable law word, 'bawdy within.' Look to the reason why the law punishes the offense. It is because such houses may draw together dissolute and disorderly persons, to the danger of the public peace, and may corrupt the manners of both sexes. Is not a house, notorious as a bawdyhouse, the very thing to attract dissolute and disorderly persons, and is it not the very thing to corrupt the manners of both sexes? To say that there is any danger of a virtuous woman being convicted on such testimony is utterly absurd. She cannot even be suspected until she has lost her character, and she cannot be convicted until she occupies a position furnishing flagrant proof. But, if such a charge should even be made against a virtuous woman, her character will be her shield: and in her vindication she may examine into the foundation and truth of every particular on which such a charge may be made. I think, too, a decent regard to good morals should always be had in requisition and adduction of evidence in a court of justice. Every corrupting fact which can be supplied by general proof should be excluded. The general proof here is just as satisfactory as the most direct proof can be. Why should more be required? The law does not require it, for no such rule of evidence exists. The best evidence which the nature of the case admits of is an old and familiar rule that has been complied with here; and we have the proof of the truth of the old saying that 'what everybody says must be true,' in the admission of the zealous counsel for the defendants that he

had not a doubt of their guilt. And, in a case in which character is its very gist, I am willing to make that which everybody says the evidence on which a jury may, if they choose, convict defendants for keeping a bawdyhouse."

We might continue to quote authorities to the same effect indefinitely. These are ample to show that we are not without support in the matter of precedents in the position which we have assumed. The rule for which we contend is in strict harmony with the fundamental principles of justice. If a house has the general reputation of being a bawdy house, such reputation must be known to its keeper, and can only be gained and maintained on account of the conduct of the persons who resort to it. It is inconceivable that a house kept for proper purposes should ever gain the general reputation of being a bawdy house. The reputation of the house is the advertisement of its keeper. It draws customers and is a source of revenue. There is and can be no injustice in holding the keeper of a house responsible for its general reputation when that reputation is backed up by any evidence which tends to show that it is well founded. It was for these reasons that in the case of *Carroll v. State*, 4 Okla. Crim. Rep. 242, 111 Pac. 1021, and the case of *Smith v. State*, 6 Okla. Crim. Rep. 380, 118 Pac. 1003, that this court held that in a prosecution for the keeping of a bawdyhouse it is competent for the state to introduce evidence of the general reputation of the house in the community in which it is situated as to its being a place where lewd and lascivious persons of both sexes congregated for the purpose of unlawful cohabitation or sexual intercourse. But it will be observed that this court has never stated that such evidence alone was sufficient to sustain a conviction. We are of the opinion that those cases which so hold go too far. We think that, while this evidence is admissible, yet standing alone and by itself it is not sufficient to sustain a conviction. Evidence of recent possession of stolen property is always admissible in a prosecution for theft, but this evidence alone will not sustain a conviction, but must be considered in connection with all the other facts and circumstances in the case. The danger of convicting a defendant alone upon the reputation of a house is clearly pointed out in an opinion by Presiding Judge Armstrong, handed down at the present term of the court, in which the conviction was reversed because there was no corroborating evidence. But in *Patterson's Case*, — Okla. Crim. Rep. —, 132 Pac. 693, the admissibility of evidence of the reputation of the house was recognized and affirmed.

46 L.R.A.(N.S.)

We have discussed this question fully, because counsel for appellant so strongly insisted that such evidence was not admissible for any purpose. In this case there is no question that the appellant kept the house. In fact, it was admitted.

In the light of the testimony of the reputation of the house, in connection with the other testimony in the case, the jury were fully warranted in finding the appellant guilty.

The judgment of the lower court is therefore in all things affirmed.

Armstrong, P. J., and Doyle, J., concur.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

ROBERT A. BOLE, Plff. in Err.,
v.

PITTSBURGH ATHLETIC COMPANY.

(— C. C. A. —, 205 Fed. 468.)

Proximate cause — amusement park — jostling of crowd.

The natural jostling or pushing of a crowd seeking entrance to a ball game, which causes a patron to be pushed against a trapdoor left open in a passageway leading to seats on an upper floor, cannot be considered as the proximate cause of the accident, for the purpose of relieving the owner of the grounds from liability for negligently leaving the door open in that place.

(May 14, 1913.)

ERROR to the District Court of the United States for the Western District of Pennsylvania to review a judgment in defendant's favor in an action brought to recover damages for personal injuries sustained by plaintiff while a patron of defendant's baseball grounds. Reversed.

The facts are stated in the opinion.

Argued before Gray, Buffington, and McPherson, Circuit Judges.

Messrs. John S. Weller and John O. Wicks, for plaintiff in error:

In determining what is proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as under the

Note. — As to liability of one maintaining place of amusement for injury to patrons, see note to *Wodnik v. Luna Park Amusement Co.* 42 L.R.A.(N.S.) 1070, and various other notes referred to therein. And see also *Wells v. Minneapolis Baseball & Athletic Asso.* post, 606.

surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

Pittsburgh. Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Scott v. Hunter, 46 Pa. 195, 84 Am. Dec. 542; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; McGrew v. Stone, 53 Pa. 436; Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344; Pennsylvania R. Co. v. Barnett, 59 Pa. 259, 98 Am. Dec. 346; Oil Creek & A. River R. Co. v. Keighron, 74 Pa. 316; Lehigh Valley R. Co. v. McKeen, 90 Pa. 122, 35 Am. Rep. 644; Cauley v. Pittsburgh, C. C. & St. L. R. Co. 98 Pa. 498; Oil City Gas Co. v. Robinson, 99 Pa. 1; Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; West Mahoney Twp. v. Watson, 112 Pa. 574, 56 Am. Rep. 336, 3 Atl. 866, 116 Pa. 344, 2 Am. St. Rep. 604, 9 Atl. 430; Quigley v. Delaware & H. Canal Co. 142 Pa. 388, 24 Am. St. Rep. 504, 21 Atl. 827; Vallo v. United States Exp. Co. 147 Pa. 404, 14 L.R.A. 743, 30 Am. St. Rep. 741, 23 Atl. 594; Scott v. Allegheny Valley R. Co. 172 Pa. 646, 33 Atl. 712; Wood v. Pennsylvania R. Co. 177 Pa. 306, 35 L.R.A. 199, 55 Am. St. Rep. 728, 35 Atl. 699; Boatwright v. Chester & M. E. R. Co. 4 Pa. Super. Ct. 279; Roach v. Kelly, 194 Pa. 24, 75 Am. St. Rep. 685, 44 Atl. 1090; Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344; Shaughnessy v. Pittsburgh, 20 Pa. Super. Ct. 609; Davis v. Snyder Twp. 196 Pa. 280, 46 Atl. 301; Gudfelder v. Pittsburgh, C. C. & St. L. R. Co. 207 Pa. 629, 57 Atl. 70, 15 Am. Neg. Rep. 672; Cohn v. May, 210 Pa. 615, 69 L.R.A. 800, 105 Am. St. Rep. 840, 60 Atl. 301, 18 Am. Neg. Rep. 247; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315; White v. Roydhouse, 211 Pa. 17, 13, 60 Atl. 316, 18 Am. Neg. Rep. 251; McCabe v. Philadelphia, 217 Pa. 140, 66 Atl. 247; Lane v. Atlantic Works, 111 Mass. 136; Benedict Pineapple Co. v. Atlantic Coast Line R. Co. 55 Fla. 514, 20 L.R.A. (N.S.) 92, 46 So. 732; Thompson. Neg. 2d ed. § 47; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259; Scheffer v. Washington City, V. S. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431; Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; Potter v. Natural Gas Co. 183 Pa. 575, 39 Atl. 7; Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733; Cameron v. Citizens' Traction Co. 216 Pa. 191, 65 Atl. 534; Scott v. Hunter, 46 Pa. 192, 84 Am. Dec. 542; Yoders v. Amwell Twp. 172 Pa. 447, 51 Am. St. Rep. 750, 33 Atl. 1017; 46 L.R.A. (N.S.)

Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Hill v. Winsor, 118 Mass. 251; Oil City Gas Co. v. Robinson, 99 Pa. 1; Bunting v. Logsett, 139 Pa. 374, 12 L.R.A. 268, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34; Corbin v. Philadelphia, 195 Pa. 461, 49 L.R.A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070, 7 Am. Neg. Rep. 563; Burrell Twp. v. Uncapher, 117 Pa. 353, 2 Am. St. Rep. 664, 11 Atl. 619; Quigley v. Delaware & H. Canal Co. 142 Pa. 388, 24 Am. St. Rep. 504, 21 Atl. 827; Butterman v. McClintic-Marshall Constr. Co. 206 Pa. 82, 55 Atl. 839.

There are many cases where the intermediate cause is the direct cause of the injury, and yet the defendant's negligence is held to be the proximate cause of the injury.

Wagner v. Hazle Twp. 215 Pa. 219, 64 Atl. 405; Sturgis v. Kountz, 165 Pa. 358, 27 L.R.A. 390, 30 Atl. 976; Shearm. & Redf. Neg. § 32; Thompson. Neg. 2d ed. § 54.

The same rule should be applied to determine whether or not the weakened condition of the plaintiff was caused by the injuries which he received in the accident.

Davies v. McKnight, 146 Pa. 610, 23 Atl. 320; Brashear v. Philadelphia Traction Co. 180 Pa. 392, 36 Atl. 914, 1 Am. Neg. Rep. 678; Batton v. Public Service Corp. 75 N. J. L. 857, 18 L.R.A. (N.S.) 640, 69 Atl. 164; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; Temme v. Schmidt, 210 Pa. 507, 60 Atl. 158; Pennsylvania R. Co. v. Books, 57 Pa. 345, 98 Am. Dec. 229; Laing v. Colder, 8 Pa. 481, 49 Am. Dec. 533, 10 Am. Neg. Cas. 144.

This is not a case where the court would be justified in taking the case from the jury, and saying as a matter of law that the defendant's negligence was not the proximate cause of the injuries to the plaintiff.

Gudfelder v. Pittsburgh, C. C. & St. L. R. Co. 207 Pa. 629, 57 Atl. 70, 15 Am. Neg. Rep. 672; Vallo v. United States Exp. Co. 147 Pa. 404, 14 L.R.A. 743, 30 Am. St. Rep. 741, 23 Atl. 594; Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; Lane v. Atlantic Works, 116 Mass. 136; Stair v. Kane, 84 C. C. A. 126, 156 Fed. 100.

Messrs. Clarence Burleigh and William A. Challenger, for defendant in error:

The plaintiff would not have come in contact with the door but for the fact that he was pushed by an unidentified person.

Even a common carrier is not bound to protect its passenger from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace.

Graeff v. Philadelphia & R. R. Co. 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107, 6 Am. Neg. Cas. 376; Ellinger v. Philadelphia & B. R. Co. 153 Pa. 215, 34

Am. St. Rep. 697, 25 Atl. 1132, 6 Am. Neg. Cas. 361; Hayman v. Pennsylvania R. Co. 118 Pa. 508, 11 Atl. 815; Eisenbrey v. Pennsylvania Co. 141 Pa. 566, 21 Atl. 635.

The proximate cause of Bole's injury was, as a matter of law, the jostling to which he was subjected.

Kelly v. Bennett, 132 Pa. 218, 7 L.R.A. 120, 19 Am. St. Rep. 594, 19 Atl. 69; Hunter v. Wanamaker, 17 W. N. C. 232; Tuff v. Warman, 5 C. B. N. S. 573, 27 L. J. C. P. N. S. 322, 5 Jur. N. S. 222, 6 Week. Rep. 693, 19 Eng. Rul. Cas. 194; Johnson v. Hudson River R. Co. 20 N. Y. 65, 75 Am. Dec. 375, 12 Am. Neg. Cas. 336; Lovett v. Chicago, 35 Ill. App. 570; Houston & T. C. R. Co. v. Beard, 42 Tex. Civ. App. 427, 93 S. W. 532; Wills v. Ashland Light, Power & Street R. Co. 108 Wis. 255, 84 N. W. 998.

The proximate cause of an injury is that cause which immediately precedes and directly produces the injury, without which the injury would not have happened.

Lindvall v. Woods, 44 Fed. 855.

Gray, Circuit Judge, delivered the opinion of the court:

The case before us arises out of an action in the court below for personal injuries sustained by the plaintiff below (plaintiff in error), on a grand stand controlled by the defendant below (defendant in error), at the Forbes Field Baseball Park, in the city of Pittsburgh.

On the afternoon of September 16, 1911, plaintiff, having paid his admission, was going along a passageway on the first floor of the grand stand, toward the elevators, to be taken up to his box in one of the galleries. On that particular afternoon, the defendant had allowed to remain open an iron trapdoor, 3 feet square, covering an opening in the main floor of the grand stand, leading to the machinery beneath that operated the elevators. When shut, the door was flush with the cement floor, and formed part of the floor of the passageway. When open, the top of the door faced the elevators and narrowed the passageway between it and the elevators, according to the presumably accurate measurement of the blueprint in evidence, to a width of 5 feet. It was testified that there were about 20,000 people at the game on that particular afternoon, and many hundreds of them who used the elevators had to pass through this narrow passageway. The door, when raised, stood at an angle of about 80 or 85 degrees from the plane of the opening which it was designed to cover, and was held rigidly in place by brace irons on either side of it.

A great crowd of people were pressing through this passageway, between the up-

lifted door and the elevators, which became more dense at that point from the pressure of those behind, as the guard rails to the elevators only admitted one at a time. The only testimony as to how the accident happened was that of the plaintiff himself. The following is the essential part of his testimony, as it appears in the record: "The crowd was progressing towards the rear to get into the elevator. I was going along, without any idea of any obstruction in the way. The point at which you pass around to get into the elevator, around the guard, is only a very short distance from the trapdoor, which was propped open,—I should say not more than 6 or 7 feet [the evidence of the blue print is 5 feet],—and this dense crowd had to go through that small opening. Somebody jostled me, and I couldn't see anything, lost my balance, and went right over this thing. Nobody could possibly have escaped it in the position I was in. The trapdoor extended about 3 feet, and I fell over and doubled up like a jackknife."

Looking at a photograph, he testified: "Well, the crowd was surging through here (indicating) to get around here (indicating) to get into the elevator. I was coming around the crowd. I was on the outside, the crowd surging around here. . . . There isn't a very strong light here, and if you are not watching for that thing, with the crowd around you it is hard to find. I was in this crowd and somebody jostled me, and I went over the edge of it. I tripped here first and lost my balance."

On cross-examination, also, he says: "There was difficulty on this particular occasion, because the crowd was so dense nobody could have seen it. I was all around in that crowd, a swirling crowd, trying to get through a 7-foot opening. I should say there were several hundred people ahead of me, waiting to get up on the elevator. I recall that there were 20,000 people there that day."

The case was submitted to the jury with a charge by the court, and a verdict was rendered for the defendant. After refusal of a motion by plaintiff for a new trial, to the judgment entered on this verdict, the present writ of error has been sued out by the plaintiff. The assignments of error are founded upon exceptions to certain portions of the charge of the court. The question raised by these assignments concerns the propriety, in relation to the facts of the case, of what was said by the court in its charge, as to the proximate cause of the injury suffered by the plaintiff. The parts of the charge excepted to are as follows: "Now, if you find the defendant was not negligent, then that is the end of this case,

but if you find the defendant was negligent, there is another question that you are to consider, and that is, whether that negligence was a direct and proximate cause of the injuries to the plaintiff. . . . If the plaintiff was jostled or pushed and thereby forced upon this hatchway door, and if he would not have come in contact with the hatchway door except for that, then you may conclude that the jostling or pushing was the direct and primary cause of the injury. If the pushing and jostling was the direct cause of the injury to the plaintiff, then you could not hold the defendant for injuries which were caused by another.

. . . I think one of the witnesses testified there was some loss of power and the engineer had to go down and start up the power. That might have caused an unnecessary and an unusual crowd there, but if the pushing and jostling was the direct and efficient cause of the injuries to the plaintiff, without which he would not have fallen over the grating and had been hurt, then the verdict should be for the defendant, because you cannot—should not make one party pay for what another party has brought about; but you are to consider all the facts in the case, and determine whether or not the jostling and pushing was the direct and proximate cause, or primary cause, or whether it was the open hatchway door."

We are compelled to differ from the learned and careful judge of the court below, in the view here taken of the application of the rule, *causa proxima, non remota spectatur*. It would answer no good purpose to indulge in the subtleties of abstract reasoning to which this maxim so often gives rise. In its juridical sense, it would seem incapable of such definition as would furnish a practical test of liability or non-liability in a given case. The terms used do not accurately connote the conceptions they are intended to cover. Whether "proximate" means "nearest" in point of time or space to the result complained of depends upon circumstances. "Primary" may sometimes better describe the efficient or responsible cause of a legal liability,—though first and in point of time the most remote. In many, if not in most, cases, that cause of an injury to which legal liability attaches may be better described as the "efficient" cause. So many elements, however, may enter into the determination of what is the efficient cause, and so long a train of antecedents may come under consideration, "but for" the happening of any one of which the result complained of would not have occurred, that we may still be involved in the difficulties of selecting from the train of antecedents the one to which should attach the legal liability sought to

be imposed. The practical application of the rule must depend upon the circumstances of each individual case.

Parsons, in his work on Contracts 6th ed. vol. 3, p. 179, says: "Not only is there no definite rule or clear and precise principle given, by which we may measure the nearness or remoteness of effect in this respect; but the highest judicial authorities are so directly antagonistic, that they scarcely serve as guides to lead us to a conclusion. . . . We have been disposed to think that there is a principle, derivable, on the one hand, from the general reason and justice of the question, and, on the other hand, applicable as a test, in many cases, and perhaps useful, if not decisive, in all. It is that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration."

For this rule, the author refers to the high authority of Pollock, Chief Baron, in *Rigby v. Hewitt*, 5 Exch. 240, 19 L. J. Exch. N. S. 291. This rule, so far as it extends, satisfies the reason and common sense which is the essence of the common law, and is applicable to the present case.

The defendant owned or controlled the premises upon which the accident, which resulted in the injury complained of, happened. The building was erected for the accommodation of the large crowds that gather to witness the athletic contests and games, which were conducted by the defendant for profit, the public being invited to patronize the same. The entrance and passageway along which the plaintiff proceeded after paying the sum demanded for his admission, was necessarily for the accommodation of the crowds who were expected to throng such places of amusement. It is not contradicted that, on the holiday afternoon in question, about 20,000 people were present to witness a game of baseball that excited the public interest. The testimony of the plaintiff is not contradicted, that many hundreds were crowding through the passageway described, which led to elevators, by which persons were taken to galleries on an upper tier or floor. That the iron trapdoor in the concrete floor, on the afternoon in question and while the crowd was pressing along the passageway, had been left open by someone in the employ of the defendant, is not denied. This open door, facing the elevators, narrowed the passageway between them and it to a width of about 5 feet, and, according to the uncontradicted testimony of the plaintiff, the crowd at that point became dense from the

pressure of those behind and from the fact that only one person at a time could pass through the guard rails to the elevators. The plaintiff says he was on the outside of this crowd; that is, on the side nearest the trapdoor, and that this crowd was "surging" through the narrow passage between the trapdoor and the elevator; that the light was not very bright; that by reason of the crowd, he did not see the door; and that, by being jostled by someone in the crowd, he fell across the edge of the iron door and sustained the injuries complained of. There is nothing to indicate that such jostle was other than an incident of the ordinary pressure of a crowd thronging into a narrow passage. There was no disorder, no assault made upon him, and nothing to indictae other than the normal condition attending a thronged and crowded passageway.

No question of proximate cause is here involved. The only question which should have been submitted to the jury is the simple one of the defendant's negligence. The charge was not that there was negligence in the location of the trapdoor opening, but in the alleged improper raising of the trapdoor, and allowing it to stand as a barrier in the pathway of persons approaching the elevator. In disposing of this question, the jury should be told that they were to take into consideration the conditions which would naturally arise in the presence of a crowd, and defendant should be held liable for those consequences (and those consequences only) which might have been foreseen and expected as a result of its conduct in permitting the trapdoor, under the circumstances, to remain open. But, as said by Mr. Justice Colt, in *Hill v. Winsor*, 118 Mass. 251: "It is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence."

We are therefore compelled to the conclusion that the learned judge of the court below was in error, in submitting to the jury, as was done in those portions of his charge upon which the assignments are based, the question whether the negligence of the defendant, if found by them, was the direct and proximate cause of the injuries to the plaintiff, or whether the jostling and pushing was the proximate or primary cause. The "surging crowd" and the "jostling" were in no sense the juridical cause of the accident, though they were the conditions which might make the negligence of the defendant the efficient cause.

The judgment below is therefore reversed, with directions for a *venire de novo*.
46 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

ECHO L. WELLS, Respt.,
v.

MINNEAPOLIS BASEBALL & ATHLETIC
ASSOCIATION, Appt.

(122 Minn. 327, 142 N. W. 706.)

Pleading — negligence — sufficiency.

1. In this a personal injury action, the complaint contained sufficient allegations of negligence, and the objection to the reception of any testimony thereunder was rightly overruled.

Baseball grounds — duty to patrons.

2. One who maintains grounds to which the public is invited to witness games of baseball is not an insurer against the dangers incident to witnessing the game, but is required to use the care and precaution of the ordinary prudent person to protect the spectators against such dangers. He is not required to anticipate the improbable.

Same — assumption of risk.

3. Persons who know and appreciate the danger from thrown or batted balls assume the risk, and they cannot claim the management guilty of negligence when a choice is given between a seat in the open and one behind a screen of reasonable extent.

Trial — jury — duty of owner of baseball grounds.

4. It is a question for the jury what precaution and care should be taken by the management of a baseball exhibition to warn and safeguard the spectators against the dangers incident to the game.

Damages — personal injury — expense of nursing.

5. If plaintiff prevailed, she was entitled to recover as special damages the reasonable value of the nursing necessitated on account of the injuries, notwithstanding such nursing was rendered by a member of the family without expectation of payment.

Evidence — warnings in baseball grounds — effect on spectators.

6. Evidence that in conspicuous places in the grand stand were signs in large letters stating that the management will not be responsible for injuries received from thrown or batted balls was admissible, as tending to prove a precaution taken to warn spectators of the perils.

Trial — instructions — error.

7. Parts of the charge held objectionable, though not, perhaps, sufficient to require a reversal.

(July 3, 1913.)

A PPEAL by defendant from an order of the District Court for Hennepin County

Headnotes by HOLT, J.

Note. — As to liability of one maintaining place of amusement for injury to patrons, see references in footnote to *Bole v. Pittsburgh Athletic Co.* ante, 602.

denying a motion for judgment notwithstanding the verdict for plaintiff or for a new trial in an action brought to recover damages for personal injuries received by plaintiff while attending a baseball game upon defendant's grounds. Reversed.

The facts are stated in the opinion.

Messrs. Kerr, Fowler, Ware, & Furber, for appellant:

A married woman is "not entitled to recover the expenses incurred for medical treatment, as these were expenses for which her husband was liable, and for which she was not liable."

Belyea v. Minneapolis St. P. & S. Ste. M. R. Co. 61 Minn. 224, 63 N. W. 627; *Gilson v. Cadillac*, 134 Mich. 189, 95 N. W. 1086; *Morris v. Grand Ave. R. Co.* 144 Mo. 500, 46 S. W. 171; *Nelson v. Metropolitan Street R. Co.* 113 Mo. App. 659, 88 S. W. 783; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79; *Newbury v. Getchel & M. Lumber & Mfg. Co.* 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 747.

The posted signs that the management will not be responsible for injuries received from thrown or batted balls constitute a notice and warning to the public, the consequences and effect of which should have been submitted to the jury.

These signs called the attention of plaintiff to the possibilities of danger, and notified her that she must assume all risks incident to putting herself in a position where she would be exposed to being struck by foul balls, and warned her that she must assume the risks incident to the game.

The fact of knowledge may be established by circumstantial evidence, even where actual knowledge must be proved.

Rine v. Chicago & A. R. Co. 100 Mo. 228, 12 S. W. 641; *Lynch v. Richardson*, 163 Mass. 160, 47 Am. St. Rep. 444, 39 N. E. 801; *Drennan v. Grady*, 167 Mass. 415, 45 N. E. 741, 1 Am. Neg. Rep. 76; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; *Parker v. Georgia P. R. Co.* 83 Ga. 539, 10 S. E. 233; *Memphis & C. R. Co. v. Askew*, 90 Ala. 5, 7 So. 823; *Harris v. Simon*, 32 S. C. 593, 10 S. E. 1076; *Presby v. Grand Trunk R. Co.* 66 N. H. 615, 22 Atl. 554; *Godfrey v. New York*, 104 App. Div. 357, 93 N. Y. Supp. 902; *Antonian v. Southern P. Co.* 9 Cal. App. 718, 100 Pac. 883.

Knowledge of limitations of protection is assumption of risk.

Brannock v. Elmore, 114 Mo. 55, 21 S. W. 452.

Defendant was bound to anticipate only usual, and not unusual and unheard of, conditions.

Larkin v. O'Neill, 119 N. Y. 225, 23 N. 46 L.R.A. (N.S.)

E. 563; Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 455.

If one chooses to take risks, he must bear the possible consequences.

Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; *Sours v. Great Northern R. Co.* 84 Minn. 230, 87 N. W. 766.

Plaintiff's election to take the more dangerous position directly contributed to her injury.

Morris v. Duluth, S. S. & A. R. Co. 47 C. C. A. 661, 108 Fed. 749; *Dixon v. Union Ironworks*, 90 Minn. 495, 97 N. W. 375; *Moody v. Smith*, 64 Minn. 524, 87 N. W. 633; *Deering v. Canfield & W. Co.* 126 Mich. 373, 85 N. W. 874; *Groff v. Duluth Imperial Mill Co.* 58 Minn. 333, 59 N. W. 1049; *Bailey, Personal Injury*, ¶ 1123; *Lumsden v. L. A. Thompson Scenic R. Co.* 130 App. Div. 209, 114 N. Y. Supp. 423; *Missouri P. R. Co. v. Moseley*, 6 C. C. A. 641, 12 U. S. App. 601, 57 Fed. 922; *La Riviere v. Pemberton*, 46 Minn. 5, 48 N. W. 406; *Wherry v. Duluth M. & M. R. Co.* 64 Minn. 415, 67 N. W. 223, 12 Am. Neg. Cas. 163.

Mr. D. R. Thomas, with Mr. C. V. White, for respondent:

It is unnecessary to allege specifically all the acts or omissions constituting negligence.

Clark v. Chicago, M. & St. P. R. Co. 28 Minn. 69, 9 N. W. 75; *McCauley v. Davidson*, 10 Minn. 418, Gil. 335; *Keating v. Brown*, 30 Minn. 9, 13 N. W. 909; *Johnson v. St. Paul & D. R. Co.* 31 Minn. 283, 17 N. W. 622; *Ekman v. Minneapolis Street R. Co.* 34 Minn. 24, 24 N. W. 291; *Olson v. St. Paul, M. & M. R. Co.* 34 Minn. 477, 26 N. W. 605; *Rolseth v. Smith*, 38 Minn. 14, 8 Am. St. Rep. 637, 35 N. W. 565; *Rogers v. Truesdale*, 57 Minn. 126, 58 N. W. 688; *Hinton v. Eastern R. Co.* 72 Minn. 339, 75 N. W. 373; *Ware v. Squyer*, 81 Minn. 388, 83 Am. St. Rep. 390, 84 N. W. 126; *Kretschmar v. Meehan*, 81 Minn. 432, 84 N. W. 220; *Smith v. Great Northern R. Co.* 92 Minn. 11, 99 N. W. 47; *Pope v. Great Northern R. Co.* 94 Minn. 429, 103 N. W. 331; *Casey v. American Bridge Co.* 95 Minn. 11, 103 N. W. 623; *Christiansen v. Chicago, M. & St. P. R. Co.* 107 Minn. 341, 120 N. W. 300; *Bjelos v. Cleveland Cliffs Iron Co.* 109 Minn. 320, 123 N. W. 922.

The owner or occupant of premises is bound to exercise ordinary care to keep them in a safe condition for those who come upon them by his express or implied invitation.

Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; *Nash v. Minneapolis Mill Co.* 24 Minn. 501, 31 Am. Rep. 349; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698; *Lee v. Minneapolis*

& St. L. R. Co. 34 Minn. 225, 25 N. W. 309; Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699; Dean v. St. Paul Union Depot Co. 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54, 8 Am. Neg. Cas. 441; Ingalls v. Adams Exp. Co. 44 Minn. 128, 46 N. W. 325; Johnson v. Ramberg, 49 Minn. 341, 51 N. W. 1043; Galloway v. Chicago, M. & St. P. R. Co. 56 Minn. 346, 23 L.R.A. 442, 45 Am. St. Rep. 468, 57 N. W. 1058; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Ryder v. Kinsey, 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 623, 64 N. W. 94; Clarkin v. Biwabik-Bessemer Co. 65 Minn. 483, 67 N. W. 1023; Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492, 8 Am. Neg. Rep. 262; Fredenburg v. Baer, 89 Minn. 241, 94 N. W. 683, 14 Am. Neg. Rep. 97; Klugherz v. Chicago, M. & St. P. R. Co. 90 Minn. 17, 101 Am. St. Rep. 384, 95 N. W. 586, 14 Am. Neg. Rep. 368; Marsh v. Minneapolis Brewing Co. 92 Minn. 182, 99 N. W. 630; Depue v. Flatau, 100 Minn. 299, 8 L.R.A. (N.S.) 485, 111 N. W. 1; Hyatt v. Murray, 101 Minn. 507, 112 N. W. 881; Farnsworth v. Farwell, 102 Minn. 371, 113 N. W. 897; Stuelpnagel v. Paper, C. & Co. 111 Minn. 3, 126 N. W. 281; Larson v. Red River Transp. Co. 111 Minn. 427, 127 N. W. 185; Birnberg v. Schwab, 55 Minn. 495, 56 N. W. 341; McQuade v. The Golden Rule, 105 Minn. 326, 117 N. W. 484.

The accident itself may be proof of the negligence.

Ryder v. Kinsey, 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 623, 64 N. W. 94; Olson v. Great Northern R. Co. 68 Minn. 155, 71 N. W. 5, 2 Am. Neg. Rep. 736; Johnson v. Walsh, 83 Minn. 74, 85 N. W. 910; Isherwood v. H. L. Jenkins Lumber Co. 84 Minn. 423, 87 N. W. 931; Ulseth v. Crookston Lumber Co. 97 Minn. 178, 106 N. W. 307; Waller v. Ross, 100 Minn. 7, 12 L.R.A. (N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 10 Ann. Cas. 715, 21 Am. Neg. Rep. 166; Gould v. Winona Gas Co. 100 Minn. 258, 10 L.R.A. (N.S.) 889, 111 N. W. 254; Cederberg v. Minneapolis, St. P. & S. Ste. M. R. Co. 101 Minn. 100, 111 N. W. 953; Parmelee v. Tri-State Teleph. & Teleg. Co. 103 Minn. 530, 115 N. W. 1135; Lehman v. Dwyer Plumbing & Heating Co. 104 Minn. 190, 116 N. W. 352; McGuire v. Great Northern R. Co. 106 Minn. 192, 118 N. W. 556; Stair v. Kane, 84 C. C. A. 126, 156 Fed. 100; Thompson Neg. §§ 995, 996.

Therefore, any notice of a limitation of liability must be clear and unmistakable, and must be brought to the notice of the guest.

Thomp. Neg. §§ 995, 996; Purvis v. Coleman, 21 N. Y. 111; Fuller v. Coats, 18 Ohio St. 343; Read v. Amidon, 41 Vt. 15, 98 46 L.R.A. (N.S.)

Am. Dec. 560; Stanton v. Leland, 4 E. D. Smith, 88; Bodwell v. Bragg, 29 Iowa, 232; Ramaley v. Leland, 6 Robt. 358; Bernstein v. Sweeney, 1 Jones & S. 271.

The owner of a place of entertainment is charged with an affirmative and positive obligation to know that the premises are safe for the public use.

Lusk v. Peck, 132 App. Div. 426, 116 N. Y. Supp. 1051, affirmed in 199 N. Y. 546, 93 N. E. 377; Thompson v. Lowell, L. & H. Street R. Co. 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; Scott v. University of Michigan Athletic Asso. 152 Mich. 684, 17 L.R.A. (N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 Ann. Cas. 515; Weiner v. Scherer, 64 Misc. 82, 117 N. Y. Supp. 1008; Coxhead v. Johnson, 20 App. Div. 605, 47 N. Y. Supp. 389.

Holt, J., delivered the opinion of the court:

Appeal by the defendant from an order denying its motion in the alternative for judgment or a new trial.

The defendant maintains grounds in the city of Minneapolis to which the public is invited to witness games of baseball. An admission fee is ordinarily charged, but upon certain days ladies are admitted free. The ball grounds are on the block bounded by Blaisdell avenue on the west and Thirty-first street on the south. The old grand stand in which plaintiff was injured was built in the corner formed by the intersection of the streets mentioned. It was so constructed and arranged that the front seats—that is, those nearest the players—and the parapet in front were at least 6 feet from the ground, then passing up towards the rear each row of seats was raised several inches above the row next in front of it. The home plate was on the line bisecting the angle formed by the streets mentioned. About 65 feet back of the home plate was the front row of a section of seats; each row in this section being about 25 feet long, and perhaps increasing in length toward the rear. This section, together with the rows on either side thereof running parallel to Thirty-first street and Blaisdell avenue, respectively, formed three sides of an octagon. The length, however, of the rows on Thirty-first street was about 90 feet, and on Blaisdell avenue nearly the same. These rows were broken by aisles running from front to rear. The grand stand was covered by a roof sloping slightly to the rear. The front, of course, was open; the space from the top of the parapet in front of the front seats to the roof being about 15 feet. Posts 8 inches square supported the roof in front. These were placed along the parapet referred to,

and about 20 feet apart, except the two behind the home plate, which were 25 feet apart, one at each end of the center section of seats above spoken of. Foul balls and foul tips frequently pass from the home plate, where the batter stands, toward the grand stand. Naturally that part of the ground stand back of the home plate is the most exposed to danger from such balls and tips, and to protect the spectators the defendant had a wire or steel screen (through which the ball could not pass) which completely covered the opening from the roof down, and extended between the two center posts mentioned, and thence to the next adjoining post on either side, so that in all about 65 feet of the center of the grand stand was protected by screen.

Plaintiff alleged that on July 9, 1910, she attended a game, and was struck with such force by a flying ball from the players that her collar bone was fractured; that the only way of protecting spectators from the dangers incident to the game was to place and maintain screens between the players and spectators; and that "the defendant did place and maintain in such position a screen or netting for the purpose aforesaid, but that defendant negligently constructed such screen or netting of insufficient size to furnish such protection; that the plaintiff saw said screen or netting, and was ignorant of the fact that it was of insufficient size, and was ignorant of the fact that a batted ball might pass the same and hit the spectators in said grand stand." The answer denies negligence, and avers that the injury was accidental, and further that the plaintiff was injured through her own negligence, and that she assumed the risk of injury from flying balls.

Plaintiff testified that she took a seat in the front row of seats on the Thirty-first street side, about 10 feet west of the easterly end of the street. As there was an aisle and box seats in front of her, she was about 10 to 12 feet to the rear of the screen. She selected the seat. There were vacant seats more protected. She does not claim that the ball which struck her went through the screen. She thinks it curved around the end of it. Her companion, seated to her right, was of the same opinion, and also stated that she thought the screen extended to the east about 8 feet farther than where she was sitting. All the other thirteen witnesses, who professed to know where the plaintiff was when she was hit, are agreed that she was seated farther east and beyond the screen.

It is not necessary to discuss each error assigned. They may be considered under the claim of appellant that the complaint does not state a cause of action, that the

defendant was entitled to judgment, that the testimony of the value of the nursing rendered by plaintiff's mother should not have been received, that the testimony relating to the posting of certain notices in the grand stand was erroneously excluded, and alleged errors in the charge.

We think it sufficiently appears from the complaint that the danger of injury to spectators is incident to a game of baseball, that it is necessary for those who manage such public amusement to protect against these dangers by screens, that the defendant, in the performance of this duty, was negligent in not furnishing a screen of sufficient size to give protection, and that plaintiff was ignorant of that fact. The complaint states a cause of action. Therefore the court properly overruled the objection to the reception of any evidence thereunder.

The court left the jury to determine plaintiff's right to recover, either upon her own claim that she was within the screen, or upon the defendant's that she was outside, when struck. Upon her theory the defendant contends that the course of the ball was so unheard of that no duty rested upon defendant to protect her therefrom, and that, if she was seated outside the screen, she knowingly assumed all risk from injury from foul balls. We are all agreed that, if plaintiff occupied the place she and her companion testify to, the defendant had performed its full duty for her protection, and there is no liability for the injury. It is inconceivable that a baseball, when fouled by a batter, could curve around the end of the screen in the manner this ball is said by her to have curved and reach her. No one claims that it glanced from striking any post or object after the time it touched the bat and before it struck plaintiff. The defendant was not an insurer against all perils, nor was it guilty of negligence in failing to guard against improbable dangers. Therefore, if the court had submitted the case to the jury solely upon plaintiff's claim, or if all the evidence had sustained her as to her position in the grand stand, a direction for judgment would have been unavoidable.

But the court also left it to the jury to say whether a recovery should be had if plaintiff was seated outside the screen; and she may have been mistaken as to where she was seated. Upon this view, we think it cannot be said as a matter of law that there is no cause of action. It has been frequently held that one who invites the public to places of amusement, such as theaters, shows, and exhibitions, must exercise a high degree of care for the safety of those invited. As to stairways,

platforms, walks, and other structures, it may be said that the duty is somewhat similar in degree and nature to that owing from a common carrier to its passengers. *Thomp. Neg.* §§ 995, 996; *Scott v. University of Michigan Athletic Asso.* 152 Mich. 684, 17 L.R.A.(N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 Ann. Cas. 515. But this rule must be modified when applied to an exhibition or game which is necessarily accompanied with some risk to the spectators. Baseball is not free from danger to those witnessing the game. But the perils are not so imminent that due care on the part of the management requires all the spectators to be screened in. In fact, a large part of those who attend prefer to sit where no screen obscures the view. The defendant has a right to cater to their desires. We believe that as to all who, with full knowledge of the danger from thrown or batted balls, attend a baseball game, the management cannot be held negligent when it provides a choice between a screened in and an open seat, the screen being reasonably sufficient as to extent and substance.

This is virtually the rule applied in *Crane v. Kansas City Baseball & Exhibition Co.* 168 Mo. App. 301, 153 S. W. 1076, where it is said: "Defendants were not insurers of the safety of spectators, but, being engaged in the business of providing a public entertainment for profit, they were bound to exercise reasonable care, i. e., care commensurate to the circumstances of the situation, to protect their patrons against injury. [*King v. Ringling*, 145 Mo. App. 285, 130 S. W. 482; *Murrell v. Smith*, 152 Mo. App. 95, 133 S. W. 76]. In view of the facts that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators, we think the duty of defendants towards their patrons included that of providing seats protected by screening from wildly thrown or foul balls, for the use of patrons who desired such protection. Defendants fully performed that duty when they provided screened seats in the grand stand, and gave plaintiff the opportunity of occupying one of those seats." And if it had appeared clearly that plaintiff knew the dangers incurred by taking a seat in the open, it should be held that she assumed all risk of injury from balls thrown or batted in the game. We do not think this knowledge conclusively appears. In the *Crane Case*, supra, one of the stipulated facts was this: "Baseball is our national game, and the rules governing it and the manner in which it is played and the risks and dangers incident thereto are 46 L.R.A.(N.S.)

matters of common knowledge." But we do not think that all who attend baseball games would or should enter such a stipulation. Only those who have been struck with a baseball realize its hardness, swiftness, and dangerous force. Women and others not acquainted with the game are invited, and do attend. It would not be either a safe or reasonable rule to hold that, in these games to which the general public is invited, no duty rests upon the management to protect from the dangers incident thereto, other than by a proper screening of part of the seats. What precaution the ordinarily prudent person, furnishing a public amusement of this kind, should take to warn and protect the spectators from the attendant dangers of which they may be ignorant, we think a question for the jury.

Over objection, plaintiff was permitted to show the value of the nursing, rendered by her mother, with whom plaintiff, although of age, was living. It does not appear that the mother expected pay therefor. The authorities are not agreed that the value of services rendered under such circumstances is an element of recoverable damages. *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191, and *Morris v. Grand Ave. R. Co.* 144 Mo. 500, 46 S. W. 170, are to the effect that the recovery may not include the value of services rendered gratuitously. In Indiana it is settled that an element of damage in a personal injury action is the reasonable value of nursing and caring for the one injured, regardless of whether rendered gratuitously or under promise to pay. In *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874, 3 Am. Neg. Cas. 175, the court says: "The plaintiff, having testified that the nurses who attended him while prostrated from the injury did so voluntarily and without charge, was nevertheless permitted, over objection, to prove by his attending physician what their services were worth. This evidence was admissible under the rulings in *Indianapolis v. Gaston*, 58 Ind. 224, and *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. These services were necessary to ameliorate the condition and suffering of the plaintiff. That they were voluntarily and gratuitously rendered was for his benefit, and not for the benefit of the defendant. *Klein v. Thompson*, 19 Ohio St. 569." *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Varnham v. Council Bluffs*, 52 Iowa, 698, 3 N. W. 792, and *Crouse v. Chicago & N. W. R. Co.* 102 Wis. 196, 78 N. W. 446, 778, are to the same effect.

Belyea v. Minneapolis, St. P. & S. Ste. M. R. Co. 61 Minn. 224, 63 N. W. 627, and other cases cited by the appellant, are not

in point, for the reason that the law placed the duty to furnish medical attendance and nursing upon another than the plaintiff in the case, at the suit of whom the defendant would be liable. We adopt the rule followed in Iowa, Indiana, and Wisconsin, to the effect that a plaintiff who is entitled to recover special damages for nursing in a personal injury action may recover the reasonable value thereof, even though the nursing was rendered by a member of the family without expectation of compensation. Although services between members of a family or relatives are not often paid for in cash, the tacit understanding is that the recipient will reciprocate in kind when occasion arises, and there is a moral obligation so to do. If the defendant's tort necessitated the nursing, it should pay the reasonable value thereof. It is true that the recovery is limited to the amount agreed upon, where the services have been rendered with the understanding that payment should be made; but it is also true that, if the agreed price is more than the reasonable value, the recovery cannot exceed such value. We therefore think that the amount alleged to have been paid or expended may be said to state, although not directly, nevertheless by permissible inference, the reasonable value. At any rate, we would not reverse on the ground that the value of the nursing was not alleged, because a slight amendment of the complaint would obviate the objection.

We also think that the testimony which was offered by the defendant that signs in large letters were posted at the entrance and in the grand stand in conspicuous positions should have been received. These signs were: "The management will not be responsible for injuries received from thrown or batted balls. M. E. Cantillion, President." As hereinbefore indicated, a jury might find that the defendant owed its patrons a duty other than providing some seats behind screens; that it must use proper care to impart notice of the danger incident to the game. It is true the defendant stated that it could not prove that the plaintiff saw these notices. But that is not decisive. The notice may serve a twofold purpose. It may impart actual knowledge to the plaintiff, and posting it might tend to absolve defendant from the charge of negligence in failing to warn of danger. If the jury should conclude that, in posting these notices and screening a part of the stand for the use of those who sought protection, the defendant had performed its full duty to its patrons, then there can be no negligence and no recovery, regardless of the plaintiff's actual knowledge of such notices. It may be contended 46 L.R.A. (N.S.)

that these signs were not in the nature of a warning, and were not intended for that purpose. Conceding that the defendant may not escape liability by merely stating it will not be responsible, nevertheless we do think the signs convey information that injuries are apt to happen from thrown and batted balls, and are therefore in the nature of a precaution to prevent injury. The signs, as well as the screens, bore upon the defendant's conduct with respect to precautions taken for the safety of the spectators; they also bore upon the question of plaintiff's assumption of risk. If the signs conveyed warning or information, the mere posting in conspicuous places in the grand stand made plaintiff's observation of them a question for the jury, without direct proof that she saw them.

Fault is found with the court's charge in several respects; but, since there must be a new trial, it is not deemed necessary to discuss the errors based thereon, except that in one place the court left the jury to say whether the screen was constructed in a reasonably safe manner. There was no evidence that the screen was defective, or did not turn the ball, so that technically the court's statement was not correct; but no attention was called to the inaccuracy at the time, and, if that were the only error in the case, it would not be reversed. It may be also said that the question of defendant's negligence did not depend on the extent to which the screen should extend beyond the place plaintiff chose for her seat, but rather upon whether the screen furnished was one which the ordinarily prudent person would deem of sufficient size to afford reasonable protection.

Order reversed, and a new trial granted.

PENNSYLVANIA SUPREME COURT.

JOHN DAVIS and Wife, Appts.,

v.

DR. J. P. KERR.

(239 Pa. 351, 86 Atl. 1007.)

Physician — Inclosing sponge in wound — rule placing responsibility on nurse.

1. Surgeons cannot relieve themselves from liability for injury to a patient by leaving a sponge in the wound after an

Note. — Liability of physician or surgeon where foreign material is left in incision.

Generally, as to liability of operating surgeon for negligent acts of interne or hospital nurse in caring for patient, see note to *Harris v. Fall*, 27 L.R.A. (N.S.) 1174.

operation, by the adoption of a rule requiring the attending nurse to count the sponges used and removed, and relying upon such count as conclusive that all sponges have been accounted for.

Evidence — burden of proof — care of surgeon.

2. The burden of showing care is upon a surgeon who leaves a sponge inclosed in a wound after the performance of an operation.

Physician — leaving sponge in wound — liability.

3. A surgeon who leaves a sponge in an abdominal incision after an operation cannot escape liability for the resulting injury, notwithstanding he relied upon the count made by the attending nurses, unless it was so concealed that reasonable care on his part would not have disclosed it, or conditions were such that, in his professional judgment, further exploration for sponges would have endangered the safety of the patient.

(February 24, 1913.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas for Allegheny County in defendant's favor in an action brought to recover damages for negligently leaving a sponge in the body of the plaintiff patient after an operation. Reversed.

The facts are stated in the opinion.

Messrs. Jesse H. Wise, William E. Minor, Joseph W. Walters, and Frank P. Corbin for appellants.

And as to the liability of a physician or surgeon for acts of associate see note to *Morey v. Thybo*, 42 L.R.A. (N.S.) 785.

Generally, as to the degree of skill and care of specialist, see note to *Rann v. Twitchell*, 20 L.R.A. (N.S.) 1030.

It is generally held that a surgeon, under his duty to exercise ordinary skill and care in performing an operation upon a patient, is liable for injuries resulting from his leaving a foreign substance, such as a gauze pad or sponge, in a wound or incision.

Thus, a surgeon was held liable for injuries resulting from his leaving a gauze sponge in the abdominal cavity of the patient. *Ruth v. Johnson*, 96 C. C. A. 643, 172 Fed. 191; *Palmer v. Humiston*, 87 Ohio St. 401, 45 L.R.A. (N.S.) 640, 101 N. E. 283; *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639, 65 N. E. 643, 13 Am. Neg. Rep. 421; *Samuels v. Willis*, 133 Ky. 459, 118 S. W. 339, 19 Ann. Cas. 188; *Reynolds v. Smith*, 148 Iowa, 264, 127 N. W. 192 (recovery upheld on condition of remittitur). In *Reynolds v. Smith*, supra, evidence of the method adopted at the hospital where the operation was performed, to determine whether all gauze pieces used in operations are accounted for, was held inadmissible, where the physician testified that his method of keeping track of the pieces of gauze used required the nurses to count them, but the 46 L.R.A. (N.S.)

Messrs. Clarence Burleigh and William A. Challenger, for appellee:

The surgeon is liable only as for negligence.

Akridge v. Noble, 114 Ga. 949, 41 S. E. 78; *English v. Free*, 205 Pa. 624, 55 Atl. 777; *McCandless v. McWha*, 22 Pa. 261; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213.

Stewart, J., delivered the opinion of the court:

The plaintiff Mrs. Gertrude Davis, with a view of having a surgical operation performed on her person by the appellee, a professional surgeon, upon the latter's suggestion, and advice and with his assistance, secured accommodations at Mercy Hospital, in the city of Pittsburgh, where the operation was performed by appellee July 24, 1908. The plaintiff was suffering from tubercular peritonitis. To reach the diseased part, an incision into the abdomen was required, sufficient in length to admit of the hand of the operator being introduced for the manipulation of the parts therein inclosed and affected. In every such operation pads or sponges are introduced through the wound to take up the secretions, the flow of blood, foreign matter, if any, and to wall off the intestines from the field of operation. These pads or sponges are all supposed to be removed before the closing up of the incision. But in this case one of the sponges inserted, a piece of gauze about 12 inches in length, through

record did not indicate that such method was followed in performing the operation on plaintiff, and there was no evidence that any precaution had been taken save by tying a knot in the second piece of gauze inserted. The court observed: "Had there been evidence of how track of the gauze was actually kept, doubtless, as bearing on the issue of negligence, testimony that this was in accord with custom would have been competent. In the absence of such evidence, the rule is otherwise."

To close an incision leaving a sponge in the body is malpractice. *Harris v. Fall*, 27 L.R.A. (N.S.) 1174, 100 C. C. A. 497, 177 Fed. 79.

In an action against a surgeon for malpractice, in which it was claimed that a sponge or pad had been carelessly left in the body after the wound had been closed, from which injury had resulted, it was held not error in *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78, for the court to charge the jury that if they believed that the pad or sponge had been in fact left in the body, they should then determine whether it was so left by reason of the failure of the defendant to exercise due care and skill: and that he owed the plaintiff a duty to exercise reasonable care and skill, in performing the operation; including, in that expression, not only the opening of the body and the

somebody's mistake or negligence, was not removed, but was allowed to remain in the abdomen after the wound had been sewed up. Though plaintiff remained in the hospital some two months under appellee's care after the operation, the mistake was not discovered until more than nine months following the operation, when a second operation was required for the removal of the sponge that had been overlooked. This action was brought by Mrs. Davis and her husband against the surgeon who performed the operation, charging him with negligence in failing to remove the sponge in the first instance. In view of the disposition we propose to make of the appeal, reference need be made to but a single feature of the case as disclosed by the evidence.

Mercy Hospital is a public hospital, supported in part by state appropriations, and is under the charge of an order known as Sisters of Charity. The defendant was neither a director, nor was he one of its staff, though he frequently performed operations there. When he or other surgeons operated in this hospital, the nurses required for assistance were assigned by the Mother Superior. It is a custom prevailing universally in hospitals of this character, when an operation such as this is to be performed, to commit to the nurses assigned the duty of preparing in advance, by sterilization and otherwise, an adequate supply of sponges, carefully counted, to be

taken into the operating room. These nurses having in charge the sponges attend upon the operation. It is the business of one having custody of the sponges to hand them to the operating surgeon as required, while it is the duty of the other to receive them from the operating surgeon after each has served its purpose. The removed sponges speak for themselves as to number. When the operation has been concluded, comparison is made by the nurses of those removed with those shown to have been introduced. In this case the defendant, preparatory to closing up the wound he had made, inquired of the nurses whether their count tallied, and whether all the sponges had been removed, and it was only upon their replying affirmatively that he closed the wound. The evidence will support no other conclusion than that the defendant was misled by the mistaken count of the nurses. Two questions were left to the jury to pass upon: First, the credibility of the witnesses who testified that defendant, before closing the wound, had inquired of the nurses whether all the sponges had been removed; and, second, whether the general system or practice of permitting the handling and counting of sponges as we have above indicated was reasonable. The verdict of the jury was an affirmative finding as to each. The only assignments of error which we propose to consider are those which relate to the rulings of the court with respect to the second question.

removal of the affected parts, but also the use and handling of the sponges or pad. In this case there was a verdict for the defendant, the evidence showing that no pads or sponges had been left in the body.

The removal of all appliances used, such as gauze pads and sponges, is part of the operation which a surgeon contracts to perform (*Akridge v. Noble*, supra, and *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639, 65 N. E. 643, 13 Am. Neg. Rep. 421), and it seems that an error in a nurse's count will not relieve a surgeon from liability for failure to remove such an appliance (*Palmer v. Humiston*, 87 Ohio St. 401, 45 L.R.A.(N.S.) 640, 101 N. E. 283).

But in *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295, an action against two surgeons, one of whom, in performing an operation, broke a drill and left the point imbedded in the patient's kneecap, the defendants were held not liable. "The evidence of the defendants on the point under consideration," said the court, "was in substance that, after the operation of wiring the fractured kneecap was completed, the plaintiff was suffering greatly; that the temperature of his body was abnormally high and his pulse abnormally rapid, and that the knee was highly inflamed; that it was impossible to remove the drill point without breaking the bone; that the drill point, as well as all

other instruments used in the operation, had been antisepticized, and it was the unanimous opinion of all surgeons and physicians who testified in behalf of the defendants that, under the circumstances, the leaving of the drill point in the bone was proper. We cannot say that the jury was wrong in agreeing with the defendants' theory." Upon the question whether defendants were negligent in not advising the plaintiff that the drill had been broken and the point left in the bone of his kneecap, the court said: "The jury have found, and the evidence sustains the finding, that the defendants, in keeping the plaintiff ignorant of the presence of the drill point in his kneecap, were in good faith exercising their best professional judgment, and when they did this they cannot be held, as a matter of law, to have been guilty of negligence, though it afterwards turned out that they were mistaken as to the effect that the drill point in the bone would have upon the plaintiff's knee."

It was held in *Brown v. Bennett*, 157 Mich. 654, 122 N. W. 305, that an attending physician who engaged a surgeon to perform an operation, and who assisted at the operation, but did not have principal charge of it, could not be held jointly liable with the surgeon for neglect to remove a sponge from the wound.

J. D. C.

The rule of practice as we have stated it required no submission. That the precautions it required in order to avoid the serious mistake of allowing a sponge to remain in the abdomen after the wound had been closed were not only reasonable, but wise, was not a subject of dispute. A verdict of a jury is not needed to give sanction to a rule or practice in surgery adopted and approved so universally by those skilled in the science of surgery. But, aside from this, however directly the negligence in this case may be traced to the nurses, the injury complained of could not be referred to the rule, but to the nurses' neglect in applying or observing the rule. Therefore, as thus understood, the reasonableness of the rule was not a question in the case. The court should have given the jury a very different understanding of what the reasonableness of the practice involved than that implied in his charge. He instructed the jury as follows (third assignment): "If you determine the custom was reasonable, or the practice, or whatever you choose to call it, custom or practice, among the surgeons was reasonable, and Dr. Kerr followed it, then that is the end of the case, and you should return a verdict for the defendant." There is here an unavoidable implication that involved in the rule, as an essential part of it, is exemption of the operating surgeon from liability in all cases where, as here, the nurses report that their count shows a removal of all the sponges, and the wound is thereupon closed up with a sponge remaining within; that the whole responsibility for the mistake is with the nurses, because of their mistaken count of the sponges. Indeed, the whole case for the defendant was conducted on this theory, as appears from the examination of the witnesses; and that the learned trial judge had no other appears, not only from the above extract from the charge, but from his answers to the several points submitted by the defendant.

The third point of defendant was as follows: "It being the undisputed evidence in the case that the counting of the sponges, both before and after an operation, was the duty of the nurses, and not of the operating surgeon, and it being further undisputed that the nurses reported to defendant, Dr. Kerr, that all the sponges had been accounted for, the verdict of the jury must be for the defendant." The answer was (seventh assignment): "That is affirmed if you find that the practice or custom to have the nurses' count the sponges is a reasonable and proper custom or practice." The instruction not only misconceives the purpose and object of the rule or practice, but

treats it as a rule defining the whole duty of the surgeon, limiting his responsibility accordingly. Manifestly the only purpose in introducing the approved system or practice was to reduce as far as practicable the hazards to which the one operated upon is exposed, by affording additional security against such accidents as here occurred. It certainly did not contemplate that the security provided was to be the only security upon which the patient could rely for the avoidance of such mishaps, displacing entirely those which had before been recognized, among these the skill and observation of the operating surgeon, which had theretofore been employed and relied upon to see that all the sponges had been removed. It may well be that, because of the additional security provided, the burden theretofore resting upon the surgeon was reduced; that whereas before it was his duty to take accurate count of the sponges, this duty being devolved upon the attending nurses, the surgeon is enabled to give closer attention to the work immediately before him. We can well understand how better results can in this way be achieved. But before the counting of the sponges by the nurses, and before the wound is closed, is it reasonable to suppose that no duty rests on the surgeon to employ his skill or observation to assure himself that no foreign substance has been allowed to remain within? This defendant did not understand the rule or practice as relieving him from all responsibility in this regard; for he testified that he supposed he had removed all the sponges and pads, and that, "when those were all removed, then my next step was to confirm that supposition by the statement of the nurse whose duty it is to count the sponges, and to have her tally with the nurse who is handing the sponges to me, the clean sponges, or the ones that haven't been used." In making the observation which led him to conclude that he had removed all the sponges, he was strictly in the line of his duty, and acting in accordance with the rules of the improved practice, according to his own testimony. Granting the credibility of his testimony, the only question of fact remaining was: Did he, in making his observation, exercise reasonable skill, care, and prudence? The surgeons who testified in behalf of the defendant unite in saying that it is only in most exceptional cases, if any, that the surgeon is warranted in exploring the restored parts after the count of the sponges by the nurses. We can understand how this is a reasonable rule of practice; but it does not concern us here.

The question relates to what preceded the count by the nurses. Here the surgeon

had reached the conclusion that he had removed all the sponges, a mistaken conclusion, but verified by the nurses' count. In reaching his conclusion, did he exercise ordinary skill? We see nothing in the evidence to warrant the inference that he did not; but, on the other hand, we find nothing to warrant the inference that he did, which is far more important, since the burden of showing care was upon him. Why was a foreign substance left in the parts which the operating surgeon should have removed? It was for him to acquit himself of negligence with respect to it. The sponge escaped his observation, why? Was it so hidden and concealed that reasonable care on his part would not have disclosed it, or were conditions such that, in his professional judgment, further exploration by him for sponges would have endangered the safety of the patient? In a word, did he do all that reasonable care and skill would require? Except as one or the other of these questions can be answered affirmatively from the evidence, the law will presume to the contrary, and attribute the unfortunate consequences to his contributing negligence. Neither does the defendant, nor a single witness in his behalf, undertake to give any explanation of the fact that here a sponge which the defendant should have removed was allowed to remain, except to say that the nurses failed to keep accurate count. For all that appears in the case the retained sponge might readily have been discovered by the surgeon, and reasonable prudence and care on his part would have avoided the accident. If this were so, clearly his negligence contributed with that of the nurses, and responsibility therefor in law attaches. The case must be tried again. We have sufficiently indicated wherein the error on the first trial consists, and such of the assignments of error as properly fall within what we have said are affirmed.

The judgment is reversed, with a venire facias de novo.

TEXAS SUPREME COURT.

S. W. POWELL, Plff. in Err.,

v.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

(104 Tex. 219, 135 S. W. 1153.)

Eminent domain — obstructing travel to business property — compensation.

1. Compensation must be made for diminution in value of business property by the raising of the grade of a railroad track across the street, which, by the complete

obstruction of travel pending the work, which is unduly prolonged, and by causing permanent difficulty of access, diverts customers from the property, where the Constitution requires compensation to be made for property damaged for public use, although the obstruction is not within the block where the injured property is located.

Same — injury to public — special injury.

2. The right to compensation for diminution of value of property by diverting travel therefrom, because of the obstruction of a street not within the block, is not defeated by the fact that other property within the block is injured in the same way, since this injury is different from that suffered by the public at large.

Evidence — measure of damages — sufficiency.

3. Evidence that, before injury to property by right of eminent domain, it was worth a certain sum, and after the injury it was worth one third less, is sufficient to carry to the jury the question of the amount of damages to be awarded for the injury.

Damages — items of injury — loss of profits.

4. Upon the question of damages to be awarded for obstructing travel to a place of business by exercise of the right of eminent domain, evidence is sufficient to carry the case to the jury, which tends to

Note. — Right of landowner to damages for obstruction of street or highway by railroad not adjacent to his property.

The earlier cases on this question have been collected in the note to *Scrutchedfield v. Choctaw, O. & W. R. Co.* 9 L.R.A. (N.S.) 496.

As to right of property owner whose access from one direction is shut off or interfered with by closing or adjoining street, or portion of street, upon which he is situated, see notes in 2 L.R.A. (N.S.) 269, and 30 L.R.A. (N.S.) 637.

As there stated, where the landowner suffers a peculiar damage from the obstructed street, he may recover, although the obstruction is not adjacent to his property.

In *Fitzer v. St. Paul City R. Co.* 105 Minn. 221, 18 L.R.A. (N.S.) 268, 127 Am. St. Rep. 557, 117 N. W. 434, the occupation of a street by the construction of a permanent improvement at a point 88 feet from premises fronting thereon, with the result that pedestrians travel on that side of the street was diverted in other directions, was held to constitute an interference with the natural property rights enjoyed by the owner, and therefore to entitle him to damages. A feature which distinguished the plaintiff's premises from other property farther down the street, as showing that the damage likely to follow to him was not the same in kind as suffered by the public generally, was the fact that no street intervened between the *cul de sac* and his lot.

show the volume of business done before and after the obstruction, the average profit made, and the loss of regular customers, and difficulty in filling orders because of the obstruction.

(March 29, 1911.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment reversing a judgment of the District Court for Navarro County in plaintiff's favor in an action brought to recover damages for injury to plaintiff's property alleged to have been caused by the obstruction of a street by defendant. Reversed.

The facts are stated in the opinion.

Messrs. Treadwell & Tarver and Richmond Mays, for plaintiff in error:

Where, in changing a grade level across a public street, a railway company makes the crossing impassable, or puts it in such condition as unnecessarily to impair its usefulness, and then abandons the work for six months, leaving it blocked and impass-

while as to other property there was an intervening street.

In *Ellis v. St. Louis, I. M. & S. R. Co.* 131 Mo. App. 395, 111 S. W. 839, where the obstruction was in an alley upon which plaintiff's premises abutted, and about 100 feet from the plaintiff's premises, and it completely cut off communication to his lot by way of the obstructed alley, and there were no intervening streets or alleys by which plaintiff might come into or go out of the alley, and thence to or from her property, plaintiff was held to suffer a different kind of damage from the general public, and to be entitled to damages for the obstruction.

The fact that there are streets on other sides of property does not prevent a recovery for such obstruction. *Ibid.*

So, in *Illinois C. R. Co. v. Elliott*, 129 Ky. 121, 110 S. W. 817, where a street was entirely obstructed several hundred feet from premises, the owner thereof was held to have a right to recover damages therefor.

In *Idaho & W. N. R. Co. v. Nagle*, 106 C. C. A. 578, 184 Fed. 598, where the railroad obstructed a street near plaintiff's premises, and there was evidence tending to show that it was so near the premises and of such character as to inconvenience and injure the plaintiff in an essentially different manner from the public at large, damages were allowed to the plaintiff.

Apparently, the obstruction in *Gray v. Charleston & W. C. R. Co.* 81 S. C. 370, 62 S. E. 442, was not adjacent to the plaintiff's property, but it prevented and destroyed the access to his property, which was situated on the street in which the obstruction was placed. This was held to be a direct injury peculiar to the plaintiff, and different in kind from that sustained by the

public, it is guilty of negligence *per se*, and liable for any resultant damages.

St. Louis Southwestern R. Co. v. Byas, 12 Tex. Civ. App. 657, 35 S. W. 22; *St. Louis Southwestern R. Co. v. Smith*, 49 Tex. Civ. App. 1, 107 S. W. 641; *International & G. N. R. Co. v. Butcher*, — Tex. Civ. App. —, 81 S. W. 820; *Missouri, K. & T. R. Co. v. Davis*, 53 Tex. Civ. App. 547, 116 S. W. 427; *Texas C. R. Co. v. Randall*, 51 Tex. Civ. App. 249, 113 S. W. 181; *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 22 L.R.A. (N.S.) 588, 134 Am. St. Rep. 457, 118 S. W. 337.

Plaintiff's damages were special and recoverable.

St. Louis Southwestern R. Co. v. Byas, 12 Tex. Civ. App. 657, 35 S. W. 22; *St. Louis Southwestern R. Co. v. Smith*, 49 Tex. Civ. App. 1, 107 S. W. 640; *Farmers' Co-op Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L.R.A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; *Galveston, H. & S. A. R. Co. v. DeGroff*, 102 Tex. Civ. App. 433, 21 L.R.A. (N.S.) 749, 118 S. W. 134.

It is not a sufficient reason for disallow-

public sufficient to sustain an action for damages therefor.

So, damages were allowed in *Mason City & Ft. D. R. Co. v. Wolf*, 78 C. C. A. 589, 148 Fed. 961, where a public street was wholly obstructed by a railroad company a short distance from the lot of plaintiff, under a constitutional provision against the taking or damaging of property without just compensation.

But where the plaintiff suffers no damage peculiar to himself and different from that suffered by the public at large, he is not entitled to recover.

Thus, in *Hyde v. Minnesota, D. & P. R. Co.* 29 S. D. 220, 40 L.R.A. (N.S.) 48, 136 N. W. 92, the right of a landowner to damages under a constitutional provision prohibiting damaging property without compensation, for the closing of a street by a railroad company at a point not abutting on his property, was denied where such owner had free access to all his lots by public streets, there being an intervening street between plaintiff's premises and the obstruction.

So, in *Crofford v. Atlanta, B. & A. R. Co.* 158 Ala. 288, 48 So. 366, a viaduct over a street, which contained a sufficient archway for travel on the street to pass through, located at a distance of 50 to 250 feet from the complainant's premises abutting on said street, was held not to be a taking, destroying, or injuring of such property within a constitutional provision requiring compensation for taking, destroying, etc.

So, a landowner was held not entitled to recover damages for the construction of a trestle by a railroad company across a street on which his lot abutted, but not in front of his lot, in *Murphy v. Chicago, M. & St. P. R. Co.* 66 Wash. 663, 120 Pac. 525.

ing damages claimed, that a party can state their amount only approximately; it is enough if, from approximate estimates of witnesses, a satisfactory conclusion can be reached.

Dickinson Creamery Co. v. Lyle, — Tex. Civ. App. —, 130 S. W. 906; *Galveston, H. & S. A. R. Co. v. DeGross*, 102 Tex. 433, 21 L.R.A.(N.S.) 749, 118 S. W. 134; 13 Cyc. 37.

The evidence in the case was sufficient to form the basis of a judgment for Powell.

Galveston, H. & S. A. R. Co. v. Baudat, 21 Tex. Civ. App. 242, 51 S. W. 541; *Sutherland, Damages*, §§ 70, 1054-3077; *Brincefield v. Allen*, 25 Tex. Civ. App. 260, 60 S. W. 1010; *Rogers v. McGuffey*, 96 Tex. 566, 74 S. W. 753; *Galveston, H. & S. A. R. Co. v. DeGross*, 102 Tex. 433, 21 L.R.A.(N.S.) 749, 118 S. W. 134; *Dickinson Creamery Co. v. Lyle*, — Tex. Civ. App. —, 130 S. W. 906.

Messrs. Baker, Botts, Parker, & Garwood, R. S. Neblett, and R. R. Owen, for defendant in error:

There was nothing to hinder or prevent

the travel which plaintiff claims was diverted, from passing his store.

Southern Oil Co. v. Church, 32 Tex. Civ. App. 325, 74 S. W. 797, 75 S. W. 817, 16 Am. Neg. Rep. 245; *Crawford v. Wingfield*, 25 Tex. 416; Rev. Stat. 1895, art. 996; *Clarendon Land Invest. Agency Co. v. McClelland Bros.* 36 Tex. 179, 22 L.R.A. 105, 23 S. W. 576, 1100; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, 6 Am. Neg. Rep. 214; *Wootters v. Crockett*, 11 Tex. Civ. App. 474, 33 S. W. 391; *Scrutcheff v. Choctaw, O. & W. R. Co.* 18 Okla. 308, 9 L.R.A.(N.S.) 496, 88 Pac. 1048; *Cram v. Laconia*, 71 N. H. 41, 57 L.R.A. 283, 51 Atl. 635.

Where the injury sustained is similar in kind to that sustained by every other member of the public who may have occasion to use the obstructed street or highway, an action by the landowner will not lie.

Gulf, C. & S. F. R. Co. v. Winter, 38 Tex. Civ. App. 8, 85 S. W. 477; *Scrutcheff v. Choctaw, O. & W. R. Co.* 18 Okla. 308, 9 L.R.A.(N.S.) 496, 88 Pac. 1048.

Plaintiff's damages, if any, were common,

In *Ft. Collins Development R. Co. v. France*, 41 Colo. 512, 92 Pac. 953, where the obstruction raised by the railroad company was from 80 to 110 feet from the house of the plaintiff, it was held that the mere fact that the plaintiff used the street obstructed more frequently than other people, and therefore would be more frequently inconvenienced by the obstruction across the street, did not entitle him to recover damages against the defendant for the obstruction of said street.

So, where the obstruction is so remote from plaintiff's property as not to affect its permanent or rental value, and the plaintiff is merely driven to a circuitous route or a longer road, no peculiar injury is shown such as to authorize the assessment of damages. *Walls v. Smith*, 167 Ala. 138, 140 Am. St. Rep. 24, 52 So. 320.

The position of the obstruction with reference to the plaintiff's property is not made clear from the opinion in *O'Brien v. New York C. & H. R. R. Co.* 148 App. Div. 733, 133 N. Y. Supp. 322, but the obstruction necessitated a longer route to the premises, and it is held that the substitution of a longer route, or one that made the plaintiff's premises less accessible, did not deprive him of any vested right, or cause any injury to the premises which must be compensated.

In *Warner v. New York, N. H. & H. R. Co.* 86 Conn. 561, 86 Atl. 23, where a street was wholly obstructed at the side of plaintiff's property, and another crossing provided, so that the only damage to the plaintiff was to render access to his land more inconvenient than it formerly was, by reason of a more circuitous route being required to be taken, it was held that he was not entitled to compensation. The company was 46 L.R.A.(N.S.)

authorized to make the change by the railroad commissioners, and the decision is based on the theory that the change is in effect made by the sovereign authority, and therefore no liability is incurred. "It is a part of the price paid for the social compact of organized society," says the court, "that the public has reserved to it certain dominant rights over all individual property. . . . Acts which would be actionable if done by an individual frequently are not when done by authority of the sovereign power."

As to whether or not the fact that one is prevented by an unlawful obstruction from using a highway causes him a special damage which will sustain an action by him against the wrongdoers, see note to *Sholin v. Skamania Bomb Co.* 28 L.R.A.(N.S.) 1053.

As to obstructions in highways preventing access to property except by circuitous route, as a special injury entitling owner to maintain an action for damages or to abate the nuisance, see note to *Sloss-Sheffield Steel & Iron Co. v. Johnson*, 8 L.R.A.(N.S.) 226, and supplementary note in 21 L.R.A.(N.S.) 75.

As to the right of owner of upland to access to navigable water, see note to *State ex rel. Denny v. Bridges*, 40 L.R.A. 593.

As to the right of a property owner to compensation for interference with light or air by railroad structure on company's own property, see note to *Davis v. New England R. Co.* 20 L.R.A.(N.S.) 1061.

See subdivision of note to *Slaughter v. Meridian Light & R. Co.* 25 L.R.A.(N.S.) 1265, on the right of abutting owner to damages for special injuries, where street railway is not considered an additional burden, relating to the interference with ingress and egress.

W. A. E.

and not special, and he sustained no damages which he could recover.

Wootters v. Crockett, 11 Tex. Civ. App. 483; Cram v. Laconia, 71 N. H. 41, 57 L.R.A. 282, 51 Atl. 635; Scrutchfield v. Choctaw, O. & W. R. Co. 18 Okla. 308, 9 L.R.A. (N.S.) 496, 88 Pac. 1048; Scott v. Marlin, 25 Tex. Civ. App. 355, 60 S. W. 969; McDonald v. Lyon, 43 Tex. Civ. App. 484, 95 S. W. 68; Decker v. Evansville Suburban & N. R. Co. 133 Ind. 493, 33 N. E. 349; Meyer v. Richmond, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Richmond Traction Co. v. Murphy, 98 Va. 110, 34 S. E. 982; Chicago v. Union Bldg. Assn. 102 Ill. 379, 40 Am. Rep. 598; Buhl v. Fort Street Union Depot Co. 98 Mich. 596, 23 L.R.A. 392, 57 N. W. 829; Davis v. Hampshire County, 153 Mass. 218, 11 L.R.A. 750, 26 N. E. 848; East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; O'Brien v. Central Iron & Steel Co. 158 Ind. 218, 57 L.R.A. 508, 92 Am. St. Rep. 305, 63 N. E. 302; Clark v. Chicago & N. W. R. Co. 70 Wis. 593, 5 Am. St. Rep. 187, 36 N. W. 326; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341; Smith v. Boston, 7 Cush. 254; Stanwood v. Malden, 157 Mass. 17, 16 L.R.A. 591, 31 N. E. 702; Morrow v. St. Louis, A. & T. R. Co. 81 Tex. 405, 17 S. W. 44; Scott v. Marlin, 25 Tex. Civ. App. 353, 60 S. W. 969; Burton Lumber Corp. v. Houston, 45 Tex. Civ. App. 363, 101 S. W. 825; Chicago v. Burcky, 158 Ill. 103, 29 L.R.A. 568, 49 Am. St. Rep. 142, 42 N. E. 173; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Bembe v. Anne Arundel County, 94 Md. 321, 57 L.R.A. 279, 61 Atl. 179; Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 50 Am. St. Rep. 343, 34 L.R.A. 769, 39 N. E. 223.

Defendant's work did not interfere with the access to plaintiff's store, and plaintiff is not entitled to recover of it.

Rev. Stat. 1895, art. 4426; McCann v. Eddy, — Mo. —, 27 S. W. 541; Stanwood v. Malden, 157 Mass. 17, 16 L.R.A. 592, 31 N. E. 702; Smith v. Boston, 7 Cush. 254; O'Brien v. Central Iron & Steel Co. 158 Ind. 218, 57 L.R.A. 508, 92 Am. St. Rep. 305, 63 N. E. 302; Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223.

Brown, Ch. J., delivered the opinion of the court:

We copy this statement of the evidence from the opinion of the court of civil appeals:

"The evidence shows that appellee owned a lot of land on the south side of First avenue, about 200 feet east of where the rail-

road crossed First avenue; said crossing being just west of Seventh street. Appellant, in attempting to comply with the Texas railroad commission's order to so construct its track that the Trinity & Brazos Valley railway, which ran along Sixth street, just east of appellee's store, could cross under appellant's track at a point a short distance north of First avenue, raised its track across First avenue to a height that rendered said street at said point practically impossible for travel, and stopped work thereon for several months. During this time the city placed obstructions at said point which deterred any person from attempting to cross at said point. First avenue was a regular thoroughfare for persons entering the city from the north and northeast. The main business section of the city is on Beaton street, and First avenue intersects Beaton street about two blocks north, or where said business section begins. To reach the business section of said Beaton street, it is as near for parties coming into the city from the north and northeast to leave First avenue at Fifth or Seventh streets, go down to Second or Third avenues, and thence to Beaton street, as it is to travel First avenue to Beaton street, thence to the business section. Travel was diverted at Fifth avenue, thence down said avenue to Second avenue, thence diagonally across one block to Third avenue, thence to Beaton street. The appellant's right of way is immediately west of Seventh street.

"Appellee's store abutted on First avenue, which was obstructed by the appellant some 200 feet west from said store; but the street in front of said store, and ingress and egress to and from the store, were not interfered with, further than the free passage along said street at the point of obstruction. There was a street immediately west of the block in which appellee's premises were situated, and between the obstruction and said premises, and this and other streets running north and south, and east and west, all open to travel, which gave him and that section free access to all parts of the city, and the only interference, as before stated, to travel, was the obstruction on First avenue caused by appellant, and this obstruction did not increase the distance to the main part of town for the appellee or those living in that section, nor those living in the country to the north and northeast. The obstruction only caused an inconvenience in reaching that portion of First avenue lying west of the obstruction to those living east thereof, and they were only inconvenienced by having to travel the distance of around one block."

We add to the statement as made by the court of civil appeals, that the plaintiff be-

low alleged in his petition that the work was prolonged an unreasonable time, beyond what was necessary to do it, during which time the crossing was impassable, which caused damage to his business. He testified to facts from which a jury might have concluded that his trade was greatly lessened, causing damage. Plaintiff testified that before the raising of the grade his property was worth \$1,300, and since that crossing was raised it was worth one third less.

Article 1, § 17, of our state Constitution, as it is applicable to the facts of this case, may be read thus: "No person's property shall be . . . damaged [for] . . . public use without adequate compensation being made, unless by the consent of such person." Does the evidence show such damage to the plaintiff's property as comes within the protection of the above section of the Constitution? We condense and restate the facts which the evidence tends to establish. The railroad was constructed and operated across a street in the city of Corsicana about 200 feet from a lot abutting on that street which plaintiff owned and upon which he had a storehouse where he transacted his business as a merchant. Under a contract with the Brazos Valley Railroad, approved by the railroad commission, the defendant in error raised its grade at that point about 2 feet, and thereby obstructed the crossing for a time, and that it unnecessarily delayed for several months the completion of the work, by which the travel of persons over the said street from points beyond the railroad track was interrupted, which travel would have come to the store of the plaintiff in error for the purpose of trading with him. The alteration of the said grade by raising it 2 feet higher made it more difficult to cross, and impaired the plaintiff's right of access to and from his property by persons who would have traded with him, and who had been trading with him, whereby the value of his property was diminished in the amount alleged in the petition. The change in the grade is permanent, and whatever effect it had upon the property of the plaintiff is permanent in its nature.

The ownership of the lot abutting upon the street carried with it as property the right of free and unimpaired access thereto and egress therefrom, and whatever impaired that right and caused a depreciation of the value of the lot constituted damages to the lot within the meaning of the Constitution. *O'Brien v. Central Iron & Steel Co.* 158 Ind. 218, 57 L.R.A. 508, 92 Am. St. Rep. 305, 63 N. E. 302; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467.

It was not necessary that the obstruction should be in front of or near to the

plaintiff's property, but the test of the right to recover in this action is: What effect did that crossing and the condition in which it was have upon the value of the plaintiff's property, and upon the exercise of his right of egress and ingress?

"The conclusions thus stated in the first edition have been verified by numerous decisions since rendered, and, we believe, without any material dissent, except in the case of Missouri, as shown below. If a street or public way communicating with the plaintiff's premises is obstructed elsewhere than in front of the plaintiff's property, as by a viaduct or bridge, or approach thereto, or by a railroad crossing a street in a cut or on an embankment, or otherwise, and the result of such obstruction is to render such property less valuable either to sell or to use, then the property is damaged, and compensation may be recovered to the extent of the depreciation." *Lewis, Em. Dom.* § 354, p. 646. The above extract from that excellent writer is supported by many authorities, of which we cite these: *Rigney v. Chicago*, 102 Ill. 64; *Coker v. Atlanta, K. & N. R. Co.* 123 Ga. 483, 51 S. E. 481; *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633; *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223; *Cooper v. Dallas*, 83 Tex. 242, 29 Am. St. Rep. 645, 18 S. W. 565; *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 175, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259.

There can be no doubt, under these authorities and the facts of this case, that a jury might find that there was damage caused by the crossing to the property and to the trade of the plaintiff in error. But the court of civil appeals placed their decision upon the additional ground that the depreciation in the value of the lot, by reason of the condition of the said crossing, is such as was suffered by all others owning property in his vicinity. This proposition can best be answered by quoting from *Texas & N. O. R. Co. v. Golberg*, 68 Tex. 688, 5 S. W. 826, as follows: "The fact that the injury was common to all other property holders on the street would not bar the plaintiff's right of recovery. The plaintiff sues for special damage to his own property by reason of defendant's having impaired the use of the street upon which it fronts. It does not affect his right to recovery that the owners of property fronting on the same street have been injured in the same manner. This is a loss peculiar to plaintiff's property, and not one he suffers in common with the community generally where the property is situated. *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467."

The law is so clearly stated by Judge Gaines in the above extract that we are unable to add any force to the reasoning which supports the conclusion announced. The depreciation of the value of the lot which belonged to Powell does not affect others who might own property in the same neighborhood, neither does the depreciation in the value of the property of others affect Powell. Therefore the injury suffered by Powell is special and personal to himself, and does not come within the rule which is invoked by the court of civil appeals.

In addition to the statement of the court of civil appeals, the plaintiff testified that his property, before the change in the grade in the street, was worth \$1,300, and after the grade had been so changed, and up to the time of the trial, it was worth one third less than that sum. This was sufficient evidence to go to the jury on the question of damage to the lot, and which was submitted by the court to the jury in a charge fair and just to the defendant. Plaintiff also testified as to the volume of trade which he did before the time the grade of the street was interfered with, and the volume of trade that he did during the time that the crossing was obstructed, also since it has been opened. He also testified to the average per cent of profit that he made on the goods sold. He stated that he had many customers from different directions from the opposite side of the railroad track who had previously come to his store over the street on which this obstruction now exists, and that during the time the obstruction existed many of those customers did not visit him as they did before. He also stated that he had customers on the opposite side of the railroad track to whom he delivered articles upon order, and that the condition of the crossing made his access to those customers much more difficult than it was previously. It would be quite difficult to prove with any degree of certainty the damages which might arise from the interference with trade under circumstances such as are shown in this case; but the evidence is such that a jury might with reasonable certainty ascertain the damage done. We therefore hold that the trial court did not err in submitting to the jury the issue of damage to the property and to the trade of plaintiff, and that the court of civil appeals erred in reversing and rendering the judgment in this case.

It is therefore ordered that the judgment of the court of civil appeals be reversed, and that the cause be remanded to the District Court for another trial.

46 L.R.A.(N.S.)

WASHINGTON SUPREME COURT.
(Department No. 1.)

SAMUEL R. STERN et al., Appts.,
v.

CITY OF SPOKANE, Resp't.

(73 Wash. 118, 131 Pac. 476.)

Eminent domain — interference with access to property — structures in street.

1. Constitutional liability to make compensation for damaging property for public use does not extend to the loss of rental value of property abutting on a highway, because of the occupation of the street with towers and power houses necessary for the removal of a condemned bridge which carries the street across a river, and the construction of a new one, although access to the property is temporarily interfered with by such structures.

Appeal — conflicting verdicts — right to set aside.

2. An appellate court cannot set aside a verdict in one case because a jury has reached the opposite conclusion on the same facts in another case.

(April 18, 1913.)

Note. — Liability of a municipality for temporary interfering with access to property in making improvements.

The liability for interfering with access during the changing of the grade of a street, and while the property is being changed and adapted to the new grade, is not discussed herein.

Cases such as *Brooks v. Boston*, 19 Pick. 174, in which the abutting landowner seeks to base a liability upon the mere fact that the street is encumbered with materials, and thus rendered inconvenient for passing and repassing, without any reference being made as to whether or not access to the abutting property is interfered with, have in general been excluded.

In the absence of unskillfulness or unreasonable delay in doing the work, a municipality is not liable for mere temporary interference with access to abutting property.

Thus, a city may temporarily obstruct a public street so far as it may be necessary to enable the city or its agent to construct a public improvement, such as a tunnel, sewer, or water supply pipe, without becoming liable for damages to an abutting owner upon the street. *Lefkovits v. Chicago*, 238 Ill. 23, 87 N. E. 58.

In *Tuggle v. Atlanta*, 57 Ga. 114, the court holds that the public officials may temporarily exclude the public from a street during the process of a public improvement, and if they have not grossly abused their discretion in doing so, the municipality is not liable. The plaintiff in this case was the owner of a store on a street from which a bridge was removed, leaving the street

APPEAL by plaintiffs from a judgment of the Superior Court for Spokane County in defendant's favor in an action brought to recover damages for injury to plaintiffs' property by the erection of a street improvement. Affirmed.

The facts are stated in the opinion.

Messrs. Robertson & Miller and J. W. Hancox, for appellants:

Recovery should have been permitted under the Constitution, and because of the nuisance created and maintained.

Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; Lund v. Idaho & W. N. R. Co. 50 Wash. 574, 126 Am. St. Rep. 916, 97 Pac. 665; Brown v. Seattle, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214;

Farnandis v. Great Northern R. Co. 41 Wash. 486, 5 L.R.A. (N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; State ex rel. Smith v. Superior Ct. 26 Wash. 278, 66 Pac. 385; Sweeney v. Seattle, 57 Wash. 678, 107 Pac. 843; Re Fifth Ave. 62 Wash. 218, 113 Pac. 762; Provine v. Seattle, 59 Wash. 681, 110 Pac. 619; Sterrett v. Northport Min. & Smelting Co. 30 Wash. 176, 70 Pac. 266; Potter v. Spokane, 63 Wash. 267, 115 Pac. 176; Rigney v. Chicago, 102 Ill. 67; Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638. 8 Sup. Ct. Rep. 820; Pause v. Atlanta, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489; Bates v. Holbrook, 171 N. Y. 460, 64 N. E. 181; Simons v. Wilson, 61 Wash. 574, 112 Pac. 653; Hummel v. Peterson, 69 Wash. 143, 124 Pac. 400.

impassable during the time the bridge so remained removed. It is not clear that access was interfered with further than in the direction in which the bridge was located.

Temporary obstructions erected in a street and a river during the construction of a tunnel under the river, which deprive an abutting owner of access to his premises, both on the side of the river and on that of the street, during the prosecution of the work, do not render the municipality liable therefor to the abutting owner, where the work is being done under authority from the state, and there is no claim of negligence, or that the work was prolonged a longer time than was necessary to complete it. Northern Transp. Co. v. Chicago, 99 U. S. 640, 25 L. ed. 337.

Such an obstruction made in the construction of an improvement which is authorized by the legislature cannot be a nuisance so as to give a right of action against the municipality for damage, where the municipality has acted within its authority and with care and skill. Northern Transp. Co. v. Chicago, *supra*.

So, in *Vidalat v. New Orleans*, 43 La. Ann. 1121, 10 So. 175, there was held to be no right to damages because access to a market on a street was temporarily obstructed on account of the banquette adjacent to the market house being torn up during some two or three months while the street was undergoing repairs. "Such inconveniences," says the court, "as may fairly and legitimately result from the making the needed public improvements, must be submitted to by all citizens without compensation."

A municipality is not liable for closing a street, thereby interfering with access to the plaintiff's property, at a dangerous railroad crossing, while an overhead bridge is being erected. *Crowell v. Monroe*, 152 N. C. 399, 67 S. E. 989. In the course of the opinion, the court states that the record does not present the question of taking private property for public use, nor the question of the permanent closing of a public street in which an abutting owner

has certain recognized rights; but that the fact discloses nothing more than a closing of a railway crossing in order that an overhead bridge immediately above the crossing may be erected for the use of the public, and evidently for public safety and convenience. "It may be that the plaintiff is inconvenienced and temporarily damaged," says the court, "but it is *damnum absque injuria*."

The court in *Osgood v. Chicago*, 44 Ill. App. 532, states that where there is no claim that the work is not done skillfully or diligently, the right to construct, being conferred by statute, might be exercised without responsibility for damage to property not invaded, but for the provision in the Constitution of 1870, which gives compensation "for property damages." The court then considers whether or not such damage comes within this constitutional provision, and concludes in the following language, which is approved on the affirmance of this decision in 154 Ill. 194, 41 N. E. 40: "But to construe that provision as giving compensation for all temporary obstructions necessary when streets are being repaired, etc., even though thereby access to abutting property is for a time wholly cut off, would be unreasonable," and it is accordingly held in the case that rent lost while the approaches to a viaduct were being constructed did not constitute such damage as required compensation to be made.

Neither is there any liability for an elevation of railroad tracks so as to interfere with the connection with a spur track belonging to the plaintiff. *Chicago Flour Co. v. Chicago*, 243 Ill. 268, 90 N. E. 674. In the course of the opinion, it is stated that "it is not claimed that there was any diminution of its value; the only invasion of their rights complained of is the temporary interference with the ordinary means of access to, and egress from, their property during the process of the work. It is well settled that inconvenience, expense, or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent inter-

The misconduct of counsel and the juror created a bias and prejudice preventing a fair trial.

Snider v. Washington Water Power Co. 66 Wash. 598, 120 Pac. 88; *Leu v. St. Louis Transit Co.* 106 Mo. App. 329, 80 S. W. 274; *Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. 389; *Benoit v. New York C. & H. R. R. Co.* 94 App. Div. 24, 87 N. Y. Supp. 951; *Williams v. Brooklyn Elev. Co.* 126 N. Y. 96, 26 N. E. 1049.

Messrs. H. M. Stephens and William E. Richardson, for respondent:

Chadwick, J., delivered the opinion of the court:

Plaintiffs are the owners of a three-story brick building and an adjoining frame structure in the city of Spokane. The lower floor of these buildings is devoted to business uses, and the upper floors are used as a hotel and lodging house. The city of Spokane is built on either side of the Spokane river, and the city has for a long time maintained a steel bridge on Monroe street,

it being the principal connecting street between the north and south sides. The old bridge being adjudged to be insecure, the city closed it for traffic on January 1, 1909, and immediately began the work of constructing a new concrete bridge, the main span of the new structure being, as we are informed, the longest arch of like construction in the world. In order to facilitate the work of dismantling the old and erecting the new bridge, the city erected two high towers in the street in front of plaintiffs' property. Over these towers, cables were run to and over like towers to the opposite side of the river. These cables were used as an aerial tramway, over which the old material was removed, and the false work and new material was carried. The city also erected a house in the street and installed an engine. This engine furnished power to run the tramway. The free use of plaintiffs' property was interrupted, and this action was brought to recover damages alleged to have been suffered in the way of lost rents, etc.

ference with their right of access to their property made necessary by the construction of a public improvement, is no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances; such a claim is not damage to property not taken within the meaning of the Constitution."

The doctrine of *Osgood v. Chicago*, supra, was approved in *Sanitary Dist. v. McGuirl*, 86 Ill. App. 392, an action against the sanitary district of Chicago, in which some of the elements of damage claimed by the plaintiff were incidental to the construction of a drainage canal, and of a mere temporary character.

The action of *Chicago v. Rumsey*, 87 Ill. 348, was one for damages arising in consequence of the construction of a tunnel under the Chicago river, and it is not clear that there was any claim made for temporary interference with access to the property, although it is stated that a claim was made for loss of rent because of the obstruction to the street adjacent to the property, by the act of constructing the tunnel herein. It was there held under the old constitutional provision against "taking" property, that no damages could be recovered of the city under such circumstances.

The temporary obstruction involved in *Northern Transp. Co. v. Chicago*, 99 U. S. 640, 25 L. ed. 337, was held not to be a taking of public property within the meaning of the Constitution requiring compensation for a taking of property.

A temporary interruption of travel to and from land in front of which a water company, a quasi municipal corporation, is laying water pipes, does not entitle the owner to compensation in an action to

assess damages for an alleged taking of the owner's lands. *Bishop v. North Adams Fire Dist.* 167 Mass. 364, 45 N. E. 925.

Where a city had removed the planks of a drawbridge which formed a part of a public highway, and obstructed the travel over the same for sixteen days, whereby the plaintiff, who was a dealer in lumber, wood, and coal at a wharf adjacent to the bridge, was injured in his business by reason of the fact that his customers were unable to come to his wharf, the plaintiff is not entitled to compensation, as these elements of damage are not special or peculiar to him, so as to furnish a good cause of action. The same was held with reference to rents on certain buildings owned by the plaintiff. *Willard v. Cambridge*, 3 Allen, 574.

If access to the premises is obstructed unnecessarily, or for an unreasonable time, by a market which is temporarily changed during the erection of a new building, the municipality is liable. *St. John v. New York*, 6 Duer, 315.

So, a loss of trade and expense in receiving and delivering goods, owing to the material excavated from a sewer being thrown in a street in front of one's place of business, and allowed to remain there an unreasonable length of time, is an injury of such a nature as to require compensation therefor by the municipality, under a statute making it the duty of a municipality to keep its highways safe and convenient, and making any town that shall neglect such duty "liable to all persons who may in any wise suffer injury to their persons or property by reason of any such neglect." *Williams v. Tripp*, 11 R. I. 447. A statute conferred upon the city power to construct sewers in the streets. This was held to suspend the duty to keep its streets safe

Without indulging in unnecessary detail, it may be said that the plaintiffs base their right of recovery upon the allegations that the act of the city was a damaging within the meaning of § 16, art. 1, of the Constitution, and that they are entitled to have their damages assessed in money; that, if the right of the city be sustained, the work was negligently and carelessly done; that the plans were defective; and, finally, if it be held to be otherwise, an unreasonable time was consumed in finishing the work. The case was tried to a jury and a general verdict was returned in favor of the city.

The following interrogatories were submitted to and answered by the jury:

"No. 1. Was there unreasonable delay in the construction of the bridge, and, if so, what was the excess of time over and above a reasonable time? A. No.

"No. 2. Did the plaintiffs suffer any loss of rentals by reason of the wrongful construction or placing of any of the structures, machinery, or appliances used in

a reasonable length of time, but no more, and if a longer time was taken, the city became liable for injuries.

This rule applies whether the city itself does the work or commits the doing of the work to contractors. *Ibid.*

What is an unreasonable length of time is largely a question of fact to be determined from all the circumstances of the case.

In *Vidalat v. New Orleans*, 43 La. Ann. 1121, 10 So. 175, where a sidewalk was torn up during some two or three months while the street was undergoing repairs, it is stated that this was much longer than seems necessary for the speedy and energetic accomplishment of the work, yet there is nothing in the evidence that would justify the belief that either the city or the paving company was grossly negligent of its obligation, or wilfully did an injury to the abutting owner, and therefore there is no liability.

In *Williams v. Tripp*, *supra*, where a municipality had let the contract for the construction of a sewer to contractors who commenced the work and allowed obstructions to remain in the street in front of the plaintiff's place of business for over seven months, a verdict was found for the plaintiff under instructions that there could be a recovery in case of an unreasonable delay in doing the work, and during the delay access to the plaintiff's store was cut off or obstructed. See statute involved in this case, *supra*.

See *Ogden v. New York*, *infra*.

In *Tuggle v. Atlanta*, 57 Ga. 114, where a bridge on a street on which the complaining landowner's premises were situated was torn down, and over four months intervened before a new structure was erected

building the bridge, and, if so, what was the amount of such loss? A. No.

"No. 3. Did the plaintiffs suffer any loss of rental on account of any negligence in the use or operation of any of the machinery or appliances used in building the bridge, and, if so, how much? A. No."

The trial was a long one, and the testimony took a wide range. It was conflicting upon all the material issues, and in consequence we feel bound by the verdicts, general and special, and hold without further discussion that the work was not negligently done, and that the city did the work within a reasonable time. It follows then that there can be no damage unless it be under the Bill of Rights. Appellants state their position in broad terms. It is that an owner of land abutting a street is given a cause of action for an invasion of his property or right of occupation, or for any act that may injure the rental value of his property; and, if the occupation of a street interferes with the owner's use and enjoyment of property in greater degree than is

thereon, the municipality was held not liable.

In order for the abutting owner to recover for negligence, negligence must be shown.

Thus, where structures were erected in a street, and at the base deposited stone, gravel, and sand, and the purposes for which they were placed there are not shown, so that the court can determine whether they remained an unreasonable time, it will be presumed that the time was reasonable, and no liability will be incurred by the city. *Lefkowitz v. Chicago*, 238 Ill. 23, 87 N. E. 58, affirming 142 Ill. App. 27.

Where the complaint does not show that the corporation is not prosecuting the work with reasonable diligence, it cannot be presumed, for the purpose of making out a cause of action in favor of the plaintiff, that the corporate officers will violate the law and perpetrate a wrong. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618. The obstruction in this case arose from large quantities of earth which was thrown out on the highway, thus obstructing the way and destroying the same, but it is not clear that the action was based upon the theory that there was an interference with access.

Where the city is acting in its private capacity it is liable for damages suffered. Thus, where a city constructing docks in its private capacity temporarily destroyed a street by an excavation, so as to prevent access to the property for two years, it was held liable to the owner thereof for damages. *Ogden v. New York*, 141 App. Div. 578, 126 N. Y. Supp. 189. A large part of plaintiff's property fell into excavation, and this would have prevented her use of the property if she had had access to it. The recovery is based on both grounds.

W. A. E.

suffered by the public generally, that he is entitled to compensation for such use or taking, irrespective of any negligence or omission arising in or growing out of the prosecution of the work. Appellants rely on the following cases: *Smith v. St. Paul, M. & M. R. Co.* 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840; *Lund v. Idaho & W. N. R. Co.* 50 Wash. 574, 126 Am. St. Rep. 916, 97 Pac. 665; *Brown v. Seattle*, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214; *Farnandis v. Great Northern R. Co.* 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; *State ex rel. Smith v. Superior Ct.* 26 Wash. 278, 66 Pac. 385; *Rigney v. Chicago*, 102 Ill. 67; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

This court has held in common with the majority of the courts in this country, that the individual is bound by the intent and purpose of the original dedicator, and that an abutting owner cannot claim damages resulting from an original grade. *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843; *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061. And that "the dedication of streets and alleys to the public use implies an agreement of the dedicator and his successors in interest that the city may establish grades and improve streets and alleys thereto in aid of such use." *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859.

The power to establish grades and improve streets imposes a duty on the administrative officers of a city to keep them in proper repair, to pave and repave, to take out worn material and to replace it with new, to build and repair bridges, to remove them, and to build others in their place. It is a duty imposed by statute, and, if omitted, subjects the city to resultant damages. It has never been held that a municipality was liable for damages consequent upon a performance of a duty. The intent of the dedicator to submit his property to the city for the establishment of grades and the building of streets and bridges being established, it follows by the same intent that the city may, as occasion requires, occupy the streets for the purpose of making or maintaining an open and passable highway in front of the abutting property. The cases cited by appellants are not in point. In all of them the act complained of was such that it permanently changed a physical condition, either destroyed the use of the street or added an additional servitude, as, for instance, in the case of *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843, which is relied on by appellants. Although not indicated in the opinion, the damage there sought to 46 L.R.A.(N.S.)

be recovered arose out of a regrade of Pine street in the city of Seattle. In such cases damages are recoverable. In doing its work, the city left a permanent obstruction at the end of an alley which was essential to the use of the plaintiff's property. If the testimony had shown a temporary obstruction incident to the repair of the street, no recovery would have been allowed. The logic of that case is that all property suffering a direct damage on account of a regrade is entitled to compensation.

Appellants charge counsel with misconduct, and a juror with interest. The motion for a new trial was filed May 18th, and a supporting affidavit was filed May 31st. The affidavit is not made a part of the statement of facts. Although not properly before us (*Spoar v. Spokane Turn Verein*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190), we have examined the affidavit, and find that it does not warrant a new trial.

Counsel asks why verdicts in personal injury cases growing out of the work complained of have been returned and sustained upon the theory that the city negligently constructed an arch which fell, causing an unforeseen and unexpected delay. We cannot answer. The fact that one jury will decide a question of fact one way, and another will decide it in a contrary way, does not raise a question of law, nor is the verdict in one case reviewable, or to be considered as evidence, in another.

Affirmed.

Crow, Ch. J., and Gose, Mount, and Parker, JJ., concur.

Petition for rehearing denied.

UNITED STATES SUPREME COURT.

MARY E. HUGHES, Appt.,
v.

UNITED STATES. (No. 718)

UNITED STATES, Appt.,
v.

MARY E. HUGHES. (No. 719)

(230 U. S. 24, 57 L. ed. 1374, 33 Sup. Ct. Rep. 1019.)

Eminent domain — taking property — Improving navigation.

1. The building by the Federal government, when improving the navigation of the

Note. — The subject of interfering with private rights in improving the navigability of a stream is considered at page 841 of the note to *Beidler v. Sanitary Dist.* 67 L.R.A. 820.

Mississippi river, of a levee behind a plantation which was thereby placed between the old and the new levee, is not a taking of property for which compensation must be made.

Same.

2. The use of dynamite by a Federal officer in an emergency, in order to enlarge an opening in a levee along the Mississippi river after the levee had given way, if wrongful, cannot be held to be the act of the United States, and therefore affords no ground for holding that the United States had thereby taken for public use the property of a riparian owner damaged by such act.

(June 16, 1913.)

APPEAL by claimant from a judgment of the Court of Claims rejecting a claim against the United States for an alleged taking of property in the course of improving the Mississippi river. Affirmed.

APPEAL by the United States from a judgment of the Court of Claims awarding damages for an alleged taking of property in the course of such an improvement. Reversed.

The facts are stated in the opinion.

Messrs. Holmes Conrad and Waitman H. Conaway for Mary E. Hughes.

Messrs. John Q. Thompson, Assistant Attorney General, and J. Harwood Graves for the United States.

Mr. Chief Justice White delivered the opinion of the court:

This suit was commenced to recover from the United States the sum of \$200,560, subsequently reduced by an amended petition to \$165,000, and \$12,000 per annum until the principal sum was paid, on the ground that the United States had, as the result of work done by it in relation to the Mississippi river, taken, in the constitutional sense, two certain plantations belonging to the claimant, one the Wigwam plantation, situated on the east bank of the Mississippi, and the other a plantation known as the Timberlake plantation, also lying on the east bank, but higher up the river; that is, in Bolivar county, Mississippi, and opposite Arkansas City on the west bank. As to the first, the Wigwam plantation, there was judgment below in favor of the United States, rejecting the claim, and No. 718 is an appeal by the claimant from that judgment. As to the Timberlake planta-

tion, there was a judgment against the United States for what was deemed to be the value of the plantation, and No. 719 is an appeal by the United States from that judgment. The court made a series of general findings stating what was considered to be the facts concerning the situation upon which the right to recover in a general sense as to both plantations was based. It then made particular findings as to the Wigwam plantation and like findings as to the Timberlake plantation. Although the general findings are in some respects amenable to the criticism that they draw erroneous conclusions of law concerning the legislation of Congress, with regard to the improvement of the Mississippi river, and the action of the officers under such legislation, as was done in the Jackson Case, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, and also treat such mistaken conclusions as findings of fact, such errors are not as apparent as they were in the Jackson Case. This results from the fact that the general expressions in the findings manifesting the error which we pointed out in the Jackson Case are, as a rule, in this case qualified by statements incompatible with the general expressions, and which therefore serve to correct the error which otherwise would exist. Thus, in finding 1, after referring to the St. Francis and other basins on the west bank and the outflow of water into these basins, ultimately reaching the Gulf of Mexico, as described in the findings in the Jackson Case, and the stoppage of such outflow and consequent increase of the volume of water in the river, which, in the Jackson Case, was virtually attributed exclusively to work done by the United States or under its control, the finding in this case accurately states the relation of the United States and the local authorities to the work as follows:

"The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimant were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the state and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows."

So, again, in No. 2, although the finding refers to the adoption of the Eads plan al-

As to right of riparian owner, as against other riparian owners, to confine flood water within banks of stream, see note to Jefferson v. Hicks, 24 L.R.A. (N.S.) 214. As to right of riparian owner to protect shore from encroachment of water, see note to Fowler v. Wood, 6 L.R.A. (N.S.) 162. For 46 L.R.A. (N.S.)

right to embank against water turned out of stream, see note to Wills v. Babb, 6 L.R.A. (N.S.) 136. As to liability of municipality for confining flood water within banks of stream to injury of riparian owner, see note to Walters v. Marshalltown, 26 L.R.A. (N.S.) 199.

most in the same all-embracing words used in the Jackson Case, it yet states in explicit terms that the acts of Congress but authorized an improvement of navigation, and empowered expenditures for that purpose, and in referring to levee construction done pursuant to such Congressional action, it is declared in the finding that the United States "for the improvement of the Mississippi river for navigation . . . and the local authorities or organizations of the states bordering along the river on both sides, from Cairo to the Gulf, have before and since 1883, constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water." Again, in the concluding part of the fourth finding, a statement in accord with that made in the Jackson Case is found concerning the co-operation of the United States and local authorities in levee building, which is qualified, however, by subsequent statements, which, with reasonable accuracy, displays the real situation, that is, the unifying of the energies of the United States and the local authorities to a common end, levee construction, although the purpose on the one hand was the improvement of navigation, and on the other, the protection of land from overflow. And this also is further illustrated by finding 3, which points out the scope and character of the authority delegated by Congress to build levees; that is, the improvement of the navigation of the river.

The special findings relating to the Wigwam plantation but established that that plantation was situated in one of the minor basins below Vicksburg, like those between Natchez and Baton Rouge, which were described in the Jackson Case. Indeed, the court, in express terms, found there was identity between that case and this, and placed its conclusion against the right to recover upon its ruling in the Jackson Case; and in so doing, in view of our affirmation of the judgment in the Jackson Case, it follows that, in our opinion, no error was committed.

As to the Timberlake plantation, special findings were made, and omitting those which relate to the title of the claimant and to the loss suffered by the overflow of the property in the years following the special action by the government, which it was considered gave rise to the right to relief, the findings are as follows:

"IX.

"Timberlake Plantation.

"Prior to the construction of the Huntington Short Line levee by the United 46 L.R.A. (N.S.)

States, the waters of the Mississippi river did not overflow and submerge the Timberlake plantation hereinafter described at such frequent intervals and for such duration as to disturb the claimant in the profitable use, enjoyment, and possession thereof, or so as to materially affect its cultivation, productive capacity, or market value. It was then suitable for the purpose of raising thereon, and there was profitably raised thereon, crops of cotton, cotton seed, corn, hay, and other products. Since the completion of said Huntington Short Line levee by the United States, placing the plantation of claimant between the old and new levee, in the restricted and narrower high-water channel of the river, the rises in the water of said river, by reason of the water being thus confined and restricted in its flow, have been, and are now, occurring at such frequent intervals and for such duration as to prevent the claimant from raising any kind of a crop thereon; the buildings have become untenable and uninhabitable; the fencing washed away; the land covered with superinduced additions of water, earth, sand and gravel to a depth of from 3 to 12 feet; said land has since grown up in willows, cottonwood, underbrush, and weeds, so as to render it valueless to her; to destroy its market value; and to compel its abandonment.

"X.

"Prior to 1898 said lands (Timberlake plantation) were comparatively high and secure from overflow by the flood waters of the Mississippi river, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value. Said lands were highly improved, well stocked with tenants and laborers, yielded large crops of cotton, cotton seed, corn, hay, and other products, were located adjacent to what was formerly the town of Huntington, located between the Huntington Short Line levee and the river, since washed away by the flood waters of the Mississippi river, and deserted as a place of residence by the inhabitants some years after the building of the Huntington Short Line levee,—1898-1900,—was very valuable as plantation property, and was worth the sum of ninety thousand dollars (\$90,000).

"The claimant, Mary E. Hughes, obtained \$12,000 from the Board of Mississippi Levee Commissioners, by judgment, for damages to the drainage of the Timberlake plantation into Black Bayou when it was thrown out by the construction of the Huntington Short Line levee in 1899-1900. This plantation is located in the vicinity of and opposite the Arkansas City gauge, and was protected from overflow up until the time

of the construction of the Huntington Short Line levee.

"XI.

"Prior to the year 1898, said Timberlake plantation was protected from overflow by the flood waters of the Mississippi river by a continuous levee line located in front of said lands, along, by, and close to the river bank for its entire frontage, built by state and local authorities, and said plantations still remained valuable for plantation purposes, and up to that time had not been seriously injured in its use and enjoyment by the flood waters of said river.

"About the year 1898, the United States surveyed and thereafter began to construct what was known as and now called the Huntington Short Line levee, a new levee, about 15 feet high, located some distance back from the old levee, behind the land of claimant, thus placing and permanently locating said Timberlake plantation between the Huntington Short Line levee and the old levee in the narrower high-water channel and bed of the river, placing an additional burden and servitude thereon, and subjecting said property to more frequent and destructive overflows and the force and scouring power of the high-water current of said river. After the completion of the Huntington Short Line levee a high water came in the river during the year 1903, and because of a break in said old levee, the water of said river began to flow onto and over the plantation of claimant, then located between the old levee and the Huntington Short Line levee, and remained standing on and over said land to a great depth after the high waters receded, and because of the great pressure of the water thus confined, standing against said Huntington Short Line levee, threatening its destruction by breaking through, the United States then caused the old levee to be blown up by dynamite in many places, so as to relieve the pressure of the water standing against the Huntington Short Line levee, and to save it, thus causing the water to rush over and across said land, injuring it for agricultural as well as all other purposes, greatly reducing its value.

"XIV.

"Upon the foregoing facts the court finds as an ultimate fact, so far as it is a question of fact, that the effect of placing and permanently locating the Timberlake plantation of claimant between the Huntington Short Line levee and the old levee, and the river bank, was and is an act on the part of the United States intending to place, and which finally resulted in placing, the lands of claimant in the narrower high-water channel of the Mississippi river, sub-

jecting it to more frequent and destructive overflows, and the forceful and destructive action of the current, placing an additional burden and servitude thereon, which has finally resulted, since the years 1907, 1908, and 1910, in such serious and continuous interruption to the common and necessary use and enjoyment of said property, as to amount to a taking thereof by the United States under the 5th Amendment to the Constitution."

It will be observed that finding 9, although special to the Timberlake plantation, contains statements concerning the general raising of the flood level in the river as the result of the levee work done by the United States and the state and local authorities, followed by a description of the injury by overflow to the Timberlake plantation, which would give rise to the inference that the judgment which was rendered against the United States as to that plantation was based upon a consideration of that subject. If that view were taken, the case would be controlled by our decision just rendered in the Jackson Case; but we cannot adopt that view of the court's action, as the court in the Jackson Case decided that like facts did not justify recovery against the United States, and reiterated in this case its conclusion in that respect by rejecting the claim as to the Wigwam plantation. Under this view we assume that finding 9 was a mere inadvertence, or, at all events, if not so, may be now put out of view. This leaves only for consideration the special facts concerning the Timberlake plantation.

The plantation bordered on the river, and was protected by a levee. Whether that levee was built by the private efforts of the owner of the land or by state or local authority does not appear. The officers of the United States, deeming it advisable, in aid of the improvement of navigation, to construct a new levee, did not locate it along the river, in front of the plantation, but joining the existing line of levee, somewhere above the projecting point on which Timberlake plantation was situated, built a direct line of levees which passed across the point several miles back of the Timberlake plantation, and joined the line of levees on the river bank below the plantation. This levee, known as the Huntington Short Line, is thus described in the report of the Mississippi River Commission for 1898, at page 3390:

"Huntington Short Line.—This is a new levee under construction from Mound Landing to a point about 1½ miles below Offutt's Landing. The new levee here is 4.4 miles in length, and will shorten the levee line 7 miles over its present length."

The findings exclude the conception that this new and more direct levee was built upon land belonging to the owner of the Timberlake plantation. They show that the location and construction of this new line of levee was approved by the local levee authorities, since they establish that those authorities paid to the owner of the Timberlake plantation a sum of money for the incidental damage occasioned to that plantation by the fact that the levee, in passing in the rear of the plantation, obstructed drains or means of drainage by which the surface water of the plantation was carried off to the rear. The report of the Mississippi River Commission for 1900, page 4849, shows that before this payment was made by the local authorities there was a suit brought by owners of the plantation, and that that suit culminated in a recognition by the local courts of the right to build the levee on payment of the sum stated, which was but a part of a much larger claim made, which was disallowed. The facts just stated serve to demonstrate the error which was committed in deciding that the exertion of national power to build levees for improving navigation had effaced the exercise of state power to construct levees for protection from overflow, since they manifest the harmonious co-operation of the two powers, the United States bearing the burden of building a great levee in the interest of navigation, and the local authorities, in view of the protection from overflow which necessarily resulted from the construction of the levee for navigation purposes, contributing the amount essential to pay an award of a local character.

Upon all these facts we are unable to perceive any ground for distinguishing the claim as to the Timberlake from that as to the Wigwam plantation or from the claims which were held to be without merit in the Jackson Case. We say this because the claims in the Jackson Case as well as the claim in this case, made as to the Wigwam plantation, in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in building levees elsewhere along the river. This being so, as it is not pretended that the building of the new line of levee here considered trespassed upon the property rights of the owners of the Timberlake plantation by an actual taking of land, the asserted claim but comes to this: That the owner of the Timberlake plantation, abutting on the river, is entitled to hold the

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United States responsible, because in improving the navigation of the river the officers of the United States, in selecting the place where the levee should be built, did not select the front of the plantation, that is, did not construct the levee along the river bank of the plantation. Thus accurately fixing the contention, it is patent that we cannot affirm the judgment of the court below against the United States as to the Timberlake plantation without reversing its judgment in favor of the United States as to the Wigwam plantation, and without disregarding the decision which we have just announced in the Jackson Case. In saying this we are not unmindful of expressions in the findings, and which indeed the court below declared in express terms were the basis of its legal conclusion in respect to the liability of the United States, to the effect that the building of the new levee operated to change the situation of the claimant's property by putting it in the bed of the river. But the substance of things may not be changed by mere figures of speech. The plantation was situated on the bank of the river. It was protected from overflow by the levee on that bank. Whether that levee was private or public, as we have said, does not appear, but nothing in the fact that a new levee was built far in the rear of the plantation changed the physical situation, or had the magical effect of transporting the property from one place to another. Where it was before the location of the new levee, it remained after the new levee was completed. True it is that if, from caving banks or other natural causes, it became impossible to protect the property by means of a levee along its front, that fact was in no way caused by the building of the new levee, and if high water and disastrous overflow subsequently came from the inherent weakness of the existing levee along the front on the river bank, the consequent loss may not be attributed to the fact that a new and stronger levee was constructed along shorter and safer lines. There is no pretense of any intention to injure the claimant by the building of the new levee; and on the contrary, light is reflexly thrown upon the conditions which led to the exercise of judgment on the part of the officers of the United States in building the new levee on the much shorter and more direct line by the report of the commission for 1899, at page 3555, where the caving condition of the bank of the river in and about the place where the plantation was situated is stated.

As to the statement in one of the findings concerning the act of an officer of the United States after the old levee had given

way, in using dynamite to enlarge the opening, we find it difficult to understand the finding. Of course it can be easily appreciated that when a break occurred in the old levee along the bank, that impelled by the great force of the current of the river and the volume of its water, there rushed through the opening or crevasse with great momentum, a body of water which might, before its force was spent, strike the new levee, although it was far in the rear, and endanger its safety,—a danger which is aptly portrayed as to a relatively similar situation elsewhere in the report of the chief of engineers for 1903 at p. 260. But the finding does not seem to refer to such a danger nor to assume that the dynamite was used to guard against it, that is, to expand the opening in the old levee to such a degree that, although increasing the quantity of the flow of water, it would diminish its momentum, and thus prevent the danger of striking against the new levee and sweeping it away. We say this since, taking the finding literally, it gives rise to the conviction that the old levee was dynamited after the river had subsided, for the purpose of allowing the water to flow off, which had accumulated in the basin created by the remaining line of old levee along the river front and the line of the new levee. We do not stop, however, to further consider the subject, since whatever view be taken of the finding, the fact as to the use of dynamite would not in law amount to a taking by the United States, because in any event the mere act, to meet an emergency, of the officer, conceding, under the circumstances stated, that it was a wrongful act, cannot be held to be the act of the United States, and therefore affords no ground in any event for holding that the United States had taken the property for public use.

It follows from what we have said that the judgment below in favor of the United States in No. 718 must be affirmed, and the judgment against the United States in No. 719 must be and it is reversed.

And it is so ordered.

WASHINGTON SUPREME COURT.
(Department No. 1.)

AUGUST PAULSEN et al., Appts.,
v.

ELIGIO FEROGGIO, Resp't.

(— Wash. —, 131 Pac. 1163.)

Master and servant — safe working place — excavation on hillside.

1. A master who sets an employee at
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work excavating a foundation for a building on a hillside at a time when other servants are making excavations further up the hill is bound to take precautions to protect the former from material which may be loosened by the latter employees in such a manner as to roll down on him.

Same — assumption of risk — sufficiency of barriers.

2. An employee engaged in making an excavation on a hillside, who knows that the employer has erected a barrier to prevent material loosened by persons working further up the hill from rolling down upon him, does not assume the risk of the insufficiency of the barriers.

Same — negligence of foreman — fellow servant.

3. The negligence of a foreman supervising different gangs of men engaged in excavating on a hillside in constructing an insufficient barrier to protect the man lower down from material loosened by those further up is that of the master, and not of a fellow servant of the workmen.

(May 6, 1913.)

APPEAL by defendants from a judgment of the Superior Court for Spokane County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Myron A. Folsom, John H. Wourms, and John H. Pelletier, for appellants:

Where the danger is alike open to both master and servant, they stand upon an equal footing, and the servant assumes the risks.

Anderson v. Inland Teleph. & Teleg. Co. 19 Wash. 575, 41 L.R.A. 410, 53 Pac. 657; Tham v. J. T. Steeb Shipping Co. 39 Wash. 271, 81 Pac. 711, 18 Am. Neg. Rep. 659; Cully v. Northern P. R. Co. 35 Wash. 241, 77 Pac. 202, 16 Am. Neg. Rep. 616; Lewinn v. Murphy, 63 Wash. 356, — L.R.A. (N.S.) —, 115 Pac. 740, Ann. Cas. 1912 D, 433; Miller v. Moran Bros. Co. 39 Wash. 631, 1 L.R.A. (N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089; Goure v. Storey, 17 Idaho, 352, 105 Pac. 794; Minty v. Union P. R. Co. 2

Note. — Duty of master to protect servant from material rolling down hillside.

This note is confined to places where the declivity is natural, or where the danger is not created by the work itself; and cases involving the duty of the master in respect to protecting the servant from the caving in of banks, cliffs, trenches, etc., which are at the time being excavated, have been excluded.

Upon the question of the servant's assumption of risk from changing conditions

Idaho, 471, 4 L.R.A. 409, 21 Pac. 660; Fisher v. Stone & W. Engineering Corp. 67 Wash. 176, 121 Pac. 44; Boyle v. Anderson & H. Lumber Co. 46 Wash. 431, 90 Pac. 433; Raven v. Seattle Electric Co. 47 Wash. 637, 92 Pac. 451; Ford v. Heffernan Engine Works, 48 Wash. 315, 93 Pac. 417; Taylor v. Washington Mill Co. 50 Wash. 306, 97 Pac. 243; Morrison v. Williams, 50 Wash. 80, 96 Pac. 691; Kelly v. Cowan, 49 Wash. 606, 96 Pac. 152; Nordstrom v. Spokane & I. E. R. Co. 55 Wash. 521, 25 L.R.A. (N.S.) 364, 104 Pac. 809; Goddard v. Interstate Teleph. Co. 56 Wash. 536, 106 Pac. 188; Shore v. Spokane & I. E. R. Co. 57 Wash. 212, 106 Pac. 753; Cole v. Spokane Gas & Fuel Co. 66 Wash. 393, 119 Pac. 831; Deaton v. Abrams, 60 Wash. 1, — L.R.A. (N.S.) —, 110

Pac. 615; Mayer v. Queen City Lumber Co. 64 Wash. 567, 117 Pac. 392; Mielke v. Chicago & N. W. R. Co. 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; Ritzema v. Valley City Brick Co. 152 Mich. 75, 115 N. W. 705.

The servant has no right to assume that the master has furnished a safe place to work, where the dangers are apparent.

Jennings v. Tacoma R. & Motor Co. 7 Wash. 275, 34 Pac. 937; White v. Spokane & I. E. R. Co. 54 Wash. 670, 103 Pac. 1119; Lewinn v. Murphy, 63 Wash. 356, — L.R.A. (N.S.) —, 115 Pac. 740, Ann. Cas. 1912 D, 433; Gardner v. Porter, 45 Wash. 158, 88 Pac. 121; Props v. Washington Pulley & Mfg. Co. 61 Wash. 9, 45 L.R.A. (N.S.) 658, 111 Pac. 888; Deaton v. Abrams, 60 Wash. 1, — L.R.A. (N.S.) —, 110 Pac. 615; Sny-

of the working place during progress of work, see notes to Citrone v. O'Rourke Engineering Constr. Co. 19 L.R.A. (N.S.) 340, and Smith v. North Jellico Coal Co. 28 L.R.A. (N.S.) 1267.

Upon the applicability of the rule as to safe place where servants are engaged in the work of removing dangerous conditions, see note to Neagle v. Syracuse B. & N. Y. R. Co. 25 L.R.A. (N.S.) 321.

The cases very generally hold that the rule as to the master's duty to furnish a safe place of work to the servant applies with full vigor to a case where the servant whose place of work is at the foot of a hill is injured by materials rolling down the hill.

Thus, in McKenzie v. North Coast Colliery Co. 55 Wash. 495, 28 L.R.A. (N.S.) 1244, 104 Pac. 801, it was held that a mine owner owes the duty to his servants who are working on a slope in the mine to inspect the batteries or dams which are erected to prevent loosening materials from rolling down upon them, to see that they are reasonably safe; and the fact that a battery or dam was erected by the miners themselves does not relieve the master from liability to one of them who is injured by its insufficiency, where he had no part in the construction.

The decision in PAULSEN v. FEROGGIO is fully supported by the decision in Campbell v. Jones, 60 Wash. 265, — L.R.A. (N.S.) —, 110 Pac. 1083, which is fully set out in the principal case.

The greater number of cases where injury occurs because of materials rolling down a hill have to do with railroads constructed along a hillside or through a deep cut; and the cases are very consistent in holding that under such circumstances the master owes the servant a special duty to guard against the danger of rocks, logs, etc., rolling down the hillside, and causing an obstruction to the railroad tracks.

Thus, in Clune v. Ristine, 36 C. C. A. 450, 94 Fed. 745, 6 Am. Neg. Rep. 416, it was held that when a railroad track is constructed in such a manner that rocks overhang it, or loose rocks are imbedded in

the slopes of cuts through which it runs in such a position that they may be displaced by the action of the elements and be precipitated upon the track, it is the duty of the railroad company either to remove them, or to take other adequate precautions to guard against danger, and to render the track reasonably safe.

So, where, for several days before the accident, it appeared that fires had been burning on the mountain side immediately above the track for several miles along a railroad in the immediate vicinity of the accident, that stones, sticks, and logs were rolling down upon the track by reason of said fires, and that this condition of affairs was known to the railroad company, and that there were no track walkers upon that section of the track until midnight, negligence upon the part of the railroad is shown sufficiently to take the case to the jury. Denver, S. P. & P. R. Co. v. Wilson, 12 Colo. 20, 20 Pac. 340.

And in Bean v. Western North Carolina R. Co. 107 N. C. 731, 12 S. E. 600, where a railroad had been constructed along the side of a mountain, it was held that the company was negligent in leaving a mass of stone just above and near the track in such a position that it might slide down upon the tracks, and the fact that the company employed a track walker whose duty it was to examine and see, just after a train had passed the dangerous point, whether rock had fallen or was about to fall, did not excuse the company; assuming that the track walker was a fellow servant of the injured trainman, and that his negligence contributed to the injury, the trainman might, nevertheless, recover on account of the negligence of the company.

A snowslide being usually mingled with gravel and rock is a dangerous obstruction to a railroad, distinct in nature from a snowdrift, and a section foreman having knowledge of such an obstruction to the track must give notice thereof to the managers of the road and to the conductor of an approaching train if he has an opportunity, and his failure so to do is the failure of the railroad company. Fisher v.

der v. Viola Min. & Smelting Co. 3 Idaho, 28, 26 Pac. 127.

As to who are fellow servants in the state of Washington, and the master's liability for their acts, the following cases are cited:

Wilson v. Northern P. R. Co. 31 Wash. 67, 71 Pac. 713; Frengen v. Stone & W. Engineering Corp. 66 Wash. 204, 119 Pac. 193; Ponelli v. Seattle Steel Co. 64 Wash. 269, 116 Pac. 864; Hale v. Crown Columbia Pulp & Paper Co. 56 Wash. 236, 105 Pac. 480; Cavelin v. Stone & W. Engineering Co. 61 Wash. 375, 112 Pac. 349; Jock v. Columbia & P. S. R. Co. 53 Wash. 437, 102 Pac. 405; Desjardins v. St. Paul & T. Lumber Co. 54 Wash. 278, 102 Pac. 1034; Mercer v. Lloyd Transfer Co. 59 Wash. 560, 110 Pac. 389; Magnuson v. Chicago, M. & St. P.

R. Co. 58 Wash. 141, 107 Pac. 1043; Johnson v. Coates Logging Co. 50 Wash. 679, 97 Pac. 801; Maloney v. Florence & C. C. R. Co. 39 Colo. 384, 19 L.R.A.(N.S.) 348, 121 Am. St. Rep. 180, 89 Pac. 649, 12 Ann. Cas. 621.

Plaintiff could not recover on the theory that he was not warned, under the evidence in this case.

Jones v. Moran Bros. 45 Wash. 391, 88 Pac. 620; Anson v. Northern P. R. Co. 45 Wash. 92, 87 Pac. 1058; Bailey v. Mukilteo Lumber Co. 44 Wash. 581, 87 Pac. 819; Woelffen v. Lewiston-Clarkston Co. 49 Wash. 405, 95 Pac. 493; Laidley v. Wm. Musser Lumber & Mfg. Co. 45 Wash. 239, 88 Pac. 124; Bundy v. Union Iron Works, 46 Wash. 231, 89 Pac. 545; Stewart v. Bal-

Oregon Short Line & U. N. R. Co. 22 Or. 533, 16 L.R.A. 519, 30 Pac. 425.

So, in *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24, 16 Am. Neg. Cas. 832, where a cliff which overhung the place of work of a servant engaged in building a wall in a mine fell upon him, the mining company was held liable because the superintendent had been told of the danger, and knew that a large crack had appeared in the cliff, and that it was growing larger, and yet took no steps to prevent it from falling.

So, where injuries were caused by a rock rolling down a hillside onto a track, it is not error to instruct the jury that if the defendant in any way knew of the dangerous condition, or might have known of it by the use of reasonable care and diligence, the failure to remove the rock was negligence. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71.

In *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, it was held that the risks assumed by an engineer on a line of road running at the foot of a mountain range do not include unnecessary risks and dangers arising from the failure of the company so to construct and maintain its track and roadbed as to prevent sand from being deposited on the track, causing a derailment.

In *El Paso & N. E. R. Co. v. Whatley*, — Tex. Civ. App. —, 85 S. W. 306, a judgment for the plaintiff in an action for death of an engineer, due to a derailment caused by the negligence of the railroad company in permitting a rock to remain on the track, was sustained, but it does not appear how the rock came to be on the track.

In situations like those here discussed the railroad company owes its servants a peculiar duty of inspection.

Thus, in *True v. Lehigh Valley R. Co.* 22 App. Div. 588, 48 N. Y. Supp. 86, it was held that in a suit for the death of an engineer, caused by the engine running into a landslide, a nonsuit was erroneous where the evidence showed that the cliff alongside of the track was composed of shale, and likely to slide off, and had slid off from 46 L.R.A.(N.S.)

time to time in small quantities, and the company had made no inspection thereof except such as could be made by observation while passing along the track.

So, in *Denver & R. G. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305, it was held that the duty of a railroad company as to inspection was not limited to its roadbed, but it would be liable for failure to protect the track from boulders rolling down an adjoining mountain side and displacing the rails of the track, where it knew or ought to have known of the danger. The court said: "The rock in the case at bar came from a point on the slope of the mountain outside of the right of way of the company. It was plainly visible from the track, however; and the character of it was, or should have been, known to the company. We do not think the obligation of the company ends with an inspection of its right of way. Objects beyond its right of way may be quite as menacing and dangerous as those within; and the company is not relieved of its obligation by showing that the rock came from a place on the mountain beyond its right of way. A week or so before, another rock came down in the night and injured materially the company's track, and from a place not far distant from the rock in question. Not long before, but in the same canyon, a large quantity of dirt and small rocks had come down, completely covering the track. Witnesses and employees of the company testified that in the spring these disturbances were more likely to occur; yet the company, it was shown, did not have the track patrolled at night. There was no inspection of the track at this place after about 5 o'clock in the afternoon before the accident. We are of opinion that the question of negligence should have been submitted to the jury."

And in *Fisher v. Chesapeake & O. R. Co.* 104 Va. 635, 2 L.R.A.(N.S.) 954, 52 S. E. 373, it was held that a railroad company which constructs its road along the base of a high bluff must exercise ordinary care to protect its employees from landslides, and such railroad is negligent where, hav-

four, 51 Wash. 127, 98 Pac. 103; Gardner v. Porter, 45 Wash. 158, 88 Pac. 121; Vianello v. Washington Iron Works Co. 55 Wash. 552, 104 Pac. 784; Hogg v. Standard Lumber Co. 52 Wash. 8, 100 Pac. 151; Omaha Packing Co. v. Sanduski, 19 L.R.A. (N.S.) 355, 84 C. C. A. 89, 155 Fed. 897; Konecki v. Delaware & L. R. Co. 77 N. J. L. 645, 26 L.R.A. (N.S.) 648, 74 Atl. 516; Ford v. Tremont Lumber Co. 123 La. 742, 22 L.R.A. (N.S.) 917, 131 Am. St. Rep. 370, 49 So. 492.

Messrs. Robertson & Miller and Thomas J. Corkery, for respondent:

The master must furnish a safe place. The servant does not assume the risk of the master's negligence in that regard.

McLeod v. Chicago, M. & P. S. R. Co. 65 Wash. 62, 117 Pac. 749; McDonough v. Great Northern R. Co. 15 Wash. 244, 46 Pac. 334; Shannon v. Consolidated Tiger & P. Min. Co. 24 Wash. 119, 64 Pac. 169; Sandquist v. Independent Teleph. Co. 38 Wash. 313, 80 Pac. 539; Mullin v. Northern

P. R. Co. 38 Wash. 550, 80 Pac. 814, 18 Am. Neg. Rep. 272; Campbell v. Jones, 60 Wash. 265, — L.R.A. (N.S.) —, 110 Pac. 1083; Hilgar v. Walla Walla, 50 Wash. 472, 19 L.R.A. (N.S.) 367, 97 Pac. 498; Howland v. Standard Mill. & Logging Co. 50 Wash. 37, 96 Pac. 686; Maloney v. Winston Bros. Co. 18 Idaho, 740, — L.R.A. (N.S.) —, 111 Pac. 1080.

The appellant, after setting in motion a dangerous agency through its own negligence, cannot be heard to complain of the confusion and fright of plaintiff.

Sandquist v. Independent Teleph. Co. 38 Wash. 313, 80 Pac. 539.

Mount, J., delivered the opinion of the court:

Action for personal injuries. Plaintiff recovered a judgment in the court below for \$2,200 on the verdict of a jury. The defendants have appealed from that judgment.

The facts are, in substance, as follows:

ing built its track along the base of a high bluff which is not solid, but seamed with a crack across its face, through which loose dirt has exuded, and which appears and is believed to be in an unsafe condition, it fails to make any special inspection or use any means to determine whether or not it is in fact safe.

And the cases also hold that a servant whose duty it is to watch the tracks and to guard against the danger of collisions between trains and materials which have fallen upon the track is not a fellow servant of the other employees of the road, but is a vice principal of the master, for whose negligence the latter is responsible.

Thus, in Louisville & N. R. Co. v. Pointer, 113 Ky. 952, 69 S. W. 1108, a recovery for the death of a fireman, caused by his engine running into a quantity of dirt and rock which had slipped onto the track in a cut, was sustained upon the ground that the section foreman by whose negligence the rock and dirt were permitted to remain upon the track was, in keeping the track safe, a representative of the railroad.

So, in Baltimore & O. R. Co. v. McKenzie, 81 Va. 71, the court said: "On the other hand, let it once be settled that the humblest watchman who walks the track is, within the scope of his employment, the representative of the company, that he has eyes to see, ears to hear, and lips to communicate to his superiors the knowledge he acquires as to the condition of the track or of impending danger, and the law upon this important subject will be placed upon such a footing as that none can misapprehend and all reasonable men must approve it."

Upon the question whether the duty to warn is delegable or nondelegable, see note to Anderson v. Pittsburgh Coal Co. 26 L.R.A. (N.S.) 624.

In a few cases recovery has been denied 46 L.R.A. (N.S.)

where injuries of the character under discussion occurred, but in these cases, it will be observed, there were other factors which entered into the result.

In Scott v. Astoria & C. River R. Co. 43 Or. 28, 62 L.R.A. 543, 99 Am. St. Rep. 716, 72 Pac. 594, where an engineer was injured by reason of a landslide which derailed the engine, a judgment for the plaintiff was reversed because the trial court permitted the jury to pass upon the question of the railroad company's negligence in locating its tracks where it did,—this being a purely engineering question which could not be submitted to the jury.

In Louisville & N. R. Co. v. Murphy, 143 Ky. 31, 135 S. W. 422, where an engineer was injured because his engine ran into a landslide, no recovery was allowed because the slide took place when the train was so close at hand that no watchman stationed there could have prevented the accident, and furthermore the plaintiff was guilty of contributory negligence in increasing rather than reducing the speed of his train at a place where he knew slides were likely to occur.

A railroad engineer who obeys, although reluctantly, an order to take his train through a mountainous region on its regular trip at a time of heavy rains, when landlides are anticipated, assumes the risk of such slides, and cannot hold the company responsible in case his train is carried from the track by a slide which comes upon it so suddenly that there is no time to escape, and the danger of which was not observed by a track inspector who had passed the spot just before the train reached there, since it must be regarded as pure accident. Kinzel v. Atlanta, K. & N. R. Co. 69 L.R.A. 757, 70 C. C. A. 73, 137 Fed. 489, 18 Am. Neg. Rep. 685. W. M. G.

The defendants, with others, on November 20, 1910, were the owners of the Hercules mine, located at Burke, Idaho. They were engaged in constructing a building for a mill near there at Wallace, Idaho. This mill was being constructed upon the side of a mountain which was very steep, rising at an angle of about 45 degrees. At that time they were engaged in making a cut for the foundation of the mill. The plaintiff was employed as a workman in this cut. His duties were to hold a drill while another workman used a large hammer with both hands to strike the drill. In order to hold the drill, it was necessary for the plaintiff to watch the drill closely. On the date named the defendants had made two angular cuts in the side of the mountain. The perpendicular wall of the lower cut was about 16 feet in height. Immediately above this, and to the east was another triangular cut, the perpendicular wall of which was about 4 feet in height. The plaintiff was working in this upper triangular cut, holding a drill while another man was hammering on the drill. He was sitting or resting upon his knees with both hands upon the drill. Each time the drill was struck, it was necessary to raise it slightly and turn it. The drill was operated in solid rock. The mountain side above where plaintiff was working had been cleared of brush, and when he was standing he could look above the perpendicular wall under which he was working, and have a good view of the side of the mountain. About 100 feet up the mountain side from where the plaintiff was working, a crew of men in the employ of the defendants were making a cut for a water flume. These men, under the direction of Mr. Franz, the foreman in charge, had piled brush below the cut for the water flume in order that the rocks therefrom might not roll down the mountain side. While the plaintiff was holding the drill, as above stated, a rock started to roll down the side of the mountain. One of the men above saw the rock, and called a warning to the men below. The foreman in charge at that time was within about 8 feet of the plaintiff. He saw the rock coming, and called a warning to the plaintiff and the man who used the hammer. The foreman and the man who was doing the hammering ran. The plaintiff at the time the warning was given was either sitting or resting upon his knees, holding the drill. He started to run, but got in the way of the rock, which struck him and injured him. The plaintiff knew that the men were working above him on the hill. He also knew that brush had been piled along the cut for the flume. But, while he was sitting at his work, he could not see above the perpendicular cut under

which he was working. He knew that the side of the hill was very steep; that when a rock or anything above was loosened, it would roll down. There was no evidence to show just where the rock started or what caused it to start down the mountain side. Plaintiff knew the vicinity and all the surroundings.

Upon the trial of the case, several interrogatories were propounded to the jury by the court at the request of the defendants, two of which questions were answered as follows: "Was the injury to the plaintiff caused by the negligence of any person or persons? Answer: Yes. If you answer the first interrogatory in the affirmative, state the name of the person or persons whose negligence caused the injury. Answer: Mr. Franz." Mr. Franz was the foreman in charge of all the men at work on the mountain side. At the close of the plaintiff's evidence, the defendants moved the court for a nonsuit, and at the close of all the evidence moved the court for a directed verdict. These motions were denied.

The appellants make no question upon the introduction of evidence or the instructions of the court. The assignments of error are to the effect that the court erred in overruling the motion for a nonsuit and the motion for a directed verdict, and that the special verdicts are inconsistent with the general verdict. The theory of the plaintiff's case is that the defendants placed plaintiff at work in a dangerous place and stationed men above him on the hillside, which made the place more dangerous than it otherwise would have been, and negligently failed to make the place safe or to keep it safe. The appellants contend upon this appeal that the plaintiff, knowing the conditions which surrounded him, assumed the risk of rocks rolling down upon him, and that the doctrine of "safe place" does not apply to this case. They also contend that the negligence, if there was any, which caused the rock to roll down the mountain side, was the negligence of a fellow servant of the plaintiff, and that the plaintiff therefore cannot recover. There is no evidence in the case which shows how the rock was started in its descent. One of the men working above saw the rock after it had started. He shouted a warning to the men below. Mr. Franz, the foreman, was standing near the plaintiff, and also shouted a warning to the plaintiff. The plaintiff, in obedience to the warning sought shelter, not knowing the course of the rock. If he had remained at his post, he would not have been injured.

We think the rule of "safe place" applies to this case. The plaintiff while at

his work was unable to see the workmen above him, or to see rocks which might start from the hillside. The foreman in charge of the work had attempted to make the place safe by placing brush below the cut for the flume where workmen were engaged in throwing rocks and material upon the brush. This brush was for the purpose of preventing such material from rolling down the hill. In other words, the foreman, who represented the master, realized the necessity of protecting the men below, and therefore had directed the men above to place this barrier for that purpose, and for the purpose of holding the material upon the ground. If we may assume for the purpose of this case that the plaintiff working below was a fellow servant with the workmen above, it was the duty of the defendants, through their foreman in charge of the work, to furnish the plaintiff with a reasonably safe place so that he might be protected from acts which he could not see and which he could not prevent. Where the plaintiff knew that the defendant had constructed a barrier, he certainly had the right to assume that the defendant had furnished an effective barrier. It is no doubt true that this court has held in many cases that a servant assumes the ordinary risks incident to the work in which he is engaged. And it is also true, as we have many times held, that the servant has no right to assume that the master has furnished a safe place where the dangers are known or are as apparent to the servant as to the master. But we think neither of these rules applies to this case. Plaintiff knew that a barrier had been erected by the defendants or their foreman. Although he knew there was danger where no barrier was constructed, he had a right to assume that the master had erected a sufficient barrier, and to rely upon the master performing the duty which had been undertaken and which the master owed to him.

In *McLeod v. Chicago, M. & P. S. R. Co.* 65 Wash. 62, 117 Pac. 749, we said: The servant "assumes the risk of such dangers only as are necessarily incident to the work. The difference is not in the rule, but in the greater number of dangers incident to the work. The real question in any case is as to what constitutes reasonably careful conduct on the part of the master looking to reasonable safety for the men. . . . If the place was made unnecessarily dangerous through the negligent act of the master or its vice principal, the master is liable for injury resulting therefrom." In *Campbell v. Jones*, 60 Wash. 265, — L.R.A. (N.S.) —, 110 Pac. 1083, where the servant was placed to work on a hillside and was injured by a stump which was loosened

from its place by the foreman in charge, we said: "But we think the court erred in sustaining the challenge to the evidence made on behalf of the defendants Jones & Onserud. They were the appellant's employers, and owed to him the duty of furnishing him with a reasonably safe place in which to work, and the duty of keeping the place reasonably safe as long as they required him to work therein. This duty was nondelegable, and when they intrusted it to another, they became responsible for the negligent performance of the duty by that other. . . . The duty of the respondents to oversee the appellant's place of work was a continuing duty, obligatory upon them at all times; that while the work itself may have been servant's work, the duty to see that its performance did not result in injury to the servants working elsewhere was the master's duty. This duty, as we say, could not be delegated, and, if the injury to appellant was caused by its negligent performance, the master is liable. This principle was announced by this court in the case of *Creamer v. Moran Bros. Co.* 41 Wash. 636, 84 Pac. 592." In *Howland v. Standard Mill. & Logging Co.* 50 Wash. 34, 96 Pac. 686, we said: "Nor do we think the act which rendered the place unsafe was the act of a fellow servant of the respondent. It is the fundamental duty of the master to make and keep safe the place in which he requires his servants to work, and this duty cannot be delegated so as to relieve the master from liability for a negligent performance of the duty. . . . But it is not the rule that a servant who goes into a dangerous situation assumes the risk of all dangers surrounding the place. He assumes those dangers only which are inherent in and which exist from the nature of business,—those dangers against which there is no absolute protection, not those caused by some negligent act of the master, and which would not exist but for such negligent act."

In this case the master had undertaken to protect the plaintiff and those working with him in the excavation for the foundation by erecting a barrier above to prevent the earth and rock from rolling down upon the plaintiff and those associated with him. It was not the duty of the plaintiff to inspect this barrier to see that it was safe, but he had a right to rely upon the master in that respect. And, when he went to work at his place at the drill, he did not assume dangers which were not incident to the work in which he was engaged. He no doubt assumed whatever risk there was in connection with his fellow workmen striking the drill and things of that character. But he might rest assured that the master

had protected him against the workmen above, as the master had attempted to do. The master's neglect in this respect was not one of the risks which the plaintiff assumed. We are satisfied for these reasons that there was no question of the assumption of risk by a fellow servant, and that the evidence was sufficient to go to the jury upon the question of "safe place." The laws of Idaho, where this action arose, are substantially the same as our own upon this question. *Maloney v. Winston Bros. Co.* 18 Idaho, 740, — L.R.A.(N.S.) —, 111 Pac. 1080; *Craesafulli v. Winston Bros. Co.* 18 Idaho, 158, 108 Pac. 740; *Knauf v. Dover Lumber Co.* 20 Idaho, 773, 120 Pac. 157.

By the special verdicts hereinbefore quoted, the jury found that the injury to the plaintiff was caused by the negligence of Mr. Franz. As we have seen, Mr. Franz was the foreman of the men employed in the work where plaintiff was working, and also foreman of the men employed in the work above upon the mountain side. His negligence as such foreman in not constructing a sufficient barrier was, of course, the negligence of the defendants, and the special verdicts are consistent with the general verdict.

We find no error in the record, and the judgment is therefore affirmed.

Crow, Ch. J., and Gose, Parker, and Chadwick, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 1.)

H. D. LARNED, Resp't.,
v.

HOLT & JEFFERY, Appt.

(— Wash. —, 133 Pac. 460.)

Nuisance — Improvement operations in street — liability of contractor.

A contractor for a street improvement which requires the removal of a large quantity of earth from one place to another, who under the authority of the municipality constructs a railway in the street upon which to move such earth, is not liable for injuries to abutting property from noise, smoke, and vibration, if

Note. — As to liability of highway contractor for dangerous conditions where municipality, county, or town is not liable, see note to *Schneider v. Cahill*, 27 L.R.A.(N.S.) 1009, and see later cases *Solberg v. Schlosser*, 30 L.R.A.(N.S.) 1111, and *Wade v. Gray*, 43 L.R.A.(N.S.) 1046.

As to whether bond of highway contractor covers personal injuries to members of public, see note to *Redditt v. Wall*, 34 L.R.A.(N.S.) 152.

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he is guilty of no negligence in the operation of the plant.

(July 10, 1913.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for injury to his business by noise, smoke, and vibration alleged to have resulted from the operation of defendant's cars and engines upon a temporary trestle in a highway. Reversed. The facts are stated in the opinion.

Messrs. Preston & Thorgrimson and Sandford C. Rose, for appellant:

There can be no recovery for a consequential injury in the absence of negligence, and the injury in the case, at bar was clearly consequential, and not direct.

1 *Thomp. Neg.* § 14; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 544, 42 Fed. 273; *Lake Shore & M. S. R. Co. v. Chicago, L. S. & S. B. R. Co.* 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596; *Fleming v. Lockwood*, 36 Mont. 384, 14 L.R.A.(N.S.) 628, 122 Am. St. Rep. 375, 92 Pac. 962, 13 Ann. Cas. 283; *Forrester v. O'Rourke Engineering Constr. Co.* 48 Misc. 390, 95 N. Y. Supp. 600; *Sadlier v. New York*, 185 N. Y. 408, 78 N. E. 272; *Suter v. Wenatchee Water Power Co.* 35 Wash. 1, 102 Am. St. Rep. 881, 76 Pac. 298; *Welch v. Seattle & M. R. Co.* 56 Wash. 97, 26 L.R.A.(N.S.) 1047, 105 Pac. 166; *Klepsch v. Donald*, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991; *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873; *James Sheehan & Co. v. Maison Barberis*, 41 Wash. 671, 84 Pac. 607; *Columbia & P. R. Co. v. Farrington*, 1 Wash. 202, 23 Pac. 413; *Fireman's Fund Ins. Co. v. Northern P. R. Co.* 46 Wash. 635, 91 Pac. 13; *Northwestern Mut. F. Asso. v. Northern P. R. Co.* 68 Wash. 292, 123 Pac. 468; *Aldrich v. Metropolitan West Side Elev. R. Co.* 195 Ill. 456, 57 L.R.A. 237, 63 N. E. 155; *Bennett v. Long Island R. Co.* 181 N. Y. 431, 74 N. E. 418; *Woodard v. West Side Mill Co.* 43 Wash. 308, 86 Pac. 579.

The acts of defendant, being done by the authority of the city in performing contracts for public works, could not constitute an actionable nuisance.

21 *Am. & Eng. Enc. Law*, 682; 1 *Thomp. Neg.* § 9; 1 *Shearm. & Redf. Neg.* § 283; 1 *Cyc.* 658; *Lund v. St. Paul, M. & M. R. Co.* 31 Wash. 286, 61 L.R.A. 506, 96 Am. St. Rep. 906, 71 Pac. 1032; *Murphy v. Lowell*, 128 Mass. 396, 35 Am. Rep. 381; *Lake Shore & M. S. R. Co. v. Chicago, L. S. & S. B. R. Co.* 48 Ind. App. 584, 92 N. E. 989; 95 N. E. 596.

Temporary noise, etc., caused in making an improvement, is not a nuisance.

Lester v. New York, 79 Hun, 479, 29 N. Y. Supp. 1000, affirmed in 150 N. Y. 578, 44 N. E. 1125; Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592.

Whatever may be the opinion of the court as to liability for smoke and vibration, and for casting cinders upon the property of respondent, there can be no recovery for the injury from mere noise.

Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840.

If there is any liability, the city alone is liable, and not the contractor, unless negligent.

Casassa v. Seattle, 66 Wash. 146, 119 Pac. 13; Kaler v. Puget Sound Bridge & D. Co. 72 Wash. 497, — L.R.A.(N.S.) —, 130 Pac. 894.

Messrs. Peterson & MacBride, for respondent:

Where one conducts his business in such a manner as to cause injury or damage to another, he may be enjoined upon the ground that the same constitutes a nuisance.

Thornton v. Dow, 60 Wash. 622, 32 L.R.A.(N.S.) 968, 111 Pac. 899; Densmore v. Evergreen Camp, No. 147 W. W. 61 Wash. 230, 31 L.R.A.(N.S.) 608, 112 Pac. 255, Ann. Cas. 1912 B, 1206; Grantham v. Gibson, 41 Wash. 125, 3 L.R.A.(N.S.) 447, 111 Am. St. Rep. 1003, 83 Pac. 14; Everett v. Paschall, 61 Wash. 47, 31 L.R.A.(N.S.) 827, 111 Pac. 879, Ann. Cas. 1912 B, 1128; Asia v. Pool, 47 Wash. 515, 92 Pac. 351, 15 Ann. Cas. 104; Ridpath v. Spokane Stamp Works, 48 Wash. 320, 93 Pac. 416; Sterrett v. Northport Min. & Smelting Co. 30 Wash. 164, 70 Pac. 263; Louisville & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Keil v. Grays Harbor & P. S. R. Co. 71 Wash. 163, 127 Pac. 1113; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Adams Hotel Co. v. Cobb, 3 Ind. Terr. 50, 53 S. W. 478; Sultan v. Parker-Washington Co. 117 Mo. App. 636, 93 S. W. 289; Kuhn v. Illinois C. R. Co. 111 Ill. App. 323; Wylie v. Elwood, 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; Graetz v. McKenzie, 9 Wash. 698, 35 Pac. 377; Rathbone, S. & Co. v. Frost, 9 Wash. 162, 37 Pac. 298; Sullivan v. Waterman, 20 R. I. 372, 39 L.R.A. 773, 39 Atl. 243.

If the contractor committed a nuisance, or a negligent act in performing the work, the city would not be liable for damages.

Galveston, H. & S. A. R. Co. v. DeGroff, — Tex. Civ. App. —, 110 S. W. 1006; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

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Parker, J., delivered the opinion of the court:

The plaintiff sought to recover from the defendant damages in the sum of \$1,032 for injury to his hotel business by noise, smoke, and vibration, which he claims resulted from the operation of the defendant's cars and engines upon a temporary trestle in the street in front of the hotel building occupied by him in Seattle. A trial before the court and a jury resulted in verdict and judgment against the defendant in the sum of \$250, from which it has appealed.

Respondent is the proprietor of a hotel business located in the building at the southwest corner of Lenora street and Westlake avenue in the city of Seattle. Appellant is a contracting company, and from November 1, 1910, to June 1, 1911, was engaged in the execution of two large street improvement contracts for that city. One of these, referred to as the Denny Hill improvement, called for the excavation and removal of a very large quantity of earth; while the other, referred to as the Westlake avenue improvement, called for a very large quantity of earth filling. It was evidently desirable on the part of the city, as well as the appellant, that the earth taken from the Denny Hill improvement should be placed in the Westlake avenue improvement. To this end, the city granted to appellant the privilege of constructing in certain streets leading from the Denny Hill improvement to the Westlake avenue improvement a small railway, upon which to run dump cars and a small locomotive engine for the purpose of transferring the earth from the Denny Hill improvement to the Westlake avenue improvement. The city not only granted this privilege, but directed what streets should be used, and also directed the manner of constructing the track. The route thus selected by the city passed along Lenora street in front of respondent's hotel. At this point it was necessary, and the city so directed, that the track be elevated so as to permit street cars and other traffic to proceed uninterrupted on that avenue. The track was so constructed, which brought it at no point nearer than 38 feet to respondent's hotel building, and from 10 to 18 feet above the surface of the street along in front of the building. Upon the track thus constructed, appellant operated its cars and engines during the period mentioned from November 1, 1910, to June 1, 1911, when the work was finished. There is no allegation or proof whatever of negligence on the part of the city or appellant in the prosecution of this work, nor as to unreasonableness of the time

occupied in its prosecution. We assume for argument's sake that during this period respondent suffered some appreciable inconvenience and damage to his business by noise, smoke, and vibration occasioned by the operation of appellant's cars and engines, though, as we have noticed, it was undisputed that such annoyance and damage was not the result of negligent operation of the cars and engines.

It is contended by counsel for appellant that its challenge to the sufficiency of the evidence to sustain any judgment against it made by request for an instructed verdict in its favor and for motion for judgment notwithstanding the verdict should have been sustained by the trial court, and that it is now entitled to a reversal of the judgment and a dismissal of the action upon that ground. We are constrained to agree with this contention. Upon the holding of this court in *Lund v. St. Paul, M. & M. R. Co.* 31 Wash. 286, 290, 61 L.R.A. 506, 96 Am. St. Rep. 906, 71 Pac. 1032, it seems plain the fact that appellant was doing public improvement work for the city, which, though appellant was an independent contractor, was under the direction and control of the city, places appellant in the same position that the city would be in had it been prosecuting the work itself, so far as liability for damages to respondent flowing therefrom is concerned; that is, if the city was not liable for consequential damages, upon the same principle appellant would not be. It seems to us that our recent decisions in *Stern v. Spokane*, — Wash. —, 131 Pac. 476, and *Hieber v. Spokane*, — Wash. —, 131 Pac. 478, are decisive of this case in appellant's favor upon the question of the damages claimed being consequential. This is the theory upon which counsel for appellant insists that it is not liable. We are constrained to so hold. It being plain that the city was engaged in a perfectly lawful undertaking, and to that end was temporarily causing its streets to be used by appellant, neither was liable to respondent for damages other than those which were the result of negligence.

It is apparent to the most casual observer that property and business locations in our centers of population are desirable, and derive well-known advantages from being so situated. The density of population which renders such locations valuable also renders the more necessary public improvements of the nature here involved, to the end that such advantages may be more fully enjoyed. The making of such public improvements necessarily results in more or less temporary inconvenience and even damage to property

and business in their neighborhood while being constructed. Aside from acts of negligence on the part of the public authorities in constructing such improvements, owners of property and business so temporarily inconvenienced or even damaged must bear such burdens as an incident to the enjoyment of the advantages which their locations give them.

The judgment is reversed, with directions to the Superior Court to dismiss the action.

Chadwick, Mount, and Gose, JJ., concur.

WASHINGTON SUPREME COURT. (Department No 2.)

J. M. JORGUSON, Appt.,
v.
APEX GOLD MINES, Respt.
(— Wash. —, 133 Pac. 465.)

Corporation — contract to pay dividends — enforcement.

1. A contract by a corporation to pay a certain amount in dividends on stock within a specified time cannot be enforced if the dividends have not been earned; at least, where the statute forbids the payment of capital to stockholders.

Same — contract to return subscription.

2. A contract by a corporation to return to a subscriber within a certain time the amount paid for his stock, which he is permitted to keep, is, in the absence of earnings sufficient to justify dividends of that amount, in contravention of a constitutional provision that corporations shall not issue stock except to bona fide subscribers therefor, nor issue any obligations for the payment of money except for money or property received or labor done.

(July 8, 1913.)

Note. — Validity of guaranty of dividends.

It is not intended to discuss the right of preferred stockholders to a preference upon the dissolution of the corporation, either as to the payment of dividends that may have accumulated or as to payment of capital stock. As to the latter question, see note to *Field v. Lamson & G. Mfg. Co.* 27 L.R.A. 136, as to preferred guaranteed and interest-bearing stock, and notes to *Lloyd v. Pennsylvania Electric Vehicle Co.* 21 L.R.A.(N.S.) 228, and *Rider v. John G. Delker & Sons Co.* 39 L.R.A.(N.S.) 1007, as to the right of preferred stock to preference as to capital.

As stated in *JORGUSON v. APEX GOLD MINES*, dividends can only be paid out of profits or surplus earnings. It follows that

APPPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to compel performance of a contract to pay dividends on the stock of a corporation. Affirmed.

The facts are stated in the opinion.

Mr. Milo A. Root for appellant.

Messrs. Frank A. Steele and Harrison Bostwick, for respondent:

No recovery under the facts can be had upon the contract in suit.

Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Pittsburgh & C. R. Co. v. Allegheny County, 63 Pa. 126; Painesville & H. R. Co. v. King, 17 Ohio St. 535; 9 Am. & Eng. Enc. Law, 698.

Morris, J., delivered the opinion of the court:

On March 22, 1909, appellant purchased from the respondent 2,000 shares of its capital stock for the sum of \$1,000. As a part of said transaction it was agreed that the corporation should guarantee that the dividends upon such stock would amount to \$1,000 within the next eighteen months, and that the corporation would pay to the plaintiff the sum of \$1,000 as dividends within that time. Pursuant to this agreement the respondent, acting under a resolution unanimously adopted by its stockholders, executed and delivered to appellant a bond, the condition of which was that if, within the period of eighteen months, the corporation

a contract which attempts to bind the corporation to pay certain dividends in any event, while it may not always be regarded as void, cannot be enforced in the absence of such profits or earnings.

In National Salt Co. v. Ingraham, 58 C. C. A. 326, 122 Fed. 40, certificates of indebtedness given to the stockholders of a corporation which in effect guaranteed to them certain dividends whether or not the earnings were sufficient to pay dividends were held void and unenforceable.

The case of Smith v. Alabama Fruit Growing & Winery Asso. 123 Ala. 538, 26 So. 232, holding void a guaranty of dividends, is sufficiently set out in JOHNSON v. APEX GOLD MINES.

Corporations frequently issue preferred stock and guarantee a dividend on it. Where such stock partakes of the nature of a debt, and is not solely of the character of stock, such a guaranty is valid.

Thus, under the provisions of a special act authorizing a corporation to issue preferred stock to a certain amount, giving its guaranty that each share of said stock shall receive semiannual dividends of a certain amount, it was held in Williams v. Parker, 136 Mass. 204, that the legislature, not having expressed any intention to limit the payment of the dividends, the stockholder was absolutely entitled to receive them, and having received them, the same could not be recovered by a receiver of the corporation.

So, under a statute authorizing the issuance of preferred stock with the assent of at least three fourths of the stockholders in interest in such corporation, and making it lawful for the corporation to guarantee the holders of such stock certain dividends, and providing that the holders of such stock shall not have the right to vote, nor be liable for the debt of the corporation, the corporation may issue preferred stock and guarantee the payment of a certain dividend thereon, since the intention of the statute was to make such holders of preferred stock creditors, and not stockholders, in the true sense of that term. Burt v. Rattle, 31 Ohio St. 116.

But where the relation is not that of 46 L.R.A. (N.S.)

debtor and creditor, dividends cannot be made absolutely payable, even under a positive guaranty. Kidd v. Puritana Cereal Food Co. 145 Mo. App. 502, 122 S. W. 784. See *infra*, discussion as to construction of such guaranty to prevent holding contract void.

The holder of preferred stock, payment of the dividends on which is guaranteed, cannot maintain an action at law against the corporation for failure to declare and pay the dividend as provided. Williston v. Michigan S. & N. I. R. Co. 13 Allen, 400.

In certain cases what is in terms an absolute guaranty of dividends is construed to be only one for the payment of dividends in case profits are made so that a fund is created out of which such dividends can lawfully be paid. In certain of these cases the decision is based in whole or in part on the theory that an absolute guaranty of the dividends is void; and to prevent holding the contract void, the contract will be held a conditional one, as above stated.

Thus, the guaranty on a certain class of stock known as prepaid stock, in Bingham v. Marion Trust Co. 27 Ind. App. 247, 61 N. E. 29, was absolute that a certain dividend would be paid, and provided that the dividend mentioned was in full of the stockholders' proposition of the profits arising from the business; but the court construed the guaranty as not an absolute liability that such dividend would be paid, but that, as a matter of law, such dividend would be paid if there were at the time of maturity funds available and applicable to the payment of the same. In this case the corporation had paid certain dividends after it had become insolvent, and upon the settlement of the affairs of the corporation by a receiver, the funds so paid were allowed as an offset against the claim of the stockholders receiving them upon a distribution of the property of the corporation.

So, in Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156, where the guaranty was in terms absolute of a certain semi-annual dividend, the court held that if the contract be construed to mean that the dividend was payable in all events it would be void; and to prevent this result any

should pay to appellant, his heirs, personal representatives, or assigns, the sum of \$1,000 in cash as dividends on the stock so purchased, then the obligation should be void; otherwise it should remain in full force and effect, and the appellant should, in addition to holding his shares of stock as fully paid up, be entitled to receive from the corporation the sum of \$1,000, less any amount which he should have received in dividends on the stock during the time. The eighteen months having expired and the corporation having failed to pay to the appellant any sum in dividends upon his stock, and having otherwise failed to comply with the obligations of its bond, appellant brought this action upon the bond, in which

he sought to recover from the corporation the sum of \$1,000. Upon a hearing it was found by the court that, since the execution of the bond, the net earnings of the corporation had not been sufficient to declare any dividends upon its capital stock, and that no dividend had been so declared. The court thereupon dismissed the action, and the case is brought here on appeal.

Upon these facts we think the judgment must be sustained. The bond sued upon obligated the company to pay \$1,000 in dividends within eighteen months, or, if such sum be not paid as dividends, the same should be paid in any event.

The courts have uniformly held that dividends can be declared and paid only out of

other reasonable construction of which the words were capable would be given it, and as they would bear the construction that the preferred stockholders should be entitled to the semiannual dividends when there were profits to pay them, this construction would be given.

So, in *Kidd v. Puritana Cereal Food Co.* 145 Mo. App. 502, 122 S. W. 784, the holder of preferred stock under a certificate binding the corporation to pay a certain semiannual dividend thereon was held to sustain the relation of stockholder toward the corporation, and not a creditor, and therefore, her right to dividends depended upon whether the receipts of the company justified the directors in paying them. It seems to have been admitted in this case that if the preferred stockholder sustained the relation of a stockholder to the corporation, her right to dividends depended upon whether the earnings were sufficient to pay them; but it was claimed by her that she sustained the relation of creditor, and therefore the dividends were payable in any event.

A similar construction was put upon such a guaranty in *Feld v. Roanoke Invest. Co.* 123 Mo. 603, 27 S. W. 635, and in an *obiter* statement in *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

While holding such a guaranty valid in some cases, the decision is limited to the payment of such dividends as do not impair the capital stock.

Thus, an agreement contained in the original by-laws of a law library association, guarantying to the stockholders a certain dividend, and providing that the board of directors shall fix the annual dues of members at such an amount as may be necessary to pay the dividends and other necessary expenses, is not invalid except in so far as it provides for the payment of dividends before the payment of necessary expenses, or prevents the keeping of the capital intact. *Cratty v. Peoria Law Library Asso.* 219 Ill. 516, 76 N. E. 707.

An agreement on the part of a railroad company to pay a certain per cent semiannually upon stock issued by it under express power from the legislature to issue

such stock was held valid in *Gordon v. Richmond, F. & P. R. Co.* 78 Va. 501. The real controversy in this case, however, was over the further provision in the stock certificates granting the holders of such preferred stock participation in dividends on the common stock in addition to the preferred dividends, and not as to the right to the guaranteed dividends.

Cases in which a guaranty of dividend by a corporation is construed by the courts to be a pledge of a fund legally applicable for the purposes of a dividend, without reference to the power of a corporation to make a pledge absolute in all cases, such as *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 575, have in general been excluded.

In *Windmuller v. Standard Distilling & Distributing Co.* 106 App. Div. 246, 94 N. Y. Supp. 52, an agreement executed by one corporation at the time of a purchase by it of the stock of another corporation which it had the power to purchase, binding it to pay a certain dividend on the stock of the corporation which it purchased, was construed to be only a method of paying a part of the purchase price of the stock, and not as an agreement to pay dividends whether any profits were actually earned or not. This decision was affirmed in 186 N. Y. 572, 79 N. E. 1119.

That dividends can only be paid out of net earnings or profits even where the stock is issued under an agreement or guaranty that a dividend of a fixed sum shall be paid on it annually is the opinion of the court in *McGregor v. Home Ins. Co.* 33 N. J. Eq. 181.

Corporations frequently provide for the payment of interest on paid-in capital stock, especially for the period previous to the operation of the corporation. Where it results in impairing the capital stock, such a contract is void.

Thus, a railroad corporation has no power to provide in a subscription contract for the payment of interest upon all sums assessed and paid in, from the day of such payment until the proposed railroad is completed and put in operation, since this enables stockholders to draw a dividend

the profits or surplus earnings of the corporation. "The rule of law that requires corporations to preserve their capital intact is alone sufficient to prevent the corporation from paying dividends except out of profits." *Thomp. Corp.* § 5305.

It being established in this case that there were no profits out of which this dividend could be declared, it follows that, if the bond be enforced against the corporation, payment must be made out of its capital, which the law will not permit, upon the ground that any contract whereby a corporation seeks to diminish its capital stock, except in some way permissible by statute, contravenes public policy and is unenforceable. Section 3697, Rem. & Bal. Code, contains provisions that it shall not be lawful to declare dividends except from the net profits arising from the business of the corporation; nor in any way pay to stockholders any part of the capital stock or reduce the same except in the manner there-

after provided. Under this section it has been held that a corporation could not reduce its capital stock by paying any portion of it to the stockholders. *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Tacoma Ledger Co. v. Western Home Bldg. Asso.* 37 Wash. 467, 79 Pac. 992; *Tait v. Pigott*, 38 Wash. 59, 80 Pac. 172. Counsel for appellant contends this section has no application, and that the only question to be determined is whether or not the contract is *ultra vires*. We think, however, it is clear that, since there are no profits nor surplus out of which this dividend can be paid, payment must be made, if at all, from the capital of the corporation, which is a direct violation of the statute. In *Lockhart v. Van Alstyne*, 31 Mich. 70, 18 Am. Rep. 156, a corporation guaranteed a semiannual dividend of 5 per cent upon its preferred stock, and it was held that, when it appeared there were no profits from which the dividends could be made, the guaranty became

in the name of interest, although the corporation may not be in a position to pay the same. *Troy & B. R. Co. v. Tibbits*, 18 Barb. 297.

A contract made by a railroad company, binding itself to pay interest upon subscriptions to stock until the road is completed, cannot be enforced against the corporation while it is largely indebted for work done and materials furnished for the construction of the road, and there are no funds for the payment of the same except the capital stock of the corporation. *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

And a contract by a corporation organized for the maintenance of a college for instruction in dental surgery, binding it to pay interest on its capital stock, is a nullity where the corporation has no means for the payment of interest except its capital stock. *Ohio College of Dental Surgery v. Rosenthal*, 45 Ohio St. 183, 12 N. E. 665.

In the absence of an express statute authorizing it, a railroad company has no power to enter into an agreement with a county under which it agrees to pay interest on the stock subscribed for by the county equal to and at the same time and place as interest falling due on the bonds issued by the county in payment of its subscription, where there are no earnings from which such interest can be paid. *Pittsburgh & C. R. Co. v. Alleghany County*, 63 Pa. 126.

On the contrary, a railroad corporation which is constructing a road was held to have power to contract to pay interest on the stock subscribed until a completion of the road in *M'Laughlin v. Detroit & M. R. Co.* 8 Mich. 100. "The stipulation in the certificate for the payment of interest," says the court, "constituted a contract between the company and the plaintiff as an individual; it created the relation of debtor and creditor to the extent of the semiannual 46 L.R.A. (N.S.)

interest." It does not appear, however, that the power of the company to issue stock with such a stipulation for interest was very strongly contested. The action in this case was to recover the interest, and a recovery was allowed.

In *Ohio v. Cleveland & T. R. Co.* 6 Ohio St. 490, under an express statute authorizing the payment of interest, a railroad company which by resolution directed the interest to be paid was held bound to pay it. Neither does it appear that the power of a corporation thus to contract was questioned in this case.

In *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, an agreement in the subscription contract of a railroad company to pay interest on all sums assessed and paid from the time of payment until the railroad should be put in operation was held to be a valid agreement, and not to invalidate the subscription contract so that no recovery could be had thereon, but this holding was based upon the construction of the contract that no time was fixed for the payment of interest, and therefore it could be paid out of the earnings of the company when those materialized.

So, in *Richardson v. Vermont & M. R. Co.* 44 Vt. 613, an agreement to pay interest on all sums paid by the stockholders up to the time that the road shall be completed and put in operation was held to be payable whenever the surplus earnings should enable the corporation properly to do so.

An agreement to pay interest is not invalid, so that it can be taken advantage of by a stockholder in a suit against him upon his subscription. *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Racine County Bank v. Ayres*, 12 Wis. 513. But the contrary was held in *Troy & B. R. Co. v. Tibbits*, supra, which was an action on a subscription. W. A. E.

wholly inoperative for want of something to which it was applicable, and was void as opposed to public policy; and that the extent to which the law would permit a corporation to go in guarantying dividends would be to guarantee the payment when there were profits to pay them; or, if profits were not realized to the necessary amount in any one year, the stockholder would be entitled when they were realized to have all arrears paid up. In *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. 126, the railroad company guaranteed the payment of interest on county bonds given to it as a subsidy, and it was held that the payment of such interest out of the capital before earnings were made was within the prohibition of the charter against paying dividends out of the capital. Similar rulings have been made in *Bingham v. Marion Trust Co.* 27 Ind. App. 247, 61 N. E. 29; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534; *Ohio College of Dental Surgery v. Rosenthal*, 45 Ohio St. 183, 12 N. E. 665; *Troy & B. R. Co. v. Tibbits*, 18 Barb. 297; *Memphis Grain Elevator Co. v. Memphis & C. R. Co.* 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

We have found one case where the facts are so similar that it would be useless to attempt to distinguish them: *Smith v. Alabama Fruit Growing & Winery Asso.* 123 Ala. 538, 26 So. 232. The corporation there sold to the plaintiff \$1,500 worth of its capital stock, and executed its bond with sureties that it would return the \$1,500 in four semiannual dividends. These dividends were not paid, and action was brought upon the bond. A demurrer was interposed to the complaint upon the grounds: (1) That the contract was illegal and void in that it undertook to indemnify plaintiffs against loss for a purchase of stock, making issue thereof fictitious and without consideration; (2) that the contract was in violation of the Constitution prohibiting corporations to issue stock or any bond for the payment of money except for money, labor done, or property actually received, and declaring void all fictitious increase of stock; (3) that it appeared from the complaint that the contract sued upon was illegal, without consideration, and void. This demurrer was sustained and on appeal the court, in affirming the judgment, said: "It requires little, if indeed anything, beyond this statement of the case, to demonstrate the correctness of the city court's ruling. The contract sued on is, of course, executory, and its enforcement is sought in this action in furtherance and completion and consummation of a fictitious subscription to

the capital stock of a corporation,—a transaction prohibited by the organic law of the land and frequently denounced as vicious and incapable of conferring or passing any rights. The jurisdiction of our courts cannot be invoked to enforcement and execution of such undertakings. In substance the contract is for the payment back by the corporation to the subscriber for its stock of the money he subscribes, thus leaving the issuance of the shares to him wholly unsupported by any consideration, fictitious, and void; and the action upon the contract is an invocation of the powers of the courts to the accomplishment of this end expressly forbidden by the Constitution of the state. If this could be done, an easy road would be opened to the utter emasculation of this most just and necessary provision of the Constitution by evasions so palpable as to be little, if at all, short of avowed and direct attempts to defy and override it."

We have a like provision in our Constitution, found in article 12, § 6: "Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such a manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void."

The bond in suit provides that, in case the full sum of \$1,000 be not paid as dividends within eighteen months, the purchaser of the stock shall, in addition to holding his stock as fully paid, be entitled to receive from the corporation \$1,000 in cash, less any amount received in dividends. This would mean, as said in the Alabama Case, the payment back to the stockholder of the money he paid for his stock, while permitting him to retain his stock as fully paid, thus leaving the issuance of the stock wholly unsupported by any consideration,—a direct conflict with the constitutional provision. See also *Thomp. Corp.* § 5354; *Cook, Corp.* § 544.

The judgment is affirmed.

Ellis, Fullerton, and Main, JJ., concur.

Petition for rehearing denied.

ALABAMA SUPREME COURT.

JOE ROMANO et al., Appts.,
v.
BIRMINGHAM RAILWAY, LIGHT, &
POWER COMPANY.

(— Ala. —, 62 So. 877.)

Injunction — to restrain nuisance — protection of vacant property.

1. That lots in a residence section of a municipal corporation are vacant does not deprive their owner of a right to an injunction to restrain the pollution of the air passing over them by illuminating gas escaping from a reservoir on neighboring property.

Evidence — injunction — judicial knowledge.

2. The court cannot refuse an injunction against the maintenance of a gas holder in a residence section of a municipal corporation, which is operated in such manner as to constitute a nuisance to neighboring property, upon its own knowledge that it may and will be rendered impervious to the escape of gas, but those questions must be determined from the evidence offered to establish them.

(June 5, 1913.)

APPEAL by plaintiffs from a decree of the Chancery Court for Jefferson County, in defendant's favor, in a suit to enjoin the maintenance of a nuisance. Reversed.

The facts are stated in the opinion.

Note. — Vacancy of property as affecting right to enjoin nuisance affecting it.

The few cases passing directly upon this question sustain the position taken in ROMANO v. BIRMINGHAM R. LIGHT & P. Co. that the fact that property is vacant will not prevent equity from enjoining a nuisance affecting it.

Thus, in *Busch v. New York, L. & W. R. Co.* 34 N. Y. S. R. 7, 12 N. Y. Supp. 85, it is held that the fact that land adjacent to defendant's tracks, along which water was permitted to accumulate in borrow pits and become stagnant, was vacant, would not prevent the courts from enjoining the nuisance, the land in question being platted and laid out in building lots, and they being depreciated in value and their sale prevented by such nuisance.

It appears from a footnote to *Peck v. Elder*, as reported in 3 Sandf. 126, that the chancellor, in granting a temporary injunction against the maintenance of a fat-boiling works, which was made permanent by the superior court, said it was of no consequence whether complainants reside on their property or not, it being sufficient that the nuisance tended to diminish its value, by preventing it being occupied by complainants or good tenants, or by destroying its value as building lots.

In *Wilson v. Townend*, 1 Drew. & S. 324, 46 L.R.A. (N.S.)

Messrs. J. A. Mitchell and Samuel B. Stern, for appellants:

The bill clearly shows that the gas reservoir or gas holder, erected in a residence section of the said city, is a nuisance.

20 Cyc. 1180; *Dow v. Winnepesaukee Gas & Electric Co.* 69 N. H. 312, 42 L.R.A. 569, 76 Am. St. Rep. 173, 41 Atl. 288; *Armbruster v. Auburn Gaslight Co.* 18 App. Div. 447, 46 N. Y. Supp. 158; *Brown & Bros. v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *English v. Progress Electric Light & Motor Co.* 95 Ala. 284, 10 So. 134; *Rouse v. Martin*, 75 Ala. 515, 51 Am. Rep. 463; *Hundley v. Harrison*, 123 Ala. 292, 26 So. 294; 1 Wood, Nuisances, §§ 556-563.

Messrs. Tillman, Bradley, & Morrow, M. M. Baldwin, and J. A. Simpson, for appellee:

Plaintiffs are not entitled to an injunction.

Rapier v. Gulf City Paper Co. 64 Ala. 330; *Baker v. Selma Street & Suburban R. Co.* 135 Ala. 552, 93 Am. St. Rep. 42, 33 So. 685; *Atty. Gen. v. Nichol*, 16 Ves. Jr. 338, 10 Revised Rep. 186; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Ray v. Lynes*, 10 Ala. 63; *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *Hundley v. Harrison*, 123 Ala. 292, 26 So. 294; *Richards v. Daugherty*, 133 Ala. 569, 31 So. 934; 1 High, Inj. § 787; *English v. Progress Electric Light & Motor Co.* 95 Ala. 263, 10

30 L. J. Ch. N. S. 25, 6 Jur. N. S. 1109, 5 L. T. N. S. 342, 9 Week. Rep. 30, which was a suit to restrain the erection of a building which would interfere with windows in property owned by plaintiff, it was contended that an injunction should not be granted, inasmuch as plaintiff did not occupy or intend to occupy the houses affected, and the only injury he could sustain was diminution of their value, for which compensation could be recovered at law. The court overruled this objection, however, saying that plaintiff should not be denied the remedy afforded by the court in case of nuisance because there was no present interference with his personal comfort, inasmuch as he might afterward wish to reside in the house; and further, the court would sustain the plaintiff's legal right simply on the ground of the damage which might be produced to property.

But in *Edwards v. Allouez Min. Co.* 38 Mich. 46, 31 Am. Rep. 301, 7 Mor. Min. Rep. 577 when it appeared that plaintiff purchased bottom lands below defendant's stamp mill, not to use, but for speculative purposes, and then sought to sell them to defendant at an enhanced price, and, on failing to do so, brought this suit to enjoin defendant from causing sand to be deposited on the land, the court refused to grant the injunction, but left plaintiff to his remedy at law by way of damages. R. L. S.

So. 134; Green v. Lake, 54 Miss. 540, 29 Am. Rep. 378; Tennessee Coal, Iron & R. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192; Louisville Coffin Co. v. Warren, 78 Ky. 400; McCutchen v. Blanton, 59 Miss. 116; McGill v. Pintsch Compressing Co. 140 Iowa, 429, 20 L.R.A.(N.S.) 406, 118 N. W. 786; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14.

Sayre, J., delivered the opinion of the court:

Appellants filed this bill for an injunction to abate a nuisance. The averment is that appellants own four adjacent lots at the corner of Pratt boulevard and Twentieth street in the residence section of that part of the city of Birmingham, formerly known as Ensley. The lots are vacant, but are being held for sale or future use as places of residence. Within a year, and since complainants acquired their property, defendant has constructed on a lot immediately across the street from appellants' property a large gas holder or reservoir in which illuminating or fuel gas is kept for distribution to its customers in the neighborhood. It is averred that "said gas reservoir or gas holder is continuously emitting fumes and gases, polluting the air in that vicinity with unpleasant and unwholesome odors which are deleterious to the health and comfort of persons living and residing in that vicinity, and particularly to persons who might reside on the real estate of complainants." To show their own injury, appellants aver that the sale of their property for any reasonable price has been and is now being prevented, the value thereof as a place of residence is "absolutely ruined, and its value is greatly depreciated."

For the chancellor's opinion, written in explanation of the grounds upon which his decree proceeded, it is to be observed that two concurring considerations operated to bring about his conclusion against the equity of the bill. Other objections were taken to the bill, but they have not appeared to us to contain merit, and, inasmuch as we have been unaided by a brief for appellee, we have assumed that it is willing to rest its case upon the grounds which were sustained in the court below, and shall confine the statement of our views to those points.

1. It did not appear to the chancellor that the structure in question, or defendant's use of it, constituted a menace to the future use of complainants' lots as vacant property. There has been no physical invasion of that part of the solid earth over which complainants have acquired exclusive

ownership and dominion; but their ownership extends *usque ad cælum*, and within the limits of that ownership they are entitled to the flow of pure air. The right is incident to the ownership of land, and must be protected as well as any other valuable right. No man has a right to interfere with the supply of pure air that flows over another's land any more than he has to interfere with the soil itself. *Savile v. Kilner*, 26 L. T. N. S. 277; *Wood, Nuisances*, 2d ed. § 544. It is not denied, therefore, that any sensible pollution of the air which flows over complainants' property, to a degree in excess of such pollution as is fairly incident to the ordinary use of land in that neighborhood, would constitute an actionable injury; but the proposition of the decree is that complainants shall have no relief in equity by way of injunction, but should be remitted to their action at law for damages, because the property is vacant, and complainants' comfortable enjoyment thereof has not been invaded or diminished. Of course, it does not follow that, because complainants might have an action at law, they cannot resort to equity. The remedy at law must be adequate to redress the particular injury complained of. An owner is entitled to be secured in the full beneficial use of his property and his complete dominion over it so long as his use and dominion do not invade the corresponding legal rights of his neighbors. The Code of 1907 has defined a private nuisance as one which may injure either the person or property of another. Section 5198. In adjusting rights and remedies between parties in respect of the uses to which real property may be devoted, regard must be had for the future. It is to secure the future that equity intervenes. Complainants and defendant alike, when they acquired property in a neighborhood set apart to residential purposes, took it with certain implied restrictions on their use of it. Complainants are also entitled to be secured in the peculiar present and future advantages of the neighborhood. This was clearly recognized by this court in the case of *Sloss-Sheffield Steel & I. Co. v. Johnson*, 147 Ala. 384, 3 L.R.A.(N.S.) 226, 119 Am. St. Rep. 89, 11 Ann. Cas. 285, 41 So. 907. Complainants ought not to be required to submit to a use of defendant's property—a use hurtful to complainants and others, though valuable to defendant—which a court of equity would deny to complainants in respect to their own property on the application of other neighbors. A court of equity interposes by injunction to prevent future injury in respect of a legal right attaching to land simply on the ground of the damage it will produce to the land and its

ownership; and in a case like this it is of no consequence whether complainants reside on their property or not. *Wilson v. Townsend*, 1 Drew. & S. 324, 30 L. J. Ch. N. S. 25, 6 Jur. N. S. 1100, 3 L. T. N. S. 342, 9 Week. Rep. 30; *Peck v. Elder*, 3 Sandf. 126.

2. Assuming, as a matter of common knowledge, to know in a general way, at least, the processes involved in the manufacture, storage, and distribution of artificial gas, because those processes are very old, the chancellor, in the absence of averments that gas was manufactured on defendant's named premises, and that its escape resulted from an irremediable defect in defendant's holder or reservoir, assumed to know that the trouble of which the bill complained could be remedied by calking the seams of the reservoir, or by tightening its rivets at the point of escape, and that there was nothing inherent in the structure and use of such reservoirs to render the escape of gas irremediable, as might be the case if gas were manufactured on the premises.

We do not feel that confidence in the completeness of our knowledge of such things which would justify our denial of complainants' right to relief on this ground taken by the chancellor. While it is held that gas works—places where gas is manufactured—are not nuisances *per se*, they are placed in the class of erections which are not within the ordinary purposes to which real estate is applied, and, although operated under statutory authorization, are to be regarded as actionable nuisances whenever they injuriously affect the use and enjoyment of property in the vicinity. 20 Cyc. 1180. For aught we know, gas holders or reservoirs, constructed for the storage and distribution of gas at points remote from the place of manufacture, may be assigned to the same class. Nor do we feel safe in assuming to know whether the injury stated in the bill results from remediable negligence in the construction, maintenance, or operation of defendant's gas holder, or whether the consequences complained of are so unavoidably incident to constructions of the sort as to render them nuisances in neighborhoods which have been set apart and occupied as places of residence. The injury here may be temporary, or it may be permanent. That question should be determined upon the evidence to be heard, and the decree granting relief, if relief shall finally appear to be proper, may be accommodated to the fact. If the structure is a nuisance, and will necessarily continue to be a nuisance, and is incapable of remedy by alteration, repair, or change of process, which would effectually correct the evil of its presence, it ought not to be allowed in the neighborhood

where it has been set up. A like result would follow upon proof that the emission of noxious gas and odor has injuriously affected the value of complainants' property for residential purposes, and will continue to do so, even though it may be correctable in the manner suggested by the chancellor, unless the defendant should evince a willingness and ask for an opportunity to apply that remedy. The proper practice in that event would be to retain the bill until that relief can be tested and the result ascertained. *Wood, Nuisances*, § 823.

Our conclusion is that the bill is not open to the objection sustained to it in the Chancery Court. On the facts stated in the bill complainants are entitled to relief. The decree will be reversed.

Reversed and remanded.

Dowdell, Ch. J., and McClellan and Somerville, JJ., concur.

A petition for rehearing having been filed, Sayre, J., on June 30, 1913, handed down the following response:

Counsel for appellee must be acquitted of any neglect in the matter of furnishing a brief. It now appears that a brief was furnished, but that it was mislaid by the clerical department of the court. Upon consideration of the application for rehearing in connection with the original brief now before us, we are of opinion that they furnish no sufficient reason for disturbing the conclusion heretofore reached. The application is denied.

IOWA SUPREME COURT.

GEORGE STREVER, Appt.,

v.

JOHN WOODARD.

(— Iowa, —, 141 N. W. 931.)

Evidence — opinion as to cause of injury.

1. A physician who has attended a person injured by another's alleged negligence may, in an action to hold the latter liable for the injury, testify as to what might have been the cause of headache from which the injured person suffers.

Note. — Precautions to be observed when about to stop vehicle in highway.

As to duty of driver to guard against persons coming in contact with rear or sides of wagon, see note to *Stuart v. Holyoke Street R. Co.* 36 L.R.A. (N.S.) 1094.

As to rule of the road governing vehicles proceeding in the same direction, see note

Highway — stopping vehicle — duty towards following vehicle.

2. One driving along a highway is not bound to look or listen for vehicles which may be approaching from behind before stopping his vehicle, nor is he bound to give warning of his intention to stop; his stopping being negligent only when he is aware of the presence of another vehicle, with which his act may cause a collision.

Damages — personal injury — nominal.

3. A verdict for nominal damages should be set aside in favor of one injured by another's negligence, where he has been compelled to pay a substantial sum for medical attendance, and there is evidence tending to show that he suffered physical pain and impaired health because of the injury.

(June 5, 1913.)

to Hackett v. Alamito Sanitary Dairy Co. 41 L.R.A.(N.S.) 332.

As to rules of the road governing vehicles proceeding in opposite directions, see note to Smith v. Barnard, 41 L.R.A.(N.S.) 323.

As to rules of road governing vehicles at intersection of streets and when turning across street, see note to Molin v. Wark, 41 L.R.A.(N.S.) 346.

This note does not deal with rights and liabilities arising by reason of vehicles standing in the highway, but is confined strictly to the question of the precautions to be observed when about to stop a vehicle.

Upon this question there is little authority, although it is likely to become a practical question, especially in connection with automobiles. While it is probably true as held in STREVER v. WOODARD, that a traveler is not bound to look or listen for vehicles which may be approaching from behind, or give warning of his intention of stopping, where he has no knowledge of the presence of another vehicle, yet where he has such knowledge it has been held that he is bound to use ordinary care with respect to such vehicles.

Thus, in Maas v. Fauser, 36 Misc. 813, 74 N. Y. Supp. 861, a driver who had just passed a wagon, apparently on the wrong side, and was confronted with a passing car, was held bound to give such attention to the situation as a man of ordinary intelligence would give; and where he decided suddenly to stop in order to escape the car it was held that he was bound to remember that the horse and wagon were coming behind, and that he could not recover for damages resulting where the wagon following unavoidably collided with his.

And in Bierbach v. Goodyear Rubber Co. 14 Fed. 826, where the plaintiff's vehicle had been run into by the defendant's, which was following, and the plaintiff claimed that the defendant was negligent in not properly turning and passing, and the plaintiff was charged with contributory negligence in suddenly stopping the speed of his horses and beginning to turn, it was held that each was bound to use ordinary 46 L.R.A.(N.S.)

APPEAL by plaintiff from a judgment of the District Court for Wright County in his favor for \$1 only in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. D. C. Chase, for appellant:

The power to set aside the verdict of a jury when manifestly inconsistent with the evidence and the result of a misconception of their powers and duties is as fully recognized where the verdict is inadequate as where it is excessive.

Hackett v. Pratt, 52 Ill. App. 346; Platz v. Cohoes, 8 Abb. N. C. 392; Henderson v. St. Paul & D. R. Co. 52 Minn. 479, 55 N. W. 53; Tathwell v. Cedar Rapids, 122 Iowa,

care in view of the surrounding circumstances of the case. The court said: "The collision occurred on a public thoroughfare, where teams have a right, in the course of business, to follow each other, turn about, pass and repass. Upon both of the parties there was devolved the duty of exercising reasonable care to avoid doing each other injury. It was the duty of the defendant's servant to observe, with ordinary care and diligence, the movements of the vehicle in advance of him, as it was the duty of the plaintiff, in turning his horse and wagon about at that place, to observe with the same kind of care and watchfulness the presence and movements of any vehicle in proximity to his. Ordinary care and caution, as mentioned in these instructions, mean that degree of care and caution which would reasonably be expected of an ordinarily prudent person in the circumstances surrounding the parties at the time of the alleged injury."

In Delfs v. Dunshee, 143 Iowa, 381, 122 N. W. 236, the evidence was such that the jury might have found that after the defendant's automobile had passed and frightened the plaintiff's horse, his driver regained partial control so as to direct the horse's course, when the defendant, hearing its approach, stopped his machine some 30 feet ahead of the horse, and thereby added to its fright, and caused it to turn and run into a pole. It was held that the court was justified in calling the jury's attention to this evidence in connection with the circumstances, and instructing that it was for them to say "whether the defendant, in thus stopping his car, was guilty of negligence," it having, in another instruction, correctly defined negligence. The court said: "In undertaking to stop, he was aware that the horse had become frightened by the automobile, and had not recovered therefrom, and it was for the jury to say whether, as an ordinarily prudent man, he ought not to have known that in bringing the vehicle, which had scared the horse, to a stop but a short distance in front of the frenzied animal approaching directly from behind, he would increase its fright and

51, 97 N. W. 96; Phillips v. London & S. W. R. Co. L. R. 5 Q. B. Div. 81, 49 L. J. Q. B. N. S. 233, 41 L. T. N. S. 121, 28 Week. Rep. 10, 8 Eng. Rul. Cas. 447; Robinson v. Waupaca, 77 Wis. 544, 46 N. W. 809; Whitney v. Milwaukee, 65 Wis. 409, 27 N. W. 39; Caldwell v. Vicksburg, S. & P. R. Co. 41 La. Ann. 624, 6 So. 217; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Emmons v. Sheldon, 26 Wis. 648; Ward v. Marshalltown Light, Power & R. Co. 132 Iowa, 581, 108 N. W. 323; Benton v. Collins, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242; McNeil v. Lyons, 20 R. I. 672, 40 Atl. 831, 4 Am. Neg. Rep. 728; Lee v. Publishers George Knapp & Co. 137 Mo. 385, 38 S. W. 1107, 1 Am. Neg. Rep. 297; McDonald v. Walter, 40 N. Y. 551; Carter v. Wells, F. & Co. 64 Fed. 1005.

In an action for personal injuries resulting from negligence, a verdict for mere nominal damages has been held inadequate where there has been an actual pecuniary outlay or expense, as for medicines or medical aid, or where the injuries are considerable, resulting in pain and suffering and loss of time, or inability to perform labor.

Chouquette v. Southern Electric R. Co. 162 Mo. 257, 53 S. W. 897; Carter v. Wells, F. & Co. 64 Fed. 1005; Fairgrieve v. Moberly, 29 Mo. App. 152; Robbins v. Hud-

son River R. Co. 7 Bosw. 1; Welch v. McAllister, 13 Mo. App. 89; LeVan v. Pennsylvania R. Co. 5 W. N. C. 293; Tedd v. Douglas, 5 C. B. N. S. 895; Beattie v. Moore, Ir. L. R. 2 Eq. 28; Bradwell v. Pittsburgh & W. E. Pass. R. Co. 139 Pa. 404, 20 Atl. 1046.

Messrs. Sylvester Flynn and McGrath & Archerd, for appellee:

The rights and duties of persons using the public highway are equal and reciprocal.

Weber v. Swallow, 136 Wis. 46, 116 N. W. 844; Millsaps v. Brogdon, 97 Ark. 469, 32 L.R.A. (N.S.) 1177, 134 S. W. 632.

Where a person is guilty of contributory negligence he cannot recover.

Gipe v. Lynch, — Iowa, —, 136 N. W. 715; Weber v. Swallow, 136 Wis. 46, 116 N. W. 844.

It is for the jury to determine whether a person lawfully using a public highway is guilty of negligence in failing to look or listen for approaching vehicles, or to do what a reasonably prudent person should have done under like circumstances.

Bowser v. Wellington, 126 Mass. 391; McDonald v. Bowditch, 201 Mass. 339, 87 N. E. 585; Kendall v. Kendall, 147 Mass. 482, 18 N. E. 233; Undhejem v. Hastings, 38 Minn. 485, 38 N. W. 488; Borg v. Spo-

render it more difficult to control; if so, in what he did the jury might have found him to have been negligent. Had the horse been given the street, it would seem that the driver might have regained control, at least the jury might so have found. The natural effect of stopping the thing which had frightened it but a short distance away was to furnish an obstacle to his progress which it naturally would attempt to avoid, and this might have been found to have turned the horse from its course, and therefore to have contributed to its injury. Ordinarily a person may stop at any point on the street where he chooses, provided he does not unduly obstruct the way; but in an emergency like this the safety of property and person is involved, and that course is exacted which an ordinarily prudent man would exercise for their protection. Having passed the horse immediately before, and being aware of the fright caused thereby, and that the horse was then running toward the receding automobile, with the driver still in the cart, it was incumbent on him to exercise care commensurate with the situation in which he found himself, to the end that no act of his should interfere with the efforts to regain control and save the horse and driver from injury. Whether he so did was fairly an issue for the jury to decide."

And it has been held that the question of negligence and contributory negligence is for the jury where it is shown that the defendant, while going up a rise in the 46 L.R.A. (N.S.)

road to a bridge, diminished the speed of his automobile, and that the plaintiff, who was some distance behind in an automobile, did likewise, and blew his horn; that at the crest of the incline the defendant's car suddenly stopped when the plaintiff's car was about 6 feet in its rear, and that the brakes were applied to the latter's car, but notwithstanding this a collision occurred which caused damage. Earle v. Pardington, 116 N. Y. Supp. 675. The court said: "It is undisputed that both parties were masters of the art of running their automobiles, and that plaintiff's was a 25-horse power machine. He claimed that by the custom of the road defendant, knowing that plaintiff's machine was not far in the rear, should have given a warning signal of an intention to stop on the bridge, either from volition or necessity; also that by turning about 2 feet more to one side a sufficient space would have been left for plaintiff's machine to pass and escape the collision. In Kettle v. Turl, 162 N. Y. 258, 56 N. E. 627, 7 Am. Neg. Rep. 482, the court said: 'The cases are exceptional where it can be held that contributory negligence was so conclusively established that nothing was left, either of inference or of fact, to be determined by a jury.' This principle applies as well to freedom from negligence. The exceptional feature of this case is that two experienced automobilists should each charge negligence against the other, a rare, though proper, opportunity for the delectation and wisdom of a jury." J. T. W.

kane Toilet & Supply Co. 50 Wash. 204, 19 L.R.A.(N.S.) 160, 96 Pac. 1037; Zoltovaki v. Gzella, 159 Mich. 620, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; Rogers v. Philips, 206 Mass. 308, 28 L.R.A.(N.S.) 944, 92 N. E. 327; Minor v. Mapes, 102 Ark. 351, 39 L.R.A.(N.S.) 214, 144 S. W. 219; Gipe v. Lynch, — Iowa, —, 136 N. W. 715; Stomme v. Hanford Produce Co. 108 Iowa, 140, 78 N. W. 841; Woolf v. Nauman Co. 128 Iowa, 261, 103 N. W. 785, 18 Am. Neg. Rep. 405; Northern P. R. Co. v. Everett, 152 U. S. 107, 43 L. ed. 373, 14 Sup. Ct. Rep. 474.

Where a person runs in front of an automobile without looking and is struck by it he is guilty of contributory negligence, precluding the recovering of damages.

Zoltovaki v. Gzella, 159 Mich. 620, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; Verdon v. Crescent Automobile Co. 80 N. J. L. 199, 76 Atl. 346; Jordan v. American Sight Seeing Coach Co. 129 App. Div. 313, 113 N. Y. Supp. 786; McCormick v. Heaser, 77 N. J. L. 173, 71 Atl. 55; Artz v. Chicago, R. I. & P. R. Co. 34 Iowa, 153; Borg v. Spokane Toilet Supply Co. 50 Wash. 204, 19 L.R.A.(N.S.) 160, 96 Pac. 1037.

The conduct of both plaintiff and the defendant must be measured by the standard of ordinary care.

Texas & P. R. Co. v. Behymer, 189 U. S. 468, 470, 47 L. ed. 905, 906, 23 Sup. Ct. Rep. 622, 13 Am. Neg. Rep. 695; Chicago G. W. R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657.

Where the alleged injuries have been inflicted by one of a number of causes shown by the evidence, for one of which the defendant might be responsible and for the others respecting which he is not responsible, the plaintiff cannot recover when it is just as probable that the alleged injuries were caused by the latter as by the former.

Kerr v. Keokuk Waterworks Co. 95 Iowa, 509, 64 N. W. 598; Trapnell v. Red Oak Junction, 76 Iowa, 744, 39 N. W. 884; Kerlin v. Chicago & N. W. R. Co. 149 Iowa, 440, 128 N. W. 548; Fleming v. Chicago, R. I. & P. R. Co. 153 Iowa, 386, 133 N. W. 751; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 598; Grant v. Pennsylvania & N. Y. Canal & R. Co. 133 N. Y. 659, 31 N. E. 220; Tibbitts v. Mason City & Ft. D. R. Co. 138 Iowa, 178, 115 N. W. 1021; Neal v. Chicago, R. I. & P. R. Co. 129 Iowa, 5, 2 L.R.A.(N.S.) 905, 105 N. W. 197, 19 Am. Neg. Rep. 213; O'Connor v. Chicago, R. I. & P. R. Co. 129 Iowa, 636, 106 N. W. 161; Asbach v. Chicago, B. & Q. R. Co. 74 Iowa, 248, 37 N. W. 182; Gores v. Graff, 77 Wis. 46 L.R.A.(N.S.)

174, 46 N. W. 48; Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 90, 47 N. E. 977, 3 Am. Neg. Rep. 711; Foster v. Bussey, 132 Iowa, 640, 109 N. W. 1105; Freeman v. Strobehn, 122 Iowa, 157, 97 N. W. 1094; Clark v. American Exp. Co. 130 Iowa, 254, 106 N. W. 642; Rice v. Whitley, 115 Iowa, 748, 87 N. W. 694; Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697, 2 Am. Neg. Rep. 136; Foster v. Elliott, 33 Iowa, 216; J. I. Case Threshing-Mach. Co. v. Taven, 65 Iowa, 359.

While an expert witness may give his opinion as to what might cause the results complained of, he cannot be permitted to usurp the functions of the jury and determine what did produce them.

Dunham v. Rix, 86 Iowa, 301, 53 N. W. 252; Muldowney v. Illinois C. R. Co. 30 Iowa, 615, 14 Am. Neg. Cas. 612; Curl v. Chicago, R. I. & P. R. Co. 63 Iowa, 423, 16 N. W. 69, 19 N. W. 308; Sachra v. Manilla, 120 Iowa, 562, 95 N. W. 198; Martin v. Des Moines Edison Light Co. 131 Iowa, 724, 106 N. W. 359.

Where the evidence is conflicting on the question of damages, and the verdict returned is supported by sufficient evidence, the finding of the jury is decisive, and settles the issue, and should not be disturbed by a motion for a new trial or by an appeal.

Reuber v. Negles, 147 Iowa, 734, 126 N. W. 966; Bell v. Kearns, 153 Iowa, 62, 133 N. W. 348; Baxter v. Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Knowlton v. Des Moines Edison Light Co. 117 Iowa, 451, 90 N. W. 818.

A new trial should not be granted in a personal injury action, because of the smallness of the verdict.

Norton v. Lincoln Traction Co. 92 Neb. 649, 138 N. W. 1132; O'Reilly v. Hoover, 70 Neb. 357, 97 N. W. 470.

Ladd, J., delivered the opinion of the court:

The plaintiff was on his way to Woolstock in a single-seated, one-horse buggy going south, on December 29, 1910. His horse was trotting along when an automobile operated by Robinson approached from the opposite direction, and passed at a distance of between 16 and 20 feet as estimated by Robinson, or 30 or 40 feet as testified by plaintiff. The defendant with his automobile, containing four or five passengers, came up behind plaintiff's rig, and when Robinson was about opposite, turned his car to go between, when the fender struck the back wheel of the buggy, lifting that side up, and caused plaintiff, with the cushion and blanket, to slip or fall out on

the ground, and the horse, becoming frightened, went on to Woolstock. The plaintiff testified that he did not stop but had slowed up, and was corroborated by the testimony of Robinson. The defendant testified that plaintiff stopped his vehicle suddenly, as though to converse with Robinson, and his testimony is corroborated by that of the persons riding with him. In this action, recovery is sought on the ground that defendant was negligent (1) in running his car at an excessive rate of speed, (2) in failing to give warning of his approach, and (3) in not keeping far enough from plaintiff's vehicle to safely pass it without a collision; and that the injury occurred without fault on the part of the plaintiff contributing thereto. The defendant denied having been guilty of any negligence, and alleged that the collision was due to the carelessness of plaintiff in suddenly stopping his horse without any notice or warning to the defendant. The evidence was such as to carry these several issues to the jury. This is apparent from even a casual examination of the record, and for this reason it is not necessary to review the evidence.

II. The plaintiff was attended by Dr. McCauliff.

He testified that upon examination made January 3, 1911, he discovered a contusion on the left side of plaintiff's head, immediately above the temple, with swelling 1½ inches in diameter, somewhat discolored and sensitive to the touch, and also a darkening or contusion of the left lip without much swelling, and that the patient said he suffered from a severe headache and was troubled with insomnia; that he called on him eight or nine times during that month, and that the headaches became more severe in a few days after his first call and the insomnia more difficult to overcome; that he was of opinion that the witness suffered severe pain from his injuries, and that after the time mentioned he was consulted by the plaintiff about once a week for another month; that he complained of pains in his head during the entire time and of impairment in his hearing and sight.

He was then asked "whether or not a violent blow upon the head or concussion from falling, such as would produce this swelling that you speak of on the head, might or might not have any effect upon the hearing, or the head itself, of a permanent nature."

A. It might.

Q. To what did you ascribe professionally the continuance of these headaches described that Mr. Strever complains of.

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An objection as incompetent, immaterial, and irrelevant was sustained.

Q. Considering the history of the case as detailed to and what you observed of those injuries in January, what would you say was the cause of these headaches?

A like objection was sustained.

Q. State whether or not a violent blow on the head in the place where you saw his injury would cause continual headache such as Mr. Strever had or not.

An objection as leading and suggestive, incompetent, and immaterial was sustained.

Q. I wish you would now state from your knowledge of the history of the case and physical condition of Strever as a physician, whether these pains that you have described or the headaches were or were not the result of injury upon his head, that you have referred to in your testimony.

Same objection was sustained.

Q. I now refer to all of this.

A like objection was sustained, and the court remarked: "This is a question for the jury; they must draw that conclusion, or they must fail to draw it."

Exceptions were saved to each of the above rulings, and all were erroneous. They called for opinions which it was competent for an expert, if possessed of sufficient information, to answer. The witness had fully qualified, and the rule is well established that though a physician may not testify what the cause of an injury actually was, his testimony as to what might have, within reasonable probability, caused it, is received. Thus as to whether an injury might have resulted from an alleged concussion by being thrown from a carriage (*Quinn v. O'Keeffe*, 9 App. Div. 68, 41 N. Y. Supp. 116), or from a blow (12 Am. & Eng. Enc. Law, 2d ed. 447). In *Barker v. Ohio River R. Co.* 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148, 12 Am. Neg. Rep. 580, testimony of a physician that the plaintiff's condition might have been caused by shock, a fall, or anything that produces a shock to the spinal column, was held admissible. See also *Bennett v. Fail*, 26 Ala. 605; *Thompson v. Bertrand*, 23 Ark. 730; *Missouri, P. R. Co. v. Lovelace*, 57 Kan. 195, 45 Pac. 590; *Oliver v. Columbia, N. & L. R. Co.* 65 S. C. 1, 43 S. E. 307; *Matteson v. New York C. R. Co.* 62 Barb. 364. The subject was one not familiar to the jury, and it was competent to call for expert opinion to aid in tracing the casual connection between plaintiff's ailments and the efficient cause; and, as a nervous temperament and a fall from a load of tile nearly four months previous were suggested in cross-examination as

such cause, the testimony of the physician who attended him during his illness as to what might have occasioned his suffering was material, and should not have been excluded. The inquiries were not vulnerable to the objection as leading, nor did they call for an opinion as to the ultimate issue to be determined by the jury. Whether he was in fact injured by the fall from the buggy would necessarily be included in the verdict of the jury, but was not determinative of the case.

III. In an instruction otherwise unexceptionable, the court told the jury that if an ordinarily careful and prudent man, situated as plaintiff was and in like circumstances, would "have looked and listened or given warning of his intention to stop in the highway, or would have driven out of the beaten track before stopping, and you further find that the plaintiff did suddenly stop in the highway, but did not look, listen, or give warning to the defendant of his intention to stop, and the collision of which he now complains was thereby occasioned, then the plaintiff was guilty of contributory negligence, and he cannot recover." The converse also was stated. The plaintiff testified that he drove out to the side of the road, and that he did not stop, but merely slowed up. For this reason the instruction might be improved by mentioning these matters hypothetically. Nor are we content with the suggestion of an obligation on the part of a traveler that he must, Janus-like, keep an outlook in the rear, or have driven from the portion of the highway along which his vehicle was moving. He was under no obligation to yield any portion of the highway to allow defendant to pass. *Elenz v. Conrad*, 123 Iowa, 522, 99 N. W. 138. Only to avoid a collision reasonably to be apprehended is the foremost traveler bound to turn to one side. His duty is to keep a lookout ahead, and only when he is aware of a vehicle coming up from the rear, and near that which he is driving, is he charged with duty of exercising ordinary care in the management of his own, so as not to injure that behind. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236. "If there be not sufficient room it is said to be 'the duty of the foremost traveler to afford it, on request made, by yielding an equal share of the road, if that be adequate and practicable; if not, the object must be deferred till the parties arrive at ground more favorable to its accomplishment.' But it is perhaps doubtful if such duty can be deemed an absolute legal duty, and even if it should be so considered, the failure of the leading traveler to perform it by turning out to one side will not justify the other in purpose-

ly running into him or attempting to pass at all hazards. The only rule of general application that can be laid down is that he who attempts to pass another going in the same direction must do so in such a manner as may be most convenient under the circumstances of the case, and if negligent, and damage results to the person passed, the former must answer for it, unless the latter by his own recklessness or carelessness brought the disaster upon himself." 2 Elliott, Roads & Streets, § 1084. The party coming up from behind must exercise reasonable care to keep his vehicle under control, and far enough in the rear to avoid the contingencies of decreasing speed, stopping and the like. He is in a situation to do this, and the law casts their burden upon him. Whether plaintiff knew defendant was immediately behind his buggy with his automobile, and so close that if he stopped it would likely run into his vehicle, was an issue to be submitted to the jury; and if such was the situation and plaintiff was aware of it, undoubtedly he took the risk in suddenly stopping, if he so did, and cannot recover; but if he was not aware that defendant was in such proximity, or if he merely slowed down the speed at which he was driving, then he was not negligent, regardless of whether he looked back or listened. Though the reference to looking and listening, guarded as it is in the instruction, may not constitute reversible error, it may as well be avoided on another trial.

IV. The jury failed to answer one of the special interrogatories submitted, and error is predicated on the court receiving the verdict without exacting an answer. As plaintiff does not appear to have insisted on an answer being required, he cannot be heard to complain. *Huss v. Chicago*, G. W. R. Co. 113 Iowa, 343, 85 N. W. 627; *Mayo v. Halley*, 124 Iowa, 675, 100 N. W. 529; *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 669, 42 N. W. 513.

V. The jury returned a verdict of \$1, and the plaintiff asked that his be set aside as inadequate. If there were proof of substantial damages, uncontroverted, the motion for a new trial should have been sustained. *Tathwell v. Cedar Rapids*, 122 Iowa, 51, 97 N. W. 96; *Ward v. Marshalltown, Light, Power & R. Co.* 132 Iowa, 581, 108 N. W. 323. That plaintiff was injured was uncontradicted. He was precipitated from his buggy to the ground, and taken immediately to Dr. Smith's office and examined. He found no bones broken, and did not remember of any contusion of the skin, but testified that he "was in a dazed condition. The man undoubtedly had had a fall, but I did not discover any lesions."

Upon calling on him a week or two later, the witness said: "All that was wrong was an intense headache and considerable nervousness. I do not know what caused those conditions. . . . The nervousness that I discovered on my call to his place might have been due to a number of different causes. I thought he was suffering from grippe and the shock or contusion of this accident." The witness then explained that there might be concussion without external evidence of it; that the time of the examination in his office he complained of his chest, head, and back, that he "attributed part of his grief to the accident, but he could have had very much the same condition without any accident at all. It was impossible to tell the real cause of the headache and nervousness,"—and explained that he had complained of sleeplessness a year or two before. The testimony of Dr. McCauliff concerning his condition has been stated. He testified further that he attributed his nervousness and sleeplessness to the injuries he found when called to treat him. That plaintiff was confined to his house a part of the time, requiring the care of a nurse for several weeks, was testified by plaintiff, his wife, a son and daughter, and an employee. Indeed there is no controversy on this point, though two physicians, Carver and Sams, examined him at the instance of defendant, October 25, 1911, and discovered no trouble with him save a catarrhal condition of the middle ear. He had fallen from a load of tile in September previous, but his testimony that he had recovered therefrom was not disputed. For medicine and medical attendance as a result of this injury he had paid \$106.75. There is no room in this record for saying that he did not suffer substantial injuries in falling from the buggy, and that this expense was occasioned thereby, and for this reason, if entitled to anything, he should have been allowed substantial damages. On this ground the motion for a new trial should have been sustained. *Reversed.*

**UNITED STATES CIRCUIT COURT
OF APPEALS, EIGHTH CIRCUIT.**

LAMSON BROTHERS & COMPANY et al.,
Plffs. in Err.,
v.
I. W. BANE.

(— C. C. A. —, 206 Fed. 253.)

**Contract — wager — order on foreign
brokers — where consummated.**

The remedies of the purchaser are governed by the law of his residence, and not 46 L.R.A.(N.S.)

by that of the broker, where, wishing to purchase stock on margin, he approaches the resident manager of a foreign broker and authorizes the purchase of the stock, upon which the manager wires the broker to make the purchase, and is notified by him that the purchase has been made, whereupon he notifies the customer of that fact and receives payment of the margin.

(May 2, 1913.)

ERROR to the District Court of the United States for the Southern District of Iowa to review a judgment in plaintiff's favor in an action brought to recover back money advanced as margins in certain stock transactions. *Reversed.*

The facts are stated in the opinion.

Argued before Hook and Smith, Circuit Judges, and Van Valkenburgh, District Judge.

Messrs. Moritz Rosenthal, Henry H. Kennedy, Joseph W. Moses, Julius Moses, Hamilton Moses, Walter Bachrach, N. T. Guernsey, W. E. Miller, and A. C. Parker, for plaintiffs in error:

The laws of Illinois have no extra territorial force or effect, and hence do not govern contracts made and to be performed in the state of Iowa, and create no rights growing out of such contracts which are enforceable in the courts of Iowa.

Ascher v. Moyse, 101 Miss. 36, 57 So. 299; *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703.

It is contrary to the policy of the law of Iowa to permit the loser to recover from the winner moneys lost at gambling.

Iowa Code, 1897, §§ 4965, 4967, 4968; *Thrift v. Redman*, 13 Iowa, 25; *Shaw v. Gardner*, 30 Iowa, 111; *Trenery v. Goudie*, 106 Iowa, 603, 77 N. W. 467; Counselman

Note. — Conflict of laws as to gambling contracts.

The present note is a continuation of a note on the same subject appended to *Winward v. Lincoln*, 64 L.R.A. 160.

In determining the place where the contract was made, the court in *LAMSON BROS. v. BANE* relied on cases involving insurance contracts. On that point, see notes in 63 L.R.A. 834, and 23 L.R.A.(N.S.) 968.

The principles, and rules for the determination of the governing law of contracts are discussed in various other aspects and in relation to many different subjects in annotation referred to in the Index to L.R.A. Notes, "Conflict of Laws."

Public policy of forum.

As shown in the earlier note, the prevailing tendency, in this country though there is a conflict upon the point, seems to be to regard statutes declaring gambling contracts and transactions illegal

v. Reichart, 103 Iowa, 430; 72 N. W. 490; Sutterley v. Fleshman, 41 Pa. Super. Ct. 131.

The Federal court sitting in Iowa is bound to uphold the policy of that state, and will, therefore, not enforce the Illinois statute, its enforcement being contrary to such policy.

Parker v. Moore, 53 C. C. A. 369, 115 Fed. 799, 111 Fed. 470; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

The provision in the Illinois statute allowing six months during which the loser may sue the winner for moneys lost at gambling operates as a bar to the institu-

tion of any suit by the loser after six months from the time that the money is lost and paid.

Hurd's Rev. Stat. 1909, § 132, p. 38; Holland v. Swain, 94 Ill. 154; Kizer v. Walden, 198 Ill. 274, 65 N. E. 116; Johnson v. McGregor, 167 Ill. 350, 41 N. E. 558; Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370; Gibb v. Dorniny, 164 Ill. App. 74.

Messrs. Jerry B. Sullivan and John B. Sullivan, for defendant in error:

Purchase and sales made with the understanding that the contract will be settled by paying the difference between the contract and the market price are void.

or void as embodying a distinctive public policy, which requires the courts of the state in which they are enacted to refuse to recognize or enforce any contract or transaction in violation of their terms, even though such contract or transaction may have had its situs outside of the forum, and therefore does not come within the direct operation of the statutes.

So, in the subsequent case of Burrus v. Witcover, 158 N. C. 384, 39 L.R.A.(N.S.) 1005, 74 S. E. 11, it was held contrary to the public policy of North Carolina to permit recovery upon a draft drawn to furnish margins, or to pay debts for margins, on future contracts which would be illegal according to the law of North Carolina, even upon the assumption that they would not be illegal according to the law of the place where the transactions took place.

And, in Thomas v. First Nat. Bank, 213 Ill. 261, 72 N. E. 801, holding that an assignee of a certificate of deposit issued by an Illinois bank to a resident of Illinois could not recover thereon against the bank, it appearing that the assignment was a part of a transaction by which the proceeds thereof were to be employed in gambling, it was declared to be contrary to the public policy of Illinois to maintain the action, even if it were to be assumed that there was no law of the District of Columbia, where the assignment was made, or in the state of Missouri, where the gambling transactions were mainly to be conducted, prohibiting the making of gambling contracts.

Nor will a court of Pennsylvania the law of which denies the right of a loser in a gambling transaction to recover back the money enforce a cause of action for the recovery of such losses, created by a statute of another state where the gambling transactions took place. Sutterley v. Fleshman, 41 Pa. Super. Ct. 131.

In Ross v. Green, 4 Harr. (Del.) 308, recovery by the loser from a stakeholder of money deposited in pursuance of a bet made in Maryland upon a horse race to be run there was denied, although horse racing and betting on horse racing in Delaware was prohibited by statute in that state. But see Tarleton v. Baker, 18 Vt. 9, 44 Am. Dec. 358, cited in the earlier note.

In England, however, it is held not con-

trary to public policy to enforce a contract growing out of gambling transactions, valid by its proper governing law, though it would be invalid and unenforceable if governed by the law of England. See English cases subsequently cited. As pointed out in the earlier note, some of the American cases also take this position; and there are other cases which have applied the law of another state with the result of upholding the contract in question; though it would have been illegal according to the law of the forum. See A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617 (cited at page 164 of the note in 64 L.R.A.). In commenting upon this case the St. Louis court of appeals, in Atwater v. A. G. Edwards Brokerage Co. 147 Mo. App. 436, 126 S. W. 823, calls attention to the failure of the supreme court to notice the question of public policy of the forum as distinguished from the question as to the proper governing law of the contract.

In some cases which apparently apply the law of another state upholding the contract, it does not appear that the contract would have been illegal even according to the law of the forum. In Conrath v. Lepper, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2, where the law of another state upholding the contract was applied, it was apparently assumed that the contract in question would have been valid according to the law of the forum.

In some cases, *e. g.*, Bearse v. McLean, 199 Mass. 242, 85 N. E. 462, *infra*, the action was not to enforce the contract, but to recover back losses sustained thereunder. Obviously the refusal to permit a recovery of losses incurred under a contract valid by its proper law, but invalid by the law of the forum, would be entirely consistent with the refusal to enforce such a contract, upon the ground that it would be contrary to the public policy of the forum.

Governing law when public policy of forum does not interfere.

Assuming that there is no objection arising from the public policy of the forum against entertaining the action, the question in relation to conflict of laws generally resolve itself into the inquiry whether the

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 247, 49 L. ed. 1031, 1037, 25 Sup. Ct. Rep. 637; Pratt v. Ashmore, 224 Ill. 587, 79 N. E. 952; Counselman v. Reichart, 103 Iowa, 430, 72 N. W. 490; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Embrey v. Jamieson, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; Weare Commission Co. v. People, 209 Ill. 528, 70 N. E. 1076.

Contracts for future delivery, made with the intention of settling by paying to the other parties to the contract the difference between the contract price at the time of selling or closing out of the deal, are wagers, and are void.

Cleage v. Laidley, 79 C. C. A. 284, 149 Fed. 346; First Nat. Bank v. Oskaloosa

case is governed by the law of the place where the contract was made or that of the place where the transactions in pursuance of it were conducted, in other words the law of the place of performance. As stated in the earlier note, the weight of authority seems to favor the law of the place where the contract is to be performed, rather than that of the place where it is made. However, there are so many variations in the essential features of the different cases that it is unsafe to make any sweeping generalizations on the point. As indicated in the earlier notes, in cases involving transactions in "futures," a material inquiry in determining the governing law is whether it is the contract between the customer and broker, or the transaction conducted by the latter, that is to be regarded.

In *LAMSON BROS. v. BANE*, however, as pointed out by the court, according to the plaintiff's own theory, the transaction between defendant and himself amounted to mere wagers, and there was therefore no place of performance outside of Iowa, in which state, upon the facts before the court, the contract was assumed to have been made. In this respect the *LAMSON CASE* is to be distinguished from *A. G. Edwards Brokerage Co. v. Stevenson*, 180 Mo. 510, 61 S. W. 617, which is set out in the note in 64 L.R.A. at page 166. The doctrine of the *Edwards Case* was followed upon a substantially similar state of facts in *Atwater v. A. G. Edwards Brokerage Co.* 147 Mo. App. 436, 126 S. W. 823. In the *Atwater Case* the court observed that "if the legality or illegality of the agent's advances for, and commissions on the account of, his principal [to which the counterclaims in question related], were to be tested by the contract of agency out of which the transactions grew in the first instance, it would seem that even the matter set forth in the counterclaims before us would fall within the inhibition of our statute, as both of the parties were residents of this state and the contract of agency entered into here. But our supreme court in [the *Edwards Case*] saw fit to omit to notice the question sug-

Packing Co. 66 Iowa, 41, 23 N. W. 255; Lowry v. Dillman, 59 Wis. 197, 18 N. W. 4.

The form of the contract is unimportant, the actual intention of the parties at the time of making the contract is the absolute test.

Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762; *Pratt v. Ashmore*, 224 Ill. 587, 79 N. E. 952.

It makes no difference if a debt or wager is made and assumes the form of a contract, gambling is none the less such because it is carried on in the form or guise of legitimate trade.

Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Weare Commis-*

gested, and treated the suit by the agent against his principal for advances and commissions, as though the validity of the subject-matter should be ascertained and determined by reference to the law of the state where the purchases and sales were actually made by the agent, or by another agent at its instance and request. The doctrine of that case is therefore to be interpreted, notwithstanding the fact the agent's claim against his principal for advancements and commissions, as here must essentially rest, in the first instance, on the contract of agency, [as ruling] the legality or illegality of the subject-matter for which the recovery is sought is to be determined by reference to the law of the state where the agent actually conducted purchases and sales on his principal's account, and not by that of the state where the agency was created."

The *Edwards Case* was also followed in *Gaylord v. Duryea*, 95 Mo. App. 574, 69 S. W. 607, upon a substantially similar state of facts.

In *Willhite v. Houston*, 118 C. C. A. 542, 200 Fed. 390, an action by a broker to recover disbursements and commissions on sales and purchases of grain, defended on the ground that the transactions out of which the account arose were gambling transactions, the plaintiffs were brokers at Kansas City, Missouri, and acted almost entirely upon telegrams and letters from defendant and his agent; the orders for sales and purchases of grain being executed, according to instructions, on the board of trade at Kansas City and Chicago. It was held that as regards their legality the sales and purchases of grain on the Chicago market were governed by the law of Illinois, by which the contract is void if both parties intend it as a wager upon the market movements to be settled by differences, but not if only one of them has that intention, and transactions on the Kansas City market were governed by the law of Missouri, by which the contract is void if either party intends a mere wager on market movements, though the other does not. The court cites the *Edwards Case* as authority,

pellant will be entitled to the reward. The appellant discovered the criminal. He was unauthorized, either by himself or by his agent, to arrest or to convict, but he did all that was possible for him legally to do. The officers of the law did their bounden duty, and the arrest and conviction followed. He caused both. This is all the contract contemplated any citizen could do. *Haskell v. Davidson*, 91 Me. 488, 42 L.R.A. 155, 64 Am. St. Rep. 254, 40 Atl. 330; 34 Cyc. 1747. The offer was not made to police officers alone, but to citizens generally. If it were made to officers only, no one officer could, either by himself, or his agent, meet the requirements of the offer with the strict construction thereof which is urged upon this court. Many conflicting authorities are cited to sustain the contentions of the respective parties. A careful reading of them all and others indicates that each case, as to the circumstances and the object sought to be obtained in offering the reward, must in a measure be considered by itself. If, for instance, great danger is from the known facts to be anticipated in making the arrest, the reward should be construed as intended for those who should brave the danger and effect the arrest. In other cases, as in this, detective ingenuity is demanded. In every case the accomplishment of the desired result, the bringing of the criminal to justice, is the object of the proffered reward. He who accomplishes that which really effectuates such result is entitled to the reward. That the services of a sheriff, a county attorney, twelve jurors, and a judge, in their respective official capacities, are necessary to consummate the arrest and conviction, detracts not from his right. Their duties are incident to their respective offices for which the law provides compensation. His is an extraordinary employment, and for compensation he looks to the contract. From all the circumstances the prime object in this case was the apprehension or discovery of the criminal. The rest followed by the orderly discharge of their duties by different officers. So far as the evidence demurred to discloses, the language employed in *Stone v. Dysert*, 20 Kan. 123, may be applied to appellant. It was said: "It is sufficient, if acting on the knowledge that a reward had been offered, and with a view to obtain it, they performed substantially the service proposed in the advertisement." P. 125.

The ruling on the demurrer and the judgment is reversed, and the case is remanded for new trial.

Petition for rehearing denied.
46 L.R.A. (N.S.)

KANSAS SUPREME COURT.

ABILENE STATE BANK, Appt.,
v.
JAMES STRACHAN.

(89 Kan. 577, 132 Pac. 200.)

Corporation — stockholders' liability — assignment.

1. To effect an assignment and disposition of shares of capital stock in a bank so as to release the assignor from the superadded liability of shareholders, fixed by law, he must procure a transfer of the stock on the books of the bank, in accordance with the provisions of the banking act.

Same — transfer on books.

2. Such a transfer is essential to a release from liability of a shareholder who sells and assigns his stock to the bank itself, in payment of a previously contracted debt owing by him to the bank.

(May 10, 1913.)

Headnotes by JOHNSTON, Ch. J.

Note. — Failure to register transfer, due to fault of corporation, as affecting continued liability of assignor of stock.

The general rule is that every person whose name, by his authority, has been placed on the books of a corporation as a shareholder, remains liable as such both to corporation and to its creditors so long as his name remains there. 10 Cyc. 714.

But there is an important exception to this general rule, recognized by some of the courts, i. e., where the transferrer has done all that can be required or expected of a reasonably careful and prudent business man to secure the registry of the transfer upon the books, but a failure has resulted by reason of the negligence, carelessness, or illegal refusal of the company to make the proper entry.

The scope of this note is confined strictly to the exception, and does not include cases such as *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699; *Giesen v. London & N. W. A. Mortg. Co.* 42 C. C. A. 515, 102 Fed. 584; and *Van Tuyl v. Robin*, 80 Misc. 360, 142 N. Y. Supp. 535, where the facts clearly show that the case could not possibly be within the exception, and the court did nothing more than apply the general rule.

Neither are cases like *Johnston v. Laffin*, 103 U. S. 800, 26 L. ed. 532, where the transfer had actually been made and entered upon the books, but was attacked upon other grounds, within the scope of the note.

There are also a great many cases where the recovery was sought from the transferee, such as *Chambersburg Ins. Co. v. Smith*, 11 Pa. 120; *Upton v. Burnham*, 3 Biss. 431, Fed. Cas. No. 16,798; *Brown v. Artman*, 166 Fed. 485 (both the transferrer and transferee may be liable); *Hamilton v. Loeb*, 108

4 Met. (Ky.) 372, 83 Am. Dec. 481; Com. v. Finley, 15 Ky. L. Rep. 572; Moss v. Meshew, 8 Bush, 187; Tilford v. Dotson, 106 Ky. 755, 51 S. W. 583; Claffin v. Carpenter, 4 Met. 580, 38 Am. Dec. 381; Owens v. Lewis, 46 Ind. 495, 15 Am. Rep. 295; Pattison's Appeal, 61 Pa. 294, 100 Am. Dec. 637; Craddock v. Riddlesbarger, 2 Dana, 206; Bear-Camp-River Co. v. Woodman, 2 Me. 407; Chitty, Contr. 301.

Claimants from the same grantor need not trace to commonwealth.

Edwards v. Mattingly, 107 Ky. 332, 53 S. W. 1032; Bloomingdale v. DuRell, 1 Idaho, 33; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Sayre v. Mohney, 35 Or. 141, 56 Pac. 526; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359.

notice to do so. Huron Land Co. v. Davison, 131 Mich. 86, 90 N. W. 1034. To the same effect, Ferguson v. Arthur, 128 Mich. 297, 87 N. W. 259.

The same rule was held to apply in St. James v. Erskine, 155 Mich. 606, 119 N. W. 897, where the deed gave the right to enter upon the land and cut and remove the timber "at any time thereafter."

In Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697, where a deed contained the words "excepting timber therein," it was held that the right of the grantor of the land in the timber was not revocable, nor could it be terminated at the will of the owner or grantee of the land, nor by notice to remove the timber. But in Huron Land Co. v. Davison, supra, the court said that they did not feel bound by the language used in the foregoing opinion.

In Wood v. Elliott, 51 Mich. 320, 16 N. W. 666, where the grantee of certain wood and timber was "to have his own time to remove" the same, it was held that a subsequent grantee of the land at the most could only by giving notice to the grantee of the timber require him to remove it within a reasonable time.

Unlimited time inferred from terms of contract.

In a few cases arising in jurisdictions asserting the rule that ordinarily the term of a reasonable time for removal will be inferred, it has been held that the terms of the contract are such that the parties must have contemplated that the owner of the timber should not be limited to a reasonable time to remove the same.

Thus, in Baker v. Kenny, 145 Iowa, 638, 139 Am. St. Rep. 456, 124 N. W. 901, the court held that the language of the contract clearly indicated that the parties intended a perpetual right of entry upon the land for the removal of the timber and "growth of timber thereon," although the contract itself was labeled "bill of sale," and a part of the description in the warranty was of "goods and chattels," and the instrument itself was recorded in the chattel mortgage record. 46 L.R.A. (N.S.)

The grantor is estopped to assert title against third persons.

Wood's Appeal, 92 Pa. 379, 37 Am. Rep. 694; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703.

A purchaser takes subject to restriction or servitude in title.

Jones, Easements, §§ 118-120; Gibson v. Porter, 12 Ky. L. Rep. 917, 15 S. W. 871.

Messrs. Jouett & Jouett, with Mr. A. F. Byrd, for appellee:

The writing under which plaintiff claims title, though under seal, is not a deed, but only an executory contract.

Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993; 2 Am. & Eng. Enc. Law, 2d ed. 90,

The court said: "The language of the instrument before us indicates that the parties contemplated the right on the part of defendant and his administrator or assigns to take timber and growth of timber from the described land. There is not only a failure to fix a time limit, but the habendum clause expressly describes the right as one which is to exist forever. It is true in neither the granting clause nor the habendum are the heirs of the grantee mentioned, and at common law the grant would be construed to be for life only. But in this state 'the term "heirs" or other technical words of inheritance are not necessary to create and convey an estate in fee simple.'"

So, in Baxter v. Mattox, 106 Ga. 344, 32 S. E. 94, the deed conveyed the timber and growing trees "suitable for sawmill purposes and being manufactured into lumber now upon, or that may hereafter grow upon," the land, and also conveyed to the grantee, his heirs and assigns, the right and privilege "now and at any and all times hereafter" to enter upon the land for the purpose of cutting such timber. It was held that the terms of the deed clearly manifested an intention on the part of the grantor to convey to the grantee a perpetual right to enter upon the land and cut and remove the timber and trees. The court said: "If it be possible to convey such a license in perpetuity, it would be difficult to conceive how such an intention could be more clearly expressed than it is in this deed."

A deed conveying certain marked and described trees to the grantee, "his heirs and assigns forever," with the full and unreserved right of way over and through the land of the grantor, or any other lands which might thereafter be owned or controlled by him, for the manufacture and removal "at any time" of the grantee's timber, and with the further right of cutting and using "at any time" all timber necessary for the manufacture or removal of the timber purchased, has been held to convey an estate in fee which is not terminated and forfeited by the lapse of a reasonable time before the removal thereof. North

94; *Dreisbach v. Serfass*, 126 Pa. 32, 3 L.R.A. 836, 17 Atl. 513.

A contract, to be binding upon either party, to be mutual in its terms and binding upon both.

Northup v. Ward, 12 Ky. L. Rep. 735, 15 S. W. 247; *Litz v. Goosling*, 93 Ky. 185, 21 L.R.A. 127, 19 S. W. 527; *Jones v. Noble*, 3 Bush, 694; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Allen v. New Domain Oil & Gas Co.* 24 Ky. L. Rep. 2169, 73 S. W. 747; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. 345; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558; *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; *Lowe v. Ayer-Lord Tie Co.* 29 Ky. L. Rep. 1302, 97 S. W. 383.

Georgia Co. v. Bebee, 128 Ga. 563, 57 S. E. 873. The court said: "The grantee's right of entry for the purpose of manufacturing or removing the timber was not limited, but the privilege was indefinite; or, to use the words of the grantor, he could exercise this right 'at any time.' Likewise, the grantee was not in any manner restricted to the time in which he could use other timber belonging to the grantor necessary to manufacture and remove the trees purchased from the grantor's land. If it be possible to frame a conveyance creating an estate in trees with a perpetual right of entry to cut and remove them from the land, this deed has that effect. It may bear harshly upon the owner of the soil, but as it was competent for him to make such a contract as this, he must abide the consequences of his own deed."

And in *Cawthon v. Stearns Culver Lumber Co.* 60 Fla. 313, 53 So. 738, it was held that as the conveyance was of "all the pine timber suitable for saw logs that there is now or may be hereafter" on the land, "with privilege of free ingress and egress at any and all times" for the purpose of removing the timber, the mere lapse of sixteen years does not terminate the grantee's right to take the timber, no other circumstances of injury or undue advantage being shown. The court said: "While, in a conveyance of growing timber intended to be removed from the land, where no time is specified for the removal, a reasonable time may be implied, to be determined from all the facts and circumstances of the particular case, yet where the conveyance contemplates future growth of at least some of the trees before their removal, and an indefinite right to remove is given, even though an intention to remove the timber appears by the conveyance, the mere passage of time without removal may not of itself, in the absence of injury or undue advantage, terminate the vendee's right to take the timber from the land."

A deed conveying all the trees and timbers standing and growing on the land forever, with free liberty to cut and carry away the trees and timber at all times, at the 46 L.R.A. (N.S.)

The fact that a writing is under seal does not necessarily imply a consideration.

Buford v. McKee, 1 Dana, 108; 7 Am. & Eng. Enc. Law, 2d ed. 93, 94.

Timber sold and conveyed to be removed within a certain time is a sale only of so much timber as is removed within the time.

Chestnut v. Green, 120 Ky. 385, 86 S. W. 1122; *Jackson v. Hardin*, 27 Ky. L. Rep. 1111, 87 S. W. 1119; *Bell County Land & Coal Co. v. Moss*, 30 Ky. L. Rep. 6, 97 S. W. 354; *Boisaubin v. Reed*, 1 Abb. App. Dec. 161; *Pease v. Gibson*, 6 Me. 81; *Warren v. Leland*, 2 Barb. 622; *Monroe v. Bowen*, 26 Mich. 523; *Kennedy v. Dawson*, 96 Mich. 83, 55 N. W. 616; *Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683; *Reed v. Merrifield*, 10 Met. 155; *Fletcher v. Liv-*

pleasure of the grantee forever, was held in *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215, to entitle the grantee to maintain trespass against the owner for cutting down the trees.

Unlimited time inferred from failure to fix definite time.

In still other jurisdictions it is held that a conveyance or reservation of timber without condition vests absolute title in the trees, and the courts will not import a provision that the same is to be removed in a reasonable time.

Howard v. Lincoln, 13 Me. 122; *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 15 L.R.A. (N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 79; *Goodwin v. Hubbard*, 47 Me. 595; *Gregg v. Birdsall*, 53 Barb. 402; *Robinson v. Gee*, 26 N. C. (4 Ired. L.) 186; *Knotts v. Hydrick*, 12 Rich. L. 314; *Wilson Lumber Co. v. D. W. Alderman & Sons Co.* 80 S. C. 106, 128 Am. St. Rep. 865, 61 S. E. 217; *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645; *Bardon v. O'Brien*, 140 Wis. 191, 133 Am. St. Rep. 1066, 120 N. W. 827; *Stukeley v. Butler*, Hobart, 168; *Lyford's Case*, 11 Coke, 46.

So, in *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 15 L.R.A. (N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 79, it was held that where standing timber is real estate, no implied contract of removal within a reasonable time arises from an absolute conveyance of it, noncompliance with which will result in a forfeiture. The court said: "The interest of the purchaser of this timber under his deed has no less claim to the protection of the law than the interest which the seller retains in the soil. The seller of this timber seeks to have the court do that which is in plain conflict with the rights which he has conveyed. By warranty deed he has sold this timber, received money for it, and now seeks to breach his own warranty by a proceeding in an equity court to cancel his deed, and declares that his vendee did not get what he warranted him he would convey. There is no justice nor equity in the contention. If he de-

ington, 153 Mass. 388, 26 N. E. 1001; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Strong v. Eddy, 40 Vt. 547; Larson v. Cook, 85 Wis. 564, 55 N. W. 703; Ford Lumber & Mfg. Co. v. Cress, 132 Ky. 317, 116 S. W. 710.

In a sale of timber where no time is fixed for its removal, the law implies that it shall be removed within a reasonable time.

Morris v. Sanders, 19 Ky. L. Rep. 1433, 43 S. W. 733; Howe v. Batchelder, 49 N. H. 204; Warren v. Leland, 2 Barb. 613; Mathews v. Mulvey, 38 Minn. 342, 37 N. W. 794; Heffin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Gilmore v. Wilbur, 12 Pick. 120, 2 Am. Dec. 410; Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 456; Boults v. Mitchell,

sired to limit the title which he conveyed, he should have placed it in the contract. If it had been his purpose to grant him a license merely to enter the land and cut the trees, his contract should have been drawn so as to express this intention. Not having done so, it is not for use, at his instance, to give to this contract an intention which deprives the vendee of his property, and is contradictory of the terms of the deed made by the vendor."

In Kentucky, it has been held that it is the law that if timber be excepted in a deed the title remains in the grantor, and if the deed is silent as to the time of removal, and there is nothing in the other provisions of the deed, or the situation of the parties, or the circumstances surrounding them when the deed was executed, to show that a severance of the timber from the land was contemplated, the grantor's title to the timber is not lost or defeated by his failure to remove it in a reasonable time. Ford Lumber Co. v. Cornett, 146 Ky. 457, 142 S. W. 718. It should be noted that this case was an action for the value of the timber.

So, in Hicks v. Phillips, 146 Ky. 305, 47 L.R.A.(N.S.) —, 142 S. W. 394, it was held that a grantor who, in conveying his real estate, reserved certain described timber growing upon the property, does not, unless there is something to show that the parties intended that it should be severed from the land, lose his title by failure to remove it within a reasonable time. This was an action by the grantee of the land to quiet title.

But if the timber is sold or reserved in a deed in contemplation of its immediate severance from the soil, then it must be removed within a reasonable time.

Davidson v. Moore, 18 Ky. L. Rep. 563, 37 S. W. 260; Morris v. Sanders, 19 Ky. L. Rep. 1433, 43 S. W. 733; Asher Lumber Co. v. Cornett, 23 Ky. L. Rep. 602, 63 S. W. 974; Dils v. Hatcher, 24 Ky. L. Rep. 826, 69 S. E. 1092; Hogg v. Frazier, 24 Ky. L. Rep. 930, 70 S. W. 291; Siler v. Louisville Property Co. 32 Ky. L. Rep. 911, 107 S. W. 266; Evans v. Dobbs, 33 Ky. L. Rep. 1053, 112 S. W. 667; Oates v. Yeargin. — Ky. —, 46 L.R.A.(N.S.)

15 Pa. 371; Andrews v. Wade, 3 Sadler (Pa.) 133, 6 Atl. 48; Goette v. Lane, 111 Ga. 400, 36 S. E. 758; Union Tanning Co. v. Shug, 22 Pa. Co. Ct. 647; Patterson v. Graham, 164 Pa. 234, 30 Atl. 247; Kincaid v. McGowan, 88 Ky. 91, 13 L.R.A. 289, 4 S. W. 802.

What is a reasonable time for the removal, see Morris v. Sanders, 19 Ky. L. Rep. 1433, 43 S. W. 733; Gay Mfg. Co. v. Hobbs, 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26; Hill v. Hill, 113 Mass. 103, 18 Am. Rep. 456.

Carroll, J., delivered the opinion of the court:

In July, 1874, John D. Spencer and his wife signed and acknowledged the follow

115 S. W. 794; Hicks v. Phillips, 146 Ky. 305, 47 L.R.A.(N.S.) —, 142 S. W. 394; Ford Lumber Co. v. Cornett, 146 Ky. 457, 142 S. W. 718; EASTERN KENTUCKY MINERAL & TIMBER CO. v. SWANN-DAY LUMBER CO.; Hounshell v. Miller, 153 Ky. 530, 155 S. W. 1148; Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co. 154 Ky. 523, 157 S. W. 1109.

Thus, where the grantor of land reserves to himself all the chestnut oak bark "now growing upon the land," the law will imply an intention to remove the same within a reasonable time, and failure to remove it within fifteen years will forfeit the right thereto. Morris v. Sanders, 19 Ky. L. Rep. 1433, 43 S. W. 733.

So, where a deed reserving the timber on the land conveyed provides that the grantor shall have "sufficient" time to remove it, "unavoidable circumstances considered, be what they may," it was held that a reasonable time would be inferred. Siler v. Louisville Property Co. 32 Ky. L. Rep. 911, 107 S. W. 266.

And where the sale was of all of the timber suitable for staves, and the grantee agreed to cut a certain amount of staves each year, it was held that the contract clearly implied that all the timber would be cut within a reasonable time. Evans v. Dobbs, 33 Ky. L. Rep. 1053, 112 S. W. 667.

In Asher Lumber Co. v. Cornett, 23 Ky. L. Rep. 602, 63 S. W. 974, the grantee of certain timber was given five years in which to remove it, but in case he desired a longer time he would have a right to let the trees stand on the land "until he shall desire to remove them." Such a contract was held to imply that the parties intended that the timber should remain on the land an indefinite time, as it did not contemplate an immediate severance from the soil.

The position of the Minnesota court is not clear.

In Mathews v. Mulvey, 38 Minn. 342, 37 N. W. 794, the court quotes with approval the following statement from an earlier case: "It would be an anomaly in the law that one man should own standing timber on the land of another with no right of

ing paper, which for convenience we will call a "deed," and it was duly recorded in the clerk's office of Wolfe county: "Know all men by these presents: That John D. Spencer, of the county of Wolfe, and state of Kentucky, and Rebecca Spencer, wife of John D. Spencer, for and in consideration of \$1, and other considerations hereinafter mentioned, to be paid by Henry C. Howard, W. E. McKinney, A. L. Greer, and John W. Greer, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Howard, McKinney, Greer, and Greer, their heirs and assigns forever, the undivided seven eighths ($\frac{7}{8}$) of the minerals and timber, with the right of way to timber and minerals when the same are being mined and worked. Said tract

of land is bounded and described as follows, to wit: . . . The grantor reserves one-eighth interest in the minerals and timber of said land, outside of the seven eighths conveyed, and is to share with grantees, as above mentioned. That is to say, the grantor is to receive one eighth of the net profits of all minerals and timber taken from said tract, so soon as mining operations commence, said grantor also reserving of the timber herein conveyed a sufficient quantity for mill, fuel, and fencing, for his own use on his farm. This deed is not to embrace, or intended to convey, anything but the minerals and timber as stated, and not to interfere with the farming interest of said territory, only so far as is necessary to work and mine minerals and getting out

entry to cut and take it away." The decision in this case turns upon other points, but it was said that a sale of all of the pine timber, the grantee "to have as long as he wishes to cut the same, provided he pays the taxes on said land," vests the title at once in the grantee, and the latter would have a right to enter upon the land and cut and remove the timber, "certainly for a reasonable time." The language used would seem to imply that the grantee had a right in perpetuity.

In Texas, contracts for the sale of standing timber which are in the form of a deed, without any reference as to the cutting of the timber, have been held to be conveyances of the timber with an interest in the land with a right to cut at any time, and there will not be imported into the deed the requirement that it shall be cut within a reasonable time. *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238; *Jones v. Lodwick Lumber Co.* — Tex. Civ. App. —, 99 S. W. 736.

But if the contract deals with the timber as personalty, with provisions in respect to the cutting, etc., it has been held in that state that the purchaser must remove it within a reasonable time, which is to be determined with reference to the circumstances of the particular case.

Weaver v. King, — Tex. Civ. App. —, 98 S. W. 902; *Beauchamp v. Williams*, — Tex. Civ. App. —, 115 S. W. 130; *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* — Tex. Civ. App. —, 139 S. W. 1015.

And this is true although the contract may contain some phrase such as, "as much time as he needs," or "as is convenient."

Houston Oil Co. v. Boykin, — Tex. Civ. App. —, 153 S. W. 1176; *Houston Oil Co. v. Hamilton*, — Tex. Civ. App. —, 153 S. W. 1194.

How reasonable time is determined.

In determining what would be a reasonable time to be allowed for the removal of the timber from the land, all the facts and circumstances of the case, and the conditions surrounding the parties at the time 46 L.R.A. (N.S.)

of the execution of the contract, should be considered.

Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; *Liston v. Chapman & D. Land Co.* 77 Ark. 116, 91 S. W. 27; *Garden City Stave & Heading Co. v. Sims*, 84 Ark. 603, 106 S. W. 959; *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801; *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806; *McNair & W. Land Co. v. Adams*, 54 Fla. 550, 45 So. 492; *Cawthon v. Stearns Culver Lumber Co.* 60 Fla. 313, 53 So. 738; *McNair & W. Land Co. v. Parker*, 64 Fla. 371, 59 So. 959; *Goette v. Lane*, 111 Ga. 400, 36 S. E. 758; *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37, 70 S. E. 672; *Mills v. Ivey*, 3 Ga. App. 557, 60 S. E. 299; *Boults v. Mitchell*, 15 Pa. 364; *Dolan v. Baker*, 10 Ont. L. Rep. 259.

What is a reasonable time is dependent altogether upon the local condition and the peculiar circumstances of each case. *Cherry Lake Turpentine Co. v. Lanier Armstrong Co.* 10 Ga. App. 339, 76 S. E. 610.

In *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776, the court, in discussing what is a reasonable time, said: "What is a reasonable time is necessarily dependent on the nature of the service, and is generally a question of fact. It is so in the present case. Still, there are certain rules not to be lost sight of. The use for which the timber is known to be wanted; the custom and rule, if such there be, of felling and removing the timber as the capacity of the mill may require it, if kept reasonably employed,—are among the inquiries which should be made in determining the question of reasonable time. The accident of a failing market, or undue delay in rebuilding the mill after its destruction,—these, and similar disturbances, should exert no influence with the jury. But when the mill was destroyed by fire, a reasonable time was allowed for its reconstruction."

"The facts are to be ascertained by an inquiry into the conditions of the land and timber, the obstacles opposing, and the facilities favoring, and the conditions surrounding, the parties at the time the contract was made. When all the circumstances are considered, and the facts are

timber." By regular conveyances, whatever right, title, and interest the grantees had under this deed came into the ownership of the appellant company. John D. Spencer died in 1883, and in 1887-88 his children and heirs at law conveyed a fee simple title to all the land embraced in the boundary mentioned in the above instrument to remote vendors of the appellee company, and by regular conveyance the estate so conveyed came into the possession of appellee. About 1902, the appellee commenced to cut and remove timber from the land, and in 1904 this action was brought by the appellant for an accounting, and to recover from appellee the value of the timber so cut and appropriated. The master commissioner to whom the case was referred reported that

determined, the law will declare whether reasonable time has expired for cutting and removing the timber conveyed." *Liston v. Chapman & D. Land Co.* 77 Ark. 116, 91 S. W. 27.

There should be taken into consideration the terms of the contract and the ascertained intention of the parties (*Union Tanning Co. v. Shug*, 22 Pa. Co. Ct. 647); the character and location of the land, and the accessibility of the land and timber (*Earl v. Harris*, 99 Ark. 112, 137 S. W. 806; *Hall v. Eastman, G. & Co.* 89 Miss. 588, 119 Am. St. Rep. 709, 43 So. 2; *Union Tanning Co. v. Shug*, 22 Pa. Co. Ct. 647; *Carson v. Three States Lumber Co.* 108 Tenn. 681, 69 S. W. 320); the kind and quality of timber (*Earl v. Harris*, 99 Ark. 112, 137 S. W. 806; *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247; *Union Tanning Co. v. Shug* and *Carson v. Three States Lumber Co.* supra); the facilities for cutting and removing the timber (*Earl v. Harris*; *Carson v. Three States Lumber Co.*; and *Patterson v. Graham*, supra); the custom or rule for removing the timber according to the capacity of the mill (*Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776); and the seasonableness of the weather during the time that has elapsed (*Earl v. Harris*, supra).

Evidence of sickness and high water is admissible. *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

And the purchaser of the timber is entitled to have taken into consideration the slashy character of the land, wet seasons, and the difficulty of securing workmen, as having prevented a prompt removal of the timber. *Garden City Stave & Heading Co. v. Sims*, 84 Ark. 603, 106 S. W. 959 (three years held not unreasonable in this case).

No account should be taken of the time elapsing between a conveyance of timber and a subsequent conveyance to a third person of the land subject to the timber deed, in determining whether a reasonable time has elapsed since the execution of the timber deed, as against a successor in interest of the grantee in such subsequent deed. *Liston v. Chapman & D. Land Co.* 77 Ark. 116, 91 S. W. 27.
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the appellant was entitled to recover \$4,852, as the value of seven eighths of the timber cut and appropriated by appellee. Afterwards, upon considering the case on exceptions to the commissioner's report, the lower court entered a judgment dismissing the petition, and as a result this appeal is prosecuted.

A number of reasons are advanced by counsel for the contesting parties in support of and in opposition to the judgment of the lower court; but we have reached the conclusion that the controlling decisive question in the case is whether the deed executed by Spencer should be treated, as contended by counsel for appellant, as conveying to the grantees therein an unconditional fee simple interest in the timber and min-

Likewise, the time during which the grantee of the timber has by injunction been prevented from operating upon the premises should be excluded. *Carson v. Three States Lumber Co.* 108 Tenn. 681, 69 S. W. 320.

But no consideration should be given to the convenience or inconvenience, the ability or inability, of the grantee, caused by or resulting from the magnitude and extent of its business, and numerous other contracts for timber to which the grantor is not a party. *Young v. Camp Mfg. Co.* 110 Va. 678, 66 S. E. 843.

And the nonconstruction of a proposed railroad in contemplation of which one purchased certain timber and mineral rights near the proposed line does not relieve the grantee from the consequences of failing to remove the timber and materials within a reasonable time. *EASTERN KENTUCKY MINERAL & TIMBER CO. v. SWANN-DAY LUMBER CO.*

What is a reasonable time, the facts being agreed, is within the province of the court to determine. *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410.

A witness will not be allowed to give his opinion as to what is a reasonable time. *Brinson v. Kirkland*, 122 Ga. 486, 50 S. E. 369.

Where a contract of sale of standing timber expressly gives a reasonable time to cut the same, parol evidence is not admissible to show that by "reasonable time" was meant the time which might elapse before a sale of the land by the grantors, the possibility of the sale having been mentioned between the parties before the timber contract. *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

Inasmuch as the question of what is a reasonable time for exercising the privilege granted in a deed of timber not specifying any time for its removal is one of fact to be determined in the light of all the facts and circumstances surrounding the transaction, and inasmuch as these will necessarily be widely variant in different cases, it cannot be determined with reference to any local custom of usage, unless such cus-

erals, or, as insisted by counsel for appellee, as only conveying to the grantees the right to the timber and minerals upon the condition that they commenced within a reasonable time to convert it into salable or manufactured products. If the deed conveyed the fee absolutely, the appellant should succeed; but if it only granted the fee with the condition annexed that the grantees should begin operations within a reasonable time, the judgment below was correct.

Having this view of the question of law that controls the case, it is important at the outset to get a clear understanding of the facts, not only in their relation to the parties at the time the contract was executed, but subsequently, as these facts will

furnish valuable aid in getting at the intention of the parties, and assist materially in the proper construction of the deed. And it is a well-settled principle in the law of contracts that, when the instrument in question is fairly susceptible of more than one construction, it is admissible to have the aid of all pertinent extrinsic facts and circumstances that will throw light on the intention of the parties in its execution, and enable the court to carry out their purpose as expressed in the writing. As was said in *Lexington & B. S. R. Co. v. Moore*, 140 Ky. 514, 131 S. W. 257: "In the construction of all contracts, the intention of the parties making the contract, if it can be arrived at from a consideration of the instrument, must control, and in aid of what

tom or usage is so general and universal as to have become necessarily by implication a part of the contract, which will not arise unless the custom is one which can be reasonably applied to the particular transaction under investigation. *Goette v. Lane*, 111 Ga. 400, 36 S. E. 758.

What constitutes a reasonable time is not to be determined by the will of the grantor. *McNair & W. Land Co. v. Adams*, 54 Fla. 550, 45 So. 492; *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247.

A contract for the sale of timber which stipulates that the vendee shall cut and remove the same as expeditiously as possible requires that he begin to cut and remove the timber promptly after the contract is made, and that he continue to cut and remove the same expeditiously from that date until it is all cut and removed; and a further provision of the contract that he shall pay the taxes if he fails to remove the timber within five years does not relieve him from the consequences of failing to start and continue the work with due expedition. *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806.

If there are any special extrinsic facts or circumstances tending to limit the period within which the trees should be removed in order to take them within a reasonable time, the burden of proving them is upon the party asserting a termination of the estate. *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37, 70 S. E. 672.

So, where a defendant claiming timber privileges produces the oldest recorded deed conveying such privileges, the burden is on the opposite party to show that such interest has terminated, unless the period which the grantees had for removing this timber is so short or so long as to warrant the court in saying as a matter of law whether a reasonable time for its exercise has not expired. *Brinson v. Kirkland*, 122 Ga. 486, 50 S. E. 369.

And the court cannot determine as a matter of law whether a reasonable time has expired or not, except in extreme cases where the period is very short or very long. *Brinson v. Kirkland*, 122 Ga. 486, 50 S. E. 46 L.R.A. (N.S.)

369. Ordinarily the question is for the jury. *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Goette v. Lane*, 111 Ga. 400, 36 S. E. 758; *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831; *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37, 70 S. E. 672; *Snyder v. East Bay Lumber Co.* 135 Mich. 31, 97 N. W. 49; *Beauchamp v. Williams*, — Tex. Civ. App. —, 115 S. W. 130.

In *Boults v. Mitchell*, 15 Pa. 364, the court, in an *obiter* statement which recognizes the right of the owner of the land to take trees under a conveyance by giving a reasonable notice, said that whether or not a notice is reasonable is a question for the jury under all the circumstances of the case, taking into consideration the contract, the intention of the parties at the time they entered into it, the kind, quality, and quantity of timber; its locality and proximity to a stream of water; the quantity of land from which it is to be removed; and in fact all the circumstances that surround the transaction at the time it occurred.

What constitutes reasonable time.

The right of a parol licensee to remove timber from a tract of 8 acres is lost by a failure to remove the same within three years, where the contract specified no time for removal. *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455.

A grantee of timber above a certain size, by a contract giving him five years to remove the same, "said term to commence from the time said party of the second part begins to manufacture said lumber into wood or lumber," loses his right by failing for thirteen years to begin cutting. *Gay Mfg. Co. v. Hobbs*, 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26 (*obiter*), followed in *Bunch v. Elizabeth City Lumber Co.* 134 N. C. 110, 46 S. E. 24.

A delay of thirteen years in starting to cut and remove was held in *Dolan v. Baker*, 10 Ont. L. Rep. 259, to be unreasonable, and to warrant an injunction against cutting after that time.

the parties intended it is admissible in the construction of many contracts that are on their face free from ambiguity, to consider their situation and the circumstances and conditions surrounding them at the time the contract was entered into,—not for the purpose of modifying or enlarging or curtailing its terms, but to shed light upon the intention of the parties. And the intention of the parties thus gathered will prevail unless it does violence to the meaning of the contract as written. Page, Contr. § 1123; *Kauffman v. Raeder*, 54 L.R.A. 247, 47 C. C. A. 278, 108 Fed. 171; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362, 15 N. E. 70; *Hildrith v. Forrest*, 4 J. J. Marsh. 217. In other words, if a written contract, when viewed from the standpoint of the parties at the time it was executed, can be made to carry out their intention as expressed in the writing, the court will adopt the construction that will accomplish this end."

Fortunately there is little dispute about

A license to cut wood upon the lot of another, when not acted upon within fifteen years, is not taken advantage of within a reasonable time, and will not authorize the person to whom it is given thereafter to cut down and carry away wood. *Gilmour v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410.

Where a grantor of land reserved to himself all the chestnut oak bark "now growing upon the land," it was held that the grantor's failure to remove the same for fifteen years forfeited the right. *Morris v. Sanders*, 19 Ky. L. Rep. 1433, 43 S. W. 733.

Where a reservation of timber gives the grantor of the land a sufficient time to remove the same, "unavoidable circumstances considered, be what they may," a delay of sixteen years to take any steps toward removing the timber, after the grantor of the land had secured a right of way by which to remove it, forfeits the right. *Siler v. Louisville Property Co.* 32 Ky. L. Rep. 911, 107 S. W. 266.

Twenty years is an unreasonable time where there has been no effort made to remove the timber. *Ward v. Moore*, — Ala. —, 61 So. 303.

So a delay of fifty years has been held to be unreasonable. *Goodson v. Stewart*, 154 Ala. 660, 46 So. 239.

Where the purchaser's agent testifies that he told the vendor at the time of making of the deed of standing timber, that the vendee would operate the timber as soon as he could get railroad facilities, eight years after a railroad was built near the property, the same having been built two years after the contract was made, afforded the purchaser a reasonable time to exercise his right, and having failed to do so, he forfeited it. *McNair & W. Land Co. v. Parker*, 64 Fla. 371, 59 So. 959.

A purchaser who five years after the contract enters and commences cutting and removing the timber, continuing to do so for 46 L.R.A. (N.S.)

the material facts. The land described in the deed was at the time of its execution practically all wild, uncultivated, uninclosed mountain land. The nearest railroad was some 40 miles away, and there were no navigable streams convenient that would lend any assistance in the transportation of timber or minerals that might be obtained. The mountainous condition of the surrounding country, the great distance from railroad facilities, and the lack of water means of transportation, produced a present condition that made the timber and minerals on the land of little or no value for commercial purposes, or indeed for any purpose. There was no local demand for timber or minerals, and in the absence of transportation facilities no incentive to attempt to put these products on the market. Spencer, the grantor, was a man of intelligence and good business capacity, and although he lived some nine years after the instrument was executed, it does not appear that he

three years, when he stops and removes his mill, even if he does not thereby abandon his right, loses the same by failure within eleven years thereafter to remove the timber. *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247.

Eleven years will be held an unreasonable delay in beginning to cut timber, where it appears it was 3½ miles from the railroad, and that for three of the eleven years there has been a sawmill at a like distance; that no local demand would have ever exhausted the lumber; and that three years before the expiration of the eleven years a near-by mill owner offered to purchase the timber and cut it immediately. *Houston Oil Co. v. Boykin*, — Tex. Civ. App. —, 153 S. W. 1176.

Thirteen years was declared to be an unreasonable length of time in *Gay Mfg. Co. v. Hobbs*, 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26, where the price for the timber was but \$200 and the grantor was to pay all of the taxes upon the land.

Delay for thirty years to remove timber and coal, as a matter of law, forfeits the right thereto under a grant the consideration for which moving to the grantor was a specified share of the net profits of working the timber and mines. *EASTERN KENTUCKY MINERAL & TIMBER CO. v. SWANN-DAY LUMBER CO.*

But it cannot be said, as a matter of law, that fifteen years is an unreasonable time, where the deed shows an intention not to require the removal of the timber as early as it could be removed in the ordinary course of business, by its recital that a part of the consideration is to be paid when the second party removes the timber, and that there may be a delivery of the timber by loading the logs upon the cars of a certain railroad, "or upon any other railroad that may hereafter be built," and that the grantor will make deliveries to the grantee

made any complaint of the failure of the grantees to begin the development of the natural resources that they had purchased. At the time the writing was executed, there were strong indications that a railroad would be constructed through or in the immediate vicinity of the land. A route was then being surveyed, and the grantees, who were interested in building the road, doubtless believed, as did Spencer, that it would only be a short time until a railroad would be in operation to this body of land. But, for reasons not necessary to notice, the contemplated railroad was abandoned, and it was not until some sixteen years afterwards, or about 1890, that a railroad was built by other parties on the route that was being surveyed in 1874, and then for the first time the timber and minerals, particularly the timber, became valuable. For the reasons suggested, during the sixteen years, from 1874 to 1890, no steps whatever of any kind or character were taken by appellant

or its vendors to sell or manufacture any timber from the land or develop its mineral resources. It is a further admitted fact that, although the railroad was opened in 1890, neither the appellant nor any of its predecessors in title made any effort to take possession of the property that it claims was granted by the instrument, or to do anything towards converting into money the timber and minerals conveyed. Indeed, not until 1904, when this suit was brought, thirty years after the deed was executed, did the appellant or any of its vendors take any action in relation to the property, or exercise any acts of ownership whatever over the property, or pay any taxes on it, or take any steps towards asserting right, title, or interest in it. The delay in failing to take any action before 1890 is excused upon the ground that, as no railroad was built until then, nothing could have been done towards the development of the property, and, as it remained undisturbed,

"at such times and in such quantities as the second party may direct." *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37, 70 S. E. 672.

A finding that two years and a half was a reasonable time for the removal of white oak timber standing on 60 acres of land will not be disturbed on appeal, where it is based on evidence on the one hand that there was so much rain during those years that the ground was kept in such a soft condition that the timber could not be hauled from the land, there being only two or three months in each of these years that any hauling could be done, and on the other hand that all the white oak timber on the land could have been cut and hauled away with one set of hands and one team within four or five months, and that there were that many months in each of the years suitable for hauling. *Oates v. Yeargin*, — Ky. —, 115 S. W. 794.

And three years is not an unreasonable delay in removing 150,000 feet of timber from a 7-acre tract, where it appears that the purchaser's mill has a capacity of five or six thousand feet per day, and that the tract of land was located in a river bottom and was accessible only during a small part of each year. *Beauchamp v. Williams*, — Tex. Civ. App. —, 115 S. W. 130.

And where a deed provides that the grantee shall have a certain time to remove the timber after beginning to cut the same, but that he shall not be limited as to the time in which he shall commence to cut, a delay of seven years in beginning operations after the expiration of the specified time will not be held to work a forfeiture, where the grantor made no effective protest or complaint concerning the delay until the bringing of the suit. *Brown v. Surry Lumber Co.* 113 Va. 503, 75 S. E. 84. In this case the court allowed one year after the termi-

nation of the suit for the removal of the timber.

Where the grantors stipulated in their conveyance that the purchasers of the timber and mill should have a lease of the mill site for five years, and longer if necessary, but were to pay a reasonable rental after five years, such stipulation affords a clear inference that the parties estimated a reasonable time within which to cut and remove the timber would not be less than five years. *Warren v. Ash*, 129 Ga. 329, 58 S. E. 858.

In *Carson v. Three States Lumber Co.* 108 Tenn. 681, 69 S. E. 320, it was held that ten years should be deemed a reasonable time to remove fifteen to eighteen million feet of timber, where the land was low and swampy and subject to overflow from the Mississippi river, and the only practical means of getting the lumber out at the time was to take advantage of periodic overflows, and such overflows occasionally failed to be sufficient to float the lumber, and the evidence of witnesses qualified as having long and large experience in such work varied from six to thirteen years as a reasonable time to remove the lumber. The court called attention to the fact that there were some cases which held that the title remains in the grantee after the time of limitation has passed, though without legal right on his part to enter; and that there were other cases which simply announced that mere lapse of time does not affect the title of the grantee, his right of entry not being involved in litigation; and, on the other hand, that there were cases holding that the title of the grantee terminates with his right of entry. But the court did not have to pass upon this question in the *Carson Case*, since it was determined that a reasonable time for the removal of the lumber in question had not at that time expired.

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there was no occasion for assertion of interest or title upon its part. The inaction after 1890 is attempted to be justified upon the theory that in 1887-88 the Spencer heirs sold the property, and so there was no reason for asserting ownership until some overt act of trespass was committed; and it is said that the appellee did not commence to appropriate the timber until 1902, and that, within a reasonable time thereafter, this action was brought to assert its rights.

It is not controverted that the predecessors in title of the appellee company, and the purchasers from the children and heirs of John D. Spencer in 1887-88, knew of the existence of the writing he had executed in 1874. It had been put to record, and whether the purchasers from the Spencer heirs or their vendees had actual notice of it or not, they were charged with the constructive notice arising from the fact that it was of record, and so there is no claim on the part of the appellee that it was a purchaser without notice of the previous sale by Spencer. With this statement of the facts, let us now see whether the deed should be treated as vesting in the grantees of John D. Spencer an absolute or only a conditional title.

It will be noticed that Spencer conveyed to the grantees seven eighths of the mineral and timber on the land, reserving to himself one eighth, and that the only consideration Spencer was to receive for the conveyance of this large estate was one eighth of the net profits of all minerals and timber taken by the grantees from the land. It is true there is a consideration of \$1 acknowledged by Spencer; but this is a mere nominal consideration, and entitled to no weight in determining the amount of the consideration that it was contemplated by the parties should be paid by the grantees for the valuable interests granted. The real, and indeed only, consideration was the obligation upon the part of the grantees to give to Spencer one eighth of the profits. This was the only material inducement that could have influenced Spencer to enter into the contract. While not doubting that the owner of land has a right to dispose of it or any severable interest therein as he pleases, and for what he pleases, and to take such consideration as he chooses to accept, whether it be great or small, or payable in cash or in instalments or in royalties, it is nevertheless a matter of first importance, in the construction of contracts like this, to understand the real consideration to be paid for the property conveyed. In an attempt to ascertain whether a deed like this was intended by the parties to be conveyed in fee simple, or only a contract or lease under which the grantees

must begin operations within a reasonable time, there is no feature entitled to more weight than the one relating to the consideration and the manner of its payment. There is and should be a marked difference between the construction and effect of a conveyance of timber and minerals, or indeed any interest in land, for a stipulated consideration, payable in cash or in secured notes or in some other valuable property, and the construction and effect of a conveyance in consideration of a royalty or per cent, to be paid out of the income derived by the grantees from the property conveyed. In other words, if Spencer for a recited consideration of \$1,000—assuming that to have been adequate—had conveyed to the grantees all the timber and minerals in the tract of land, he would have parted by this conveyance with all right, title, and interest in the timber and minerals, and no delay in the development of the property on the part of the grantees would have conferred upon Spencer or any person claiming under him the right to forfeit the contract, or to insist that it had been abandoned. Nor would any effort to convert such a conveyance into a license or lease be approved by the courts. Such a contract would be a fully executed instrument. Nothing would remain to be done by either of the parties. All the title and interest that Spencer had would have passed out of his control, and the grantees would have the right to do with the property as they pleased, or as any other owner of the whole estate would have the right to do with it. When the consideration has been fully satisfied, and the grantor has parted with his estate, the transaction between the parties is a closed incident. The grantor has no further interest or concern in the property conveyed. But a very different situation is presented when the only consideration the grantor is to receive is a per cent of the profits the grantee may realize from the development of the estate. Under such a contract the consideration is a continuing one, to be paid only by the labor of the grantee in the development of the property. The grantor has a continuing interest in the estate conveyed, the transaction between the parties is not a closed incident, and the grantee is not at liberty to do with the property as he pleases. He cannot use or fail to use it to the prejudice of the grantor, who has rights that must be respected.

Looking now at the instrument in question, in connection with the situation of the parties, the circumstances surrounding them at the time it was executed, and the subsequent conduct of the grantees, it is obvious that it was an implied condi-

tion of the contract that the grantees should within a reasonable time begin operations so that the grantor might receive some consideration for the estate he had parted with. To adopt the view of this contract insisted on by counsel for appellant would be to place it absolutely and without limitation in the power of the grantees to hold the property for an indefinite time or forever without paying to the grantor anything whatever for the privilege. In other words, the grantor would be placed in the attitude of having conveyed to the grantees all the timber and minerals on seven eighths of a large body of land, without receiving any consideration until it might suit the convenience or interest of the grantees to undertake the development of the property, and this they might delay for ten, twenty, fifty, or even one hundred years. In the meantime, pending this inaction, the grantor would be deprived of the right to use or control the property conveyed, or realize anything from it, as well as denied the right to dispose of it. We do not think any court should give to a contract like this such a construction as would place it in the power of the grantee, without any loss, outlay, or disadvantage, to take, keep, and hold indefinitely valuable property rights in the manner attempted in this case.

It is strongly insisted, however, that this deed conveyed the fee in the timber and minerals described, and as there is no stipulation in the instrument as to when the grantees shall commence the development of the property, and no condition reserving to the grantor the right to re-enter or enforce a forfeiture for inaction on the part of the grantees, however long it may continue, the grantor must be left without remedy or redress. It is true that the contract does not expressly or in terms impose any conditions upon the grantees, or mention when, if at all, the development of the property is to begin. But the court will not be hindered in its purpose to give to a contract like this a construction that will carry out the manifest intention of the parties by the mere omission of conditions that perhaps would have made plainer the purpose of its execution. We will read into the contract such terms and conditions as the contract and the circumstances surrounding its execution warrant us in assuming were in the minds of the parties when it was entered into. So interpreting it, we are well satisfied that it should be read as if there had been inserted in it, in apt terms, a condition imposing upon the grantees the duty of beginning within a reasonable time, under pain of forfeiture or abandonment, the development of the estate 46 L.R.A.(N.S.)

granted. Nor is there anything novel to the law in this method of interpretation. The books are full of cases in which the courts, to prevent gross injustice, have gathered from the contract and the circumstances surrounding its execution the intention of the parties, and construed it to carry out their purpose, although in so doing it was found necessary to supply omissions. In a note to *Chauvenet v. Person*, 11 L.R.A.(N.S.) 417, the editor, in a review of the cases upon this subject, states the result of his investigation as follows: "Generally, all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals; and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and, in general, while equity abhors a forfeiture, yet, when such a forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected from the laches of the lessee, and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease."

In *Shenandoah Land & A. Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303, the court, in a case very similar to this, said in substance that, although there was no covenant in a mining lease on the part of the lessee to mine the minerals in the land thereby conveyed, yet where, by the terms of the lease, the only compensation the lessor received was a portion of the minerals mined, in order to give effect to the lease, it would be so construed that the acceptance of it by the lessee would constitute an agreement on his part to mine the minerals to be found in the property within a reasonable time, and if he failed to do this, equity would, at the instance of the lessor, cancel the agreement. To the same effect are *Bay State Petroleum Co. v. Penn Lubricating Co.* 121 Ky. 637, 87 S.W. 1102; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558; *Breckenridge Asphalt Co. v. Richardson*, 147 Ky. 834, 146 S. W. 437; *Aye v. Philadelphia Co.* 193 Pa. 451, 74 Am. St. Rep. 696, 44 Atl. 555, 20 Mor. Min. Rep. 177; 2 Page, Contr. § 1123; *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434; *Tennessee Oil, Gas & Mineral Co. v. Brown*, 45 C. C. A. 524, 131 Fed. 696; *Adams v. Gre Knob Copper Co.* (C.

C.) 3 Hughes, 589, 7 Fed. 634, 3 Mor. Min. Rep. 183.

In Snyder on Mines, vol. 2, § 1136, the author states that in the construction of mining deeds and contracts, "the intent of the parties is generally to govern, where that can be gained either from the instrument itself and the surrounding circumstances, or from parol testimony admitted within the general rules." And it is further said that "the consideration is important as governing the intention of the parties."

Nor do we find anything in Hicks v. Phillips, 146 Ky. 305, 47 L.R.A. (N.S.) —, 142 S. W. 394, in conflict with the view we have expressed. In that case, after a full review of the authorities, we held that where the grantor in a deed conveying land reserved the timber on a specified part of the land, and there was nothing in the other stipulations of the contract, or in the situation of the parties or the circumstances surrounding them at the time the contract was executed, to show that a severance of the timber from the soil was contemplated, the title to all the timber then standing on the land specified remained in the grantor, and was not lost or defeated by his failure to cut and remove it within a reasonable time. The essential difference between that case and this is that there the grantor did not sell or convey the timber in question. Undoubtedly, the grantor of the fee has the right to sell so much of the estate as he pleases, and retain so much of it as he pleases; and it is no concern of the grantee what the grantor does with the estate that he has not conveyed. In such a state of case, the contract is fully executed by both parties. Nothing remains to be done by either. But, even where there is a reservation such as existed in the Hicks Case, there might be, as we said in the opinion, extrinsic facts and circumstances indicating that it was contemplated by the parties that the timber should be removed within a reasonable time, so that the grantee might get the full benefit of the land he had purchased.

Assuming, now, that the grantee in contracts like the one we are considering is to begin operations within a reasonable time, and that in the absence of any express condition to this effect such an agreement will be implied, the question of what is a reasonable time is not really involved in this case. It is obvious that a reasonable time in which operations should have commenced had expired many years before any action was taken by the appellate company, and that, under a fair and just construction of the contract, the grantee must be deemed to have abandoned its rights

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under the lease long before the institution of this action. When the grantee in a contract like this will be deemed to have abandoned his rights is generally a question of fact to be determined by the circumstances of each particular case. But if the reasonable time doctrine is to be applied in any case, it would be difficult to conceive of a case presenting stronger reasons than this one does for its application.

We do not regard the conveyance by the Spencer heirs as a matter of any importance in determining the principles that must control this case. The case might well be treated as if John D. Spencer was yet living, and in 1902 had cut and removed the timber, and this action had been brought against him. In this contest with the vendee of Spencer, the appellant occupies no better position than it would in a contest with Spencer himself, and the appellee holds the same place as Spencer would if living, and he had done as it is claimed it did.

Of course, if the grantees had taken the fee, no question of abandonment could arise. The unconditional owner of the fee cannot be divested of his estate merely by nonuser. There is no such thing known to the law as nonuser of the fee amounting to an abandonment in the sense that the owner will lose his estate. The owner of the fee has the right to use or not use it as he pleases. He is not required to exercise any acts of physical ownership to hold or preserve his title. And, if the grantees in the Spencer deed had acquired the unconditional fee, we would have no difficulty in sustaining the contention of the appellant.

It is further insisted that, if the contract obliged the grantees to begin operations within a reasonable time, the remedy of the grantor upon their failure was a suit for damages, or for specific performance, or to forfeit the lease. We readily admit that the grantor in contracts like this has the option to resort to these remedies or any of them; but the fact that he does not resort to either does not preclude him from relying upon an abandonment of the contract by the grantee. In other words, where nonuser or inaction has worked an abandonment, the grantor may re-enter and take possession of the premises as if no conveyance had been executed. There is no sound reason why he may not peaceably obtain possession of his property without resorting to other remedies given by the law. He has the right to peaceably and quietly do that which the judgment of the court would give him the right to do. His entry does not prejudice the rights of the grantee; as, if it is wrong-

ful, he may be successfully proceeded against as a trespasser.

We may with much propriety consider the sale of the property by the heirs of Spencer as an entry upon their part, indicating a purpose to take possession upon the theory that the grantees had abandoned whatever rights they acquired under the deed. The title and possession of the property upon the death of Spencer came into the possession of his heirs, and at the time it was sold by them the long nonaction of the grantees in the Spencer deed had worked a forfeiture of any title or interest they may have had in the estate.

It is also suggested that, as the railroad contemplated in 1874 was not built, the doctrine of reasonable time should not be applied, as under the admitted facts the property conveyed could not be developed. But if the belief that the road would be built was one of the moving causes that induced the execution of the contract, the fact that it was not built furnishes strong reason why the contract should be treated as abandoned. Manifestly the grantee in a case like this should not be allowed to postpone beyond a reasonable time the performance of implied conditions upon the ground that a prospective railroad had not been built. If a contrary rule was adopted, the grantor would be made the victim of conditions that he did not make and could not control, and the grantee become the sole beneficiary of a situation that put it out of his power to perform the conditions that influenced the grantor in making the contract.

Upon a consideration of the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

Winn, J., not sitting.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

FRED A. BURKHART.

(154 Ky. 92, 157 S. W. 18.)

Conflict of laws — action on foreign statute — limitation period.

The statute of limitations of the forum

Note. — Law governing limitation where action is brought in one state upon a cause of action created by a statute of another.

As to duty of Federal courts to follow state decisions as to the effect and construction of state statutes of limitation, see note in 40 L.R.A. (N.S.) 421.
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governs in an action in one state for a personal injury based on a statute of another state, which does not prescribe the limitation period.

(May 28, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Henderson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Yeaman & Yeaman and C. H. Moorman, for appellant:

In respect to limitations of actions the law of the forum governs.

Minor, Conf. L. § 210; 25 Cyc. 1018; Lewis's Sutherland Stat. Constr. § 668; Graves v. Graves, 2 Bibb, 209, 4 Am. Dec. 697; Bennett v. Devlin, 17 B. Mon. 358; Farmers' & T. Bank v. Lovel, 8 Ky. L. Rep. 261, 1 S. W. 426; Templeton v. Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507, 696; Louisville & N. R. Co. v. Pointer, 113 Ky. 960, 60 S. W. 1108; McArthur v. Goddin, 12 Bush, 275; Adams Exp. Co. v. Walker, 119 Ky. 126, 67 L.R.A. 412, 83 S. W. 106; The Harrisburg, 119 U. S. 214, 30 L. ed. 362, 7 Sup. Ct. Rep. 140.

Mr. Benjamin D. Warfield also for appellant.

Messrs. F. J. Pentecost and J. W. Johnson for appellee.

Settle, J., delivered the opinion of the court:

The appellee, Fred A. Burkhardt, a bridge carpenter, while in the employ of the appellant, Louisville & Nashville Railroad Company, and at work upon one of its railroad bridges in Vanderburgh county, Indiana, fell therefrom a distance of 14 feet to the ground below, whereby his collar bone was broken and back strained, resulting in serious and permanent injury to his person.

The accident occurred September 1, 1910, and on August 23, 1912, this action to recover damages therefor was brought by him against appellant in the Henderson circuit court; it being alleged in the petition that both appellant and appellee are residents of Kentucky; appellee being a citizen of the city of Henderson and appellant having been incorporated under the laws of Kentucky.

Many states have enacted statutes on the question as to the effect that foreign statutes of limitation shall have in suits within their respective jurisdictions; see note in 48 L.R.A. 625; and as to the construction of such statutes when they permit the *lex loci* to be pleaded in bar of the action, see notes to Doughty v. French, 4 L.R.A. (N.S.) 1029, and to Bruner v. Martin, 14 L.R.A. (N.S.)

having its chief office in the city of Louisville, and owning a railroad running from the city of Louisville through the county and city of Henderson to Evansville, Indiana. It is alleged in the petition that appellee's injuries were caused by the negligence of appellant and its bridge foreman in furnishing him a defective jackscrew not reasonably safe for use, the rod of which slipped from its place while he was using it to raise a bridge timber, causing him to lose his equilibrium and fall to the ground.

The action was based upon a statute of Indiana which makes the employer liable in damages to the employee for an injury sustained by the latter by reason of the employer's negligence in furnishing him a defective tool or machinery for use in work

required of him. Yet another statute of that state, also pleaded by appellee, provides that an action to recover damages for personal injuries may be brought at any time within two years next after the cause of action accrues. The answer traversed the affirmative matter of the petition, except its averments as to appellant and appellee being residents of Kentucky, alleged contributory negligence on the part of appellee, and pleaded the statute of limitations of Kentucky which bars an action for the recovery of damages for a personal injury, unless brought within a year after the injury is received. The issues were completed by the filing of a reply which controverted the pleas of contributory negligence and limitation. The trial resulted in a verdict award-

776. Cases determined by reason of such statutes are not included in the present note.

The general rule is that where the *lex loci i. e.*, the limitation statute of the state where the cause of action arose, simply bars the right of action, only the remedy is affected; hence the *lex fori*, i. e., the limitation statute of the jurisdiction where suit is brought, will govern; but, with an exception as to residence, if the *lex loci* avoids the liability, then the substance of the cause is affected; hence the *lex loci* will govern. See notes in 48 L.R.A. 625, and 6 L.R.A. (N.S.) 658.

It will be seen by the cases cited *infra* that this general rule, in the absence of a statute changing it, applies where the cause of action is created by a statute of the state where it arose, and is not confined to causes of action arising by virtue of the common law. An apparent exception exists in cases where the same statute that creates a cause of action not known to the common law, also imposes the time limitation; but it will be seen *infra* that the exception is only apparent, for the reason that such limitations affect more than the remedy.

The holding in *LOUISVILLE & N. R. Co. v. BURKHART* is in harmony with this general rule. The *lex loci* simply created a bar to the right of action in general terms, but did not destroy the cause of action. Although the cause of action was created by a statute of the state in which it arose, yet it was governed as to enforcement by the *lex fori* just as if it had been a common-law action. This holding is supported by the following cases in which the cause of action was also created by a statute, which did not impose a limitation operating as a condition of the right of action. *O'Shields v. Georgia P. R. Co.* 83 Ga. 621, 6 L.R.A. 152, 10 S. E. 268; *Montague v. Cummings*, 119 Ga. 139, 45 S. E. 979; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Hurley v. Missouri P. R. Co.* 57 Mo. App. 675; *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 573, 27 S. W. 387; *St. Louis & S. F. R. Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403; *Morgan v. Camden & A. R. Co.* 18 W. N. C. 128; *Boyd v. Clark*, 8 46 L.R.A. (N.S.)

Fed. 849 (not a direct holding see holding, *infra*): *Finnell v. Southern Kansas R. Co.* 33 Fed. 427; *Nonce v. Richmond & D. R. Co.* 33 Fed. 429; *Munos v. Southern P. Co.* 2 C. C. A. 163, 2 U. S. App. 222, 51 Fed. 188; *Gregory v. Southern P. Co.* 157 Fed. 113 (the limitation here was in a separate section of the same statute that created the right, but it referred to several classes of actions, and purported to be a general limitation act so far as the classes of action enumerated were concerned. See same case, *infra*); *Ramsden v. Knowles*, 151 Fed. 718; *Ramsden v. Knowles*, 10 L.R.A. (N.S.) 897, 81 C. C. A. 105, 151 Fed. 721, writ of certiorari denied in 206 U. S. 562, 51 L. ed. 1180, 27 Sup. Ct. Rep. 795; *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503, writ of certiorari denied in 183 U. S. 695, 46 L. ed. 394, 22 Sup. Ct. Rep. 932; *Irvine v. Elliott*, 203 Fed. 82; *Platt v. Willmot*, 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. Rep. 542 (not a direct holding) *Hobbs v. National Bank*, 37 C. C. A. 513, 96 Fed. 396, rehearing denied in 41 C. C. A. 205, 101 Fed. 75; *Dexter v. Edmonds*, 89 Fed. 467; *Schiffer v. Columbia College*, 87 Fed. 166; *Hutchings v. Lamson*, 37 C. C. A. 564, 96 Fed. 720.

In *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; and *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171, the question was as to what law governed the time when the limitations begin to run, but they indirectly lend support to the proposition here considered.

But a limitation prescribed by a statute creating a cause of action not known to the common law will govern wherever the action is brought under the statute, as against the *lex fori*; at least when the period prescribed by the foreign statute is shorter than the period prescribed by the *lex fori*, since the limitation is a condition upon which the right of action is given, and by necessary implication affects the substance of the cause. This principle is supported by *Selma, R. & D. R. Co. v. Lacey*, 49 Ga. 106; *Eastwood v. Kennedy*, 44 Md. 563; *Ross v.*

ing appellee \$200 damages, and from the judgment entered thereon this appeal is prosecuted.

The record does not contain the evidence nor instructions, and the single question presented for decision by the appeal is, Do the pleadings support the judgment? In other words, does the limitation of two years, prescribed by the statute of Indiana, or that of one year, prescribed by the statute of Kentucky, apply? If the latter statute should control, it is manifest that the trial court erred in refusing the peremptory instruction directing a verdict for appellant, which was asked by its counsel at the conclusion of appellee's evidence and again after all the evidence was introduced.

As previously stated, it appears from the

petition that the action was instituted only seventeen days short of two years after appellee's injuries were received, and it is therein alleged that "the law of the state of Indiana also provides that a suit for damages resulting from said injury may be instituted at any time within two years from the date of said injury." The answer of appellant denies the applicability of the Indiana statute of two years, and, in the third paragraph, pleads the Kentucky statute of one year; therefore the question of limitation was one upon which the evidence threw no light, but a question of law, to be determined from the admitted facts presented by the pleadings. Waiving the question whether the Indiana statute of limitations was sufficiently pleaded by ap-

Kansas City Southern R. Co. 34 Tex. Civ. App. 586, 79 S. W. 626; *Earnest v. St. Louis, M. & S. E. R. Co.* 87 Ark. 65, 112 S. W. 141; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *Davis v. Mills*, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692 (limitation not in the same statute. See same case, *infra*); *Wingert v. Carpenter*, 101 Mich. 395, 59 N. W. 662; *Hamilton v. Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57; *Boyd v. Clark*, 8 Fed. 849; *Munos v. Southern P. Co.* 2 C. C. A. 163, 2 U. S. App. 222, 51 Fed. 188; *Dailey v. New York, O. & W. R. Co.* 26 Misc. 539, 57 N. Y. Supp. 485; *Cavanagh v. Ocean Steam Nav. Co.* 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116, writ of certiorari denied in 184 U. S. 700, 46 L. ed. 765, 22 Sup. Ct. Rep. 939; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877 (not a direct holding on the point but a recognition of the principle); *International Nav. Co. v. Lindstrom*, 60 C. C. A. 649, 123 Fed. 475, writ of certiorari denied in 193 U. S. 669, 49 L. ed. 840, 24 Sup. Ct. Rep. 852; *Stern v. La Compagnie Générale Transatlantique*, 110 Fed. 996; *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157 (case was really controlled by another point, but this one was also set out as an independent ground); *Andrews v. Bacon*, 38 Fed. 777.

This doctrine, although the facts did not necessitate a holding thereon, was recognized in *O'Shields v. Georgia P. R. Co.* 83 Ga. 621, 6 L.R.A. 152, 10 S. E. 268; *Montague v. Cummings*, 119 Ga. 139, 45 S. E. 979; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Morgan v. Metropolitan Street R. Co.* 51 Mo. App. 523; *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 573, 27 S. W. 387; *St. Louis & S. F. R. Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403; *Atchison, T. & S. F. R. Co. v. Mills*, 53 Tex. Civ. App. 359, 116 S. W. 852; *Finnell v. Southern Kansas R. Co.* 33 Fed. 427; *Gregory v. Southern P. Co.* 157 Fed. 113, and other cases, *supra*.

Some courts have reached the same result by holding that in such case the limitation

in the statute is a method of procedure prescribed by the state where the action is given; that in order to enforce such law the court enforcing it must follow the procedure prescribed in the statute; and that such statutes are not properly classed with limitation statutes. See *Grove Bldg. & L. Assn. v. Stockton*, 148 Pa. 146, 23 Atl. 1063; *Hutchinson v. Ward*, 192 N. Y. 375, 127 Am. St. Rep. 909, 85 N. E. 390; *Dennis v. Atlantic Coast Line R. Co.* 70 S. C. 254, 106 Am. St. Rep. 749, 49 S. E. 869; *Hudson v. Bishop*, 32 Fed. 519, *s. c.* on rehearing in 35 Fed. 820.

The rule that the time limitation contained in a statute creating a cause of action will be applied in another jurisdiction, being only a rule of construction under the general rule stated at the beginning of this note, cannot be a hard-and-fast rule, decisive in all cases. Hence, it has been held that even though the limitation is contained in a separate section of the statute that creates the cause of action, it will not be applied in a foreign jurisdiction if evidently it is not specifically directed to the cause of action therein created (*Gregory v. Southern P. Co.* 157 Fed. 113); but if it is so directed, it will be applied even though it is contained in another section (*Negaubauer v. Great Northern R. Co.* 92 Minn. 184, 104 Am. St. Rep. 674, 99 N. W. 620, 2 Ann. Cas. 150; *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, 40 C. C. A. 22, 99 Fed. 635, writ of certiorari denied in 178 U. S. 611, 44 L. ed. 1215, 20 Sup. Ct. Rep. 1029), or even in another statute (*Davis v. Mills*, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692).

With the exception of the cases subsequently discussed, it appears in the cases applying to the limitation prescribed by the statute of the state where the cause of action arose, that the period prescribed by that statute was shorter than the period prescribed by the law of the forum; so that the application of the general rule that limitation is governed by the *lex fori* would have resulted in the enforcement of a cause of action that had been extinguished by the lapse of time prescribed by the statute of

pellee, it can have no effect in this state. It is a well-recognized rule that statutes of limitation are of state regulation and founded on state policy. Such statutes, therefore, have no extraterritorial force or operation, for which reason foreign jurisdictions are not bound by them; hence the doctrine in respect to limitations of actions is that the law of the forum governs; and this is true whether the action is *ex contractu* or *ex delicto*. Minor, Conf. L. § 210; 25 Cyc. 1018.

The doctrine is thus stated in Lewis's Sutherland, Statutory Construction, § 668; "And ordinarily courts disregard the limitation fixed in the contract or tort, and enforce only the *lex fori*."

Necessarily statutes of limitation affect the remedy, and not the right; and, as ar-

gued by counsel for appellant, they are as much a part of the remedy as are our forms of pleading, our rules of evidence, and our manner of conducting trials; hence the Indiana statute of limitations can have no more operation in this state upon the one than upon the other.

The rule to which we refer has always been the law in Kentucky, and, among the earlier cases approving it, is that of *Graves v. Graves*, 2 Bibb. 209, 4 Am. Dec. 697, in the opinion of which it is said: "The statute of limitations does not affect the validity of the contract, but the time of enforcing it; or, in other words, it does not destroy the right, but withholds the remedy. It would seem to follow, therefore, that the *lex fori*, and not the *lex loci*, was to prevail with respect to the time when the ac-

its creation. In this connection the interesting question arises whether the limitation prescribed by the foreign statute creating the cause of action will govern to the exclusion of a shorter limitation prescribed by the law of the forum. As the exception to the general rule referring the question of limitation to the *lex fori* rests upon the ground that the prescription of the foreign statute does not relate to the remedy merely, but imposes a condition upon the cause of action itself, whereby it is extinguished when the prescribed period has run, it may be doubted whether the exception should apply if the period prescribed by the foreign statute has not expired, but the shorter period prescribed by the law of the forum has expired.

Upon this hypothesis the question presented seems to be merely one as to remedy, and therefore to fall within the general rule that the *lex fori* governs as to limitation as a part of the remedy. Concededly this general rule will apply and prevent an action at the forum upon a cause of action which would be barred by the statute of limitations of the forum, although it would not by that of the state where it arose, if it is a common-law cause of action, or even a cause of action created by a statute which does not prescribe any special limitation. It is one thing to hold that a cause of action cannot be enforced in any jurisdiction after the expiration of the time limited by the statute creating it, even though it would not be barred by the statute of limitations of the forum, and quite another to hold that the court of the forum will entertain an action upon a cause of action not barred by the statute of its creation, if it would be barred by the statute of limitations of the forum. It is not apparent that there is any greater obligation under the principles of comity resting upon the court of one jurisdiction to enforce a cause of action created by a statute of another, which prescribes a limitation that has not yet expired, if the action would be barred by the law of the forum, than there is in case of a concededly existing cause of action at common law, or

under a statute of another jurisdiction which prescribes no special limitation.

It may be that when the law of the forum is consulted, the limitation prescribed by the statute of the forum in relation to causes of action like the one involved in this case will be found inapplicable because it relates only to causes of action arising at the forum. But even so, it is still possible that there may be a general statute at the forum applicable to foreign as well as domestic causes of action, which prescribes a shorter period than that fixed by the foreign statute. If there is no general or special limitation at the forum applicable to foreign causes of action of the kind involved, the action may doubtless be entertained, assuming that the cause of action has not been extinguished by the expiration of the period prescribed by the foreign statute. But that result upon the present hypothesis may be attributed to the fact that there is no limitation at the forum applicable to the case, rather than to the predominance of the *lex loci* over the *lex fori*.

The view that the general rule which refers the question of limitation to the *lex fori* will apply if the cause of action would be barred by the law of the forum, but not by the foreign statute, even assuming that the limitation prescribed by the foreign statute would prevail if it were shorter than that prescribed by the law of the forum, was adopted, argumentatively at least, in *Weaver v. Baltimore & O. R. Co.* 21 D. C. 499. The court in that case, while conceding that if the time limited by a foreign statute creating a cause of action for death has expired, no action can be maintained, although the statute of the forum allows a longer period, nevertheless stated, in effect, that if the forum has a statute of limitations, properly so called, that fixes a shorter period, the action cannot be maintained after the expiration of that period, although the period fixed by the foreign statute has not expired. It was held in this case, however, that the limitation prescribed by the statute of the forum creating a right of action for death only applied to causes of

tion should be commenced." The later cases show no departure from this rule; among these are the following: *Bennett v. Devlin*, 17 B. Mon. 358; *Farmers' & T. Nat. Bank v. Lovel*, 8 Ky. L. Rep. 261, 1 S. W. 426; *Templeton v. Sharp*, 10 Ky. L. Rep. 499, 9 S. W. 507, 696; *John Shillito Co. v. Richardson*, 102 Ky. 52, 42 S. W. 847; *Labatt v. Smith*, 83 Ky. 599,—in each of which it was held that the statutory bar of the state where the remedy is sought to be enforced by action, and not of the state where the contract was made, governs. In a more recent case (*Louisville & N. R. Co. v. Whitlow*, 114 Ky. 470, 43 S. W. 711), quoting with approval from *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 13, 47 Am. Rep. 771, 16 N. W. 413, we said: "The statute of another state has, of course, no extraterri-

torial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought; and we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*."

In the still more recent case of *Adams Exp. Co. v. Walker*, 119 Ky. 126, 67 L.R.A. 412, 83 S. W. 107, we find this expression of the same conclusion: "It is insisted for appellant that, the contract here having been made in Wooster, Ohio, it must be governed by the laws of Ohio; and that by

action arising at the forum, and that if there was any statute of limitation of the forum applicable to the case, it was the general statute which allowed a period exceeding that fixed by the foreign statute.

It may be observed that in the cases cited at the beginning of the note which apply the general rule that the *lex fori* governs where the foreign statute creating the cause of action does not prescribe a special period of limitation, the courts must have found, either in the general statute of limitation of the forum, or in the special statute of the forum relating to similar causes of action, some limitation applicable to the cause of action in question, notwithstanding its foreign origin.

The view now under consideration is also sustained, argumentatively at least, in *Hutchings v. Lamson*, 37 C. C. A. 564, 96 Fed. 720, an action brought in Illinois to enforce a stockholder's liability under the Kansas statute, where the court said: "The general rule is that, in respect to the limitation of actions, the law of the forum governs; and while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum. It would involve serious and possibly absurd consequences if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred. The cases cited show that the law of Kansas, if applicable, will be enforced in Illinois, but they do not say nor imply that a like or different limitation by the statute of Illinois may not apply." The apparent assumption in this case that the period fixed by the Kansas statute, if shorter than that fixed by the statute of Illinois, would control, was probably unwarranted in view of the express decisions to the contrary in other cases, resting upon the ground that the limitation is one prescribed by the general statute, and not by the statute creating the cause of action (see *Dexter v. Edmonds*, 89 Fed. 467; *Whitman* 46 L.R.A. (N.S.)

v. Citizens' Bank, 49 C. C. A. 122, 110 Fed. 503; *Schiffer v. Columbia College*, 87 Fed. 166). However, that fact does not materially affect the intrinsic force of the distinction made by the court. See also *Platt v. Wilmot*, 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. Rep. 542, where the court, applying the general principle that the *lex fori* governs as to the limitation, without discussing the question whether or not the limitation prescribed by the Kansas statute should be regarded as a condition of the cause of action, held that the three-year period prescribed by the New York Code of Civil Procedure for actions against directors or stockholders to enforce a common-law or statutory liability was applicable to an action to enforce the double liability of stockholders under the Kansas statute.

However, it has been expressly held that the limitation prescribed by a statute creating a cause of action will govern when it prescribes a longer as well as when it prescribes a shorter period than that fixed by the statute of the forum. Thus, in *Theroux v. Northern P. R. Co.* 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 84, it was held that an action for death under a Montana statute could be brought in a Federal court sitting in Minnesota at any time within three years, the period allowed by the Montana statute, although the limitation prescribed by the Minnesota statute for similar actions is two years. The court, in support of its decision, said: "To refuse to entertain such a suit within three years would be to subtract from the liability, and to impair the right intended to be conferred by the laws of Montana; for the period allowed in which to enforce the liability, as we have before shown, is a substantial part of the liability imposed and of the right intended to be created." It may be suggested in reply to this argument that the refusal to entertain the cause of action, conceding that it was still an existing one under the statute by which it was created, would no more subtract from the liability or impair the right intended to be conferred by the foreign statute, than the application of the limitation

the laws of Ohio such a limitation is valid. Limitation is governed by the law of the forum in which the suit is brought, and the courts of this state will not, as a matter of comity, enforce a contract made in Ohio as to the time when the suit shall be brought, for this is regulated by our statutes."

Section 2516, Kentucky Statutes, fixes the limitation in such a case as the one at bar and is quite emphatic in its declaration that "an action for an injury to the person of the plaintiff . . . shall be commenced within one year next after the cause of action accrued, and not thereafter."

It is true, as argued by appellee's counsel, there are some exceptions to the limitation it declares, but they have no application to this case; the exceptions are found, however, in § 2541 (misnumbered 2451) and § 2542.

prescribed by the law of the forum subtracts from the liability or impairs the right intended to be conferred by a statute of another state, which does not prescribe any period of limitation at all; in which case it is conceded that the limitation prescribed by the *lex fori* governs.

In *Negaubauer v. Great Northern R. Co.* 92 Minn. 184, 104 Am. St. Rep. 674, 99 N. W. 620, 2 Ann. Cas. 150, it was also held that the Montana limitation of three years rather than the Minnesota limitation of two years governed a cause of action for death arising under the Montana statute. Apparently, however, the distinction now under discussion was not urged, the defendant relying upon the contention that the Montana statute did not itself fix the time within which the action must be brought. Moreover, the court in this case took the position that the limitation prescribed by the Minnesota death statute was necessarily inapplicable to a cause of action originating in another state, since the limitation was confined to causes of action originating in Minnesota. It may be, therefore, that in spite of the statement in the opinion that the limitation fixed by the statute of Montana applied to the cause of action, the decision should be really regarded as resting upon the ground that there was no limitation at the forum applicable to the case, or at least, none that prescribed a period of less than three years. See *Weaver v. Baltimore & O. R. Co.* 21 D. C. 499.

In *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, 40 C. C. A. 22, 99 Fed 635, it was also assumed, but without discussion, that the principle applied conversely, so as to permit the action to be maintained if the time limited by the foreign statute has not expired, though the time limited by the law of the forum has expired. As in the *Negaubauer* Case, however, the question discussed was merely whether the principle applied where the limitation was not incorporated in the statute which created the right, but in a stat-

Section 2541 provides: "When, by the laws of any other state or country, an action upon a judgment or decree rendered in such state or country cannot be maintained there by reason of the lapse of time, and such judgment or decree is incapable of being otherwise enforced there, an action upon the same cannot be maintained in this state, except in favor of a resident thereof, who has had the cause of action from the time it accrued." Obviously this section has no application to the case in hand, for it is not an action upon a judgment or decree.

Section 2542 provides: "When a cause of action has arisen in another state or country between residents of such state or country, or between them and residents of another state or country, and by the law of the state or country where the cause of action accrued an action cannot be maintained

ute of limitations directed to the right of action; and the distinction under discussion was apparently not suggested.

In view of the comparatively few reported cases in which the courts have had occasion to pass upon the question when the limitation prescribed by the foreign statute was longer than the period prescribed by the law of the forum, and of the failure of some of those cases to recognize the possibility of a distinction, the point can hardly be regarded as settled. As already stated, it is not apparent why the doctrine that the limitation prescribed by the foreign statute which creates the right of action is a condition of the right of action, so that the latter is extinguished when the time so prescribed has expired, and will not thereafter sustain an action anywhere, should exclude the operation of the general rule which refers the question of limitation to the *lex fori* if the period prescribed by the foreign statute has not expired. The reason for the departure from that rule when the foreign statute creating the cause of action prescribes a period shorter than that fixed by the statute of the forum, namely, that the limitation is a condition of the cause of action, so that the latter is extinguished when the period has run, seems entirely lacking when the statute of limitations of the forum prescribes a shorter period than the foreign statute; and the court is merely called upon to apply the general rule that it will not entertain an action which is barred by the statute of the forum, although an action is not barred by the law of the state where the cause of action arose. Such an application of the rule does not impair or affect the cause of action itself, but merely withholds the remedy in the particular jurisdiction, leaving the parties free, at least, apart from the possible effect of *res judicata*, to enforce the cause of action in the state of its creation, or in any other state where limitation has not run.

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thereon by reason of the lapse of time, no action can be maintained thereon in this state." It is equally obvious that this section can afford appellee no relief, for it only applies to a case where the action is barred by the law of the state where it arose; as held in *Labatt v. Smith*, 83 Ky. 599, it has no reference to residents of this state, but to those who are nonresidents of the state and come into it in order to enforce their rights; the object of the statute being to prevent one of them from having an advantage over the other.

Nor do we think the case of *John Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847, relied on by appellee, has any application. The parties were both nonresidents of Kentucky; the plaintiff residing in Ohio and the defendant in New York, to which state he had removed from Ohio. The action was brought in Kentucky, but the cause of action arose in Ohio. The defendant answered, pleading the statute of limitations of Kentucky, but by reply the plaintiff pleaded the Ohio statute of limitations which had not barred the cause of action when the defendant removed from Ohio to New York, and, under the laws of Ohio, did not run while he remained in New York. So, as the case was one between citizens of other states, upon a cause of action which arose in Ohio and had not been barred by the statute of limitations of that state, and the statute would have interposed no bar if the action had been brought in Ohio, it was properly held that the action could be maintained in Kentucky. In other words, the case was one to which § 2542, Kentucky Statutes, was clearly applicable.

The case at bar, however, is wholly different, for both appellant and appellee were, when the cause of action arose, and have since remained, residents of this state; hence, although the cause of action arose in Indiana, § 2542 does not apply, but the case must be controlled by § 2516, Kentucky Statutes, which requires such an action to be brought within a year next after the cause of action arose. If the statute of Indiana, which gives the right of action attempted to be asserted by appellee, had prescribed the time within which the action to enforce the right must be brought, quite a different question from the one we have would have been presented, for in that case the limitation as to time would have to be treated as a part of the right, and be governed by the same law that creates the right. But the Indiana statute in question does not prescribe the period of limitation; it is instead found in another and general statute of that state; therefore it has no force outside of that state, and such limitation cannot be applied in Kentucky.

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As said by Mr. Minor in his *Conflict of Laws*, § 210: "But if the period of limitation is not prescribed by the same statute which confers the right, but is found in a general statute, the general principle applies, and it becomes a law relating to the remedy, which will have no extraterritorial force. In such case the law of the situs of the remedy (*lex fori*) again becomes the 'proper law.'" *Cooley*, Const. Lim. 3d ed. 361; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *McArthur v. Goddin*, 12 Buah, 274.

This question was considered and elaborately discussed in *O'Shields v. Georgia P. R. Co.* 83 Ga. 621, 6 L.R.A. 152, 10 S. E. 268, and by the Georgia supreme court held that, where a right of action is given by a statute of another state, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that state, the *lex fori*, not the *lex loci*, applies on the subject of limitation.

Here the appellee's petition shows a common-law right of recovery; the fact that he needlessly set forth a statute of Indiana, which does not prescribe the period of limitation, will not enable him to evade the Kentucky law as to the limitation, which necessarily controls; therefore the peremptory instruction asked by the appellant should have been given.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HANNAH E. PIERCE, Admr., etc., of
Hannah T. Baker, Deceased,
v.

STATE NATIONAL BANK OF BOSTON.

(215 Mass. 18, 101 N. E. 1060.)

Limitation of action — certificate of deposit — demand.

Demand must be made for payment of a certificate of deposit payable without interest on return of the certificate properly indorsed, within the time limited for bringing an action upon such certificate.

(May 24, 1913.)

Note. — The question when limitation begins to run against an action on a certificate of deposit is considered in the note to *Re Gardner*, 29 L.R.A.(N.S.) 685.

Generally as to when limitation begins to run against an action on a contract payable on demand, see the note to *Fallon v. Fallon*, 32 L.R.A.(N.S.) 486.

RESERVATION by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to enforce payment of a certificate of deposit. Bill dismissed.

The facts are stated in the opinion.

Mr. Eugene B. Jackson for complainant.

Messrs. H. M. Aldrich and Edwin G. McInnes, for respondent:

The certificate is presumed to have been paid.

Howland v. Shurtleff, 2 Met. 26, 35 Am. Dec. 384; Denny v. Eddy, 22 Pick. 533; Kingman v. Kingman, 121 Mass. 249; Inches v. Leonard, 12 Mass. 379; Gaines v. Miller, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426.

A demand must be made within a reasonable time.

Codman v. Rogers, 10 Pick. 112; Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070; Whitney v. Chesnire R. Co. 210 Mass. 263, 96 N. E. 676.

The obligation in suit is not an evidence of indebtedness issued by a bank; it is, at most, an obligation to assume and pay such an indebtedness. The statute applicable is therefore the ordinary six-year statute.

Hinsdale v. Larned, 16 Mass. 65; Baker v. Atlas Bank, 9 Met. 182; Com. v. Co-chituate Bank, 3 Allen, 42; Stebbins v. Scott, 172 Mass. 356, 52 N. E. 535.

Loring, J., delivered the opinion of the court:

This is a suit in equity to collect the amount of a certificate of deposit issued in 1850, on which a demand for payment was made thirty-six years later (to wit, on November 27, 1895), but not before, and where the suit to collect was begun forty-seven years later (March 7, 1906). The present suit had its origin in a writ dated March 7, 1906, which by leave of court was amended into this bill in equity. It is based on the claim that the State Bank which issued the certificate (by name The Hide and Leather Bank) was reorganized under the same name as a United States bank (and so liable for the debts of the state bank under the rule applied in *Atlantic Nat. Bank v. Harris*, 118 Mass. 147), and that later the National Hide and Leather Bank became consolidated with the defendant bank on terms which made that bank liable for its debts.

The certificate is in the following words:

Certificate of Deposit. \$1,324.

Boston, July 19, 1859.

Jacob Chase, Esq., has deposited in the Hide and Leather Bank thirteen hundred

twenty-four no/100 dollars payable on the return of this certificate, to his order indorsed on the same.

[Signed] J. S. March, Cashier.

The word "Original" appeared printed or written across the face of the certificate.

It was decided in *Shute v. Pacific Nat. Bank*, 136 Mass. 487, that while a certificate of deposit has for the most part the incidents of a promissory note it differs from a promissory note payable on demand in at least one respect; namely, it is not overdue until after a demand for payment is made, and so it is not subject in the hands of a subsequent holder to a set-off of notes due from the original payee, under Gen. Stat. chap. 53, §10. For subsequent cases as to certificates of deposit, see *Hunt's Appeal*, 141 Mass. 515, 6 N. E. 554; *Schmidt v. People's Nat. Bank*, 153 Mass. 550, 27 N. E. 595.

The purpose and use of certificates of deposit (using that term in the proper sense) is to transmit funds and make payments. In this respect certificates of deposit are like certified checks. See for example *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 648, 19 L. ed. 1008, 1019, where the two are classed together. An example may be found in a case where a person has occasion to make a payment in his own city or town, or to transmit funds to another city or to another country. He does not want to carry or send gold or notes which are a legal tender. Again, he cannot expect his own check to be taken in payment. Under these circumstances he deposits in a bank the sum to be paid or transmitted, and procures a certificate of deposit (in the form set forth above), or he draws his check and procures it to be certified by the bank, or he procures a cashier's check on a bank in the place where the payment is to be made. Then, by indorsing the certificate of deposit, the certified check, or the cashier's check, to the person to whom he wishes to make the payment or transmit the money, he effects his object with ease and safety. It is apparent from this that the function performed by a certificate of deposit is one which contemplates a presentation of it for payment within a short time. The bank has the use of the money deposited so long as the certificate is outstanding, while the person who holds the certificate gets no interest on the sum it represents. The general rule, therefore, is applicable; namely, that the time within which a demand must be made is the time limited for bringing an action. *Campbell v. Whoriskey*, 170 Mass. 63, 67, 48 N. E. 1070; *Downer v. Squire*, 186 Mass. 189, 71 N. E. 534;

Whitney v. Cheshire R. Co. 210 Mass. 263, 96 N. E. 676. The plaintiff has contended that the period of limitation applicable to a certificate of deposit issued by a bank is fixed by Rev. Laws chap. 202, § 1, at twenty years, and not by Rev. Laws chap. 202, § 2, at six years. It is not necessary to decide whether this be so or not; no demand was made until thirty-six years after the date of the certificate; in either event the demand was too late.

There are to be found in the books instances where instruments have been issued in the form of certificates of deposit payable on demand, which serve a different purpose and are subject to a different rule. These are certificates which are issued for money borrowed and which carry interest. An instance is to be found in *McGough v. Jamison*, 107 Pa. 336. There the deposit was made in "Parker's Savings Bank," and a certificate like the certificate here in question was issued, which bore interest at 5 per cent "if left six months." The purpose of a negotiable receipt for money borrowed is a continuing loan of money. Although the paper issued in that and similar instances is in its terms like a certificate of deposit, it is, speaking with accuracy, a negotiable receipt for money borrowed, and not a certificate of deposit. The transaction is in substance the same as that in *Campbell v. Whoriskey*, 170 Mass. 63, 67, 48 N. E. 1070, and the result to be reached is not affected by the fact that the person with whom the deposit was made as an investment issued a negotiable receipt payable with interest, in place of a non-negotiable one, as was done in *Campbell v. Whoriskey*. For these reasons the same conclusion was reached in *McGough v. Jamison* that was reached in *Campbell v. Whoriskey*; namely, that the general rule did not apply, and consequently that it was not necessary to make a demand within the statutory period for bringing an action. *Finkbone's Appeal*, 86 Pa. 368, on the authority of which *McGough v. Jamison* was decided was in substance a similar case.

It follows that the bill must be dismissed, with costs.

So ordered.

MINNESOTA SUPREME COURT.

ED. G. FREICK, Resp't.,

v.

RAY BENJAMIN HINKLY, Appt.

(122 Minn. 24, 141 N. W. 1096.)

Injunction — against suit in other state.

The courts of a state may restrain a citi-

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zen of that state from prosecuting a suit against another citizen of the same state in the courts of another state, if necessary to prevent an inequitable advantage; but litigants are seldom restricted to the courts of their own state, and, to justify enjoining the prosecution of a foreign suit, begun before any proceedings were taken in the home courts, it must appear that the foreign suit will result in evading the effect of some local law, or in securing some other inequitable advantage, or in imposing some inequitable disadvantage.

(May 29, 1913.)

APPEAL by defendant from an order of the District Court for Rock County, enjoining the prosecution of an action in another suit upon certain promissory notes. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. A. J. Daley, for appellant:

The general allegation in the complaint, that plaintiff's witnesses live in Minnesota, is wholly insufficient to call for the injunctive order of the court.

White v. Caxton Book-Binding Co. 10 N. Y. Civ. Proc. Rep. 146; *Durant v. Pierson*, 19 N. Y. Civ. Proc. Rep. 203, 12 N. Y. Supp. 145.

All the complaint really alleges is that it would be more convenient for plaintiff to try his case here. That is no cause for an injunction.

Bank of Bellows Falls v. Rutland & B. R. Co. 28 Vt. 470; *Donnelly v. Morris*, 27 Jones & S. 557, 36 N. Y. S. R. 78, 13 N. Y. Supp. 427.

A mere difference in the rules of evidence in the two states is not cause for injunction.

Edgell v. Clarke, 19 App. Div. 199, 45 N. Y. Supp. 979; *Carson v. Dunham*, 149 Mass. 52, 3 L.R.A. 203, 14 Am. St. Rep. 397, 20 N. E. 312.

Mr. E. H. Canfield for respondent.

Taylor, C., filed the following opinion: According to the complaint, one Kubach, in September, 1908, by a fraudulent trick, induced plaintiff to write his name upon four pieces of paper, which now appear as promissory notes. The complaint is drawn to bring the case within the provisions of § 2747, Rev. Laws, 1905, and sets forth facts which, if true, show that, by virtue of that section of the Code, plaintiff has a complete

Note. — For injunction against action or proceeding in foreign jurisdiction, see notes to *Thorndike v. Thorndike*, 21 L.R.A. 71, and *O'Haire v. Burns*, 25 L.R.A. (N.S.) 267, and other annotation referred to in the later note. See also the later case of *Jones v. Hughes*, 42 L.R.A. (N.S.) 502.

defense against the notes, even in the hands of a bona fide purchaser. It is not claimed that defendant, the present owner of the notes, at the time he obtained them, had any knowledge of the fraud by which they were originally procured. It further appears from the complaint that the notes were signed at Luverne, Minnesota, and by their terms are payable at that place; that both plaintiff and defendant have been residents of Minnesota for many years, and reside at Luverne; that plaintiff made a visit to Germany in the latter part of the year 1911, and on returning from such visit in February, 1912, he landed in the state of New Jersey; that immediately after he had landed, defendant commenced a suit against him in the state to recover the amount of these notes; that plaintiff answered in the New Jersey action, and it is liable to be brought on for trial at any time; that any judgment that may be rendered against plaintiff in New Jersey cannot be collected there, for the reason that he has never had any property in that state; and that nearly all his property is in Rock county, Minnesota. The complaint also asserts that the witnesses necessary to establish plaintiff's defense reside in Rock county, Minnesota; but no witnesses are named, and no facts are stated to which they will testify. The complaint further asserts that the action is brought in New Jersey to deprive plaintiff of the benefit of § 2747, Rev. Laws, 1905, and to prevent him from making his defense; but no facts appear, other than the distance between Minnesota and New Jersey, from which such an inference may be drawn. The judgment asked is that the notes be surrendered for cancelation, and that defendant be enjoined from further prosecuting any action upon them in the courts of New Jersey or elsewhere.

Upon the complaint, without any other affidavits or evidence upon either side, the trial court granted a temporary injunction restraining defendant from further prosecuting the New Jersey action until the termination of this action. From the order granting this injunction, defendant appeals.

That the courts of a state may, in a proper case, enjoin one citizen of the state from prosecuting a suit against another citizen of the state in the courts of a sister state, is well settled, and is supported by numerous authorities. *Hawkins v. Ireland*, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, 16 Am. & Eng. Enc. Law, 421; *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560, 10 46 L.R.A. (N.S.)

Ann. Cas. 20, and note at page 27. "The question is, Under what circumstances will a court of equity restrain a party from invoking the aid of the courts and processes of another state? It certainly will not do that simply to compel him to carry on his litigations at home. It will not act upon the basis of any distrust of the courts of a sister state." *Brewer, J., in Cole v. Young*, 24 Kan. 435.

To warrant such an injunction, some sufficient ground for the interposition of a court of equity must be shown. Perhaps the most common ground for such action is that the prosecution of the foreign suit, if permitted, would result in evading some law that applies in the state in which the parties reside. Courts will intervene where a suit is brought in a foreign court to evade exemption laws, or where a creditor, proceeding in the foreign jurisdiction, would secure a preference forbidden by the state of his residence, or perhaps where an action in the state of residence was prior in time, or, as said in *Hawkins v. Ireland*, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73, "whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage over other citizens." Ordinarily the court that first obtains jurisdiction retains it, and other courts will not interfere. That it may be inconvenient to go to the foreign state to try the suit does not justify such interference. *Donnelly v. Morris* (Super. N. Y.) 27 Jones & S. 557, 13 N. Y. Supp. 427. "To justify equitable interposition, it must be made to appear that an equitable right will otherwise be denied the party seeking relief." *Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178; *Thorndike v. Thorndike*, 142 Ill. 450, 21 L.R.A. 71, 33 Am. St. Rep. 90, 32 N. E. 510; *Carson v. Dunham*, 149 Mass. 52, 3 L.R.A. 203, 14 Am. St. Rep. 397, 20 N. E. 312; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 54 Mo. App. 147, affirmed by supreme court in 127 Mo. 242, 27 L.R.A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010; *Boyd v. Hawkins*, 17 N. C. (2 Dev. Eq.) 329. See also *Bank of Bellows Falls v. Rutland & B. R. Co.* 28 Vt. 470; *Spreckles v. Hawaiian Commercial & Sugar Co.* 117 Cal. 377, 49 Pac. 353; *Burgess v. Smith*, 2 Barb. Ch. 276; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238.

In the present case the New Jersey suit is prior in time, and plaintiff shows no equitable ground upon which the courts of Minnesota can intervene to stop the progress of that suit. The only basis for his application is that the notes are Minnesota

contracts; that both parties and the plaintiff's witnesses, if he have any, reside in Minnesota; and that plaintiff has no property in New Jersey. There is nothing to show that the laws of New Jersey differ in any respect from those of Minnesota, or that he will not receive, in that state, the full benefit of the Minnesota statute upon which he relies. As said in *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979: "Unless we are prepared to say that, in all cases where two residents of this state have a dispute, we will compel them to litigate questions at issue between them in the courts of this state alone, and prevent them by injunction from appealing to the courts of any other jurisdiction, we would not be authorized to interfere in this action." Had suit been brought in Minnesota in advance of the New Jersey suit, it might, perhaps, furnish a basis for an injunction. But the New Jersey suit was brought before the present action, and, so far as the record shows, is the only suit ever brought anywhere to enforce these notes or any of them.

Plaintiff had been abroad, and it is not shown that defendant knew he was returning to Minnesota. Plaintiff does not show that he has any witnesses in Minnesota who can testify to anything material at the trial. There is no showing that New Jersey is not the most convenient place of trial for defendant and his witnesses, if he have any, nor that other legitimate reasons do not exist for bringing the suit in that state. If the suit had been commenced in a remote county of the state of Minnesota, instead of in New Jersey, a motion for a change of venue, based on the ground of convenience of witnesses, would hardly be granted upon the showing here presented.

We are not to be understood as holding that an injunction may not issue where the facts presented show that a trial of the suit in the foreign court will impose an unreasonable burden upon the defendant, and that it is brought in a distant state for the purpose of compelling the defendant to forego his defense, or incur unreasonable and unnecessary expense, and not for any legitimate reason. But the burden is upon one who seeks an injunction to present facts which justify its issuance. No case has been cited by counsel in which an injunction has been issued upon such a state of facts as is here presented, and after a somewhat extended search we have been unable to find any such case.

Order reversed.

Philip E. Brown, J., took no part.
46 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

GULLEDGE BROTHERS LUMBER COMPANY, Resp't.,

v.

WENATCHEE LAND COMPANY, Appt.

(122 Minn. 266, 142 N. W. 305.)

Criminal law — penal statute — what is.

1. The question whether a statute of one state, which in some aspects may be called penal, is a "penal law" in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

Same — revenue act — enforcement out of state.

2. Plaintiff is a corporation created under the laws of the state of Washington. The statutes of Washington require corporations to pay an annual license fee, and provide as a penalty for nonpayment of such fee that no corporation in default thereof shall be permitted to maintain any action in the courts of that state. Plaintiff was in default of payment of such license fee when this action was brought. The supreme court of Washington has construed these statutes as revenue acts pure and simple, and has held that the provisions thereof are for the purpose of enabling the state to enforce the payment of its revenue, and that a corporation in default does not forfeit the right to exist, but continues to be a corporation until a forfeiture is adjudicated by proper proceedings in a proper court. Held, that the purpose of the acts is to punish an offense against the public justice of the state of Washington, that they are of the class of penal acts which will not be enforced outside of the state where they were enacted, and that plaintiff may maintain an action in this state.

Corporation — dissolution — action in other state.

3. The principle that a corporation which has been dissolved by proper proceedings in the state of its creation could not there-

Headnotes by HALLAM, J.

Note. — GULLEDGE BROS. LUMBER CO. v. WENATCHEE LAND CO. seems to be a case of first impression as to the extraterritorial recognition of a statute of the domicile which prohibits a corporation from suing. The decision is in harmony with the general rule that a penal statute of one state will not be enforced by the courts of a sister state.

As to enforceability in Federal court or court of another state, of a contract made by a foreign corporation which has not complied with the conditions of doing business within the state, see note to *Strampe v. Minnesota Farmers' Mut. Ins. Co.* 20 L.R.A. (N.S.) 999.

after commence or maintain an action in any other state is not applicable to this case, since, according to the laws of Washington, the plaintiff corporation has not been dissolved.

(June 27, 1913.)

APPEAL by defendant from a judgment of the District Court for Hennepin County in plaintiff's favor in an action brought to recover damages for breach of contract. Affirmed.

The facts are stated in the opinion.

Messrs. Arthur W. Selover and Brooks & Jamison, for appellant:

The act of counsel in commencing this action in the name of the corporation was a nullity, the corporation having lost its right and franchise to sue under the law of the state of its creation.

Thomp. Corp. § 6628; American Waterworks Co. v. Farmers' Loan & T. Co. 20 Colo. 203, 25 L.R.A. 338, 46 Am. St. Rep. 285, 37 Pac. 269; White v. Howard, 38 Conn. 342; Wharton, Conf. L. pp. 238, 1216, §§ 105a, 510q; Elliott v. Atlantic Coast Line R. Co. — S. C. —, 75 S. E. 886; Anglo-American Land Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 743; Citizens' Light & P. Co. v. Seattle Gas & Electric Co. 60 C. C. A. 686, 125 Fed. 1001, Myatt v. Ponca City Land & Improv. Co. 14 Okla. 189, 68 L.R.A. 810, 78 Pac. 185; Canada Southern R. Co. v. Gebhard, 109 U. S. 528, 537, 27 L. ed. 1021, 1024, 3 Sup. Ct. Rep. 363.

Mr. Jay W. Crane, for respondent:

Statutes of this nature are penal.

G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Keystone Mfg. Co. v. Howe, 89 Minn. 256, 94 N. W. 723; Thomas Mfg. Co. v. Knapp, 101 Minn. 433, 112 N. W. 989; 30 Cyc. 1347; Midland Co. v. Broat, 50 Minn. 562, 17 L.R.A. 312, 52 N. W. 972; State ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861.

To enforce the said Washington statutes in Minnesota by closing our courts results only in enforcing the collection of revenue for the state of Washington.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Story, Conf. L. § 104.

State laws have no extraterritorial effect for the enforcing of penalties.

Alleghany Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; 3 Thomp. Corp. 2d ed. § 2104; Craig v. Benedictine Sisters Hospital Asso. 88 Minn. 535, 93 N. W. 669; Tolerton & S. Co. v. Barch, 84 Minn. 497, 88 N. W. 19, 46 L.R.A. (N.S.)

Hallam, J., delivered the opinion of the court:

Plaintiff was incorporated under the laws of the state of Washington in September, 1903. This action was commenced June 4, 1909, to recover damages for breach of a contract. The complaint states a cause of action. Gullede Bros. Lumber Co. v. Wenatchee Land Co. 111 Minn. 418, 127 N. W. 395, 923.

Defendant in its answer pleaded, by way of abatement, that plaintiff was incapacitated from commencing and maintaining this action by reason of its failure to pay an annual license tax imposed by the laws of the state of Washington. After plaintiff rested its case, the court heard defendant's evidence under its plea in abatement and plaintiff's evidence in reply. The court decided in defendant's favor on this plea and ordered the action dismissed.

The facts found by the court are, in substance, as follows:

That the statutes of the state of Washington have for some years contained a provision that every corporation incorporated under the laws of that state shall, on or before the 1st day of July of each and every year, pay to the secretary of state, for the use of the state, a license fee, and the further provision that "no corporation shall be permitted to commence or maintain any suit, action, or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due," and that "it shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees. . . ." Rem. & Ball. Code, §§ 3714, 3715.

It is further found by the court that plaintiff defaulted in the payment of said license fees for the years 1904, 1905, 1906, 1907, and 1908, and was in default of the payment of said license fees at the time of the commencement of this action, June 4, 1909; that on account of nonpayment of said license fees plaintiff could not have commenced and could not have maintained this action in the courts of the state of Washington, and, as conclusions of law from these facts, the court found that plaintiff could not commence and maintain this action in Minnesota. A motion for a new trial was granted on the ground that the statute mentioned is penal in its nature and cannot be enforced in this state, and is therefore no defense to this action. Defendant appeals.

The order granting a new trial must be affirmed.

1. It is sometimes stated in general terms

that the courts of one state will not enforce the penalties imposed by another state (Cook, Corp. § 223; Story, Conf. L. §§ 620, 621; Wharton, Conf. L. 3d ed. § 4); that penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the state or country where they were enacted (Scoville v. Canfield, 14 Johns. 338, 340, 7 Am. Dec. 467). This is perhaps too broad a statement of the rule. A statute penal in its nature may create an obligation in favor of a private individual. Obligations of this sort will be enforced in any jurisdiction. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Fitzgerald v. Weidenbeck* (C. C.) 76 Fed. 695; *Thomp. Corp.* 2d ed. § 4776.

The true rule, as we conceive it to be, is laid down in *Huntington v. Attrill*, supra. Mr. Justice Gray said: "The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

In harmony with the same principle, it was said in *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 230, 8 Sup. Ct. Rep. 1370: "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws."

In that case a statute imposing a penalty upon any insurance company of another state doing business in Wisconsin without having deposited with the proper officer of the state a full statement of its property, and of its business done during the previous year, was held in the strictest sense a penal statute. See also *Henry v. Sargeant*, 13 N. H. 321, 332, 40 Am. Dec. 146.

The distinction above mentioned is further exemplified by the language of Lord Watson in *Huntington v. Attrill*, 8 Times L. R. 341, as follows: "In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offenses against the state; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs which was the very es-

sence of the international rule." It is there further said: "The rule had its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of someone representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed,"—cited with approval in *Huntington v. Attrill*, 146 U. S. 657, 681, 36 L. ed. 1123, 1132, 13 Sup. Ct. Rep. 224, 233.

2. Applying these principles, it seems clear that the statutes of Washington in question are of the class of penal acts which will not be enforced outside of the state where they were enacted. These statutes have been construed by the supreme court of that state. *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861. That case arose as follows: The original act contained a provision that a corporation, whose name has been stricken from the records of the office of the secretary of state for failure to pay its license fee, may apply to said official for reinstatement at any time within six months thereafter, and upon payment of all license fees and of an additional penalty, it may be reinstated; but if such application is not made within such period of six months, the secretary of state shall enter upon his records a notation that such corporation is dissolved, and it shall thereupon be dissolved, and the trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors, to be disposed of under appropriate court proceedings. In 1911 this act was amended so that a corporation whose name has been so stricken may make application for reinstatement at any time after its name has been stricken from the records. It was contended that the act of 1911 violated a provision of the Constitution of Washington which prohibits the remission of a forfeiture. The court held otherwise, and in defining the meaning of the acts said: "These respective acts were not primarily directed against corporations; they were revenue acts pure and simple, and the provisions directed against corporations were for the purpose of enabling the state to enforce the payment of its revenue. . . . The corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture and enforce it. . . . The act of the secretary of state in striking the corporation from the records of his office, or in noting it as dissolved for failure to pay its license fees, was not a

forfeiture of the corporation, so that any act of the legislature providing for a reinstatement of such corporation would be void as the remission of a forfeiture."

This construction placed by the supreme court of Washington upon the meaning of these acts is binding upon us. It clearly appears therefrom that the purpose of these acts is not "to afford a private remedy to a person injured by the wrongful act," but to "punish an offense against the public justice of the state;" that it is a statute imposing a penalty "for the protection of its revenue . . . laws," and is cognizable only in the state where made. In order to secure payment of a revenue license fee, the state of Washington denies to a corporation in default of such payment the right to sue in its courts; but that state still recognizes its existence as a corporation. So long as such a corporation is permitted to exist by the government of the state of its creation, this state will not, for the purpose of enforcing the revenue laws of that state, deny to such a corporation the right to sue in our courts.

3. We do not overlook the principle that the capacity of a corporation and the powers possessed by it are, in a general sense, primarily determined by the laws of the state or country in which it was created, and that it can exercise no powers except those derived from its charter or the laws of that state. Wharton, Conf. L. 3d ed. § 105a. If, under the laws of the state of its creation, it has no right to sell a particular commodity or enter into a particular class of contracts, such power cannot be conferred by the laws of another state. 19 Cyc. 1214; *Citizens' Light & P. Co. v. Seattle Gas & Electric Co.* 60 C. C. A. 686, 125 Fed. 1001; *Myatt v. Ponca City Land & Improv. Co.* 14 Okla. 189, 68 L.R.A. 810, 78 Pac. 185. If it is actually dissolved by proper proceedings in its home state, its existence is ended, and it could not thereafter commence or maintain an action or exercise any corporate functions anywhere. But these principles are not applicable here. We have here no question of the powers of this corporation to contract and to do business. Its powers in that particular are not questioned. We have no question of the dissolution of this corporation. It has not been dissolved. We have only the question whether we shall deny it the right to sue, as a penalty for its failure to contribute its share to the revenues of the state of Washington. On principle and authority we decline to do so, and we hold that plaintiff may maintain an action in this state.

Order affirmed.

Holt, J., took no part.
46 L.R.A. (N.S.)

A petition for rehearing having been filed, the following *Per Curiam* response was handed down July 11, 1913:

Defendant, on petition for rehearing, cites the case of *Soderberg v. McRae*, 70 Wash. 235, 126 Pac. 538, to the effect that, when a corporation is dissolved under the statute cited in the opinion, the property of the corporation passes immediately to the trustees; and defendant urges that an action cannot accordingly be maintained by the plaintiff corporation. The decision above cited cannot affect the disposition of this appeal. The trial court did not find that the corporation had been dissolved. Perhaps the evidence received required a finding to that effect; but, if so, it further appears that evidence was offered and rejected to the effect that the corporation had been reinstated. This evidence should have been received. If not admissible under the pleadings as they stood, opportunity should have been given to amend. If this reinstatement is established on the trial, it is complete rebuttal of the defense in abatement. See *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144.

Ordered, that the petition for rehearing herein be and the same hereby is denied and stay vacated.

Holt, J., took no part.

MISSISSIPPI SUPREME COURT.

JUNIUS BROWN, Appt.,

v.

STATE OF MISSISSIPPI.

(— Miss. —, 62 So. 353.)

Weapons — razor.

A razor is not within a statute making it an offense to carry concealed any toy pistol, glass, or metallic knuckles, slung shot, or other deadly weapon of like kind or description.

(June 23, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Adams County convicting him of unlawfully carrying concealed a deadly weapon. Reversed.

The facts are stated in the opinion.

Mr. Charles F. Engle, for appellant: The term "weapon" itself indicates that it is for the offense or defense of a person, and that it cannot be extended to include

Note. — As to what are weapons within offense of carrying concealed weapons, see note to *Mitchell v. State*, 34 L.R.A. (N.S.) 1174, and see also *Burnside v. State*, 45 L.R.A. (N.S.) 780.

ordinary instruments not used for any such purpose.

Harris v. Cameron, 81 Wis. 239, 29 Am. St. Rep. 891, 51 N. W. 437; State v. Page, 15 S. D. 613, 91 N. W. 313; 40 Cyc. 852.

A razor is not a deadly weapon, the carrying of which concealed is prohibited.

State v. Nelson, 38 La. Ann. 942, 58 Am. Rep. 202; State v. Lowry, 33 La. Ann. 1224; Strahan v. State, 68 Miss. 347, 8 So. 844; State v. Williams, 70 Iowa, 52, 29 N. W. 801; State v. Larkin, 24 Mo. App. 410.

Criminal intent is an essential element of crime.

Miles v. State, 99 Miss. 165, 54 So. 946.

The defendant in this case was shown conclusively to be under the age of fourteen years.

He was therefore prima facie presumed to be incapable of entertaining criminal intent, incapable of distinguishing between right and wrong or good and evil.

Miles v. State, 99 Miss. 165, 54 So. 946; Beason v. State, 96 Miss. 105, 50 So. 488; Joslin v. State, 75 Miss. 838, 23 So. 515; Westbrook v. Mobile & O. R. Co. 66 Miss. 560, 14 Am. St. Rep. 587, 6 So. 321.

Mr. B. W. Crawford also for appellant.

Mr. Frank Johnston, Assistant Attorney General, for the State.

Reed, J., delivered the opinion of the court:

Junius Brown, a boy about thirteen years old, was charged with unlawfully carrying concealed "a certain deadly weapon, to wit, a razor." Upon the trial of the case in the circuit court on appeal from the justice of the peace court, where the charge was made, a demurrer to the affidavit was filed, on the ground that "a razor is not such a deadly weapon as is contemplated by §1103, Code of 1906." This demurrer was overruled. For the same reason, the appellant moved the court to exclude the evidence and give peremptory instruction for the defendant, after the testimony was all introduced. From conviction, appellant appeals, and assigns as error the action of the trial court in refusing to sustain the demurrer and to grant the peremptory instruction.

Section 1103 of the Code of 1906 provides that "any person who carries concealed in whole or in part, any bowie knife, dirk knife, butcher knife, pistol, brass or metallic knuckles, slung shot, sword, or other deadly weapon of like kind or description, shall be guilty of a misdemeanor."

Is a razor a deadly weapon, in the meaning of the statute? It will be noted that the statute names certain weapons, and then includes "other deadly weapons of like kind or description."

A razor is defined in the Century Dictionary to be "a sharp-edged instrument used for shaving the face." In 23 Am. & Eng. Enc. Law 2d ed. p. 891, this definition is given: "A razor is a sharp instrument or tool used for shaving purposes." We taken the following definition from 33 Cyc. 1537: A razor is a sharp "instrument or implement pertaining to the toilet or shop, having a well-known and specific use, to which it is ordinarily applied." In State v. Nelson, 38 La. Ann. 942, 58 Am. Rep. 202, it is said: "A razor is an instrument or implement appertaining to the toilet or shop. It has a well-known and specific use, to which it is ordinarily applied. It is not known or usually sold in market as a weapon."

It was settled in State v. Nelson, supra, that a razor is not a "dangerous" weapon within the statute in Louisiana, which declares that "whoever shall carry any weapon or weapons concealed in or about his person, such as bowie knives, pistols, dirks, or any other dangerous weapons, shall, on conviction," etc. It will be noted that the Louisiana statute is similar to that in this state. We think it is broader in its inclusions. The statute in this state, after naming certain weapons, says, "Other deadly weapons of like kind or description." In Louisiana the statute says, "Or any other dangerous weapons." Referring to the razor as such a weapon, Watkins, J., in delivering the opinion of the court, said: "It may be quite as easily and conveniently carried in the pocket as a pen-knife, and when thus carried is effectually concealed from public open view. Under such circumstances the concealment of one would be just as pernicious as the other." Defining the difference between a razor as a dangerous weapon when used in a combat or assault, and instruments which are made to be used in fights, and which are ordinarily called arms or weapons, Judge Watkins said: "The lawmaker, in our view, . . . only denounced as a crime the carrying concealed dangerous weapons *eo nomine*, and not such articles or instruments as might be used in an assault."

It was decided in the case of State v. Iannucci, 4 Penn. (Del.) 193, 55 Atl. 336, that a razor is a deadly weapon within the meaning and conception of the statute of Delaware on the subject. We find, however, that the Delaware statute is quite different from that in this state. It pro-

vides that, "if any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife, . . . shall upon conviction," etc. It will be seen that no weapons are specifically named in this statute, and that there is no limitation whatever as to the kind of instruments which are included as deadly weapons.

In deciding the case of *State v. Larkin*, 24 Mo. App. 410, the court indicates that, if a razor is carried as a weapon of offense, it might be termed a deadly weapon concealed. On the other hand, the court clearly states that it is not to be ordinarily denominated such weapon. In delivering the opinion of the court, Rombauer, J., said: "A razor is an article of common domestic use, and while no one could be held guilty of the offense of carrying a dangerous and deadly weapon concealed about his person, simply because he so carried a razor, yet, if surrounding circumstances would tend to show that he carried it as a weapon of offense, he might become liable to the charge, because a razor, when thus used, is notoriously a weapon dangerous to life."

The only testimony in the present case showing why appellant had the razor concealed on his person when the officer found it is his own statement, as follows: "My aunt give me that razor to have sharpened. She uses it to cut her corns with. I had it in my pocket." Though a razor is an article of ordinary domestic use, still it is well known that it can be used with deadly effect. This can also be said of an ordinary pocket knife, or other articles or instruments which are not classed as weapons. In some sections of the land it may be the habit or custom of a certain class of persons to carry a razor concealed for the purpose of using it in combat. The time may come when it will be so generally used as an instrument in combat as to cause the legislature to include it in the names of deadly weapons, which shall not be carried concealed. But we cannot decide that it is so included now.

We are construing the statute. The purpose thereof is to prevent the carrying concealed weapons; that is, instruments used in fights, or arms. Certain of the instruments well known to be weapons are named, and then it includes "other deadly weapons of like kind or description." We do not believe that we can list the razor in the class of instruments defined to be weapons of like kind and description to those designated in the statute.

Reversed, and defendant discharged.
46 L.R.A.(N.S.)

MONTANA SUPREME COURT.

CHARLES WALTERS, Resp't.,
v.

CHICAGO, MILWAUKEE, & PUGET
SOUND RAILWAY COMPANY et al.,
Appts.

(— Mont. —, 133 Pac. 357.)

Evidence — weight — positive and negative.

1. Positive testimony by persons interested in knowing whether or not a signal was given for a train approaching a road crossing that it was not is sufficient to take the question to the jury, notwithstanding testimony by those in charge of the train that it was.

Railroad — street crossing — failure to stop — negligence.

2. Failure to stop an automobile and look and listen before crossing a railroad track is not negligence as matter of law.

Same — failure to look.

3. It is not negligence *per se* for one approaching a railroad crossing in a cut to fail to stop before attempting to cross, if, because of the narrowness of the cut and a curve near the track, he could not have seen along the track from a position of safety sufficiently far to be of any avail, and he could not have returned to his vehicle after leaving it to look along the track in the time in which a train would cover the space between the point where it would become visible on the curve, and the crossing.

Same — failure to look last in right direction.

4. It is not negligence *per se* to fail to

Note. — Care required of driver of automobile at railroad crossings.

For a discussion of the general question of the duty of a traveler approaching railway crossings as to place and direction of observation, see note accompanying *Wallenburg v. Missouri P. R. Co.* 37 L.R.A.(N.S.) 135.

As to conduct of flagman, or absence from his post, as affecting liability for injury at crossing, see note to *Roby v. Kansas City Southern R. Co.* 41 L.R.A.(N.S.) 355.

The question of the care required of the driver of an automobile at railroad crossings is covered in the notes to *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A.(N.S.) 794, and *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, and the present note is only supplementary to those.

Stopping, looking, and listening—generally.

There appears to be some conflict upon the question whether a failure to stop an automobile and look and listen before crossing a railroad track constitutes negligence. In *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A.(N.S.) 794, 93 C. C. A. 413, 168 Fed. 121, and *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, 103 C. C. A. 135,

look last in the direction from which a train is actually approaching before entering a zone on a highway crossing a railroad track from which a view of the track could not be had.

Damages — award for personal injuries — excess.

5. \$15,000 is not excessive to award to a man twenty-three years old, struck by a train at a railroad crossing and rendered unconscious for six or eight hours; his skull slightly fractured; his hip socket fractured so that he could not walk without help for a year; his nervous system shocked; his pelvic bone and lower spinal processes displaced, causing partial paralysis; and his ability to work at his trade, from which he was earning \$125 a month, destroyed.

(June 14, 1913.)

179 Fed. 577, such conduct was held to show contributory negligence on the part of the drivers of the machines. It will be noticed, however, that a contrary result was reached in *WALTERS v. CHICAGO, M. & P. S. R. Co.*

And in *Texas & P. R. Co. v. Hilgartner*, — Tex. Civ. App. —, 149 S. W. 1091, the court said that it was uniformly held error in Texas to charge that it is the duty of one approaching a railroad crossing to stop, look, and listen, and held that this rule was applicable to a traveler approaching such a crossing in an automobile.

But it was held that even if such a duty existed, it would be improper to instruct the jury that if the driver failed to observe such duty he could not recover, since such an instruction assumed as a matter of law that his failure was negligence which directly contributed to the accident. *Texas & P. R. Co. v. Hilgartner*, supra.

In *Lockridge v. Minneapolis & St. L. R. Co.* — Iowa, —, 140 N. W. 834, where an automobile had been run into at a railroad crossing at which a flagman was stationed, it was held that the rule that one must stop, look, and listen was not a hard-and-fast rule, and that the failure to observe the rule was not in itself, under all circumstances, such contributory negligence as would prevent a recovery. The court said: "This court, in *Hartman v. Chicago G. W. R. Co.* 132 Iowa, 584, 110 N. W. 11, said: 'It is easy to say, and it is a correct proposition, that a person approaching a railway crossing must bear in mind that it is a place of danger, and he must be vigilant to discover the approach of trains, and use reasonable care to avoid injury therefrom.' But whether such reasonable care requires him to stop, look, and listen, whether he had a right to place reliance upon the absence of danger signals, or upon any other given fact or circumstance, depends so much upon the peculiar conditions by which he is surrounded that, save in cases exceptionally free from doubt, the question of contributory negligence must be left to the jury; and an instruction that the failure to stop, look, and listen at all points in his passage 46 L.R.A. (N.S.)

A PPEAL by defendants from a judgment of the District Court for Silver Bow County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. George F. Shelton, Fred J. Furman, and A. J. Verheyen, for appellants:

The driver of an automobile approaching a railway crossing cannot recover for injuries received in a collision between the automobile and a train, unless he proves that he stopped, looked, and listened.

Brommer v. Pennsylvania R. Co. 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179

over railway crossings is contributory negligence is erroneous. In the case of *Schulte v. Chicago, M. & St. P. R. Co.* 114 Iowa, 94, 86 N. W. 65, this court said: 'The traveler is held to the duty of looking and listening for approaching trains, within a reasonable distance from a crossing, and if this has been done, it is for the jury to say whether he was bound, in the exercise of ordinary care, to stop, look, and listen, or to look and listen without stopping at some other point nearer or farther.'

In *Chase v. New York C. & H. R. R. Co.* 208 Mass. 137, 97 N. E. 377, it was held that there was no evidence from which it could be found that a chauffeur operating a seven-passenger car was in the exercise of due care where it appeared that while driving along a country road at about noon on a bright day he approached a grade crossing with which he was familiar, and knew that trains might come from either direction at any moment, at a speed of from 12 to 15 miles an hour until he was very close to the track, when he reduced his speed to 8 miles an hour, and while crossing the track the machine was struck by a train proceeding at not more than 25 miles an hour, which he did not see until he was within 15 feet of the track. The court said: "The rules of law applicable to the driver of a horse-drawn vehicle approaching a railroad crossing have been laid down in many cases. He must look and listen in a reasonable way, so as, if possible, to secure his safety. The proper application of this rule for one driving an automobile is simple, and in concrete cases far less difficult than for the driver of horses. As was said in *Hubbard v. Boston & A. R. Co.* 162 Mass. 132, 38 N. E. 366; 'There are very few horses than can safely be stopped within 15 or 20 feet of a railroad track to await the passage of an express train. One driving there before the accident was obliged to choose between the risk of driving across and being struck by an express train whose approach he might fail to hear, and the risk of stopping to look so near the track as to expose him to great danger from the fright of his horse if an

Fed. 577; New York C. & H. R. R. Co. v. Maidment, 21 L.R.A.(N.S.) 794, 93 C. C. A. 413, 168 Fed. 21; 28 Cyc. 41; Spencer v. New York C. & H. R. R. Co. 123 App. Div. 789, 108 N. Y. Supp. 245, affirmed in 197 N. Y. 507, 90 N. E. 1166; Bonert v. Long Island R. Co. 145 App. Div. 552, 130 N. Y. Supp. 271; Read v. New York C. & H. R. R. Co. 123 App. Div. 228, 107 N. Y. Supp. 1068; Horandt v. Central R. Co. 78 N. J. L. 190, 73 Atl. 93; Huddy, Automobiles, 3d. ed. § 164, p. 184; Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377.

The driver of any vehicle approaching a railway crossing must look and listen for an approaching train, and, where necessary,

approaching train would be near.' The driver of an automobile is in so such danger. If his machine is a good one, it can be controlled easily and perfectly, and there is no danger from it if he stops to look and listen within 6 feet of the track. The difference between automobiles and vehicles drawn by horses, in the application of the rule, has been recognized by the courts. In New York C. & H. R. R. Co. v. Maidment, 21 L.R.A.(N.S.) 794, 93 C. C. A. 413, 168 Fed. 21, the court said: 'He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. . . . These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized.' To the same purport is Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577. See also Spencer v. New York C. & H. R. R. Co. 123 App. Div. 789, 108 N. Y. Supp. 245, affirmed in 197 N. Y. 507, 90 N. E. 1166. With the statement of the law in the paragraph above quoted we entirely agree. With proper care on the part of the driver, there is no danger in crossing a railroad with an automobile upon an ordinary highway in a country town. In this case, considering that part of the testimony which is most favorable to the plaintiffs, there is no evidence that Hancock was in the exercise of due care; but, on the contrary, the accident seems to have been caused by his great carelessness." 46 L.R.A.(N.S.)

in the exercise of ordinary care and caution, must stop his vehicle; and a failure to do so precludes a recovery.

Sprague v. Northern P. R. Co. 40 Mont. 481, 107 Pac. 412; Hunter v. Montana C. R. Co. 22 Mont. 525, 57 Pac. 140.

The jury had no right, under the instructions of the court, to conclude that the bell was not rung and the whistle was not sounded in the manner testified to by the witnesses for the defendants.

Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377; Horandt v. Central R. Co. 78 N. J. L. 190, 73 Atl. 83.

Messrs. Maury, Templeman, & Davies, for respondent:

There is no more of an absolute standard

See also Hull v. Seattle, R. & S. R. Co. under heading, "Where engine stops," and Witmer v. Bessemer & L. E. R. Co. under heading, "Where driver voluntarily stops."

—where danger is apparent.

It has been held that the driver of an automobile is guilty of contributory negligence in keeping his eyes fixed on the highway just ahead of him until too late to stop and prevent being run down at a crossing where the physical situation generally pointed unmistakably to the presence of a railroad crossing, and there was a full-sized crossing sign plainly visible at a distance, and upon coming closer the track could clearly be seen, and there was an unobstructed view up and down the track. Horandt v. Central R. Co. 78 N. J. L. 190, 73 Atl. 93, subsequent appeal 81 N. J. L. 488, 83 Atl. 511.

And in Lassen v. New York, N. H. & H. R. Co. — Conn. —, 87 Atl. 734, where the driver of a heavy truck was seen when a train, approaching a crossing at the rate of 35 miles an hour, was about 100 feet from a crossing, and although there was no obstruction to his view, he drove his truck onto the crossing, in front of the train, it was held that he was guilty of contributory negligence in attempting to pass in front of the train, or in not knowing that it was approaching.

And a chauffeur is guilty of contributory negligence in not discovering the approach of the train which struck him, and in failing to stop his machine, where it appears that he looked south when about 25 or 30 feet from a crossing which he was approaching at about 3 or 4 miles an hour, and saw no train approaching; that his automobile was surrounded by a crowd proceeding in the same direction in which he was going; that he did not stop as he approached the crossing, and as he was passing over the first rail of the north-bound track, some of the people screamed and fell back, and that he then looked south again, and saw the train which struck him approaching about 400 feet away, and immediately gave the machine more power in an effort to

of ordinary care and diligence required of the public than there is required of the railroad company.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Texas & P. R. Co. v. Hilgartner, — Tex. Civ. App. —, 149 S. W. 1091.

Plaintiff was not negligent as matter of law.

Mason v. Northern P. R. Co. 45 Mont. 474, 124 Pac. 271; Lorenz v. Burlington C. R. & N. R. Co. 115 Iowa, 377, 56 L.R.A. 752, 88 N. W. 835; Wheeler v. Oregon R. & Nav. Co. 16 Idaho, 375, 102 Pac. 347; Grant v. Oregon R. & Nav. Co. 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126; Thompson v. New York C. & H. R. R. Co. 110 N. Y.

636, 17 N. E. 690; Greenawaldt v. Lake Shore & M. S. R. Co. 165 Ind. 219, 74 N. E. 1081; Alabama & V. R. Co. v. Lowe, 73 Miss. 203, 19 So. 96; Thomp. Neg. §§ 189, 1651; 2 White, Personal Injuries on Railroads, § 1016; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Texas & P. R. Co. v. Hilgartner, — Tex. Civ. App. —, 149 S. W. 1091; Allen v. Botson & M. R. Co. 197 Mass. 298, 83 N. E. 863; Hartman v. Chicago, G. W. R. Co. 132 Iowa, 582, 110 N. W. 10; Louisville & N. R. Co. v. Lucas, 30 Ky. L. Rep. 539, 99 S. W. 959; Central R. Co. v. Hyatt, 151 Ala. 353, 43 So. 867; Vance v. Atchison, T. & S. F. R. Co. 9 Cal. App. 20, 98 Pac. 41; Missouri, K. & T. R. Co. v. James, 55 Tex. Civ. App.

cross ahead of the train, but was struck by it. *Spencer v. New York C. & H. R. R. Co. supra*. The court said: "The evidence establishes to our entire satisfaction that the train which collided with the automobile was in plain sight long enough to have enabled him to shut off the power and bring the machine to a standstill before reaching the track. At the rate of speed at which he was moving, he might have stopped the car almost immediately. It is impossible to believe that with the exercise of ordinary care the plaintiff could not have seen the approaching train and avoided the accident. The only diligence shown to have been exercised by plaintiff was to look from two different points to the south where the train was approaching in plain view without seeing it. He passed over the last 30 feet before reaching the tracks, the most dangerous part of the route, without looking; and it is no excuse to say that he was hemmed in by the people bound for the station. These conditions were only temporary, and would shortly pass away. Common prudence, if necessary to properly handle his machine, required him to stop and proceed no further until he could exercise full vigilance. *Heaney v. Long Island R. Co.* 112 N. Y. 122, 19 N. E. 422. 'The fact that he did not see the train under these circumstances did not create an issue of fact to be determined by the jury, and their verdict cannot be permitted to stand.'"

—where view obstructed.

Where the view along a track is obstructed until the driver of an automobile is near a street crossing, the tracks are a signal of danger, and impose upon the driver the duty of looking and listening before going on them. *Chappell v. United R. Co.* — Mo. App. —, 156 S. W. 819.

In *Dickinson v. Erie R. Co.* 81 N. J. L. 464, 37 L.R.A.(N.S.) 150, 81 Atl. 104, which was an action to recover for damages resulting from a collision between a train and automobile a crossing, it was held that where there are permanent obstructions in sight that make danger invisible, and a transient noise that would make it inaud-

ible, it is negligence for a traveler to go forward from a place of safety to a place of possible danger without waiting for hearing to become defective.

But it was held that the duty to stop did not arise except where there were transient noises or temporary obstructions to the view. *Ibid*.

It was held in this case that the driver of an automobile was not guilty of contributory negligence as a matter of law in not stopping before his view became effective, where it appeared that his view in approaching a grade crossing was obstructed by permanent obstructions so he could not see a train approaching on the west-bound track until the front wheels of his machine were on the east-bound track, and it appeared that upon reaching the top of a hill 200 feet distant from the crossing, he turned off power and proceeded by force of gravity, noiselessly, at a speed of 4 miles an hour, constantly looking and listening, but hearing no signals, and it further appeared that there were no transient noises nor temporary obstructions to his view. *Ibid*.

The court in *Wachsmith v. Baltimore & O. R. Co.* 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913 B, 679, said that the negligence of the driver of an automobile was manifest where it appeared that the view as he approached a grade crossing was shut off until a point 17 or 20 feet from the track was reached, and that from there there was a clear view for several hundred feet, and that when 25 or 30 feet from the track, he slackened speed almost to a full stop and suddenly went forward onto the crossing, and was struck by a shifting engine, of the approach of which no notice was given. The question under consideration in this case, however, was whether the driver's negligence could be imputed to a passenger of the machine.

It has been held that a finding that a young woman whose automobile was struck by a train at a crossing was not guilty of contributory negligence is not sustained by the evidence where it appeared that the view at a greater distance than 30 or 34 feet from the track was partially obstructed, but that a clear view for about a mile was

588, 120 S. W. 269; *Chesapeake & O. R. Co. v. Hawkins*, — Ky. —, 124 S. W. 836; *Crabtree v. Missouri P. R. Co.* 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932; *Farris v. Southern R. Co.* 151 N. C. 483, 40 L.R.A. (N.S.) 1115, 66 S. E. 457; *Erie R. Co. v. Schultz*, 106 C. C. A. 23, 183 Fed. 673.

Negligence, either upon the part of a plaintiff or a defendant, to be a cause of injury, must be a proximate and an efficient cause,—one directly producing the accident or injury.

Beeler v. Butte & L. Copper Development Co. 41 Mont. 465, 110 Pac. 528; *Neary v. Northern P. R. Co.* 41 Mont. 480, 110 Pac. 226; *Melzner v. Northern P. R. Co.* 46 Mont. 162, 127 Pac. 146; 29 Cyc. 527-529 (f); *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531.

Plaintiff, when he approached the railroad

afforded when within that distance, and witnesses testified that they saw the train at a great distance and called out to the plaintiff, although she testified that she looked, but did not see the train until it was 60 or 70 feet away and she was 6 or 7 feet from the crossing, and the evidence further showed that her control of the car was so feeble that after seeing the train she nevertheless drove upon the track. *Bonert v. Long Island R. Co.* 145 App. Div. 552, 130 N. Y. Supp. 271.

In an action to recover for damage done to an automobile which was run into at a crossing in which the pleadings raised the question of contributory negligence was held that an instruction submitting the question of contributory negligence was warranted, although the defendant introduced no testimony upon the point, where it appeared from the evidence introduced by the plaintiff that the driver knew that tracks crossed the street at the point where the accident occurred, and that a building stood 10 or 12 feet from the track, and partially obstructed the view, but that, after passing this, one could see 75 or 100 feet down the track, and it appeared that the plaintiff's automobile was going only about 3 or 4 miles an hour, and could have been stopped in 4 or 5 feet. *Chappell v. United R. Co.* — Mo. App. —, 156 S. W. 818.

In *Texas & P. R. Co. v. Hilgartner*, — Tex. Civ. App. —, 149 S. W. 1091, it was held that a requested instruction was properly refused as being upon the weight of the evidence which stated that if the buildings, structures, and obstructions of view surrounding the track as plaintiff was approaching the crossing were such that he could not see the train crossing the street until it had gotten to the edge or on the street upon which he was traveling, it was his duty to use care proportionate to the situation in approaching the track in order to ascertain whether or not there was a train upon the track, greater than it have been if his view up and down the track had been unobstructed.

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crossing, had a right to presume and rely upon the presumption that defendant would perform its duties under the law, and would ring the bell on its locomotive, and blow the whistle as required by law; and this is peculiarly true where the crossing, like the crossing in question, is an obscure one.

Henry v. Cleveland, C. C. & St. L. R. Co. 236 Ill. 219, 86 N. E. 231; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308; *Illinois C. R. Co. v. Moss*, 142 Ky. 658, 134 S. W. 1122; *Moore v. Wabash R. Co.* 157 Mo. App. 92, 137 S. W. 5; *Toledo, St. L. & W. R. Co. v. Lander*, 48 Ind. App. 56, 95 N. E. 319; *Lewis v. Rio Grande Western R. Co.* — Utah, —, 123 Pac. 97; *Thomp. Neg.* § 1612.

A person need not be an expert to give his opinion as to the distance a locomotive

—where driver voluntarily stops.

The question of contributory negligence on the part of a driver of an automobile which was struck at a crossing is properly left to the jury where there is positive testimony that the driver stopped, looked, and listened at the proper place before attempting the crossing, and that the approaching train was not then in view. *Witmer v. Bessemer & L. E. R. Co.* 241 Pa. 112, 88 Atl. 314.

And it was also held proper in this case to submit the question of whether the driver exercised due care after being committed to the crossing to the jury. The court said: "It is only in clear cases, where the facts are undisputed and but one inference can be drawn from them that courts can declare as a matter of law a party guilty of contributory negligence. Under our cases there was no imperative duty requiring the driver of the motor car to stop on the tracks of the railroad company after being committed to the crossing, because there might be more danger in stopping than in going ahead. It was his duty to use due care and to proceed cautiously even after being committed to the crossing; but there was no imperative duty either to stop or to go ahead. His duty in this respect depended upon the circumstances of the case and the dangers with which he was confronted. Whether he did all that his duty required him to do depended upon the facts; and unless in a very clear case, it is always the province of the jury to determine the facts. We see nothing in this case so exceptional as to take it out of the ordinary rule. The learned counsel for appellant has called our attention to some cases from other jurisdictions in which a distinction is made between the duty of the driver of a team and the driver of an automobile at a grade crossing. No such distinction has yet been made in any of our cases, and we do not deem it necessary for the purposes of the present case to determine finally whether such a distinction should be made. No matter

whistle can be heard when blown, and a locomotive bell heard when rung.

Thomp. Neg. § 7758; Jones, Ev. 2d ed. § 366; Wigmore, Ev. § 460.

Sanner, J., delivered the opinion of the court:

At about 6:12 P. M. on July 28, 1910, the respondent, while driving a Ford runabout, was struck on a public road crossing between Butte and Anaconda by one of appellant company's trains. His companion was instantly killed and he seriously injured. To recover for such injuries he brought this action, alleging as negligence on the part of appellants that they were running the train at excessive speed, and that they failed to blow the whistle, ring the bell, or give any alarm of its approach. Respondent had a verdict for \$15,000, upon

which judgment was entered. This appeal is from that judgment, and from an order overruling a motion for new trial.

1. It is claimed that the evidence of appellants' failure to sound the whistle or ring the bell was insufficient to take the case to the jury, and that, in the face of positive testimony that the whistle was sounded and the bell rung, the jury was not authorized to find for the respondent. It is quite true that the testimony of the engineer and other employees of the appellant company is positive, and that of one other witness rather ambiguous, to the effect that the bell was rung and the whistle sounded in the regular way at from 50 to 80 rods from the crossing. The respondent, however, testified that, as he approached the crossing and for some time before reaching it, he was alert for any warning, having both looked

what the true rule may be in this respect, under the facts of the case at bar, it was for the jury to say whether the driver of the motor car could have avoided the collision if he had exercised due care after being committed to the crossing."

And the question of contributory negligence on the part of the driver of an automobile is properly left to the jury where he testified that he stopped, looked, and listened, when about 9 feet from the first track at a crossing with which he was unfamiliar, and his testimony was not directly disputed, but was in some measure substantiated. *Bush v. Philadelphia & R. R. Co.* 232 Pa. 327, 81 Atl. 409. The court said: "The law with respect to such cases as this is so clearly expressed in *Ely v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 233, 27 Atl. 970, by the late chief justice, that no other citation of authority is required. It is there said: 'The mere act of stopping does not, it is true, of itself show that he stopped at a proper place, nor that there was not another and better place where he should have stopped again, or that his duty of looking and listening was performed with the proper care and attention; but stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clear that no other inference can properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury.'"

—where engine stops.

In *Hull v. Seattle, R. & S. R. Co.* 60 Wash. 162, 110 Pac. 804, where the motor to the plaintiff's automobile stopped as he was nearing a crossing, and while attempting to restart it the machine ran onto the crossing and stopped, it was held that he owed no absolute duty to stop before attempting to cross, but that if he could ascertain by listening and looking that he could cross in safety, he was entitled to recover. The court said: "The respondent's driver owed

no absolute duty to stop before attempting to cross the appellant's track. If, on approaching the track, he could ascertain by looking and listening that he could cross in safety, he has complied with the rule. Here the driver testified that he traveled parallel to the appellant's track for 6 miles without meeting or being passed by a single car; that on arriving at the track he looked in both directions and listened, and neither saw nor heard a train approaching, and that the time it would take an approaching train to travel over the distances he could see the track gave him plenty of time to cross if no mishap befell his car. The sequel, also, proves his statement to be true. It will be remembered that the car stopped with the rear wheels between the rails, and that the passengers had time to alight after the stopping of the car and proceeded along the track towards the approaching train a considerable distance before the train reached the place of crossing. Under these circumstances it would have been error for the court to have charged the jury that the respondent was guilty of negligence as a matter of law if he did not stop before attempting to cross the track."

And it was further held that the plaintiff was entitled to have his conduct judged by the surrounding circumstances at the time of the accident, and if it appeared to be that of a reasonably prudent person, a recovery might be had. *Ibid.*

In *Carnochan v. Erie R. Co.* 73 Misc. 131, 130 N. Y. Supp. 514, it was held that no recovery could be held for damage done to an automobile which, because of a defect in its machinery, had stopped so near the track that it was struck by a passing train. The questions involved in this case, however, were as to the negligence of the defendant's flagman in giving incorrect information concerning expected trains, and in failing to signal the train which struck the machine to stop.

—crossings where flagmen maintained.

In *Lockridge v. Minneapolis & St. L. R. Co.* — Iowa, —, 140 N. W. 834, it was held

and listened for the approach of a train, and that the whistle was not sounded nor the bell rung. D. M. Canty, who, with his brother and niece, had made the crossing a very few seconds before, and who were only 20 or 30 feet away, whose hearing was good, and who heard the sound of the train as it struck the respondent's machine, testified that he heard no whistle, nor bell, nor other warning of the train's approach; and James A. Canty also testified that he heard no whistle nor bell, though he hears all sounds plainly and distinctly. The niece, Miss Dugan, testified to similar effect.

The sufficiency of the foregoing to raise an issue, and the present contention of appellants against it, are alike settled in *Riley v. Northern P. R. Co.* 36 Mont. 545, 93 Pac. 948. At page 559 of that decision, Mr. Justice Smith, speaking for this court, said: "Appellant affirms that it was proven by the uncontradicted evidence that the bell was ringing, and that there was a headlight

upon the rear of the switch engine. On the part of the defendant there was positive testimony that the bell was ringing and the light burning. The plaintiff's witnesses simply testified that they did not hear any bell or see any light. Appellant argues that this negative testimony is of no weight, in view of the positive testimony opposed to it. Ordinarily, when one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court could not say that it was entitled to less weight than the affirmative testimony."

2. The testimony of respondent tended to show that, while he looked and listened as he approached the crossing, he did not "stop, look, and listen," and the question is presented by appellants whether the driver of an automobile, approaching a railway cross-

that where, under the ordinances of a city, a railroad company was required to and did maintain gates, or a watchman or flagman at a crossing, travelers had a right to presume that when no warning was given to them as they approached, they might proceed with safety.

In this case it was held that the jury might properly find that the driver of an automobile which was run into at a crossing was free from contributory negligence where there was testimony which was in part disputed, that the plaintiff, as he approached the crossing, which he frequently passed, and at which a flagman was maintained, looked and listened, but heard no train and saw no flagman, but that as a train which he did not see until it was upon him was about to strike the machine, a flagman rushed out and tried to push it back. *Ibid.*

And where an automobile, traveling on a frequented thoroughfare, approaches a railroad crossing over which there are many tracks and at which a city ordinance requires the railway company to keep a flagman night and day, and the chauffeur sees no flagman and no flag in front of the first track where he has the right to expect to see him in case a train is approaching, and sees no train, he is not guilty of negligence in proceeding; and where the flagman then appears and gives warning, but only in time to enable the chauffeur to stop on the first track, where he is almost immediately run into by a train, the accident will be attributed to the negligence of the flagman. *Roby v. Kansas City Southern R. Co.* 130 La. 880, 41 L.R.A. (N.S.) 355, 58 So. 696.

Speed.

It is improper to instruct the jury that it was contributory negligence on the part of the driver of an automobile to approach a

railroad crossing in a city at a greater speed than 6 miles an hour, where, under a city ordinance, it was not negligence *per se* to approach such crossing at a speed less than 8 miles an hour. *Texas & P. R. Co. v. Hilgartner*, — Tex. Civ. App. —, 149 S. W. 1091.

Where driver acts in emergency—running machine off crossing planks.

It has been held that the driver of an automobile is negligent in running off the end of a 16-foot planking on an unobstructed railroad crossing on a bright night, when his lamps are all burning, and stalling his machine on the rails. *Nicol v. Oregon-Washington R. & Nav. Co.* 71 Wash. 409, 43 L.R.A. (N.S.) 174, 128 Pac. 628.

Where the driver of an automobile is placed in a position of danger without his fault, his failure to stop his automobile instead of jumping cannot be said to be negligence as a matter of law. *Dickinson v. Eric R. Co.* 81 N. J. L. 464, 37 L.R.A. (N.S.) 150, 81 Atl. 104. The court said: "Where a traveler, without any fault on his part, is placed in a position of imminent peril at a crossing, the law will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer; and this rule is especially applicable where the person is placed in such perilous position by reason of the railroad company's negligence, as in failing to give the proper signals. All that is required of a person in such an emergency is that he act with ordinary care under the circumstances; it being for the jury to determine whether such an emergency existed, and whether the traveler acted with due care."

J. T. W.

ing, is not charged with the absolute duty to "stop, look, and listen." The appellants, conceding that as to other vehicles using a public highway the general rule upon approaching a railway crossing is to exercise such care and caution as might be expected of an ordinarily prudent person under the circumstances, insist that "the duty of an automobile driver, approaching tracks where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping, and where looking, and where listening will be effective, is a positive duty." *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A. (N.S.) 794, 93 C. C. A. 413, 168 Fed. 21; *Brommer v. Pennsylvania R. Co.* 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179 Fed. 577.

Both of the decisions just cited emanated from the circuit court of appeals for the third district, speaking through Judge Buffington, and they proceed upon the mistaken ideas that a railroad has some sort of a paramount right to the use of a public highway crossing, and that whether a citizen using the highway on approaching such crossing must stop, look, and listen depends upon the motive power he is using and its amenability to control; whereas the true rule, as we understand it, is that the citizen has an equal right with the railway company to use the crossing, and the amenability to control of the motive power he is using bears more properly upon how near he may come to the place of danger before taking the precautions that common prudence generally requires. Of these cases nothing further need be said than this: If they are to be taken to hold, in the absence of express statute, that it is contributory negligence, as a matter of law, for the driver of an automobile not to stop, look, and listen before using a highway crossing, without regard to whether ordinary prudence would require such a course, they are contrary in spirit to the rule announced by the superior authority of the Supreme Court of the United States (*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679); are against the weight of general decision (*Texas & P. R. Co. v. Hiltgartner*, — Tex. Civ. App. —, 149 S. W. 1091; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Spencer v. New York C. & H. R. R. Co.* 123 App. Div. 789, 108 N. Y. Supp. 245; *Bonert v. Long Island R. Co.* 145 App. Div. 552, 130 N. Y. Supp. 271; *Hartman v. Chicago, G. W. R. Co.* 132 Iowa, 582, 110 N. W. 10; *Louisville & N. R. Co. v. Lucas*, 30 Ky. L. Rep. 539, 99 S. W. 959; *Vance v. Atchison, T. & S. F. R. Co.* 9 Cal. App. 20, 98 Pac. 41; *Missouri, K. & T. R. Co. v. James*, 55 Tex. Civ. App. 588, 120 S. W. 269; *Chesapeake & O. R. Co. v. 46 L.R.A. (N.S.)*.

Hawkins, — Ky. —, 124 S. W. 836), and are in conflict with the settled rule in this state. (*Mason v. Northern P. R. Co.* 45 Mont. 474, 124 Pac. 271; *Sprague v. Northern P. R. Co.* 40 Mont. 481, 107 Pac. 412; *Hunter v. Montana C. R. Co.* 22 Mont. 525, 57 Pac. 140.)

In the *Sprague Case* appears the following: "Whether, in selecting the point which they did select to stop and listen for approaching trains, Nelson and Chappel exercised ordinary care to make their listening effective, and whether, in doing what they did from that point until the injury occurred, they exercised such care and prudence as reasonable men under like circumstances would have exercised, were questions of fact for the jury to determine;" and in the *Mason Case* this court, disapproving of certain instructions, said: "Neither of these instructions correctly states the law. They imposed too great a burden upon the plaintiff. If such were the law, a person approaching a railroad track would either be obliged to keep a constant lookout in both directions, or it would be incumbent upon him, in order to avoid the imputation of contributory negligence, to stop, if necessary, and look for a train at the last available point, and at the last moment of time, before crossing the track. The law is that one desiring to cross a railroad track must exercise reasonable care for his own safety." We see no reason to change these rules either for or against any class of vehicles in lawful use.

3. The passages just quoted are decisive also of the third contention of appellants, *viz.*: that the particular circumstances required respondent to stop, look, and listen, and that, as he did not stop at all, nor look and listen, where such looking and listening would have revealed the approach of the train, he is *ipso facto* convicted of contributory negligence. The argument, although not so expressed, seems to be that if the respondent's view as he neared the crossing was restricted so that he could not see whether a train was coming, he should have proceeded, with his machine under such control that he could instantly stop, to a point between the walls of the cut and the track where he could see, and there look and govern himself accordingly; or that he should have stopped his machine, gone forward into the cut afoot, and ascertained whether the coast was clear; or, if a train coming from Butte towards the cut was visible, then failure to see it was due to failure to look at the right time and place, and in either case there can be no recovery under the *Sprague* and *Hunter* decisions.

A short review of the salient features of the case will disclose that the matter is not

so easily settled. The respondent was struck by a passenger train which had left Butte shortly before, and was running at not less than 45 nor more than 55 miles an hour. The crossing is in a cut variously estimated at from 8 to 12 feet deep at that point, which cut extends from the crossing eastward about 1,000 feet. The county road east of the crossing follows the general contour, which is about the same as the top of the cut, to a point about 125 feet from the crossing; there the approach to the crossing begins, and it consists of another cut (at a right angle to the railway cut) through which the county road gradually descends from the general level to the level of the track. According to respondent, a train approaching the cut from Butte is visible to the traveler on the county road from where the approach to the crossing begins back to a point one eighth to one-fourth of a mile distant; after proceeding into the approach a little distance, such a train could not be seen, whether in or out of the cut; nor could such a train coming into the cut be seen before the traveler on the county road reached the point above mentioned, one eighth to one-fourth of a mile from the cut; when he reached this place he took "a reasonably long look" to the east for a train and saw nothing; he then looked westward with the like result; he then looked forward, and, being at the approach to the cut, saw the Cauty machine coming towards him; alert then for any warning or sound of a train, anxious also to avoid meeting the Cauty machine on the crossing, he checked his speed, descended slowly and quietly towards the track, saw the other machine pass safely over the track, passed the other machine about 20 or 30 feet from the crossing, and, still listening for a train, reached the track where the accident occurred. He also testified that to see a train, after once entering the approach to the crossing, he would have to proceed to a point where his front wheels would be on the track; that there is a curve in the track where it enters the east end of the cut; and that to stop his car, walk forward to the crossing to view the track, return to the car, and make the crossing, would require from two to five minutes.

By way of maps, profiles, and photographs, there is evidence on behalf of appellants to show that when a passenger train is in the cut, about 6 feet of it projects above the top of the cut. East of the crossing, between the county road and the cut, are a pole fence and the right-of-way fence, built of posts and wire; these to some extent obstruct the view, and while we think that a train drifting downgrade through the cut is visible to one on a level

with the top of the cut whose attention was drawn to it, it would not be obtrusive without some warning. The witness Nick testified that he could stand in the county road at a point 80 feet from the track and still see a passenger train coming from the east; but how much above or below his eyes would be the eyes of the respondent sitting in a Ford runabout does not appear. There was also testimony that the curve in the track just east of the cut is a 3-degree curve; that from the east end of the ties at the crossing to the wall of the cut is 11 feet; that the distance from the front edge of the front wheel to the seat of a Ford runabout is 5 feet 6 inches; and that the width of a passenger coach is 10 feet, so that it extends over either side about 1 foot beyond the end of the ties.

Doubtless the case made by appellants was sufficient to defeat a recovery; but it must be remembered that, if any substantial conflict existed in the evidence, this court will not substitute its views for those of the jury, who were the judges of the weight and credibility of respondent's showing. If they believed that the curve to the east of the cut prevented a view from the crossing much beyond the end of the cut (1,000 feet away), and that it would take the respondent not less than two minutes to stop his machine, go to the track, take his view, return to the machine, and cross, it is quite clear that such a proceeding, unless the train was in the cut, would induce a false rather than a real security, because a train approaching at 45 or 55 miles an hour would traverse the entire visible distance in not to exceed 13 seconds. If the jury believed that it was not feasible for the respondent—either from lack of knowledge or because of the narrow margin of safety as disclosed by the appellants' own measurements—to stop his machine at a point within the cut where he could have a view without getting off, then he could not be convicted of negligence for failure to do that; and if the jury believed that the respondent did, before descending into the cut, take a reasonably long look from a point where he says a view was of any value, the facts that he took that look before, instead of after, his look in the other direction,—which, in due care, he was also bound to take,—and that thereafter, though still listening for the possible approach of a train, he gave some attention to the Cauty machine,—which it was also his duty to avoid, and which he saw pass the track in safety,—would certainly not necessitate the conclusion that he was guilty of contributory negligence in attempting to cross the track.

Crediting the testimony of the engineer

and others that the crossing of the Cauty machine elicited two blasts from the whistle of the train, it might well be said that the respondent, hearing them and nevertheless proceeding, was chargeable with negligence, as a matter of law; but if it be true that the whistle was not sounded then or at all, nor the bell rung, as the respondent and the occupants of the Cauty machine say, then the very passage of Cauty, unchallenged, in the absence of information to the contrary, was some assurance to the respondent that the crossing was safe.

From the views above expressed it follows that no error was committed by the trial court in overruling the motion for nonsuit, or in modifying appellants' offered instructions 2a and 4a, or in refusing appellants' offered instructions 5a and X. The instructions given were undoubtedly correct so far as they went; and if there was any error in failing to more specifically define the care required of the respondent, it is unavailing to the appellants, since no proper instruction on this subject was offered by them. We see nothing in the other rulings complained of to warrant a reversal of this case.

4. We are then brought to the verdict, which appellants assert is unreasonable and excessive. At the time of the accident the respondent was twenty-three years of age, was a stereotyper by trade, having spent several years in learning that business, and was earning \$125 per month. By the injuries received in the accident he is forever barred from again pursuing his trade, and at the time of the trial was earning \$80 per month running a moving picture machine. We have here an established loss of \$45 per month, or \$540 per year, and to purchase an annuity equal to this amount would require approximately \$11,000. In addition to this, the respondent suffered a total loss of earning capacity for about a year. When struck by the train he was thrown 75 feet; his hip socket was fractured; his skull slightly fractured; he sustained other severe external bruises, and suffered internal hemorrhages from the intestines and kidneys; he was unconscious for six or eight hours, confined five weeks to his bed, compelled to use crutches for five or six months, and a cane for three or four months thereafter. It was a year before he walked without help. His pain for several weeks was severe; his nervous system sustained serious shock; he has a displacement of the pelvic bone and of the lower spinal processes, causing atrophy, shortening and partial paralysis of one of his legs, an increased susceptibility to tubercular infection, and other difficulties. For all this he receives the difference be-

tween the amount of the verdict and the proved loss of earning capacity. While the amount awarded may, apart from the circumstances, seem to have been generous, we do not feel authorized to say that it is so excessive as to evince passion and prejudice, or to warrant any action by this court. The judgment and order appealed from are affirmed.

Brantly, Ch. J., and Holloway, J., concur.

Petition for rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY O. ROGERS, Appt.,

v.

HELEN A. ROGERS.

(— N. J. —, 86 Atl. 935.)

Husband and wife — desertion — justification.

1. Under our statute, desertion is justified only when the deserting party has been so offended against as to authorize at his or her instance a decree of divorce or judicial separation, but the guilt of the offending party must appear by clear and satisfactory proof.

Divorce — counter offense — proof.

2. When a defendant in a divorce case pleads a counter matrimonial offense against the petitioner in bar of the suit, the offense so pleaded is not made out unless supported by corroborating evidence the same as though it were made the basis of an application for divorce.

Same — desertion — withholding support.

3. While the support of his wife and children by the petitioner was meager, and possibly not all that he could and should have provided out of such means as he had, nevertheless the mere fact of failure to provide sufficient support for a wife does not constitute desertion by the husband under our statute.

Same — efforts at reconciliation.

4. When a wife deserts her husband, it is his duty to make proper approaches to her and sincere efforts to induce her to return to him, unless it is apparent that such approaches and efforts would be entirely futile.

Headnotes by WALKER, Ch.

Note. — For failure to furnish support as ground of divorce or separation, see note to Carson v. Carson, 43 L.R.A. (N.S.) 255.

For effort by one spouse to induce the other to return home as a condition of desertion by the latter, see note to Hill v. Hill, 39 L.R.A. (N.S.) 1118.

Evidence — sufficiency.

5. Evidence examined, and held to show a wilful, continued, and obstinate desertion by a wife of her husband under such circumstances as excused him from making approaches to her and an effort to induce her to return to him, because it was apparent that any such inducement or effort would have been futile and unavailing.

(April 24, 1913.)

A PPEAL by plaintiff from a decree of the Court of Chancery in defendant's favor in an action for a divorce. Reversed. The facts are stated in the opinion.

Mr. Archibald C. Hart for appellant.

Messrs. Hance & Miller for respondent.

Walker, Ch., delivered the opinion of the court:

Mr. Rogers filed a petition for divorce in the court below, alleging wilful, continued, and obstinate desertion by his wife for the statutory period of two years. She answered, denying the desertion, and averred that she went to the home of her parents in New York city in the month of August, 1908, with their children, and that the petitioner refused to permit her to re-enter their home at Hasbrouck Heights, New Jersey, and barred the house against her; that she had at all times been anxious and willing to return to the petitioner and so informed him, provided he would cease from cruel and inhuman treatment toward her, and cease from treating her as a servant, and permit her to be mistress of the household and rear her children as the wife of the petitioner, to all of which requests the petitioner refused to accede; that after August, 1908 (the time of the separation), the petitioner refused to provide her with money for the support of herself and children; and that she commenced a suit in chancery for such support, which resulted in his agreeing to pay her the sum of \$3 per week for the support of their two children, and that he has continued to pay such weekly sum.

The cause was referred to Vice Chancellor Stevenson, who advised a decree dismissing the husband's petition. In the course of his oral opinion he remarked: "When a man sues his wife for divorce for desertion, and charges her with wilful, continued, and obstinate desertion, he must prove that the desertion had those three characteristics. The burden is upon the husband, the petitioner. He must show by a preponderance of the evidence that his wife was guilty of obstinate desertion, and in my judgment in this case the husband entirely fails. As I have already indicated, the great weight of the evidence

in this case tends to show that there was no such obstinacy on the part of the wife; that if proper approaches had been made to her, if an honest, sincere effort had been made by the husband for a reconciliation, it would have been successful."

We are in accord with the proposition that a party to a suit for divorce, who charges the other with wilful, continued, and obstinate desertion, must prove that charge, and that the burden of proof is cast upon him or her who prefers it. This is axiomatic. It has been so often decided as not to need the citation of authorities to support it.

In this case the defendant left the petitioner, and has remained away from him for more than the statutory period of two years. Was she justified? If not, was the husband obliged to make a proper effort to induce her to return? This, in turn, involves the question whether such inducement would have been futile, and was so understood by the husband.

First. The parties were living in a house owned by the petitioner at Hasbrouck Heights, in this state; and on the morning of August 18, 1908, the defendant went for a visit to her parents in New York city with their two children; the petitioner accompanying them. Before starting, and on the way to New York, they quarreled about money matters. They had had repeated disputes about money, and the petitioner was shown to have been a miserly and penurious man. His income was small, to be sure, and that was a reason for economy, but not for the penuriousness in which he indulged and which amounted to considerable privation to his wife and children.

On cross-examination the defendant was asked what were her real reasons for deserting the petitioner, and she answered that it was because he refused to give her money that he should have given her to run the house with, and his general continued unkind treatment. At an interview with her husband, at her father's house in New York, she agreed to return to him only upon condition that she should have \$30 a month to run the house with, and that they were to occupy separate rooms. She asserted that from the time she made those conditions to the time of giving her testimony her mind on that subject had not changed. She only paid one visit to the Hasbrouck Heights house after she went to her father's in 1908, and that was not to live with her husband, but to take her furniture and belongings away. On the occasion of the petitioner being at the defendant's father's house, her father told the petitioner that if his wife returned to

him they would have to occupy separate rooms, and the defendant in her testimony said that that was the first that was said about separate rooms.

The defendant testified that her husband would not agree to the conditions, and that her father then asked her to state her decision, and she asked the petitioner if he had changed his idea as to how she should run the house, and he said, "No." She then asked him if he would continue to carry the money for the running of the house, and he said, "Yes;" and she asked if she was not to have any if she went back, and if he was to continue to buy the things and pay the bills and he said, "Yes;" he thought he could do it more economically than she could, and she said she would not return under those conditions; and she added that if he changed and she went back, still they would occupy separate rooms.

It should be stated that the defendant's refusal to occupy the same room with her husband was because she suspected him of having some sort of venereal disease, although she admits she did not accuse him of it while living with him. It was only brought to his attention by her father at the interview just adverted to, according to the husband's testimony. The defendant's father testified that he himself said nothing to Rogers about his alleged physical condition; that the subject was not brought up at the conversation in his (witness), house, although his daughter had intimated to him such was the case. He did say that he exacted as a condition of his daughter's going back to her husband that they should occupy separate rooms, and gave as a reason that he understood Mr. Rogers was entirely too passionate a man for his wife under the circumstances, whatever they were. The date of the interview with the father was September 8, 1908; the husband having paid one visit to his wife at her parents between the date of her leaving, August 18, 1908, and that visit was on August 31, 1908. On the 10th of September, 1908, it was that Mrs. Rogers went to her former home and removed her things in the absence of her husband. The petitioner continued to occupy his house from the time of their separation until the filing of his petition in this cause. His wife never returned to him, and he never made any overtures to her for a reconciliation, or endeavored to persuade her to return to him. It must be conceded that Mrs. Rogers left her husband and has remained away from him. She does not deny it. In her answer she seeks to justify it by alleging that her husband had been guilty of cruel and inhuman treatment to-

ward her; that he treated her as a servant, and did not permit her to be mistress of the household and rear her children as his wife; that after the separation he refused to provide her with money for the support of herself and children.

Under our statute, desertion is justified when the deserting party has been so offended against as to authorize at his or her instance a decree for divorce or judicial separation; but the guilt of the offending party must appear by clear and satisfactory proof. *Drayton v. Drayton*, 54 N. J. Eq. 298, 301, 38 Atl. 25; *Suydam v. Suydam*, 79 N. J. Eq. 144, 146, 80 Atl. 1057.

Assuming that the charge of cruelty in the defendant's answer is sufficiently pleaded, and that the pleader intends to charge the extreme cruelty which is cause for divorce *a mensa et thora* under our statute, still it is not proved; that is, the facts testified in support of the allegation do not in and of themselves constitute extreme cruelty. But even if they did, being an affirmative defense, the burden of proving it would be upon the defendant; and, as it amounts to a matrimonial offense pleaded in bar of a suit for divorce, it would have to be supported by corroborating evidence the same as though it were made the basis of an application for divorce. *Letts v. Letts*, 79 N. J. Eq. 630, 632, 82 Atl. 845, Ann. Cas. 1913 A, 1236. The same rule was applied in *Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl. 71.

So far as the question of venereal disease is concerned, the wife only suspected it, and did not accuse her husband of it, much less prove it. Therefore no fact is presented which makes a case of extreme cruelty visited by the husband upon the wife through sexual intercourse while he was so afflicted, and the case does not fall within *Cook v. Cook*, 32 N. J. Eq. 475, 479, and *Crane v. Crane*, 62 N. J. Eq. 21, 26, 49 Atl. 734. As to her father's assertion of the reason for the imposition of the condition under which she might return, namely, that they were to occupy separate rooms because the petitioner was entirely too passionate for his wife, it is sufficient to say that the court is not given to be informed of any facts which might show extreme cruelty arising out of gross abuse of marital rights. The court of chancery in *English v. English*, 27 N. J. Eq. 71, granted a decree of divorce from bed and board forever on the ground of extreme cruelty, consisting mainly in gross abuse by the husband of his marital rights, rendering it unsafe for the wife to cohabit with him or be under his command or control, which decree, however, was reversed in this court

(27 N. J. Eq. 579), but only because it was apprehended that further acts of the same abuse would not be attempted if the wife should return to him (27 N. J. Eq. 585), and the divorce was refused and the bill dismissed, but without prejudice, so that the facts urged in the complaint before the court might be used if the case should again be brought. But the case at bar does not come within this doctrine, for want of proof of any gross abuse of marital rights such as would constitute extreme cruelty.

While the support of his wife and children by the petitioner was meager, and possibly not all that he could and should have provided out of such means as he had, nevertheless the mere fact of failure to provide sufficient support for a wife does not constitute desertion by the husband under our statute. See *Palmer v. Palmer*, 22 N. J. Eq. 88; *Skean v. Skean*, 33 N. J. Eq. 148; *Thomas v. Thomas*, — N. J. Eq. —, 74 Atl. 125, 127.

The learned vice chancellor in the court below lays considerable stress upon the want of proper approaches by the husband to the wife, and the absence of sincere effort on his part to induce a reconciliation and her return.

We, however, think that this cause falls within that class of adjudicated cases which excuse the husband from making an effort in the direction just mentioned, because it is apparent to us from the wife's conduct—her actual desertion of her husband, the imposition of unlawful and unreasonable conditions before she would return, her removing her furniture and belongings from his house in his absence, bringing a suit for alimony shortly after the separation—that any overtures or efforts made by her husband to induce her to return would have been entirely futile. See *Hall v. Hall*, 65 N. J. Eq. 709, 55 Atl. 300; *Sterling v. Sterling*, 71 N. J. Eq. 59, 63 Atl. 548; *Purnell v. Purnell*, — N. J. —, 70 Atl. 187.

The above views lead to a reversal of the decree below and the granting of a final decree of divorce to the petitioner and appellant.

NEW YORK COURT OF APPEALS.

RE ESTATE OF ELIZABETH B. WHITE, Deceased.

(208 N. Y. 64, 101 N. E. 793.)

Succession tax — life estate — death before assessment.

The value for purposes of succession tax of a life estate must be determined by ascertaining its theoretical present value, according to the rule provided by statute, although it falls in before the tax is assessed.

(April 1, 1913.)

APPPEAL by the state comptroller from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing a decree of the Surrogate of Erie County, which confirmed an order fixing the tax on the estate of Elizabeth B. White, deceased, so far as it affected the life estate of Gilbert B. Morgan, a beneficiary under the will. Reversed.

The facts are stated in the opinion.

Mr. Edward N. Mills, for appellant:

There is no absolute right in the individual, at his death, to dispose of his property by will or otherwise; such privilege, when it exists, is created by the civil law.

Knowlton v. Moore, 178 U. S. 85, 44 L. ed. 987, 20 Sup. Ct. Rep. 747; *Re Dows*, 167 N. Y. 231, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439.

The civil law may also regulate the manner of such distribution, and impose such conditions thereon as it may deem proper.

Re Sherman, 153 N. Y. 4, 46 N. E. 1032.

The transfer tax upon the life estate of Gilbert B. Morgan is based on the value of his right to succession, not upon the value of property which later came into his actual possession.

Re Western, 152 N. Y. 102, 46 N. E. 315; *Re Sloane*, 154 N. Y. 109, 47 N. E. 978; *Re Vanderbilt*, 172 N. Y. 69, 64 N. E. 782.

The ascertainment of the value of the taxable interest and the fixing of the tax necessarily take place subsequent to the death; but the guide is the value at the time of death, when the interests were acquired.

Benton v. Wickwire, 54 N. Y. 226; *Re*

Note. — *Basis and method of computing value of life estate or annuity for purposes of succession tax.*

This note is confined strictly to the subject indicated by the title, but includes the question which is a particular phase of that subject, whether in any event a succession tax may be presently assessed against an ordinary life estate when the same is not modified or limited by any provision which makes either the title or the amount of the life estate contingent or defeasible. As implied by the statement just made, the note does not include cases which hold a life estate not presently taxable upon the ground of its unascertainability, due to the existence of such a contingency, as that word is used in the broad sense. An illustration of the cases so excluded is to be found in *Re Surrogate of Cayuga County*, 46 Hun, 657, holding that the right of the wife to whom an estate is devised for life, to impair and diminish the same for any purpose whatever,

Durand, 194 N. Y. 477, 87 N. E. 677; *Re Jones*, 28 Misc. 356, 59 N. Y. Supp. 983; *Re Heller*, N. Y. L. J. 1903.

Mr. Carl H. Smith, for respondent:

A tax should not be imposed upon something never received.

Re Hall, 36 Misc. 618, 73 N. Y. Supp. 1124; *Re Heller*, N. Y. L. J. 1903; *McElroy*, Transfer Tax Law, 2d ed. p. 452; *Re Hutchinson*, 105 App. Div. 487, 94 N. Y. Supp. 354.

The transfer tax law is a statute of special taxation, and must be construed as favorably to the taxed as is consistent.

Re Harbeck, 161 N. Y. 217, 55 N. E. 850; *Re Fayerweather*, 143 N. Y. 114, 38 N. E. 278; *Re Enston*, 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87.

renders the assessment of a collateral inheritance tax under the New York statute of 1885 premature during her life.

By way of further illustration on this point attention is directed to *Herold v. Shanley*, 76 C. C. A. 478, 146 Fed. 20, holding that the mortality tables are improperly used to ascertain the value of the interests of remaindermen under the Federal internal revenue legacy tax, where a devise of the residue of the testator's estate is postponed until death or remarriage of his widow. In this connection the court said that, even if the use of the mortality tables were permissible in a proper case, they should not have been used here, for one of the contingencies contemplated by the will was the remarriage of the widow, and that while the probability of death might perhaps be approximately estimated from the recorded experience of insurance companies, there were as yet no certificates available from which the probability of remarriage might be even conjectured. To the same effect is *Re Millward*, 6 Misc. 425, 27 N. Y. Supp. 286; and *Re Sloane*, 154 N. Y. 109, 47 N. E. 978.

In this connection, see also *Re Roosevelt*, 143 N. Y. 120, 25 L.R.A. 695, 38 N. E. 281, holding that life annuities contingent on survivorship are not subject to a collateral inheritance tax until they vest by the termination of the life on which they are contingent.

Generally—life estate.

From *Re Cornwallis*, 11 Exch. 580, 25 L. J. Exch. N. S. 149, 4 Week. Rep. 711, it appears that in England, at least in the legacy duty act of 36 Geo. III. chap. 52, and the succession duty act of 1853, mortality tables were inserted for the ascertainment of annuities and life estates.

The United States Supreme Court in *United States v. Fidelity Trust Co.* 222 U. S. 158, 56 L. ed. 137, 32 Sup. St. Rep. 59, essentially indorsed the course of the collector of internal revenue in computing the value of a life estate for taxation under the war revenue act of 1898, upon the basis of

Collins, J., delivered the opinion of the court:

The last will and testament of Elizabeth B. White bequeathed the sum of \$200,000 to a trustee, and directed, as a term of the trust, the payment of the interest and income from the trust fund, which remained after certain expenses were paid, to Gilbert B. Morgan, the grandson of the testatrix, during his life. The testatrix died March 2, 1908. The will was admitted to probate April 18, 1910, after a contest. Gilbert B. Morgan died November 8, 1908. Subsequent to the death of the life beneficiary and the probate of the will the proceeding to determine the transfer tax upon the estate was instituted.

Section 230 of the tax law (Consol. Laws

the then theoretical present value, ascertained by the use of the mortality tables. The precise holding in the case was that the entire clear value, so ascertained, of a legacy under a will devising the residuary estate in trust, to pay over to the testator's niece the net income in quarterly payments for life, and not merely so much of such life estate as she had actually received before a certain date, had vested prior to that date in the sense of the provision of another act for the refunding of so much of the succession tax as had been collected on "contingent beneficial interests which shall not have become vested" before the date mentioned.

In *Re Kaas*, 5 Pa. Co. Ct. 583, involving a gift of the net income for life, the court said that, in ascertaining the value of life estates and annuities in obedience to statute, the appraiser should take into consideration commissions of the trustee and other charges which may be incurred, and evidence generally tending to show the probable net income; then the court added that when the probable net income is ascertained, it may then be proper to adopt the standard of the Carlisle tables in fixing the cash value of annuity on that amount, based upon the age of the annuitant and the probable duration of life.

In *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439, the court held simple remainders dependent upon no contingencies presently taxable before the termination of the precedent estate, upon the ground that their value was readily ascertainable by the use of annuity tables.

In *Re Maresi*, 74 App. Div. 76, 77 N. Y. Supp. 76, involving a bequest to the testator's widow of a life estate in the personal property, subject to life annuities in favor of others, the court held that it was proper, in calculating the present value of the widow's life estate, to deduct from the net value of the personal property the present value of the annuities, instead of deducting therefrom the actual amount of principal necessary to produce these annuities; and that the fact that the widow would not, until the annuitant died, receive the income

1909, chap. 60) contains the provision: "The value of every future or limited estate, income, interest, or annuity dependent upon any life or lives in being shall be determined by the rule, method, and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be 5 per centum per annum."

The surrogate's court, affirming the determination of the appraiser, made pursuant to such provision, determined the value of the interest of Gilbert B. Morgan in the estate of the testatrix, in accordance with the valuation of it by the superin-

tendent of insurance, at \$138,809. The appellate division, upon the appeal of the executor, held this erroneous, and remitted the proceeding to the surrogate's court, with the direction that it determine the value of the interest of the life beneficiary according to the actual duration of his life. The principle upon which it rested this decision, as stated in its opinion, was: "The purpose of the statute (§ 230 of the tax law) was to afford a method of valuing an estate or interest not capable at the time of ascertainment with exactness because of the uncertainty attendant upon the duration of an existing life. To such a case the statute clearly applies; but where there is no such uncertainty, the reason for the statute rule does not exist, and, hence, the

on so much of the funds as might be necessary to produce the annuities, did not render such method of computation improper, since § 230 provided that when any property shall be transferred subject to any charge determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing upon the extinction or determination of such charge should be deemed a transfer of property in the same manner as though the person beneficially entitled thereto had then acquired such increase of benefits from the person from whom the title to their respective estates was derived.

In *Re Von Storch*, 7 Pa. Dist. R. 204, the court cited and followed *Re Handley*, 3 Lack. Leg. News 9, as having prescribed the proper method of ascertaining the present value of life estates for the purpose of taxation by computation upon the basis of the annuity tables and 5 per cent.

In *Re Lange*, 55 N. Y. Supp. 750, holding a remainder vested in expectancy presently taxable, the court stated merely that the value of the remainder was properly ascertained by deducting the value of the precedent life estate, which was found and reported by the appraiser, though the method adopted by the appraiser was not shown. To the same effect is *Re Bogert*, 25 Misc. 466, 55 N. Y. Supp. 751.

In *Re Runcie*, 36 Misc. 607, 73 N. Y. Supp. 1120, the court merely remarked in passing that the decision involved a simple life estate, the value of which could be computed as soon as it came into existence.

—annuity.

See also *Re Kaas*, supra.

In *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 114, writ of certiorari denied in 207 U. S. 587, 52 L. ed. 353, 23 Sup. Ct. Rep. 255, it was held that the Federal war revenue act of 1898, relating to "legacies and distributive shares" arising from personal property, did not warrant a tax upon the residuary personal estate of the testator as legacy of the corpus, where an annuity—46 L.R.A. (N.S.)

i. e., a fixed sum, as distinguished from the income of a fund—was directed to be paid to a person for life, out of the total income of the entire residuary estate, real and personal; and that a tax could be enforced only upon the specific payments as they from time to time fell due. The court said that the method adopted by the collector was unauthorized, the statute prescribing no method of valuation, since he did not estimate by life tables the value of a life estate in a designated and ascertained fund, but, by an exercise of his arbitrary judgment, proceeded to create the fund that would produce the income, though it had not been designated by the testator, and then proceeded to value the same by the use of life tables. The court distinguished *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, a case not within the scope of this note, as it does not involve a life estate.

However, the other cases which involve the question take the contrary view without much discussion, and on the apparent assumption that the same rules apply to annuities as to life estates in the strictest sense.

Thus, the Massachusetts supreme court holds that in ascertaining the value of the remainder for succession tax, in a residuary estate from which the testator has directed the payment each year of a sufficient sum to make the income of the life tenant a certain amount, including her private income, if the private income is substantially the same from year to year, the life interest in the residue may be regarded as an annuity for the difference between the private income and the specified sum, which may be valued as of the time of the testator's death in the manner provided by the statute, according to the actuaries' experience tables, at 4 per cent compound interest. *Howe v. Howe*, 179 Mass. 546, 55 L.R.A. 626, 61 N. E. 225.

And in a New Jersey case involving a gift of the residuary estate to the testator's brother, with the direction that he pay to a certain person a certain sum each year for such person's life, the court declared without discussion that the property thus passed was

statute was not intended to apply in such a case." *Re White*, 149 App. Div. 428, 431, 134 N. Y. Supp. 281, 284. Upon this appeal by the comptroller from an order of the appellate division, we are to declare the correct method of valuation.

The tax in question is imposed, as provided in the statute, upon the transfer of, and not upon, the property. It is a tax upon the method by which the interest of the life beneficiary in the estate of the testatrix was transferred to and acquired by him. It is in the nature of an excise tax on the right to and method of transfer. *Re Keeney*, 194 N. Y. 281, 87 N. E. 428. The right to make a testamentary disposition of or the right to inherit property is not an inherent right; nor is it guaranteed

by the fundamental law. Its exercise to any extent depends entirely upon the consent of the legislature as expressed in their enactments. It can withhold or grant the right; and, if it grants it, it may make its exercise and its extent subject to such burdens and requirements as it pleases. Wherein the legislature is silent in the matter of the devolution of property, the courts cannot speak; and as it has spoken, the courts must obey and enforce.

The power of taxation is likewise vested in the legislature as a part of the more general power of making laws; and, except as restrained by the Federal Constitution, its exercise for public purposes is unlimited. The authority under which a tax is collected and the method of its collection lie

an annuity for life, and that its value might properly be fixed by a determination of its worth at the testator's decease, considered in the light of the legatee's probability of life. *Re Rothschild*, 71 N. J. Eq. 210, 63 Atl. 615, affirmed without opinion in 72 N. J. Eq. 435, 65 Atl. 1118.

In *Re Tracy*, 179 N. Y. 501, 72 N. E. 519, involving § 230 of the New York statute set out in *RE WHITE*, the court held that the present value of a life annuity should be ascertained by the use of the standard of mortality employed by the superintendent of insurance, and that the amount of the tax computed thereon should be paid out of the funds set aside for creating the annuity, but that inasmuch as the annuity was payable from the residuary estate, the tax paid upon the annuity should be returned to the residuary estate by deducting from each annual payment of the annuity the proportionate part of such tax, to be ascertained by dividing the amount of the tax paid by the number of years the annuity will probably continue. It is to be observed that it is recited in the statement of facts that the annuity was contingent upon the annuitant remaining as faithful in the service of the testator's daughter as he had been in the testator's service; but such fact seems not to have occurred to the court as affecting the present taxability of the annuities.—at least, such fact seems not to have been urged by counsel.

After life tenant's death.

As in *RE WHITE*, it was held in *Re Jones*, 28 Misc. 356, 50 N. Y. Supp. 983, that the statutory method according to the standard of mortality employed by the superintendent of insurance was the proper method, though the life tenant died before appraisal.

The case of *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512, shows that it is provided in the Massachusetts act of 1891 that in case of an annuity or life estate, the value thereof should be determined by the so-called actuaries' combined experience tables and 4 per cent compound interest. And the Massachusetts court holds that the valuation is to be made in compliance with this provision, although the 46 L.R.A. (N.S.)

life estate terminates before the valuation. *Howe v. Howe*, supra, involving the valuation of the contingent remainder of property devised to an exempt person for life.

So it is held by the district court for the eastern district of Pennsylvania, in *United States v. Farr*, 196 Fed. 990, that the value of a life estate for the purposes of a legacy tax under the Federal war revenue act was properly ascertained by the use of mortality tables duly adopted by the United States; and this although the life tenant died before the expiration of the year after the death of the testator, allowed by the statute for the payment of the tax, which it seems expired before the assessment was made. Apart from the effect of the death of the life tenant, the court relied entirely upon the decision of the United States Supreme Court in *United States v. Fidelity Trust Co.* 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59, upon the propriety generally of using the mortality table.

However, the contrary was held by the circuit court of appeals for the third circuit in *Herold v. Kahn*, 86 C. C. A. 598, 159 Fed. 608, the court declaring that the ascertainment of the present value by the use of mortality tables could not be supported, notwithstanding the death of the life tenant was not known at the time of the assessment. But it is to be observed that the decision in *Herold v. Kahn* antedates those in *United States v. Farr* and *United States v. Fidelity Trust Co.* supra.

And in *Re Hall*, 36 Misc. 618, 73 N. Y. Supp. 1124, the court, in appraising a remainder for the purpose of a tax, after the death of the life tenant, refused to follow *Re Jones*, supra, and apply the statutory method, upon the grounds that the life tenant outlived her expectancy, and that the remaindermen were not ascertainable until her death, that the appraisal of the remainder had therefore been postponed until her death, and that the life estate created consisted in an annuity, it being provided that the trustees should use the principal to make up the fixed income in case of a deficiency, and the trustees having necessarily invaded the principal for this

in the discretion of and must be prescribed by the legislature. *Gautier v. Ditmar*, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913 C, 960. The proper inquiry, therefore, is: What method of determining the value of the interest of the life beneficiary does the statute prescribe?

At the commencement of the proceeding to determine the tax, §§ 220 and 221 of the tax law fixed the measure of the amount of the tax. Thereafter those sections were amended and § 221a was added. Laws 1911, chap. 732, § 3. Under those sections the true test by which the tax is to be measured is the value of the interest or estate transferred at the time of the transfer thereof. *Re Sloane*, 154 N. Y. 109, 47 N. E. 978. The interest of the life beneficiary accrued on the death of the testatrix, and its value as of the time of that occurrence is the sum to which the rate per centum as fixed by the statute should be applied, and under the provision within § 222 the tax then became due and payable. Inasmuch as it became due and payable at the time of the transfer, or at the death of the testatrix, it would seem to follow, logically and necessarily, that the amount of it should be determined upon the conditions then existing. The legislature enacted that such determination should be made through the use of the rule prescribed in and by the language of § 230, already quoted. This provision is mandatory in its language, and the statute contains no other applicable or

intended to apply to this case. The language is clear and its meaning certain. The court has not the power to declare that it was not intended to apply to this case, and to modify the rule it states or create another. Indeed, we may well believe that the legislature, when creating it, contemplated the precise conditions here existing. They are neither strange nor beyond reasonable expectation. It is commonly known that frequently the actual imposition of the tax is delayed by protracted litigation or other causes, and that the lives of life tenants may fall far short of or extend beyond the periods fixed by the mortality tables. In harmony with such knowledge, and indicative that it existed, is the further clause of § 230, as follows: "Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting."

The rule promulgated by the legislature effects certainty and uniformity which the principle adopted by the appellate division would tend to destroy, because classes of facts might be found to exist by an appraiser and surrogate's court, which, if permitted application, would affect the determination of the tax. While in this case the rule works to the advantage of the state, inasmuch as the remainder has passed to a religious corporation exempt from the tax, such manifestly is not its necessary or uni-

purpose. The court held that the value of the remainder should be ascertained upon the basis of the actual duration of the life tenant's life.

Effect of life tenant's poor health, etc.

The Tennessee court holds that where the statute provides that the computation shall be made by the Carlisle life tables "whenever the use of life tables is necessary or applicable," said tables are not conclusive and should be supplemented by evidence as to the age, habits, and health of the person whose expectations of life is being considered; and that since the annuitant was in a low state of health and incurable, it was improper to use the mortality tables; at least, to the extent of making them the sole test. *Crenshaw v. Knight*, — Tenn. —, 150 S. W. 468. The court stated that the legislature, in inserting the quoted words in the statute, must have had in mind the general principle which, as stated in 16 Cyc. 616, requires the computation of the probable duration of a life estate to be based upon tables of life expectancy, taking into consideration the state of the tenant's health and other circumstances of the particular case.

This idea underlies *Re Goldstein*, 14 W. N. C. 176, where the court, after stating 46 L.R.A. (N.S.)

that the Pennsylvania act of 1858 left it to the individual register to determine the mode in each case as to appraising the present value of life estates and annuities, said: "We believe that in most of our counties, the Carlisle tables are resorted to for determining the average duration of human life, and through that the present value of a continuing legacy. But it is manifest that a calculation based upon those tables, and into which no element drawn from the circumstances of any single case is allowed to enter, must often result grotesquely. That calculation would show no difference in the chances of life between the man of twenty-five years, stricken with paralysis, and the trained athlete of the same age in robust health."

On the contrary, in *Re Robertson*, 5 Dem. 92, in ascertaining the value of a life estate for taxation under the statute of 1885, whose language is not set out, the court held that such an estate should be valued according to the rules of the supreme court, which involved the use of life tables to show the probable duration of life, and that the result could not be varied because the physical condition of the life tenant made it unlikely that she would live during the period indicated as her expectancy.

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form result, and it is not subject to criticism as unjust and harsh.

The order of the Appellate Division and the decree of the Surrogate's Court made thereon should be reversed, and the original decree of the Surrogate's Court reinstated with costs in both courts.

Cullen, Ch. J., and Werner, Willard Bartlett, Hiscock, Chase, and Hogan, JJ., concur.

NEW YORK COURT OF APPEALS.

RE SETTLEMENT OF ACCOUNTS OF ALICE D. WILLIAMS et al., Exrs., etc., of William Williams, Deceased.

(208 N. Y. 32, 101 N. E. 853.)

Judgment — on foreign judgment for alimony — effect.

The recovery of a judgment on a foreign judgment for alimony does not merge the latter so as to take the debt for the second judgment out of the operation of the bankruptcy act, which exempts debts due for support of wife from discharge.

(March 25, 1913.)

A PPEAL by the executors of William Williams, deceased, from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a decree of the surrogate for Monroe County disallowing a claim which had been filed against the estate for alimony under a decree of divorce. Affirmed.

The order of the appellate division granting leave to appeal to this court certifies that in its opinion the following questions of law are involved which ought to be reviewed in this court, *viz.*:

(1) Was the South Dakota decree merged in or superseded by the judgment recovered in this state on February 17, 1894?

(2) Did the discharge in bankruptcy release decedent, William Williams, from liability under the New York judgment?

(3) Should the surrogate, on the papers and proofs before him, have allowed the claim of Eliza T. Williams?

Mr. Hugh Satterlee, with Messrs. McGuire & Wood and Henry D. Shedd, for appellant:

Note.—Upon the question whether a judgment rendered in one state upon a judgment of a sister state operates as a merger of the latter, see note to Lilly-Brackett Co. v. Sonneman, 42 L.R.A. (N.S.) 360. In this connection attention is also called to cases cited in the note to Minkus v. Armstrong, 12 L.R.A. (N.S.) 873, holding that a judgment rendered in one state under a penal statute of that state does not merge so as to prevent the court of another state from giving effect to the general rule that the court of one state will 46 L.R.A. (N.S.)

The discharge in bankruptcy released decedent, William Williams, from liability under the New York judgment.

Barber v. Barber, 21 How. 582, 16 L. ed. 226; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Lynde v. Lynde, 41 App. Div. 280, 58 N. Y. Supp. 567, 162 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Wood v. Wood, 7 Misc. 579, 28 N. Y. Supp. 154; Arrington v. Arrington, 10 Am. Bankr. Rep. 103; Fite v. Fite, 5 Am. Bankr. Rep. 461; Gutta Percha & R. Mfg. Co. v. Houston, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402; Beach v. Beach, 29 Hun, 181.

The South Dakota decree was merged in and superseded by the judgment recovered in this state on February 17, 1894.

Davies v. New York, 93 N. Y. 250; Carr v. Rischer, 119 N. Y. 117, 23 N. E. 296; Lytle v. Crawford, 69 App. Div. 273, 74 N. Y. Supp. 660; Goodrich v. Dunbar, 17 Barb. 644; Purdy v. Doyle, 1 Paige, 558; Gould v. Hayden, 63 Ind. 443.

Mr. James M. E. O'Grady, for respondent Eliza T. Williams.

The New York judgment based upon the South Dakota decree for divorce and alimony was not discharged in the bankruptcy proceedings of William Williams.

Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; Menzie v. Anderson, 65 Ind. 239; Noyes v. Hubbard, 64 Vt. 302, 15 L.R.A. 394, 33 Am. St. Rep. 928, 23 Atl. 727; Romaine v. Chauncey, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826; Barclay v. Barclay, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636; Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Barber v. Barber, 21 How. 582, 16 L. ed. 226.

There was no merger of the Dakota decree for divorce and alimony and the New York state judgment.

not enforce the penal laws of another. Perhaps in this connection attention ought to be called to the case of Fauntleroy v. Lum, 52 L. ed. U. S. 1039, which reveals a sharp conflict of views among the members of the Supreme Court as to the right of a court of one state to go behind a judgment rendered in another in order to inquire into the validity of the claim upon which it was based. The judgment involved in that case, however, was not rendered under a penal statute.

1474; *Maisner v. Maisner*, 62 App. Div. 286, 70 N. Y. Supp. 1107; *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 326.

Chase, J., delivered the opinion of the court:

The testator died September 14, 1904. This is a proceeding brought in the surrogate's court for a final judicial settlement of the accounts of the executors of the last will and testament of the testator. The respondent, in 1892, was the wife of the testator. In that year, in a contested action in the circuit court in the state of South Dakota, she recovered a judgment of absolute divorce against him, and in the judgment was awarded for alimony and costs \$32,704.98. In 1894, in a contested action upon said judgment in this state, in which action the issues involved in said action in South Dakota were alleged and shown, she recovered a judgment against him of \$35,765.46. In 1899 the testator filed a petition in an involuntary bankruptcy proceeding in the United States district court for the northern district of New York. In said petition and the schedules made a part thereof, he stated that his entire indebtedness consisted of two claims against him, one being a note of \$500 given for the purchase price of certain stock which he had pledged as collateral security for the payment of said note, and the other being the claim of the respondent, therein described as follows: "Eliza T. Williams, Rochester, N. Y. This debt is in a judgment recovered in her favor February 17, 1894, and docketed in Monroe county clerk's office, and the consideration of the judgment was a judgment recovered in South Dakota for counsel fee and alimony in an action in that state for a divorce, amounting to \$35,765.46." No assets were received by the trustee in bankruptcy. The testator was adjudged a bankrupt, and on March 15, 1900, he was discharged from all of his debts which were provable in bankruptcy. The respondent presented to the executors a verified claim, in which she described said judgment rendered in this state, and stated that the same was due and owing to her as "being in the nature of a judgment for alimony." The claim was rejected by the executors, and in this proceeding the judgment roll in the said action in South Dakota, and also the judgment roll in the said action in this state, were received in evidence without objection. It was conceded that said judgments had not been paid, but the executors insisted that the New York judgment had been discharged by the proceeding in bankruptcy. The sur- 46 L.R.A.(N.S.)

rogate by the decree entered herein disallowed the respondent's claim.

It was found as a fact by the surrogate that the judgment recovered in this state was an effort and endeavor on the part of the respondent to enforce the judgment of the circuit court of South Dakota. According to the weight of authority, the recovery of the judgment in this state was not a discharge of the South Dakota judgment, and it was not merged in the judgment so recovered in this state.

It may be inconvenient that two judgments should subsist in the same state against the same person on the same judgment, but no such inconvenience can exist in the case of judgments rendered in different states, and there is no sufficient reason for the application of the purely technical doctrine of merger subversive of substantial justice, as it would be in such cases. *Story, Conf. L. 8th ed. § 599*, note a; *Black, Judgm. 2d ed. § 864*.

It is claimed by the appellant, that, admitting that the judgment recovered by the respondent in South Dakota was to enforce a duty enjoined upon the testator by the marital relation, the judgment in this state was purely a judgment for debt represented by the amount of the judgment entered in South Dakota upon which the action was brought.

The bankruptcy statute, as it has existed since 1903, expressly provides that alimony due or to become due for maintenance or support of wife or child is exempt from discharge under Bankr. act July 1, 1898, chap. 541, § 17, 30 Stat. at L. 550, 551, U. S. Comp. Stat. 1901, p. 3428, as amended by act Feb. 5, 1903, chap. 487, § 5, 32 Stat. at L. 798, U. S. Comp. Stat. Supp. 1911, p. 1496. Although there was no such express exemption in the bankruptcy statute prior to the amendment in 1903, that amendment was merely declaratory of the true meaning and sense of the statute as originally enacted. *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 300, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265. In *Audubon v. Shufeldt*, 181 U. S. 575, 577, 45 L. ed. 1009, 1010, 21 Sup. Ct. Rep. 735, 736, the court say: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which

is entitled to full faith and credit in another state, and may therefore be there enforced by suit. *Barber v. Barber* (1858) 21 How. 582, 16 L. ed. 226; *Lynde v. Lynde* (1901) 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555. But its obligation in that respect does not affect its nature. In other respects alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction. . . . The result is that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy, or barred by the discharge."

The decision in the Audubon Case is not dependent upon authority of the court, which awarded the alimony, to amend the judgment therefor as the circumstances of the parties may require.

In *Wetmore v. Markoe*, 196 U. S. 68, 71, 49 L. ed. 390, 391, 25 Sup. Ct. Rep. 172, 173, 2 Ann. Cas. 265, the court say: "It is conceded in argument by counsel for the plaintiff in error that this case would be within the decision of this court in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, if the judgment for alimony had been rendered in a court having control over the decree, with power to amend or alter the same. It is insisted, however, that, there being in this case no reservation of the right to change or modify the decree, it has become an absolute judgment beyond the power of the court to alter or amend, and is therefore discharged by the bankruptcy proceedings. *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663; *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123. . . . The precise question there is, Is such a judgment as the one here under consideration a debt within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment. *Boynton v. Ball*, 121 U. S. 457, 466, 30 L. ed. 985, 987, 7 Sup. Ct. Rep. 981. . . . The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character notwithstanding the judgment. We 46 L.R.A. (N.S.)

think the reasoning of the Audubon Case recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty. 46 L.R.A. (N.S.)

not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. . . . In the case of *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826, it was held that alimony was awarded not in the payment of a debt, but in the performance of the general duty of the husband to support the wife. . . . While it is true in this case the obligation has become fixed by an unalterable decree, so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father."

In the proceeding now before us, assuming that the surrogate had power to pass upon the question whether the respondent's claim had been discharged by the bankruptcy proceeding, the facts were before the court, and looking beneath the judgments it appears that the foundation upon which the respondent's claim rests is the alimony decreed by the South Dakota court to be paid by the testator to the respondent. The alimony was due in the form of a judgment entered in the legal method of enforcing the testator's obligation. Even if we give to the appellant's argument all the force and effect that he claims for it, the judgment rendered in South Dakota was not discharged by the decree in bankruptcy. The inconsistent and absurd results that would arise from holding that the New York judgment was discharged by the decree in bankruptcy, while the South Dakota judgment remained in full force and effect, require that the New York judgment should not be discharged unless the South Dakota judgment upon which it is founded is at the same time discharged.

A decree in bankruptcy proceedings should not be held to be a discharge of a judgment in one state unless it, at the same time, is held to be a discharge of any and all judgments of other states, which are founded primarily upon the same debt or duty, and which have such a relation to each other that a payment of one would result in a

defense to or extinguishment of the others.

The order appealed from should be affirmed, with costs payable out of the estate. First question certified should be answered, not within the purview of the bankruptcy act; second question certified should be answered in the negative; and the third question certified should be answered in the affirmative.

Cullen, Ch. J., and Werner, Willard Bartlett, Hiscock, Collin, and Hogan, JJ., concur.

OREGON SUPREME COURT.

F. M. GREIG, Trustee, etc., of Howard N. Ford, Bankrupt, Appt.,
v.

C. C. MUELLER, Trustee, etc., of First National Bank of Vale et al., Respts.

(— Or. —, 133 Pac. 94.)

Mortgage — consideration — pre-existing debt.

1. A pre-existing debt is a sufficient consideration for a mortgage given to secure it. Same — for benefit of mortgagor — validity.

2. A chattel mortgage given to a creditor who has collateral security with which he is satisfied, for the purpose of enabling the mortgagor to force a settlement with another creditor, is void where the mortgagor is permitted to continue his business without accounting to the mortgagee for sales which he makes of the mortgaged property.

(June 10, 1913.)

APPEAL by plaintiff from a judgment of the Circuit Court for Malheur County in defendants' favor in a proceeding to cancel a chattel mortgage alleged to have been executed in fraud of the bankrupt's creditors. Reversed.

Statement by Eakin, J.:

Howard H. Ford, a dealer in autos, auto goods, and sundries, in connection with his auto repair shop, being in failing circumstances, was adjudged a bankrupt. The plaintiff was appointed assignee of his estate, and as such brought this suit to have canceled a certain chattel mortgage given by Ford to Mueller for the benefit of the defendants, the First National Bank of Vale,

Note. — For the validity of a chattel mortgage of stock of merchandise as affected by a provision or agreement giving the mortgagor possession with power of sale, see notes to Ephriam v. Kelleher, 18 L.R.A. 604, and Gilbert v. Peppers, 36 L.R.A. (N.S.) 1181.

The effect of the mortgagee's consent to the sale of property by the mortgagor after the mortgage is given as a waiver of the lien, is treated in the note to Carr v. Brawley, 43 L.R.A. (N.S.) 302.

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hereinafter referred to as Vale bank, and the First National Bank of Ontario, hereinafter referred to as the Ontario bank. The mortgage was given on May 11, 1911, at which time Ford was indebted to the Vale bank in the sum of \$8,700 as evidenced by certain promissory notes and overdrafts, and to the Ontario bank in the sum of \$3,500. New notes were executed by Ford to Mueller for said amounts secured by the said mortgage. The mortgage covered "three 40-horse power Oakland automobiles; one 30-horse power Oakland touring car; one 30 horse power Oakland roadster; one 40x45 horse power Pierce Arrow touring car; one lathe, one drill press, one electric motor, two gasoline tanks, of about 300 and 500 gallon capacity, respectively; all tools, fixtures, appliances, and all stock in trade, goods, wares, and merchandise, and sundries . . . including all furniture and furnishings, office safe . . . all of the foregoing mentioned and described property now being in that certain brick building on the east side of the Main street in Ontario . . . occupied by the party of the first part under the name and style of Ontario Auto Company. . . ." It is provided in the mortgage that, "and these presents are on the express condition that if the said party of the first part, his executors, administrators, and assigns shall well and truly account on the third Saturday of each and every month hereafter during the life of these presents unto the said party of the second part . . . for all of the receipts of said business, and pay over the net profits thereof after the running expenses thereof shall have been paid, as may be approved by the party of the second part, and the replacement of said stock shall have been provided for in the pleasure of the said party of the second part . . . then these presents shall be void." At the time of the execution of the mortgage Ford was largely indebted to the Oakland Motor Car Company, of Detroit, Michigan. It appears that one purpose of Ford in making the mortgage was to put himself in a position that he might force a satisfactory compromise or settlement with the Oakland Motor Car Company, as well as to secure the mortgagees. Ford made two informal reports under the mortgage to Mueller, which were indefinite and incomplete, but did not pay over any of the proceeds of the business, and continued to sell the goods at retail in the usual way, keeping no specific account of his transactions. He paid his personal expenses as well as the expenses of the business out of the receipts, but kept no account thereof. The Ontario bank was made a defendant, but disclaims any interest in said mortgage. The Vale bank answered, setting up the notes of Ford to Mueller in

the sum of \$6,700 as given for its benefit for a pre-existing debt, and that they, with the mortgage, were taken in Mueller's name for the benefit of the said Vale bank. Upon the trial the court found that the mortgage was a valid, subsisting lien in defendant's favor, enumerating the items of goods covered by the mortgage as consisting of more than 400 items, and adjudged that plaintiff is not entitled to any relief. Plaintiff appeals.

Messrs. McCulloch & Eckhardt and H. C. Eastham, for appellant:

Where a mortgage is designed and made for the benefit of the mortgagor, to enable him to continue in business by placing his property beyond the reach of legal process, it is void as to creditors.

Sabin v. Columbia River Lumber & Fuel Co. 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692, 35 Pac. 854; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; Lewiston Nat. Bank v. Martin, 2 Idaho, 734, 23 Pac. 920; Brown v. Barber, 47 Kan. 527, 28 Pac. 184; Jacobs v. Ervin, 9 Or. 52; Ryan v. Rogers, 14 Idaho, 309, 94 Pac. 427; Humphrey v. Mayfield, 63 Kan. 208, 65 Pac. 234; Smith v. Epley, 55 Kan. 71, 39 Pac. 1016; Wilson v. Voight, 9 Colo. 614, 13 Pac. 726; Brasher v. Christophe, 10 Colo. 284, 15 Pac. 403; 14 Am. & Eng. Enc. Law, 2d ed. p. 371.

Where it appears, either on the face of the mortgage or by parol, that the mortgagee of personal property has given the mortgagor an unlimited power to dispose of the property mortgaged for the use of the mortgagor, then the mortgage is void as to creditors.

Orton v. Orton, 7 Or. 482, 33 Am. Rep. 717; Pabst Brewing Co. v. Butchart, 67 Minn. 191, 64 Am. St. Rep. 408, 69 N. W. 809; Bremer v. Fleckenstein, 9 Or. 266; Second Nat. Bank v. Hunt, 11 Wall. 392, 20 L. ed. 190; Brooks v. Bank of Beaver City, 82 Kan. 597, 109 Pac. 409; Leser v. Glaser, 32 Kan. 546, 4 Pac. 1026; Hangen v. Hachemeister, 114 N. Y. 566, 5 L.R.A. 137, 11 Am. St. Rep. 691, 21 N. E. 1046; Black v. Fuller, 4 Neb. (Unof.) 303, 93 N. W. 1010; Leopold v. Silverman, 7 Mont. 266, 16 Pac. 580; Mandeville v. Avery, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951; Eckman v. Munnerlyn, 32 Fla. 367, 37 Am. St. Rep. 109, 13 So. 922; Davenport v. Foulke, 68 Ind. 382, 34 Am. Rep. 265; Voorhis v. Langsdorf, 31 Mo. 451; Mobley v. Letts, 61 Ind. 11; Richardson v. Jones, 56 Kan. 501, 54 Am. St. Rep. 594, 43 Pac. 1127; Jones, Chat. Mortg. § 422; Leser v. Glaser, 32 Kan. 546, 4 Pac. 1026; Spiegelberg v. Hersch, 3 N. M. 281, 4 Pac. 705; Wineburgh v. Schaer, 2 Wash. Terr. 328, 5 Pac. 299.

If the mortgagee has an agreement with 46 L.R.A. (N.S.)

the mortgagor not to sell any of the mortgaged property, but, disregarding this agreement, the mortgagor did sell portions of the mortgaged property and apply the proceeds to his own use, the mortgagee by his silence permitting this to be done, the inference is that the sales were made with the consent of the mortgagee, and renders the mortgage void.

Aiken v. Pascall, 19 Or. 495, 24 Pac. 1039; Eckman v. Munnerlyn, 32 Fla. 367, 37 Am. St. Rep. 109, 13 So. 922; Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. 696; New v. Sailors, 114 Ind. 407, 5 Am. St. Rep. 632, 16 N. E. 609; Edgell v. Hart, 13 Barb. 380, affirmed in 9 N. Y. 213, 59 Am. Dec. 532; Byrd v. Forbes, 3 Wash. Terr. 318, 13 Pac. 715; Standard Implement Co. v. Schultz, 45 Kan. 52, 25 Pac. 625; McKibbin v. Brigham, 18 Utah, 78, 55 Pac. 66; Wile v. Butler, 4 Colo. App. 84, 34 Pac. 1110; Wineburgh v. Schaer, 2 Wash. Terr. 328, 5 Pac. 299; Spiegelberg v. Hersch, 3 N. M. 281, 4 Pac. 705.

If a chattel mortgage is given bona fide, and the parties, by their subsequent treatment of it and the property covered by it, convert it into an instrument calculated to effectuate the same purpose, it is none the less fraudulent and void from the time such purpose is promoted.

Sabin v. Wilkins, 31 Or. 457, 37 L.R.A. 465, 48 Pac. 425; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; First Nat. Bank v. Caperton, 74 Miss. 857, 60 Am. St. Rep. 540, 22 So. 60; 14 Am. & Eng. Enc. Law, 2d ed. 371; Fisher v. Kelly, 30 Or. 13, 46 Pac. 146; Harbison v. Tufts, 1 Colo. App. 140, 27 Pac. 1014; Swiggett v. Dodson, 38 Kan. 702, 17 Pac. 594; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; Buckstaff Bros. Mfg. Co. v. Snyder, 54 Neb. 538, 74 N. W. 863; Paxton v. Smith, 41 Neb. 56, 59 N. W. 690; Gregory v. Whedon, 8 Neb. 373, 1 N. W. 309.

A mortgage of an entire stock of goods, which includes all others of like nature that may be put in the store and be on hand when default is made, the mortgagor remaining in possession and selling in the usual course of business and making purchases to replenish the stock, is fraudulent as to creditors.

Harman v. Hoskins, 56 Miss. 142; Simmons v. Jenkins, 76 Ill. 479; Putnam v. Osgood, 51 N. H. 192; 14 Am. & Eng. Enc. Law, 2d ed. 371; Wilson v. Voight, 9 Colo. 614, 13 Pac. 726; Harbison v. Tufts, 1 Colo. App. 140, 27 Pac. 1014; Paxton v. Smith, 41 Neb. 56, 59 N. W. 690; Griawold v. Sheldon, 4 N. Y. 581; Gregory v. Whedon, 8 Neb. 373, 1 N. W. 309; Hall v. Johnson, 21 Colo. 414, 42 Pac. 661; Roberts v. Johnson, 5 Colo. App. 406, 39 Pac. 596.

Mr. C. M. Orandall, for respondents:

Fraud is never presumed, and must be distinctly alleged.

9 Enc. Pl. & Pr. 684; Keel v. Levy, 19 Or. 460, 24 Pac. 253.

Before a creditor can maintain a bill to set aside a fraudulent conveyance of his debtor, he must either establish his claim by a judgment, or acquire a lien by attachment.

Dawson v. Coffey, 12 Or. 513, 8 Pac. 838; Dawson v. Sims, 14 Or. 561, 13 Pac. 506; Matlock v. Babb, 31 Or. 516, 49 Pac. 873; Fleischner v. First Nat. Bank, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; Leavengood v. McGee, 50 Or. 233, 91 Pac. 453.

Subsequent creditors must show actual fraud against them.

Wilson v. Stevens, 129 Ala. 630, 87 Am. St. Rep. 86, 29 So. 678; Weaver v. Owens, 16 Or. 301, 18 Pac. 579; Leavengood v. McGee, 50 Or. 233, 91 Pac. 453; Williams v. Kemper, 99 Minn. 301, 109 N. W. 242; Seed v. Jennings, 47 Or. 464, 83 Pac. 872; Rike v. Ryan, 147 Ala. 497, 41 So. 959; Simmons v. Ingram, 60 Miss. 886; Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614; Tunison v. Chamblin, 88 Ill. 378; Edgerly v. First Nat. Bank, 30 Ill. App. 425; Sweet v. Dean, 43 Ill. App. 650; Voorhis v. Michaelis, 45 Kan. 255, 25 Pac. 502; Hesser v. Black, 5 Mart. N. S. 96; Henry v. Hyde, 5 Mart. N. S. 633; Mercer v. Andrews, 2 La. 538; Morgan v. Davis, 4 La. 141; Brown v. Ferguson, 4 La. 257; Brunet v. Duvergis, 5 La. 124; Matthai v. Heather, 57 Md. 483; Burne v. Kunzman, — N. J. Eq. —, 19 Atl. 667; Hopson v. Payne, 7 Mich. 334; Robinson v. Von Dolcke, 3 Ohio Dec. Reprint, 107; Nicholas v. Ward, 1 Head, 323, 73 Am. Dec. 177; Hickman v. Perrin, 6 Coldw. 135; Hall v. Moriarity, 57 Mich. 345, 24 N. W. 96; Stallor v. Kirkpatrick, 1 Monaghan (Pa.) 486.

A voluntary conveyance is valid as to subsequent creditors unless secret benefit is reserved to the transferrer.

Hesse v. Barrett, 41 Or. 202, 68 Pac. 751; Jones, Chat. Mortg. 5th ed. § 346a; Blakely Printing Co. v. Pease, 95 Ill. App. 341; Allen v. Lyness, 81 Conn. 626, 71 Atl. 936; Stumph v. Bruner, 89 Ind. 556.

A debtor may prefer one creditor to exclusion of others.

Lehrenkrauss v. Bonnell, 199 N. Y. 240, 92 N. E. 637; Bamberger v. Schoolfield, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; Corry v. Shea, 144 Wis. 135, 128 N. W. 892, Ann. Cas. 1912 A, 1154; Levy v. Williams, 79 Ala. 171; Bates v. Vandiver, 102 Ala. 249, 14 So. 631; Bray v. Ely, 105 Ala. 553, 17 So. 180; Cook v. Thornton, 109 Ala. 523, 46 L.R.A. (N.S.)

20 So. 14; Jolly v. Kyle, 27 Or. 95, 39 Pac. 999; Sabin v. Columbia River Lumber & Fuel Co. 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692, 35 Pac. 854; Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805.

Transferees must participate in intent to defraud others to render conveyance void as to them.

Pritz v. Jones, 117 App. Div. 643, 102 N. Y. Supp. 549; Sabin v. Columbia River Lumber & Fuel Co. 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692, 35 Pac. 854; Currie v. Bowman, 25 Or. 364, 35 Pac. 848; Mapes v. Burns, 72 Mo. App. 411; Esselgruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Grosshans v. Gold, 49 Neb. 599, 68 N. W. 1031; Hyde v. Bloomingdale, 23 Misc. 728, 51 N. Y. Supp. 1025; Watts v. Dubois, — Tex. Civ. App. —, 66 S. W. 698; Koch v. Peters, 97 Wis. 492, 73 N. W. 25; Carey v. Dyer, 97 Wis. 554, 73 N. W. 29; H. B. Claflin Co. v. Grashorn, 99 Wis. 356, 74 N. W. 783; Foster v. McAlester, 52 C. C. A. 107, 114 Fed. 145; Baldwin v. LaFayette Land Co. 62 Fla. 129, 56 So. 943; National Surety Co. v. Udd, 65 Wash. 471, 118 Pac. 347.

Mortgage of future property is valid in equity.

6 Cyc. 1052; 5 Am. & Eng. Enc. Law, 982; Jones, Chat. Mortg. 5th ed. § 170; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Re Sentenne & G. Co. 120 Fed. 436.

Eakin, J., delivered the opinion of the court:

It is first contended that defendant parted with no consideration for the mortgage at the time of its execution. That contention may be briefly answered by the statement that a pre-existing debt secured by mortgage is a sufficient consideration for it. Currie v. Bowman, 25 Or. 364, 35 Pac. 848; Jolly v. Kyle, 27 Or. 95, 39 Pac. 999; Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; Hesse v. Barrett, 41 Or. 202, 68 Pac. 751.

It is next claimed that Ford made the mortgage for the purpose of hindering and delaying creditors. According to Ford's own statement he feared trouble with the Oakland Motor Car Company, which held a claim against him for about \$8,000; and for the purpose of getting a settlement with it he proposed to the Vale bank and to the Ontario bank that, in order to protect them, he would give them a chattel mortgage. He says that neither the Vale bank nor the Ontario bank requested the mortgage. The Ontario bank did not agree to accept it, but said they were satisfied with the paper they had; that Monroe, the cashier of the Vale bank, said, "He was willing to (accept it)

if it was any benefit to me,"—thus showing a fraudulent purpose on the part of Ford, which was acquiesced in by the Vale bank. Monroe admits knowledge of Ford's purpose, and acquiesced in the mortgage; and although the mortgage contains no reservation in favor of Ford, and is in form valid, it is clear that the Vale bank nominally accepted the mortgage to benefit Ford, and thereafter, with a tacit understanding, permitted him to continue the business unrestrained and for his own benefit. It is said in *Sabin v. Columbia River Lumber & Fuel Co.* 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692: "Where a mortgage is designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, it is void as to creditors." Where the mortgage on its face contains no evidence of being made for the benefit of the debtor, yet, as said in *Sabin v. Wilkins*, 31 Or. 450, 48 Pac. 425, 37 L.R.A. 465, note, "as it is a thing capable of modification by subsequent agreement, either expressed or implied by co-operative and wilful disregard of its terms and conditions, it is a prerequisite to its continuing validity that good faith and fair dealing be maintained towards those whose interests may be affected by it." If the parties, by their subsequent treatment of it and of the property covered by it, converted it into an instrument calculated to delay or defraud creditors, it will be thus rendered fraudulent and void from that time. In *Orton v. Orton*, 7 Or. 478, 33 Am. Rep. 717, it is held that where, by the provisions of the mortgage, or by an agreement between the mortgagor and the mortgagee, the mortgagor is to remain in possession of the property and may sell the mortgaged property for the benefit of the mortgagor, the mortgage is void as to purchasers and attaching creditors. And in *Bremer v. Fleckenstein*, 9 Or. 266, where there was a parol agreement between the mortgagor and mortgagee that the former might sell the goods at retail and use the proceeds for his own expenses, expense of the business, and to replenish the stock, it is said that such an agreement renders a mortgage void as to other creditors of the mortgagor. This court has recognized that by agreement or provision in the mortgage the mortgagor may remain in possession of the stock of goods and continue to make sales, strictly accounting to the mortgagee for the proceeds of the sales less the expense of making the sales; but by agreement and connivance in disregard of the terms of the mortgage Ford was permitted to use it to ward off his creditors, and yet to proceed to use the goods exclusively for his own benefit without paying the mortgage debt there- 46 L.R.A. (N.S.)

from. Thus with the acquiescence of the mortgagee the mortgage became an instrument to hinder and delay creditors, in violation of the terms of the statute. To maintain his preference the mortgagee under such a mortgage must be diligent to require observance of its terms and spirit. This duty is well stated in *Sabin v. Wilkins*, supra, and in *Currie v. Bowman*, supra. The Vale bank knew Ford was selling at retail and for credit as well as for cash, keeping no account of such sale nor of the receipts therefrom, although by the mortgage both the expense of making the sales and the purchase of new stock were to be made only on approval of the mortgagee. As beneficiary of the mortgage the Vale bank did not require nor receive any monthly account provided for, or payment to it of the receipts from sales, neither did it control the expenditure of the receipts. In fact, it acquiesced in Ford's methods of conducting the business as he pleased, in total disregard of the mortgage or of its requirements, and without even keeping an account of his doings.

We conclude that the mortgage was executed by Ford for a fraudulent purpose; that the Vale bank accepted it with knowledge of that purpose and for Ford's benefit, and permitted him to conduct the business as he had formerly done and for his own benefit; and that as to other creditors the mortgage was void.

The decree is reversed and a decree will be rendered here adjudging the mortgage to be void.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

GEORGE W. SHISLER

v.

CITY OF PHILADELPHIA, Appt.

(239 Pa. 468, 86 Atl. 1019.)

Mandamus — to strike property from plat.

Mandamus will not lie to compel municipal officers to strike private property from a plat of a proposed park, although the property was platted without authority of law; since the plat constitutes merely a cloud on title, for removal of which mandamus is not a proper remedy.

(March 3, 1913.)

Note. — A search has failed to reveal any other cases passing upon the right to mandamus to compel exclusion of property from eminent domain proceedings.

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County, granting a writ of mandamus to compel the striking of property from a plat of a park. Reversed.

The facts are stated in the opinion.

Messrs. James Gay Gordon, Jr., Edwin O. Lewis, and Michael J. Ryan, for appellant:

Mandamus will not lie to compel the director of the department of public works and the chief of the bureau of surveys to strike plaintiff's property from the city plan.

Com. ex rel. Northeastern Rapid Transit R. Co. v. Fitler, 136 Pa. 129, 20 Atl. 424; Com. ex rel. Hamilton v. Pittsburgh, 34 Pa. 496; Lehigh Water Co.'s Appeal, 102 Pa. 515; Com. ex rel. Dist. Atty. v. West Chester, 9 Pa. Co. Ct. 542.

Mr. Charles H. Downing, for appellee:

The court below clearly had the right to grant the mandamus.

Com. ex rel. Moulds v. Fleming, 23 Pa. Super. Ct. 404; Kell v. Rudy, 1 Pa. Super. Ct. 507.

Elkin, J., delivered the opinion of the court:

The mandamus issued in this case directed the director of the department of public works and the chief of the board of surveyors to strike from the city plan certain described property of the plaintiff which it was alleged had been plotted for a proposed public park without authority of law.

The first question for decision is whether mandamus is a proper remedy in such a case. The writ of mandamus only issues where there is no other specific and legal remedy, or when it is expressly authorized to be issued by statute. It does not lie to compel a public officer to do any official act which the law does not impose upon him, or to discharge the duties of his office in a manner not authorized by law, or to do any official act which the law does not expressly or by implication require such officer to perform. *Davis v. Patterson*, 12 Pa. Super. Ct. 479. In *Com. ex rel. Northeastern Rapid Transit R. Co. v. Fitler*, 136 Pa. 129, 20 Atl. 424, this court, speaking through Mr. Justice Paxson, said: "Such writ has never been held to be a proper remedy, except where there is a clear legal right in the relator, and a corresponding duty of the defendant, and the want of any other adequate, appropriate, and specific remedy." If the relator has suffered any injury by the plotting of the properties in question on the city plan, it is because a cloud has been cast upon his title, and we are not aware of any authority for holding mandamus to be a proper remedy for removing a cloud upon title to real estate.
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We agree, in part at least, with the contention of counsel for appellee, that the city had no authority under the ordinance of 1907 to plot upon the city plan to properties in question, so as to have any binding effect upon the owners thereof. Certainly no such authority is conferred by the acts of May 13, 1857 (P. L. 489), or June 24, 1891 (P. L. 394). It may be that under the act of February 2, 1854 (P. L. 21), the board of surveyors under the general powers therein delegated, and especially that relating to the "planning of the city," may have the authority to prepare for the use and convenience of the city alone; general plans having in contemplation park and other public improvements. But such plans would have no binding effect on anyone, not even upon the city itself, which could change the plans at its pleasure before the necessary legal steps had been taken to appropriate and condemn the land for park purposes. Such proceedings are purely statutory, and the city has no authority to appropriate or condemn lands unless authorized to do so by law. The act of June 26, 1895 (P. L. 349), confers upon cities of the commonwealth the right "to purchase, acquire, enter upon, take, use, and appropriate private property for the purpose of making, enlarging, extending, and maintaining public parks within the corporate limits of such cities, whenever the councils shall, by ordinance or joint resolution, determine thereon." The act of 1891 also empowers cities to purchase, take, and hold ground to use for the purpose of public parks. The method of procedure is set forth in the act of 1895, and it must be followed. If the parties cannot agree as to the purchase price, there must be an appropriation of the land by ordinance, and the damages must be ascertained in the manner set forth in the act. These acts evidently contemplate an immediate appropriation of the lands desired for park purposes, and the ascertainment of damages as of the date when so appropriated.

The ordinance of 1907 did not appropriate the lands in question, and nothing done under that ordinance in any way interfered with the right of the then owner, or any subsequent purchaser, to use or dispose of his property as he thought proper. The ordinance of June 13, 1912, set forth in the answer, was the first appropriation of the land for park purposes upon the part of the city within the meaning of the law. Under the facts averred in the answer, this was a proper appropriation, and the city is bound by it. It now remains for the interested parties to have the damages properly assessed as required by the act. It is true this ordinance was passed after the

present proceeding was instituted, and if appellee had any clear legal right to be enforced by a writ of mandamus, it would be necessary to hold that the city acted too late to deprive the landowner of his remedy. But mandamus is not a proper remedy, and therefore this proceeding cannot be sustained.

Decree reversed, and petition dismissed, at the cost of appellee.

WASHINGTON SUPREME COURT. (Department No. 1.)

LYMAN HINCKLEY et al., Respts.,

v.

CITY OF SEATTLE, Appt.

(— Wash. —, 132 Pac. 855.)

Judgment — award in eminent domain — action for injuries due to improvement.

1. An award of damages in an eminent domain proceeding to condemn a portion of an abutting lot for a slope in order to raise the grade of a highway will not preclude an action to hold the municipality liable for damages for injuries caused by the buckling of the surface of the lot and the extension of the slope because the earth proved to be unstable under the weight of the fill.

Public improvements — injury to property — effect of change of grade.

2. The fact that the owner of property abutting on a highway changes its surface to adapt it to use in connection with the street grades does not prevent his holding the city liable for injuries to it by the buckling of the surface in consequence of a fill in the street, although it might not have been affected if it had been left in its natural condition.

(June 13, 1913.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover damages for injuries to plaintiffs' property because of a street improvement constructed by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. James E. Bradford and C. B. White, for appellant:

All matters that were, should have been,

might have been, or could have been, raised in the condemnation proceedings, are adjudicated and forever closed in that judgment.

15 Cyc. 923; State ex rel. Ledger Pub. Co. v. Gloyd, 14 Wash. 7, 44 Pac. 103; Dolan v. Scott, 25 Wash. 217, 65 Pac. 190; Burke v. Kansas, 118 Mo. 309, 24 S. W. 48; Lafayette v. Nagle, 113 Ind. 425, 15 N. E. 3; Denver City Irrig. & Water Co. v. Mid-daugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; Chicago & I. C. R. Co. v. Hunter, 128 Ind. 213, 27 N. E. 477; Lewis, Em. Dom. § 866; Compton v. Seattle, 38 Wash. 514, 80 Pac. 757; Spokane Valley Land & Water Co. v. Jones, 53 Wash. 37, 101 Pac. 515; Johnson v. Spokane, 72 Wash. 298, 130 Pac. 341; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; Churchill v. Beethe, 48 Neb. 87, 35 L.R.A. 442, 66 N. W. 992; Grant v. Hyde Park, 67 Ohio St. 166, 65 N. E. 891; Union Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052; Gilbert v. Savannah, G. & N. A. R. Co. 69 Ga. 396; Trogden v. Winona & St. P. R. Co. 22 Minn. 198; Kohl v. Hannaford, 5 Ohio Dec. Reprint, 306; Brown v. Greenfield Twp. 109 Mich. 557, 67 N. W. 566; New Jersey I. & I. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420; Hord v. Holston River R. Co. 122 Tenn. 399, 135 Am. St. Rep. 878, 123 S. W. 639, 19 Ann. Cas. 331.

Respondents' own acts materially and naturally contributed to the damage, and hence they are barred from any recovery in this suit or any similar suit.

15 Cyc. 507; Louisville, N. A. & C. R. Co. v. Boland, 53 Ind. 398; Williams v. Michigan C. R. Co. 2 Mich. 259, 55 Am. Dec. 59; Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273, 12 Am. Neg. Cas. 293; Sanders v. Aiken Mfg. Co. 71 S. C. 58, 50 S. E. 679; Easler v. Southern R. Co. 59 S. C. 311, 37 S. E. 938; Thomp. Neg. §§ 176, 177; McLeod v. Spokane, 26 Wash. 346, 67 Pac. 74; Roberts v. Spokane Street R. Co. 23 Wash. 325, 54 L.R.A. 184, 63 Pac. 506.

Messrs. Peterson & Macbride, for respondents:

The issue in this case was not adjudicated in the condemnation proceeding.

Casassa v. Seattle, 66 Wash. 146, 119

Note. — As to liability of municipal corporation for injury to lateral support in making street improvements, see note to Talcott Bros v. Des Moines, 12 L.R.A. (N.S.) 696. As to liability of railroad company for removal of lateral support to adjoining property, see note to Pettit v. Jamestown & F. R. Co. 21 L.R.A. (N.S.) 318. As to whether condemnation or grant of land for railroad right of way carries right to 46 L.R.A. (N.S.)

lateral support, see note to Manning v. New Jersey Short Line R. Co. 32 L.R.A. (N.S.) 155. For removal of lateral support as damage or injury to property within constitutional provision against taking, damaging, or injuring property for public use without compensation, see note to Farnandis v. Great Northern R. Co. 5 L.R.A. (N.S.) 1086.

Pac. 13; *Provine v. Seattle*, 59 Wash. 681, 110 Pac. 619.

The damage was not caused by the excavation made by respondents.

Henley v. Wilson, 81 N. C. 405; *Phares v. Stewart*, 9 Port. (Ala.) 336, 33 Am. Dec. 317.

Chadwick, J., delivered the opinion of the court:

The material facts in this case are not disputed. The plaintiffs are the owners of a lot extending from Dexter avenue to Westlake avenue in the city of Seattle. The lot slopes from Dexter avenue down to Westlake avenue. The city of Seattle condemned the right to raise the grade of Dexter avenue, to widen it 7 feet, and to make a bank with a slope of $1\frac{1}{2}$ to 1 on the property of the plaintiffs. Damages were assessed and paid by the city, and Dexter avenue was improved in accordance with the original plans and specifications. After the fill had been made, the earth that had been put into Dexter avenue began to sink, and was repeatedly filled by the city. In the meantime plaintiffs had excavated that part of their lot abutting on Westlake avenue, so as to make it level with that street. After a time the fill on the Dexter avenue side of their property began to slide downhill, and the earth in that part of the lot that had been excavated or cut down to the street level bulged or buckled. The foundation of plaintiffs' dwelling house was destroyed, and the house had to be removed. We take it from the record that, barring the pushing down of the fill or bank and the buckling of that part of the lot which had been cut to the level of Westlake avenue, there was no great change in the contour of the land. Plaintiffs brought this action to recover damages. From a verdict in their favor, the city has appealed.

The first and principal contention of the city is that all of the issues raised in this case were adjudicated in the Dexter avenue regrade case, and that it is not liable for any damages which may have been caused by the weight of the fill imposed upon respondents' property.

Undoubtedly the city believed, when it drew its plans for the regrade of Dexter avenue, that it had condemned enough land for the bank, and to sustain the fill it contemplated, and which it thereafter made in Dexter avenue, abutting plaintiffs' property. Appellant invokes the rule that "all matters that were, should have been, might have been, or could have been, raised in the condemnation proceedings, are adjudicated and forever foreclosed by that judgment." This may be admitted, but it does not answer the question whether a loss that neither party

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had any reason to anticipate, and the possibility of which, if suggested, would have been rejected as speculative and conjectural by the trial court, can now be compensated in damages. In the case brought by the *Olympia Light & P. Co. v. Harris*, 58 Wash. 410, 108 Pac. 940, the claimant undertook to show that a ridge which the company purposed to use as a retaining wall for the waters of a lake when raised to a higher level would not successfully retain the waters, but would permit of leakage or seepage, we said: "As to whether it will or not is now conjectural, and must be until it is put to the desired use. If it then should be ascertained that it is ineffectual, respondents have their remedy in an action where the damage can be readily and easily determined from the physical facts then existing, and not as a matter of speculation and conjecture as it must now be." In the Dexter avenue condemnation the city proceeded regularly. It condemned the right to raise the grade and to make a slope on plaintiffs' property of $1\frac{1}{2}$ to 1. It fixed this ratio, because from experience it had found it to be sufficient. On the other hand, plaintiffs graded that part of their lot abutting on Westlake avenue to conform to the established grade. This was a lawful thing to do, a necessary thing to do if the property was to be made available, and a thing to be anticipated in the natural order of events. The thing that was not anticipated was the sinking of the fill in the street, which had to be backfilled for a long time, and which not only added to the weight of the fill, as called for in the plan, but also pushed the slope further down on plaintiffs' property, and from some cause or combination of causes made the earth on the graded part of the lot buckle up. An engineering problem is presented. Manifestly a property owner should not be held to the doctrine of *res judicata* when he has failed to set up as an item of damages something that was not foreseen by the engineers who drew the plans for the improvement of Dexter avenue, or those who had charge of the work.

We find no hesitation in applying the doctrine of the *Casassa Case*, reported in 66 Wash. 146, 119 Pac. 13, to the facts in this case. There the city assumed that a 1 to 1 slope would be sufficient. The property owner moved his house back beyond the slope: "When the contractors for the city proceeded with the work of excavation, the slope was not sufficient to hold the soil, which, on account of its character, slid into the cut and carried with it the houses, which were completely demolished." A recovery was had, although it was argued, and with much force, that a plan for a 1 to 1

bank, taking into consideration the "character of the soil and its disposition to slide," was patently deficient, and the consequent damage must have been considered by the jury. A condemnation must proceed along the lines marked out by the condemnor; the property owner cannot anticipate, and will not be heard to speculate upon, possible consequences. They must be reasonably probable. *Olympia Light & P. Co. v. Harris*, supra. Having in mind these principles, we held that, where the "character of the soil" was such as to defeat the estimates and the opinions of the engineers, more land was occupied than was contemplated, and that additional damages could be recovered. The damage sustained by plaintiffs may be justly attributed to a physical condition,—the character of the underlying soil. The case of *Provine v. Seattle*, 59 Wash. 681, 110 Pac. 619, is also relied on. In that case the trespass was wilful, and the verdict could have been sustained in any event; it may, however, be considered as authority to sustain the holding that a city cannot take more than it has paid for.

The Pennsylvania Railroad Company, "by authority of law," which we may assume, for the purposes of this case, is the power of eminent domain, proceeded to construct a connecting line over an embankment between two points on its main track, for the purpose of avoiding a dangerous and expensive curve. The company put into the embankment or fill about 160,000 cubic yards of earth and other filling, when the surface of property owned by an abutting owner irregularly upheaved, so that his building was almost completely wrecked, and was deserted by his tenants. It was the theory of the complainant that the upheaval was due to the deposit of filling material upon soft ground, that the silt and mud were thereby forced back upon adjacent property, "or that the filling material itself moves upon and through the mud, under the surface of his lot and up through that surface, and he insists that from one or the other or both of these causes the surface of the lot has been and is being disturbed." The right to recover damages in such a case is admitted. *Herbert v. Pennsylvania R. Co.* 43 N. J. Eq. 21, 10 Atl. 872. The same railroad company filled in upon its lands a quantity of earth and raised an embankment of great height, and thereby forced and pressed a large quantity of earth into and upon the lots of another beneath the surface of the same, and thereby upheaved the surface and caused the foundation and walls of the dwelling house thereupon to crack and topple over. Upon this statement of facts it was held that

the complainant had a cause of action. *Costigan v. Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 810. In *Roushlang v. Chicago & A. R. Co.* 115 Ind. 106, 17 N. E. 198, a railway company had received a deed and paid the consideration for land upon which to construct and operate its road. The complaint alleged: "That a portion of the land over which the railroad was constructed was marshy; that through that portion the railway company made an embankment about 12 feet high; that after the road had been used for about six months the embankment . . . began to sink; that, to keep the grade up to the original height, the railway company deposited upon the top of the embankment a large amount of earth, sand, and other material; that, as the same was thus deposited, the embankment kept sinking until the roadbed finally became settled and solid; that a large amount of the earth and other material thus deposited, as it sank, spread and extended under the surface of the land beyond the land of the railway company, and upheaved the plaintiff's land adjoining the right of way and rendered worthless several acres of it."

We understand the law of eminent domain to be the same, whether it is invoked by a city or by a public service corporation, and this case is strangely like the one at bar. There the rule is laid down, as it has been often declared in this state, that, in considering the damages to be assessed, the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting, or that might reasonably be expected to result, from the appropriation and construction of the road in a proper manner. In passing upon the main question the court said: "The real question in the case before us is not one of negligence, but of an encroachment upon land outside of the company's right of way. When the company discovered that its roadbed was sinking, could it, without making compensation, or the payment of damages, have gone upon appellant's land and constructed walls or banks to prevent the roadbed from sinking and spreading? Clearly not. That it did not do, but, what in effect was the same thing, it filled in earth and other materials until the embankment spread out beyond the right of way upon appellant's adjoining lands, and upheaved the surface and caused the injury described in the complaint. It may be that the company had no knowledge that the filling would cause the spreading of the embankment and the upheaval of appellant's land. Whether or not it had such knowledge is not stated in the complaint; nor do we think that it is

material in this case. By reason of the filling upon the embankment it was caused to spread upon appellant's land, and caused the injury. That the railway company may have had no knowledge that the filling would cause the injury is not sufficient to exonerate it from liability. The fact remains that appellant granted to the railway company a strip of land upon which to construct and operate its road, and it has so constructed it as to make it rest, not only upon the strip thus granted, but also upon his adjoining land not granted. The railway company is thus occupying land which was not granted to it, and which neither party intended should be either granted to it or occupied by its road. The road is no less an encroachment upon appellant's land because its foundation is beneath the surface. That fact might affect the amount of damages, but it does not alter the rights of the parties. The railway company had a right to construct its road upon the strip of land granted, but it has no right to occupy additional land without compensation or the payment of damages. The strip of land was granted before the road was constructed, and hence the consideration paid must be presumed to have been measured by the value of the land granted and the anticipated damages, in the light of surrounding circumstances and the knowledge of the parties at that time. It surely was not intended at that time that the roadbed should cover and rest upon land outside of the strip granted. Nor could it have been anticipated that in the construction of the road land outside of the right of way would be occupied by the roadbed or any portion of it. It would not be reasonable, therefore, to assume that, in fixing the compensation, the parties included damages for such encroachment. Had the strip of land been taken by condemnation instead of by grant, the commissioners or jury, in assessing the damages, could not have included damages from such encroachment: First, because they could not have assumed that the railway company would voluntarily so construct its road as to make it rest partially upon land outside of the right of way. To have assumed that, and to have assessed damages accordingly, would have been to assume that the railway company would commit a trespass, and to have assessed, in advance, damages resulting from such trespass. Second, because they could not have known in advance that the result of the fill would be to cause the embankment to so spread as to encroach upon appellant's land and cause injury. Such an injury could not reasonably have been expected to result from the proper construction of the road. It will not be presumed

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that the parties included in the price agreed upon at the time of and for the grant any amount for injuries which could not properly have been considered by the commissioners and jury, had the right of way been taken by condemnation proceedings."

To further sustain its position that the damages now claimed cannot be recovered in another suit, the city cites and relies upon the following cases: *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757; *Johnson v. Spokane*, 72 Wash. 298, 130 Pac. 341; *Carpenter-McNeill Invest. Co. v. Spokane*, — Wash. —, 131 Pac. 823; and for the sake of future reference the case of *Grosshoff v. Spokane*, — Wash. —, 132 Pac. 643, may be added. In the *Compton Case* the court held that the matters sought to be litigated in the principal case were actually litigated in the condemnation case. In the *Johnson Case* the item sought to the recovered was on account of the lowering of the surface of the street, and the court held, as it held in the *Grosshoff Case*, that this was a question that was open to the plaintiff, and might have been litigated in the condemnation suit. In the *Carpenter-McNeill Case* the work which it was alleged was negligently performed had been done at the time the condemnation suit was tried. It was accordingly held that the plaintiff could have set up in that suit all damages claimed by him, not only on account of the physical change of the grade, but all that had resulted from the manner in which the work was done. The corner stone of that case was the statute (*Rem. & Bal. Code*, § 7820). We find nothing in these cases that would defeat the right of these plaintiffs to recover.

There are other assignments of error predicated upon the instructions. The pleadings were drawn upon the theory of negligence, and the plea of contributory negligence was tendered as a defense. Upon the oral argument it seemed to be conceded by all parties that this is not a case of negligence. If it were so, we would hold that the plaintiffs were not guilty of contributory negligence in excavating that part of their lot abutting on Westlake avenue.

We have not overlooked the contention of the city that, if the property had been left in its natural condition, there would have been no disturbance. This is not sound. City property located upon the slope of a hill must ordinarily be put to some use, and, if necessary, must be cut or filled. As hereinbefore suggested, the owner cannot be held negligent or his recovery defeated if he pursues his lawful right; otherwise the law would demand that all property taken or damaged for a public use be bought outright.

The case was not tried upon a correct theory of the law, but we are satisfied that plaintiffs are entitled to a judgment against the defendant, and the amount of the verdict not being seriously challenged, we will not discuss the questions raised on the instructions.

Affirmed.

Crow, Ch. J. and Gose, Mount, and Parker, JJ., concur.

Petition for rehearing denied.

MISSOURI SUPREME COURT.
(In Banc.)

WILLIAM CAPP et al., Resp'ts.,
v.

CITY OF ST. LOUIS, Appt.

(— Mo. —, 158 S. W. 616.)

Negligence — dangerous premises — public parks — turntable cases.

1. The conditions necessary to liability under the doctrine of the turntable cases are not necessary to hold a municipality liable for the death of a child drowned in a dangerous pond in a public park, where it had a perfect right to play.

Municipal corporation — unsafe condition in park — negligence.

2. A municipal corporation may be found negligent in maintaining in a public park, where many children resort to play, a pond several feet deep formed in a small stream in which they are in the habit of wading, by water from a storm sewer which the municipality turned into the stream, so as to render it liable for the death of a child drowned while playing there.

Evidence — sufficiency — presumption as to death.

3. That a boy is not shown to have been drowned in the pond where his body was found does not justify the sustaining of a demurrer to evidence in an action against the one responsible for the maintenance of the pond, where he was last seen wading in the stream a short distance above the pond, where the water was only a few inches deep, on the theory that he may have drowned in the stream and his body been washed into the pond.

(Lamm, Ch. J., and Graves and Brown, JJ., dissent.)

(June 2, 1913.)

Note.—As to liability of municipality for injuries through unsafe conditions in parks or public grounds other than streets, see note to Bisbing v. Asbury Park, 33 L.R.A. (N.S.) 523.

Although, as pointed out in the opinion, 46 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Circuit Court of the City of St. Louis in favor of plaintiffs in an action brought to recover damages for the death of their minor son, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Lambert E. Walther and William E. Baird, for appellant:

If an injury may have resulted from more than one cause, for one of which, and not the other, the defendant is liable, it must be shown with reasonable certainty that the cause for which the defendant may be liable produced the result, and if the evidence leaves it to conjecture, the question cannot be submitted to the jury.

Warner v. St. Louis & M. River R. Co. 178 Mo. 125, 77 S. W. 67; Epperson v. Postal Teleg. Cable Co. 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66.

Messrs. Taylor R. Young and Willard H. Guest, for respondents:

Defendant owed plaintiffs the duty to exercise ordinary care in the maintenance of Forest park, to keep it free from the nuisance complained of.

Carey v. Kansas City, 187 Mo. 715, 70 L.R.A. 65, 86 S. W. 438; Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304; Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; Price v. Atchison Water Co. 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Sioux City & P. R. Co. v. Stout, 17 Wall. 661, 21 L. ed. 748; Edmondson v. Moberly, 98 Mo. 523, 11 S. W. 990; Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; Schmidt v. Kansas City Distilling Co. 90 Mo. 294, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; Straub v. St. Louis, 175 Mo. 413, 75 S. W. 100, 14 Am. Neg. Rep. 384; Williams, Mun. Liability for Tort, § 184.

It will be presumed, until the contrary is shown (and that burden was on defendant), that deceased would not have deliberately waded beyond his depth, but rather fell off the steps and was drowned while playing thereon with his companion Ulrich, who was at the same time also drowned in the same pool.

Buesching v. St. Louis Gaslight Co. 73 Mo. 219, 39 Am. Rep. 503; Lancaster v.

CAPP v. ST. LOUIS did not involve the doctrine of attractive nuisance, attention is here called to the note in 19 L.R.A. (N.S.) 1143, setting out cases involving the applicability of that doctrine to ponds.

Washington L. Ins. Co. 62 Mo. 121; *Weightman v. St. Louis, I. M. & S. R. Co.* 223 Mo. 718, 123 S. W. 38; *McGahan v. St. Louis Transit Co.* 201 Mo. 507, 100 S. W. 601; *Eckhard v. St. Louis Transit Co.* 190 Mo. 613, 89 S. W. 602.

Even if this were not the law, defendant would still be liable, as the water above and below this pool for a distance of over 1,000 feet was only from 1 foot to 15 inches in depth; defendant having admitted in its answer that deceased was drowned while wading in the River Des Peres.

Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Linnberg v. Rock Island*, 157 Ill. App. 527.

Per Curiam:

The following attached opinion, written by Woodson, J., in division, was adopted by the court in banc. All concur, except Lamm, Ch. J., and Graves and Brown, JJ.

Woodson, J., filed the following opinion:

The plaintiffs brought this suit in the circuit court of the city of St. Louis against the defendant to recover the sum of \$10,000 damages sustained by them on account of the death of their minor son, Cecil Capp, caused by the alleged negligence of the city in not properly guarding a pool of water (which will be presently described) in Forest park, in which the deceased fell and was drowned. A trial was had before the court and a jury, and after hearing the evidence and the instructions of the court, the jury found the issues for the plaintiffs, and assessed their damages at \$2,500. Upon the verdict of the jury, the court rendered judgment for the plaintiffs, and after taking the proper preliminary steps therefor, the defendant duly appealed the cause to this court.

No question is raised as to the sufficiency of the pleadings, and we will therefore pass them by. The facts are practically undisputed, and are as follows:

The plaintiffs were husband and wife, and the deceased was their lawful son. The city of St. Louis is a municipal corporation organized and existing under the laws of the state of Missouri, known as the "Scheme and Charter." That Forest park is a public park belonging to, and was under the management and control of, the city. Through the park ran a small stream of water known as the "River Des Peres." Many years prior to the happening of this unfortunate incident, the city constructed what is known in the record as "Euclid Avenue storm sewer," which drained a large part of the city of St. Louis, as well as a considerable

part of the territory of St. Louis county, which emptied into the River Des Peres at a point in the park where the deceased was drowned. The park was large, having an area of more than 1,400 acres, and said river, in its ordinary stages, was insignificant, no larger than an ordinary creek, but in times of storm, the waters thereof, accompanied with those of said sewer, became and were a mighty torrent, swift, turbulent, and terrible in its flow to the Merriam and to the "Father of Waters." At the junction of said sewer with said river, the waters of the former in full flow had, many years prior to the accident, washed out the bed of the river, and thereby caused to exist therein an excavation about 60 feet in diameter and of a depth varying from a few inches at the outer margin, to some 10 or 12 feet in the center, which for years had been filled with water and refuse from said sewer and river. At the junction of the river and the sewer, the outlet thereof is about 10 feet in breadth and 14 in height, with perpendicular walls constructed of stone with cap rocks on top which are about 18 inches higher than the adjacent surface of the ground. Immediately adjacent to the mouth of the sewer, there are four stone steps 12 feet long and 6 inches thick, leading therefrom down to the water, two of which are generally covered with the water of the pool, and the other two are above the water line.

The River Des Peres is wholly unguarded in its entire length, as it passes through the park; and boys and children, with the knowledge, if not the acquiescence, of the city, have been in the constant habit of wading in the bed of said river, from early spring until late fall, and to skate thereon in the winter time. The park is one of the great public resorts of the world, constantly frequented by many men, women and children. The World's Fair was held therein in 1904, which was visited by millions of people, and it has continued to be the greatest public resort of the city ever since. It is highly improved, carefully attended and cared for, constantly guarded and policed, by and at the great cost of the city. Some 200 feet from the mouth of the sewer, there is a fine spring, and a path leading therefrom to the Lindall boulevard and Kingshighway entrances to the park, which pass within a few feet of the mouth of said sewer. This was the most frequented part of the park.

The last time the deceased was seen alive was July 10, 1908, when he and another boy named — Ulrich, about the same age, were seen by a mounted policeman named Hutton, wading in said river about 100 feet above said pool. On or about the 12th day of July, the body of Ulrich was

discovered floating in said pond, and when the father of Cecil Capp heard of that fact, knowing that the deceased and Ulrich left home together, he began to search the pond for his son, with the result that on the 15th of July, he found the body of his son therein. Both of them had been drowned. When discovered, the pants of the deceased were rolled up as far as they could be, and there was some evidence which tended to show that the sleeves of his shirt were likewise rolled up. The evidence also showed that boys and children generally were in the habit of wading in said river, and were in the habit of fishing for crawfish therein, and playing in and about the mouth of the sewer and on the steps mentioned. Such additional facts as may be necessary for a proper disposition of the case will be considered in the course of the opinion.

I. The city assigns but two errors in its brief, but discussed a third in the oral argument of the case in this court, namely, that there was no evidence of negligence on the part of the city in keeping, managing, and controlling the park. We will consider this question first, but preliminary thereto it should be borne in mind that the public parks of the cities, while designated for the use of all classes, nevertheless it is common knowledge that they are in fact more generally used and occupied by the middle and poorer classes of our citizens, who have not the means to justify them in going to the mountains, the seashore, or foreign countries for rest and recreation, as is the custom and practice of the wealthy and more fortunate class.

During the open and warm seasons of the year the parks are usually filled with the women and minor children of the poor, and especially the latter, who are usually sent there alone for safety, recreation, and amusement, while their parents are down town earning their bread by the sweat of their faces. One of the most important, if not the principal, quality or beneficial element of a public park, is the safety it throws around the unprotected youth and indiscreet of the state, placed therein by their toiling parents, chiefly for the safeguards supposed to be thrown around them, and incidentally for play and recreation, while they, the parents, earn a living for themselves and children. Were it not for the supposed safety of the parks, the poor of the cities would be compelled to either personally guard their minor children, which would materially impair their earning power, or they would have to turn their children loose upon the public streets of the city, where they would be constantly liable to come in contact with the numerous vices and dangerous agencies ever present

therein. It is largely for this protection of life and limb, and the separation of the youth of the country from vice and dangers, that these parks are created and maintained at such enormous cost and expense to the cities and people of the state, without which they would be absolutely worthless. That being unquestionably true, the public parks of the cities should be maintained in a reasonably safe condition for those who frequent and use them, and especially for the unprotected youth.

The evidence is undisputed that the city of St. Louis created and maintains this inexcusable nuisance, which is a constant menace to the lives of the children who visit Forest park. Common sense and common experience teach us that this inexcusable nuisance can be abated at a trifling expense to the city, probably at a sum not to exceed one half of the cost of defending this suit; and why should it not be done? It has already claimed for its vicious reward the lives of two bright and innocent boys, who were as sweet, near, and dear to their parents as our children are to us. But no, echoes the city, through the voice and pen of her able and worthy city counselor, I will maintain this horrible nuisance, right in the heart of the principal playground of the children of the metropolis of this state, which is giving forth its offensive odors and sickly and deadly germs every day and night of its existence, to say nothing of its ever-yawning mouth, ever ready to swallow up the body of any and all children who may happen perchance to play thereat, or who may wade into its unknown depth, but well-known filth and slime.

And in this connection it might be said that much confusion has been injected into this class of cases by applying to it the doctrine applicable to the turntable cases. That rule has no application whatever to this case, or to the class to which it belongs. In this class the injury occurred, and of necessity must occur, at a place where the injured party had both the legal and moral right to be, while in the turntable cases the injury occurred, and of necessity must have occurred, on private property, a place where the injured person had no legal right to be, but was induced to go there by an attractive piece of machinery or other matters equally attractive to children.

The confusion mentioned grows out of the fact that there is another class of cases akin to this, where the injury occurs upon private property, namely, in the reservoirs of waterworks of the municipalities of the country, or in other private ponds and pools of water. In those cases the injured child is concededly a trespasser, but is attracted there by the water of the reservoir,

pool, or pond, which the owner knows will instinctively attract children; and in some of the states, even in the latter class, the injured party or his representative is permitted to recover, while in others that right is denied. The authorities supporting the latter class are cited as authorities in the class to which the case at bar belongs, for the reason that if a recovery can be had in the former, where the injured party is a trespasser, then *a fortiori* a recovery should be had in this, the latter, where the injured party had a lawful right to be.

In this case, the son of the plaintiffs lost his life in a pool of water located in a public park, a place where the child had the right to be; but the record fails to show that either the boy or his parents had any knowledge of the depth of the pool. So in the consideration of this case, care should be taken so as not to confuse the principles of law governing it with those controlling the turntable cases, for the obvious reason that one might be entitled to a recovery in this class, and not in that.

Returning to the contention of counsel, previously stated, namely, that the record contains no evidence of negligence on the part of the city, the uncontradicted evidence shows that Forest park was a public resort for men, women, and children, and that thousands visited it daily, and especially children, boys, and girls; also that they were in the habit of wading, playing, and fishing in said river, and playing on and about the steps at the mouth of the sewer, where there was a pool of water from 8 to 12 feet deep in the center. This pool was caused by the waters of the stream flowing down and over the steps mentioned, and washing the dirt and soil from the bed of the river, thereby making an excavation therein which filled up with the waters thereof. This pool had existed for years, and unquestionably the city had knowledge of its existence, which the evidence shows could have been filled up or guarded at a very small cost. The park being a public place, and containing this unguarded pool of water, and frequented by many children, young and indiscreet, at the invitation of the city, who we all know are greatly attracted by pools of water, bubbling brooks, and running streams, made the situation highly attractive and dangerous to any and all children who might approach the place and play in or about the stream and pool.

That evidence, in my opinion, was sufficient to warrant the court in submitting to the jury the question whether or not said conduct of the city was such as an ordinarily prudent person would have done under similar circumstances. If it was, then the city was not liable for the damages done; 46 L.R.A. (N.S.)

if, upon the contrary, it was not, then the city was liable. That was a question of fact which the trial court, in my opinion, properly submitted to the jury, which I believe is supported by the following authorities: Williams, Mun. Liability for Tort, § 184; Carey v. Kansas City, 187 Mo. 715, 70 L.R.A. 65, 86 S. W. 438; Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304; Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Price v. Atchison Water Co. 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450; Sioux City & P. R. Co. v. Stout, 17 Wall. 661, 21 L. ed. 745; Edmondson v. Moberly, 98 Mo. 523, 11 S. W. 990; Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; Schmidt v. Kansas City Distilling Co. 90 Mo. loc. cit. 294, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; Straub v. St. Louis, 175 Mo. 413, 75 S. W. 100, 14 Am. Neg. Rep. 384.

In the case of Carey v. Kansas City, 187 Mo. 715, 70 L.R.A. 65, 86 S. W. 438, the city owned and converted a part of a block of ground on which was located its water reservoir, into a public park, and on a level with the coping of the reservoir wall, the city built a walk or park way, and on the outer edge of the coping it built a wire fence 4½ feet high. While the eleven-year-old son of the plaintiffs was playing in and about the premises, he fell into the reservoir and was drowned. This court, in a unanimous opinion written by Judge Fox, held that the care required of the city was that care which an ordinarily prudent person would have exercised under similar circumstances. But under the facts of that case, the court further held, and properly so, that the city was under no legal obligation to construct a fence around the reservoir, which would be impossible for boys to climb over, but only such a fence as would prevent children who had reasonable respect for the wishes of the owner of the property, from trespassing upon it. That case clearly holds, and properly so, that the law imposes upon Kansas City the imperative duty of keeping the public parks thereof in a reasonably safe condition for persons using the same for pleasure, amusement, or recreation, and especially for children while engaged in their innocent sports, plays, and recreations.

In the case of Barthold, the supreme court of Pennsylvania tersely stated the law and facts as follows: "Turning therefore to the evidence, we find it was shown that the pool or well in which the plaintiff's son lost his life was upon ground acquired by the city some six months before the accident, for the purpose of adding it to Fairmount park. It was not only upon the public grounds, but

was open of access to persons of all ages. The wall that enclosed it was lower than the surrounding surface. The plaintiff's son came to the pool to wash his shoes, and sat down upon a stone which was part of, or was lying upon, this wall. The stone tipped under his weight, and he fell backward into the water and was drowned. The stone on which he sat fell at the same time into the pool. Whether it was the exercise of proper care on the part of the city to leave this pool for six months in the condition described, open to the access of children in the public grounds, was not a question of law, but of fact, and properly submitted to the jury. We have nothing to do with the correctness of their finding."

There is no difference whatever in principle between that case and the case at bar; the facts, however, in this case show far more culpability on the part of the officers and agents of the city of St. Louis, than those did on the officers of Philadelphia.

In the case of *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155, the petition charged that the city, while constructing a bridge in one of the streets thereof, made an excavation in the bed of a small stream where it crossed said street; also constructed a levee from the bank of the stream to said excavation or pit, and knowing that the children of persons residing near there were in the habit of playing in the absence of the workmen, without safeguards of any kind; and in consequence thereof the child of the defendant (in error), without negligence on his part, while at play, fell into the pit and was drowned, etc. The city demurred to the petition, for the reason that it did not state facts sufficient to constitute a cause of action against it, which was by the trial court overruled. Thereafter, the city carried the case to the supreme court of Indiana on writ of error (I suppose, though the report says "appeal"), and the court, in sustaining the rulings of the trial court, used this language:

"The initial proposition upon which the appellant rests its argument against the sufficiency of the complaint is that it does not appear from the facts averred that the city was guilty of any breach of duty in respect to the plaintiff or his child. That the liability of the city can only be affirmed upon the theory that it has violated its duty in the premises is too clear for serious controversy. Speaking upon the subject as applied to an adult, this court, in the case of *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783, used the following language: 'Before it can be affirmed that the appellant was negligent with respect to the transaction concerning which

its omission is imputed to it as wrongful, it must appear that it was under some legal duty or obligation to the plaintiff at the time when and place where the injury occurred, which was left undischarged. If it is liable at all, this is the foundation upon which its liability rests.' *Lary v. Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572. In respect to cases such as we are considering, a learned author says: 'It is important to bear in mind in actions for injuries to children, a very simple and fundamental fact which in this class of cases is sometimes strangely lost sight of, viz., that no action arises without a breach of duty.' 2 Thomp. Neg. p. 1183, note.

"With this rule in view, and with the further concession that, in dealing with cases which involve injuries to children, courts and juries have sometimes strangely confounded legal obligations with sentiments that are independent of law, it must nevertheless be kept in mind that wherever an adult may be without incurring the imputation of being an intruder, a child may also go free from the like imputation. The same circumstances which would justify a recovery by one who had reached years of discretion, and had sustained an injury from the act of another while free from fault, would justify a recovery by an infant of such years as to be incapable of fault, provided its parents or guardian were also guilty of no neglect which could be imputed to the child. And so, conversely, except when a child is seen in time so that injury to it might be avoided, persons who are lawfully using or carrying on business on their own premises are not liable for injuries to children, unless under the same circumstances they would have been liable to others who were equally free from fault.

"The conclusion to be drawn from the approved cases on the subject is that the owner of premises who has neither expressly nor impliedly invited the public to come upon or pass over his grounds is under no legal obligation to keep them free from pitfalls, or in a condition of safety, for those who in the pursuit of their own pleasure or convenience pass over such premises, even though it be with the acquiescence of the owner. Persons passing over premises of that description exercise the privilege with its attending perils, and this without distinction as to whether or not they have arrived at an age of discretion. Unless contrivances are placed on such premises with an actual or constructive intent to hurt intruders, the proprietor is not liable for injuries resulting to persons by reason of the condition in which the premises have been left, or from the prosecution of a bus-

iness thereon, in which the owner had a right to engage. *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 225, 50 Am. Rep. 783, and cases cited; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Hargreaves v. Deacon*, 25 Mich. 1; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767.

"The foregoing, and many other analogous cases which might be cited, proceed upon the theory that the person sought to be held liable had done nothing to produce injury to others who voluntarily strayed upon or invaded the premises on which the injury occurred. In all such cases the owner may dig an excavation in his own land not substantially adjoining a public highway, and no action lies against him by one who has fallen into the excavation. *Hardcastle v. South Yorkshire R. Co.* 4 Hurlst. & N. 67, 29 L. J. Exch. N. S. 139, 5 Jur. N. S. 150, 7 Week. Rep. 326; *Hounsell v. Smyth*, 29 L. J. C. P. N. S. 203, 7 C. B. N. S. 731, 6 Jur. N. S. 897, 1 L. T. N. S. 440, 8 Week. Rep. 277; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478; *Nicholson v. Erie R. Co.* 41 N. Y. 525.

"But there is a clear distinction between the cases cited and the case where an excavation is made in or so near a highway, as that one, while rightfully using the highway, may without fault sustain injury by falling into the excavation. Not less clear is the distinction between a case in which an excavation is made, or something calculated to amuse or attract children is done or left, at a place where the child has a right to be, and one in which the same thing is done at a place where, in order to reach the place of danger, the child becomes an intruder upon the premises of another.

"Whoever, while passing along, or when properly in a public street, suffers an injury while exercising the degree of care which the law requires of such persons, by falling into an excavation which has been made in or near such street, is entitled to maintain an action for such injury against the person making the excavation. In such a case, the person making the excavation comes under an obligation to make it safe in respect to all persons who have a right to use the street.

"Streets are open to persons of all ages, and children are and must be permitted, to some extent at least, to go upon the streets of towns and cities, without incurring the imputation of negligence upon themselves 46 L.R.A. (N.S.)

or their parents. It would be intolerable to hold, as a matter of law, that a parent, having no knowledge of the presence or probability of danger, was nevertheless guilty of negligence in permitting a five-year-old child to pass beyond the dooryard into the street without an attendant. Whoever, therefore, does anything in, or immediately adjacent to, a public street, calculated to attract children of the vicinity into danger which they cannot appreciate, owes the duty of protecting them by suitably guarding the source of danger, or in case this is impracticable, by giving timely warning to their parents and guardians of the existence of the danger. *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755; *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; 2 Dill. Mun. Corp. § 1005. The right of a child to go or be in or upon a street is in no way dependent upon the occupation or pecuniary condition of its parents. *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793.

"If a person of discretion, while attempting to pass over the stream in question where it crossed Spruce street, had fallen into the pit into which the child fell, no doubt could be entertained that such person, if free from contributory fault, might have recovered for an injury sustained; or if the plaintiff, without knowledge of the pit, had permitted his horse to go there for water, and it had fallen into the unguarded hole and had been injured, the liability of the city would have been beyond question. As we have seen, the liability of the city is precisely the same in case a child rightfully in a street sustains injury from a defect created therein by the city, as in the case of an adult who is injured while free from fault, from a like cause. It would shock all sense of justice to hold that a city might dig a pit in a street and leave it so that children might be lured into it, and yet deny to parents who were without fault any remedy for the loss of a child.

"Considered in the light of what has been said, it seems clear to us that the demurrer to the complaint was properly overruled. The excavation into which the appellee's son fell was made in Spruce street, at a point where it crosses Pleasant run. It was made in the bed of a shallow stream, and left alone unguarded on a July day, with knowledge that children were accustomed to play in the vicinity. The city must be held to know that children are attracted to such a place in July weather.

They were not intruders. It was gross carelessness on the part of the city, with such knowledge, to leave an unguarded pit filled with water in the street, into which an unsuspecting child might fall."

The same law that requires a municipal corporation to keep its streets free from nuisances, and reasonably safe for those who lawfully use them, also imposes upon it the duty to keep its public parks and other public places in a reasonably safe condition for all who lawfully frequent and use them.

The case of *Price v. Atchison Water Co.* 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, is very interesting, able, and instructive. While the defendant in that case was a private corporation, and the accident occurred on private property, nevertheless it is a strong authority in support of the defendant's liability in the case at bar. In fact, the reason is all the stronger for holding a public or municipal corporation liable for the death of a person occurring on public grounds, than it is for holding a private corporation responsible therefor when occurring on private property. The opinion was written by Chief Justice Doster, conceded to be one of the ablest jurists of the country; the facts and the law applicable thereto were stated in the following language:

"Melrose H. Price, the son of plaintiffs in error, a bright, intelligent boy of about eleven years of age, was drowned in one of the reservoirs of the defendant in error. These reservoirs were two in number, and were situated in or near the corporate limits of the city of Atchison, in immediate proximity to a section of the residence portion of the city. They were of unequal size; one having a capacity of about 1,100,000 gallons, the other about 3,000,000 gallons. The smaller one was used as a 'settling basin,' into which the water was pumped, and from whence it was discharged into the larger one through a pipe. The opening of this pipe into the larger basin was covered with an 'apron' made of lumber, and designed to break the force of the water discharge and prevent injury to the walls of the reservoir. It was partially buoyed by the water, and rose and fell as the water supply increased or lessened. For 4 feet from the top, the walls of the smaller reservoir were perpendicular, and thence slanted to the bottom; and its basin was about 10 feet in depth in the deepest part. The walls of the larger reservoir slanted at an angle of about 45 degrees, and its basin had a depth in its lowest part of about 15 feet. It would be difficult, if not impossible, for a person falling into the larger basin to get out unaided, on account

of the steepness of the walls. These reservoirs and appurtenant grounds occupied about 3 acres, and were attractive places for children, many of whom frequented there for fishing and for other sports. They were inclosed with a barb-wire fence ten to twelve wires high. There were two gates through the fence, which, however, were always kept closed, and two rudely constructed contrivances designed for stiles, but being, as described by some of the witnesses, 'sheds,' or large boxes, nailed to adjacent trees and inclosing most of the wires, but upon and over which it was not difficult for boys to climb from the outside. A watchman and custodian of these grounds was employed by the defendant. He was aware of the habit of the boys of the town to climb over the stiles, and permitted them to do so without objection. The boy Melrose, without the consent or knowledge of his parents, went with some companions to the reservoirs in question to fish and play, and venturing upon the apron before described, for the purpose of crossing from one part of the reservoir wall to another, the end which projected out upon the water sank, precipitating him into the basin, where he drowned. Immediately upon starting to go upon the apron, one of his companions called to him and warned him of the danger of so going, saying to him he might fall in. To this he replied, 'Oh, no!' His parents had frequently warned him of the danger of going to the reservoir, and he had trespassed there but once before, and then without their knowledge.

"The plaintiffs in error sued to recover damages for the loss of their son, occasioned by the negligent maintenance of the reservoir, and the negligence of the defendant in permitting him access to the dangerous situation described. The above statement summarizes the evidence for the plaintiff. To this evidence a demurrer for insufficiency to prove a cause of action was sustained. This action of the court is alleged as error, and is brought here for review. The contention arising upon the above state of facts divides itself into two principal questions: First, was the defendant in error negligent, as to the deceased boy, in maintaining the dangerous reservoir? and, second, was the deceased guilty of contributory negligence in venturing upon the slanting wall and projecting apron? These are questions of fact, and they should have been left to the jury for determination. They are not questions of law for decision by the court.

"It is, however, contended by the defendant in error, that, inasmuch as the deceased was a trespasser upon its grounds, it owed to him no duty to guard against the acci-

dent which occurred. Without doubt, the common law exempts the owner of private grounds from obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who go upon them not by invitation, express or implied, but for pleasure or through curiosity. Cooley, Torts 2d ed. 718; 1 Thomp. Neg. 303; Dobbins v. Missouri, K. & T. R. Co. 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62. The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express. The rule collected out of the authorities is vigorously, but not too strongly, stated in 1 Thompson on Negligence, 304, 305: 'There is also a class of cases which hold proprietors liable for injuries resulting to children although trespassing at the time, where, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happened. In such case, the question of negligence is for the jury. It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon baited with meat, so that his neighbor's dog attracted by his natural instincts might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it, and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life. Such is not the law.'

"The principle involved is the same as that upon which those actions known as the 'turntable cases' have been resolved, and in which it has been held, with few exceptions, that the maintenance in an unguarded manner, of a dangerous apparatus for the shifting of locomotives, attractive to children residing or accustomed to playing near by, constitutes negligence upon the part of the companies. In one of these cases, it was quite well remarked by Mr. Justice Valentine: 'Everybody knowing the nature and instincts common to all boys must act accordingly. No person has a right to leave, even on his own land, dan-

gerous machinery calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who does thus leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. It is a violation of the beneficent maxim, *Sic utere tuo ut alienum non laedas*. It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored, as numerous cases which we might cite would show.' Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 691, 31 Am. Rep. 203.

"The reasons upon which these cases proceed, and the authorities supporting the rule, are strongly set forth in Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393. They are, in brief, that, where a person maintains upon his premises anything dangerous to life or limb, and of a nature to invite the intrusion of children, he owes them a duty of precaution against harm, and is liable to them for injury from that thing, even though their own act, if not negligent, puts in operation its hurtful agency. One may not bait his premises with some dangerous instrument or quality alluring to the incautious or vagrant, and then deny responsibility for the consequences of following the natural instincts of curiosity or amusement aroused thereby, without taking reasonable precautions to guard against the accidents liable to ensue. Rights can only be enjoyed subject to those limitations which regard for the weaknesses and deficiencies of others dictate to be humane and just. This rule has been applied, not only in the turntable cases, but to others in which dangerous situations have been negligently maintained, and especially to cases of death or injury by falling into unguarded pools or vats of water. Brinkley Car Works & Mfg. Co. v. Cooper, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484.

"Counsel for defendant in error endeavors to distinguish the turntable and other like cases from the one under discussion, upon the ground that, in such first-mentioned cases, the dangerous instruments or places were not inclosed so as to exclude or warn trespassers, while, in the present case, the reservoirs had been so fenced as to render access to them difficult, to say the least, and in any event to operate as notice to stay on the outside because of the dangerous situation within. Whatever merit such precautionary measures might have under other circumstances, it is sufficient to say that, in this case, they were not reasonably effective; because it was the daily habit

of trespassing boys to mount the fence and frequent the reservoirs on the inside, and this habit was known to the company's responsible agent, and was not only tolerated, but went unrebuked by him. Knowing the fence to be ineffective either as barrier or warning, it was the duty of the company to expel the intruders, or adopt other measures to avoid accident. Whatever advantage the defendant in error might have gained from the erection of a reasonably effective barrier or warning is neutralized by the facts of its knowledge that the boys did trespass, and its permission to them to do so. It is as though no fence at all had been erected."

In the case at bar, the deceased child, in addition to having been attracted to the stream and pool in which he was drowned, by his strong boyish instincts to play, wade, paddle, and fish in the waters thereof, he, and all other children of the city, and adults for that matter, were invited upon the premises to indulge without restraint those childish desires, unprotected from the great dangers incident to their very existence.

The case of *Pekin v. McMahon*, supra, was a suit by the parents of a child eight years old, to recover damages for its death, caused by the alleged negligence of the city in maintaining a deep pit on lots belonging to it, filled with water, and only partially fenced, into which it fell while playing about it, and was drowned. The supreme court of Illinois, in passing upon that question, used this language:

"The general rule is well settled that the private owner or occupant of land is under no obligations to strangers to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation either express or implied, and merely to seek their own pleasure or gratify their own curiosity. 1 *Thomp. Neg.* p. 303; 2 *Shearm. & Redf. Neg.* (4th ed.) § 715. An exception, however, to this general rule exists in favor of children. Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises which are thus supplied with dangerous attractions are regarded as holding out implied invitations to such children. The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordi-

nary care to keep it in safe condition; for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees.' 2 *Shearm. & Redf. Neg.* 4th ed. § 705; 4 *Am. & Eng. Enc. Law*, p. 53, and cases in note. In such case, the owner should reasonably anticipate the injury which has happened. 1 *Thomp. Neg.* p. 304.

"There is conflict in the decisions upon this subject, some courts holding in favor of the liability of the private owner, and others ruling against it. Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. To charge him with such an obligation under such circumstances is merely to apply the well known maxim, *Sic utere tuo ut alienum non laedas*. It is true, as a general rule, that a party guilty of negligence is not liable if he does not owe the duty which he has neglected to the person claiming damages. *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L.R.A. 352, 25 *Am. St. Rep.* 397, 26 *N. E.* 661. But, though the private owner may owe no duty to an adult under the facts stated, the cases known as the turntable cases hold that such duty is due from him to a child of tender years.

"The leading one of the turntable cases is *Sioux City & P. R. Co. v. Stout*, 17 *Wall.* 657, 21 *L. ed.* 745. There the company was held liable in an action by a child about six years old, who had injured his foot while playing with a turntable belonging to the company, although it was contended that he was a trespasser and had received the injury because of his own negligence, and that the company owed him no duty; it appearing that the turntable was located upon the private grounds of the company in a settlement of from 100 to 150 persons, about 80 rods from the depot, near two traveled roads, and was a dangerous machine, and was not guarded or fastened, and that a servant of the company had previously seen boys playing there, and had forbidden them to do so; and it was further held that the care and caution required of a child is according to his maturity and

capacity, and is to be determined by the circumstances of each case; that the fact of the child being a technical trespasser made no difference in his right of recovery; that the question of the defendant's negligence was one for the jury to determine; and that the jury were justified in believing that children would probably resort to the turntable, and that the defendant should have anticipated their resort to it, from the fact that several boys were at play there when the accident occurred, and had played there on other occasions within the observation and to the knowledge of defendant's employees. To the same effect are the following cases: *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 123; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637; *Id.* 77 Ga. 102; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269.

"In many, if not all, of the foregoing turntable cases, stress is laid upon the facts that the turntable was in a public or open and frequented place; that it was dangerous and left unfastened, and, when in motion, was attractive to children by reason of their love of motion, 'by other means than their own locomotion;' and that the servants of the railroad companies knew, or had reason to believe, that it was attractive to children, and that children were in the habit of playing on or about it. The doctrine of the cases is that the child cannot be regarded as a voluntary trespasser, because he is induced to come upon the turntable by the defendant's own conduct. 'What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years.' *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Union Stock Yards & Transit Co. v. Rourke*, 10 Ill. App. 474.

"We are unable to see any substantial difference between the turntable cases and the case at bar. Here was a half block of ground in a populous city, bounded on two sides by public streets and on the third side by a public alley; with an opening of some 40 feet in the fence upon the street on the south side, and an opening of equal dimensions in the fence upon the alley on the north side; with a causeway running from one opening to the other diagonally across the premises, inviting approach and actually used for passage by men and teams. Upon this half block was a dangerous pond or pit in which the water was always 5 or 6 feet deep, and sometimes 14

feet deep. Logs and timbers floated about in this pond; and boys had for some time been in the habit of playing upon them in the water. The city authorities had been notified of its attractiveness to children, and of its dangerous character. They not only suffered the pond to remain undrained, but the fences around it to be broken down in some places, and to be actually removed in others. The deceased boy, Frank McMahon, is proven to have entered the premises at the opening in the fence on the alley. This opening was only 17 feet from the barn of Soady, where he dismounted from the wagon on which he had been riding. The place where he was seen playing in the water was only a few feet from this opening on the public alley. The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach.

"The doctrine of the turntable cases is sustained by other cases where the injuries complained of were caused by agencies of a different character. Such are *Mackey v. Vicksburg*, 64 Miss. 777, 2 So. 178; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Whirley v. Whiteman*, 1 Head. 610."

The other cases cited announce the same rule of law, and no special good would be accomplished by making further quotations from them. As previously stated, we are firmly of the opinion that the evidence was sufficient to make a case for the jury; and we are, therefore, of the opinion that the court properly submitted the question of the city's negligence to the jury.

II. Counsel for the city next insist that the trial court should have sustained the demurrer to the evidence, for the reason that there was no evidence introduced which tended to show the deceased child was drowned in the pool of water complained of.

This insistence is wholly untenable, for the reason that it is not denied, but practically conceded, by counsel that the child was drowned; but be that true or not, the evidence is conclusive that he was in fact drowned. But notwithstanding that fact, counsel insist that the deceased may have drowned in the stream of water above the pool, and his body may have been washed into it, where it was subsequently found. There is not a particle of evidence preserved in this record upon which to predicate such an assumption. In fact, all of the

testimony is to the contrary. The uncontradicted evidence was that the stream of water in the River Des Peres, in its ordinary and usual stage, was very small, varying in depth from a very few inches to 15 inches in its deepest places, for a distance of 1,000 feet above and below the pool of water in which the body was found; and there was not a particle of evidence tending to show that the stream did not remain in its ordinary and usual stage from July 10, 1908, when the boy was last seen alive wading in the stream about 100 feet above the pool, until a few days thereafter, when his body was found.

The presumption is that he was exercising ordinary care at the time he was drowned. *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503. Also that he was not assassinated, for the law never presumes that a crime has been committed. This is elementary.

III. It is finally insisted that the argument of counsel before the jury was calculated to prejudice the minds of the jury against the defendant, and was for that reason erroneous. We have examined the record touching that matter, and have failed to find any objectionable language therein, or in the suggestion that the witnesses were improperly interrogated about immaterial matters for the purpose of unduly influencing the jury.

Finding no error in the record, we are of the opinion that the judgment should be affirmed, and it is so ordered.

ARKANSAS SUPREME COURT.

MARION CAPPS, Appt.,

v.

STATE OF ARKANSAS.

(— Ark. —, 159 S. W. 193.)

New trial — criminal law — jury's reading newspapers.

A new trial should be granted where the

Note. — Juror in criminal case reading newspaper account of trial as ground for new trial.

For opinion gained from newspapers as disqualification of juror in criminal case, see the note to *Scribner v. State*, 35 L.R.A. (N. S.) 985.

This note presupposes that it appears by competent evidence that newspaper accounts of the trial have been read by one or more jurors, and it does not deal with the question of the manner or quantum of proof that there has been such reading.

The question whether a new trial should be granted in a criminal case, because the jury have read newspaper accounts of the

jury in a murder case read narrative newspaper articles at the trial containing statements that the evidence is not shaken, is sufficient to convict, that there is little conflict, that the testimony is sensational, that the public was startled, and pointing out the strong features of the evidence.

(McCulloch, Ch. J., dissents.)

(July 14, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Sebastian County convicting him of murder. Reversed.

The facts are stated in the opinion.

Messrs. Jesse A. Harp, George W. Dodd, and I. Simmons, for appellant:

If the defendant in a criminal case has or might have been prejudiced by the reading of newspapers by the jury while in discharge of their duty, the verdict will be vitiated.

People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681; *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176; *State v. Walton*, 92 Iowa, 455, 61 N. W. 179; *State v. Caine*, 134 Iowa, 147, 111 N. W. 443; *Cartwright v. State*, 71 Miss. 82, 14 So. 526; *State v. Jackson*, 9 Mont. 508, 24 Pac. 213; *Carter v. State*, 9 Lea, 440; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *United States v. Ogden*, 105 Fed. 371.

Messrs. William L. Moose, Attorney General, and John P. Streepey, Assistant Attorney General, for the State:

Jurors' affidavits as to misconduct were inadmissible.

Kirby's Dig. § 2423; *Wilder v. State*, 29 Ark. 293; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Hampton v. State*, 67 Ark. 266, 54 S. W. 746; *Dolan v. State*, 40 Ark. 454.

Smith, J., delivered the opinion of the court:

The appellant was indicted for the crime of murder in the first degree, alleged to have

trial, is addressed to the discretion of the trial court, and depends upon whether the accused has been prejudiced by such reading.

As was stated by the court in *People v. Gaffney*, 14 Abb. Pr. N. S. 36, 1 Sheldon, 304, an inquiry will always be whether an improper influence, through such a medium, was brought to bear upon the jury.

Reading accounts not of a nature to influence the jury.

The reading by jurors in a criminal case of newspaper accounts of the trial is not a cause for a new trial when the articles read were not of a nature to influence the jury.

United States v. Reid, 12 How. 361, 13

been committed in the Greenwood district of Sebastian county, after premeditation and deliberation, by tying Rose Capps and Priscilla Capps in the bed upon which they slept, and by then and there perpetrating the crime of arson by setting fire to and burning a certain house, which they occupied, and which said house was under the control of the said Marion Capps, and thereby wilfully and feloniously caused the death of the said Rose Capps and Priscilla Capps, by then and there causing them to be burned to death. The venue was changed to the Ft. Smith district, and upon a trial there appellant was found guilty, and appeals to this court from the judgment sentencing him to hang.

A number of exceptions were saved at

the trial, and are assigned here as error calling for the reversal of the case. Among other grounds upon which a reversal is asked are the discovery of new evidence and the insufficiency of the evidence; but, in view of the fact that the case will be reversed for another reason, we do not discuss those assignments of error. No exceptions were saved to any of the instructions, and as the other errors complained of are not likely to occur at another trial, we discuss only the error which in our judgment calls for the reversal of the case, and this error is the misconduct of the jury in reading, and in being permitted to read, newspaper articles relating to the trial.

It was also objected that the verdict of the jury was insufficient to support a judg-

L. ed. 1023; *United State v. Francis*, 144 Fed. 520; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899; *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782; *State v. Cucuel*, 31 N. J. L. 249; *People v. Gaffney*, 14 App. Pr. N. S. 36, 1 Sheldon, 304; *State v. Brown*, 7 Or. 186; *Com. v. Valverdi*, 32 Pa. Super. Ct. 241; *Moore v. State*, 36 Tex. Crim. Rep. 88, 35 S. W. 668.

Thus it has been held to be no ground for a new trial that the jury or some of them read in a newspaper:—

—(prior to their retirement) a perfectly fair *résumé* of the facts. *People v. Leary*, 105 Cal. 486, 39 Pac. 24 (murder);

—reports of the progress of the trial. *People v. Fernandez*, 3 Cal. App. 489, 86 Pac. 899;

—a statement that the case was upon trial. *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782;

—a report or abstract of the evidence. *State v. Cucuel*, 31 N. J. L. 249;

—a portion of the testimony and brief abstract of the argument of counsel. *People v. Gaffney*, 14 App. Pr. N. S. 36, 1 Sheldon, 304 (a capital case);

—(after their selection, but before the jury was entirely completed) a reference to the case, a part of which was somewhat jocular but in no wise prejudicial to the defendant. *State v. Brown*, 7 Or. 186 (where, however, there was probably a waiver).

It was held to be no ground for a new trial that two jurors had read a newspaper report of the evidence, where one of them stated that it was correct and had refreshed his memory, and the other did not think it accurate, but both saying that it had not influenced them. *United States v. Reid*, 12 How. 361, 13 L. ed. 1023.

A juror knows all about the progress of the trial, and it cannot hurt him to read what he already knows. *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899.

In *United States v. Francis*, 144 Fed. 520 (modified as to the sentence in 152 Fed. 155), the court was of the opinion that a 46 L.R.A. (N.S.)

mere account of some of the evidence and of incidents occurring during the trial, and some incidents as to the arrest of other parties, did not constitute any objectionable matter that would prejudice the defendant's case.

It is not ground for a new trial that a juror has read a comment in a newspaper on his qualification by reason of the fact that he was formerly a policeman. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

Reading prejudicial accounts.

Conversely, the reading by the jury in a criminal case of newspaper articles which are likely to influence the jury is ground for a new trial.

Mattox v. United States, 146 U. S. 140, 38 L. ed. 917, 13 Sup. Ct. Rep. 50; *Capps v. State*; *People v. Stokes*, 103 Cal. 193, 142 Am. St. Rep. 102, 37 Pac. 207; *United States v. Ogden*, 105 Fed. 371; *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681; *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176; *Cartwright v. State*, 71 Miss. 82, 14 So. 526; *Com. v. Landis*, 12 Phila. 576; *Com. v. Johnson*, 5 Pa. Co. Ct. 236; *Carter v. State*, 9 Lea, 440; *Walker v. State*, 37 Tex. 366; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

Thus it has been held that a new trial should be granted in criminal cases where the jurors, or some of them, had read in a newspaper:—

—an article containing charges against the accused not in evidence, and stating that the testimony was strong and that the accused did not venture to testify in his own behalf. *United States v. Ogden*, 105 Fed. 371;

—an article giving evidence excluded by the court and containing intimations that two of the jury had been corrupted. *People v. Stokes*, 103 Cal. 193, 142 Am. St. Rep. 102, 37 Pac. 207;

—articles as to charges of perjury against the defendant's witnesses. *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681;

—an article describing the accused as

ment imposing the death sentence, for the reason that it did not declare the degree of the homicide of which the defendant was guilty. Section 2409 of Kirby's Digest reads as follows: "The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of crime shall be found by such jury." The judge in his charge to the jury gave them the following directions: "Gentlemen, if you find the defendant guilty of murder in the first degree, the crime with which he is charged in the indictment, write your verdict, 'We the jury, find the defendant guilty as charged

in the indictment.' If you find him guilty of murder in the second degree, write your verdict, 'We, the jury, find the defendant guilty of murder in the second degree,' and assess his punishment at a term in the state penitentiary of not less than five nor more than twenty-one years, the time to be fixed by you, not less than five nor more than twenty-one years. If you find the defendant not guilty, write your verdict, 'We, the jury, find the defendant not guilty.' If you find him not guilty on the ground of insanity, state that fact in your verdict." The jury returned the following verdict: "We, the jury, find the defendant guilty as charged in the indictment." It is contended that, although this verdict, read by itself, does not state the degree of the

having been convicted of murder, granted a new trial, and let off on account of a loss of records. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (murder);

—(in a homicide case) an editorial criticizing the lax administration of the law by juries in homicide cases. *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176; see also *State v. Walton*, 92 Iowa, 455, 61 N. W. 179, *infra*, "Particular statutes;"

—accounts containing in substance the testimony with unfavorable comments and remarks against the accused. *Cartwright v. State*, 71 Miss. 82, 14 So. 526 (homicide);

—(in a forgery case) a statement that the accused had already been convicted of a forgery, stating briefly the facts as to such previous crime. *Com. v. Landis*, 12 Phila. 576;

—(in a capital case) a statement that "we hope that strict justice will be accorded him, and that, if innocent, which few believe, he may be able to prove it, and thus save his neck from the gallows." *Com. v. Johnson*, 5 Pa. Co. Ct. 236;

—(in a manslaughter case) accounts highly prejudicial to the accused, not of the trial, but of the crime, and comments upon it. *Carter v. State*, 9 Lea, 440.

In *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799, it was held ground for a new trial in a homicide case where the defense was insanity, that the jury had read a newspaper containing an account of another murder trial where the defense was insanity, containing expert testimony in regard to insanity that might prejudice the jurors in the case on trial. But compare *Schissler v. State*, 122 Wis. 395, 99 N. W. 593, *infra*, "Appellate review."

In *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50, it was held to be good ground for a new trial that eight of the jurors had read a newspaper published after the case had been given to the jury, containing statements that the defendant had been tried for his life once before: that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the de-

fendant's friends gave up all hope of any result but conviction: and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict.

In *Cartwright v. State*, 71 Miss. 82, 14 So. 526, where it was held to be good ground for a new trial that some of the jurors had read newspaper accounts of the trial containing in substance the testimony with some unfavorable comments and remarks against the accused, the court said: "It filtered through the medium of a partisan of the state, and was his version of the evidence. This version, too, was accompanied by remarks of the reporter unfriendly to the accused, and well calculated to excite prejudice in the mind of a reader. The homicide was characterized as 'the unprovoked murder of two officers while in the discharge of official duty.' The defendants were declared to be the possessors 'of very unsavory and damaging antecedents.'"

In *Walker v. State*, 37 Tex. 366, where a murder case was reversed on several grounds, the court said: "The suffering jurors to have, during the progress of the trial, daily access to newspapers containing imperfect or incorrect accounts of the trial being had before them, together with comments upon the person and characters of those connected with the trial, was certainly erroneous and improper, and of itself sufficient to vitiate the verdict rendered by them."

But the reading of a prejudicial article will not result in a new trial if the court is satisfied that the accused has not been harmed thereby. Thus, in *Moore v. State*, 36 Tex. Crim. Rep. 88, 35 S. W. 668, it was held to be no ground for a new trial that, after the jury had agreed that the plaintiff was guilty and while deliberating upon the length of imprisonment they should give him, one of the jurors, who said he was not influenced by it, read a newspaper account of the defendant, stating that he was under indictment for murder in another part of the state and had been accused of various misdemeanors: and the juror stated that, after reading the article he finally agreed to

homicide, it is yet made definite and certain by reference to the charge of the court; that the verdict returned employed exactly the language which the court directed to be used in the event appellant was found guilty of murder in the first degree. The courts are divided on the question of the sufficiency of such verdicts, and eminent authority could be cited upon both sides of the question of the sufficiency of this verdict. Unquestionably the verdict would be insufficient except by reference to the charge of the court; but, as we are reversing the case upon another ground, we permit any discussion of its sufficiency here, as that question is not likely to arise upon another trial.

The newspaper articles complained of

a less term for imprisonment than that for which he was formerly in favor.

And see cases, *infra*, "Appellate review," where the appellate court declined to disturb the ruling of the trial court refusing a new trial, although the articles read were prejudicial to the defendant.

Article containing judge's charge.

In *Farrer v. State*, 2 Ohio St. 54, it was held to be cause for a new trial in a murder case that the jurors read a newspaper containing a portion of the judge's charge, a part of which at least was admitted to be entirely correct, and the rest of it was in condensation. The real ground of the decision seems to have been that it would have been error for the judge himself to have repeated his charge to the jury in the absence of the prisoner and his counsel, and that therefore the jury could not thus consider the charge by themselves.

Comment on defendant's failure to testify.

The interesting question whether the reading by the jury of newspaper statements that the defendant failed to testify in his own behalf will be ground for a new trial seems to be unsettled.

It was held in *Williams v. State*, 33 Tex. Crim. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958, that the reading by two jurors of a newspaper was not fatal to the verdict, although the headlines stated that the defendant was not placed on the stand. As to this the court said: "It merely stated a fact already known to the jury. The inhibition upon counsel in the case alluding to defendant's failure to testify is statutory (Acts 21st Leg. 37), and it is for that reason we reverse cases where the statute is violated, even though the error was harmless."

But in *United States v. Ogden*, 105 Fed. 371, in granting a new trial for the reading by the jurors in a criminal case of a newspaper article highly prejudicial to the defendant in several matters, and which stated in headline that the accused did not testify, and below it, that he "did not venture on

were published in the Ft. Smith Times Record and the Southwest American, daily papers published in that city, and each was shown to have had a large circulation. The foreman of the jury testified upon the hearing of the motion for a new trial that he and other jurors read these articles. But this evidence was not competent for that purpose, and would be insufficient to support a finding that members of the jury had read these articles, because jurors are not thus allowed to impeach their verdict. § 2423 of Kirby's Digest; *Wilder v. State*, 29 Ark. 293; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Hampton v. State*, 67 Ark. 266, 54 S. W. 746. But the finding that the papers had been read by the jury did not depend alone upon

the stand in his own defense, the court said: "In defiance of the constitutional provision that no man shall be obliged to testify against himself, attention was called to that fact, and it was asserted that the defendant did not venture to testify in his own behalf,—an assertion which neither judge nor counsel would have been permitted to make during the course of the trial."

Under particular statutes.

The reading by jurors of a fair synopsis of the evidence in a newspaper is not receiving additional evidence within the statute, and is not a cause for a new trial. *Williams v. State*, *supra* (murder).

A newspaper is not a "paper" within a statute inhibiting the receipt by the jury of "papers" not authorized by the court. *State v. Jackson*, 9 Mont. 508, 24 Pac. 213, where it was held that the reading of newspapers by the jury was not within the meaning of the word "papers" as used in the statute providing: "A new trial shall be granted when the jury receive any evidence, papers, or documents not authorized by the court," but fell within the further provision of the statute which provided: "A new trial shall be granted when the jury has been separated without leave of the court, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case" (and it was held "that the simple reception by a juror of a newspaper does not, *ipso facto*, vitiate the verdict, but that such reception must be considered as any other misconduct of a jury, and be treated by the rules governing cases of misconduct").

When the statute provided that "the jury may also take with them notes of the testimony or other proceedings on the trial taken by them, but none taken by any other person," it was held to be cause for a new trial in a homicide case that the jurors, while they were deliberating, had read newspaper accounts purporting to be full reports of the evidence and the addresses of counsel, with fulsome commendation of the arguments of the counsel for the state, and

the affidavit of the jurors, as the officer in charge of the jury and the proprietor of the hotel at which the jury was being entertained testified that the jurors bought these papers, and some of the jurors read them, and that other jurors had access to the daily papers belonging to the hotel, and read them as other guests did. These articles were very lengthy, extending over several columns of each of these papers, and we will not set them out in *extenso*, but copy the following excerpts from them:

Ft. Smith Times Record:

"Hears His Children Tell How He Tried to

Burn Them to Death in Their Beds.

"Calmly and dispassionately Bertha and

Ellis Capps told the jury in the circuit court this morning a story that, if not broken down, will send their father, Marion Capps, to the electric chair, that mode of capital punishment having been substituted by the present legislature for hanging.

"The Flame-Scarred Brother.

"Ellis Capps, age fourteen years, bore plainly the evidence of his close call from death in the flames in scars that disfigured his forehead and hands and mutilated one ear. His testimony did not materially differ from that given by his sister.

"Neighbor Testifies to Rope.

"Capps Feared Mob.

"Wiggington says Capps expresses desire

with criticisms and complaints against the courts for failure to bring criminals to justice. State v. Walton, 92 Iowa, 455, 61 N. W. 179.

In State v. Caine, 134 Iowa, 147, 111 N. W. 443 (quoted from in CAPPS v. STATE), where the statute required the court to admonish the jury, "that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial . . . and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them," it was held to be cause for a new trial that the jurors read newspaper accounts of the case, which, while not objectionable for general purposes, were not strictly accurate. The court said: "The reading of newspaper accounts of and comments upon the trial is thus prohibited by the letter and the spirit of the statute."

Waiver.

The question of waiver seems generally to have arisen where there was no reason to consider that the jury had been prejudiced.

In Hunter v. Georgia, 43 Ga. 483, the appellate court declined to disturb a verdict where, after some of the jury had been sworn and while they were waiting for the completion of the jury, they read a newspaper attack upon the defendant's counsel, who was aware of this at the time, but made no exception to it until after the verdict.

In Bulliner v. People, 95 Ill. 394, it was held that the defendant had waived any objection to the reading of two newspapers, one of which had been handed to a juror by the defendant's counsel, who later saw the juror reading the other paper and privately asked the court to see that papers did not reach the jury, but made no motion. It appeared in the record that it was thought best by the trial court, "and was so stated to counsel at the time, that as the paper was already in the hands of one 46 L.R.A. (N.S.)

of the jurymen it would give the article too much prominence and do the defendants more harm than good to speak about it, and nothing further was said or done about it."

In McCue v. Com. 103 Va. 870, 49 S. E. 623, the court declined to order a new trial where the prisoner and his counsel made no objection to the statement of the court to jurymen, before the formation of the jury, that they might read the parts of the daily newspaper not relating to the trial, but must avoid anything relating thereto, and it did not appear that the limits imposed by the court were exceeded, although the court had not inquired of the defendant or his counsel at the time whether they had any objections.

In Marrin v. United States, 93 C. C. A. 351, 167 Fed. 951, it was held that there was no error in refusing to withdraw a juror where the matter of the reading of objectionable newspaper articles was called to the attention of the court by the defendant's counsel, and several of the jurors thereupon admitted reading the articles and stated that they would not be influenced thereby, and the defendant did not insist upon any motion but left himself in the hands of the court.

It was held that there was no prejudice to the defendant where, before the jury was completed, those of the jurors who had been selected read a newspaper reference to the case, and the court offered to discharge the jury if the defendant's counsel wished it, who declined to take any attitude, but excepted to the fact that the jury was not discharged and told the court he would except if they were discharged. State v. Brown, 7 Or. 186.

Appellate review.

The granting or refusing of a new trial in a criminal case on account of the reading of newspaper accounts by the jury is a matter of discretion in the trial court, and will only be reversed where there is clear abuse of discretion. Com. v. Valverdi, 32 Pa. Super. Ct. 241; State v. Briggs, —

for officer to make haste to get him to a place of safety as it was horrible affair, and was afraid neighbors do him bodily harm."

And the following excerpts are taken from the Southwest American:

"Children testify that father murders three by firing home; other witnesses for the state told of finding ashes held in perfect form of charred rope, across the breast of the children who met death in the house."

"Judge Harp was scored by the court by the nonarrival of a witness from Jenny Lind, whose absence caused a halt in the case. Shortly afterward, when counsel attempted to place on stand a witness who had been given the privilege of court room throughout hearing, Judge Hon again grew warm in his remarks to Jurge Harp, and said condemned counsel's action in case of missing witness as well as in other case."

"On Cross-Examination Wigginton

"Said he saw big oil can in the ruins.

Minn. —, 142 N. W. 823; State v. Jackson, 9 Mont. 508, 24 Pac. 213; Schissler v. State, 122 Wis. 365, 99 N. W. 593.

See also as indicating a like opinion Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138, where the particular question was upon the separation of jurors in a murder case, the reading of newspapers being merely incidental.

In State v. Briggs, — Minn. —, 142 N. W. 823, the court said: "The court below was in better position to determine whether prejudice resulted from the act of the juror, and, having ruled thereon adversely to defendant, its conclusion should not be disturbed."

The reading of newspapers stating the evidence or part of it and incidents occurring at the trial in the presence of the jury, and not incorrect, will not lead an appellate court to overthrow the discretion of the trial court in refusing a new trial. Com. v. Valverdi, 32 Pa. Super. Ct. 241.

And that the articles read are prejudicial to the defendant will not necessarily cause the appellate court to interfere with the discretion of the trial court. Thus, in State v. Jackson, 9 Mont. 508, 24 Pac. 213, it was held that the reading of newspapers by jurors, containing accounts of the evidence and comments adverse to the defendant before the trial was half over, when the matter was brought to the attention of the court, who forbade any further reading of the papers, was not a cause for a new trial, as the court on appeal could not hold that any prejudice had appeared.

So, in Palmore v. State, 29 Ark. 248, where a murder case was sent back for a new trial for other errors, it was stated that the appellate court would not overrule the decision of the trial court refusing a new trial on account of the reading 46 L.R.A. (N.S.)

The top dented, no flames issuing from the holes. The prosecution contends that this proves the can had been emptied of oil, and that there was no explosion. Had there been an explosion, the state asserts the can would have been torn and battered."

"Every one of the three witnesses who testified at the morning session gave startling testimony.

"In fact their stories constitute a series of sensations. Hardly had the audience recovered from the surprising recital of fifteen-year-old Bertha Capps, than Ellis, aged fourteen, droopy-eyed and weary, his hands and face disfigured by the ravages of the fire, and standing as mute evidences of the child's horrible experience, startled the spectators with his testimony. The story of the children corroborated in detail, but with one or two minor exceptions both related their testimony in a straightforward manner, and every neck in the room was stretched so that not a word would escape the listener.

by a juror of a newspaper article asserting that the prisoner had been proved guilty.

And in Schissler v. State, 122 Wis. 365, 99 N. W. 593, where in a murder case the defense was insanity, and some of the jurors had read a newspaper upon feigning insanity, referring to a case in another state where it was claimed that insanity had been feigned in capital cases, and it had been held by the court below that no improper influence had affected the verdict, the appellate court in affirming the judgment said: "Since this decision does not appear to be against the clear weight of the evidence it will not be disturbed by this court." Compare State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799, supra, "Reading prejudicial accounts."

See also infra, "Where court satisfied with result."

—where court satisfied with result.

There are cases which place the appellate court's refusal to grant a new trial on account of newspaper reading by the jury on the ground that that court is satisfied with the result.

Thus, in State v. Williams, 96 Minn. 351, 105 N. W. 265, it was held that it was not ground for a new trial in a murder case that the jury read an account of the evidence of the defendant on the stand, giving in the main a correct account of it, but commenting upon the defendant in a manner showing bias against him, when from the whole case the defendant, in the opinion of the court, had not been prejudiced. The court said: "It affirmatively appears, as already stated, from the evidence in this case, that the jury could not have returned honestly or intelligently any other verdict than the one they did return. Nor can we intelligently assume that they would

"Their testimony was delivered without emotion, except towards the closing part of the girl's cross-examination, when her answers became haughty and snappy. She finally broke into tears as she dramatically exclaimed, after she had given shocking testimony, that 'I would tell the same story if I was on my dying bed.'

"Despite the insistent and repeated efforts of counsel for the defense to shake stories of the children the youthful witness remained firm. Said father read them twentieth chapter of St. John from the Bible. She did not know that the subject dealt with the resurrection."

It is always improper for a juror to discuss a cause which he is trying as a juror, or to receive any information about it except in open court and in the manner provided by the law. Otherwise some juror might be subjected to some influence which would control his judgment, something might be communicated to him which would be susceptible of some simple explanation,

which could not be made because of the ignorance of the influence to which the juror had been subjected. But while jurors should never read the newspaper accounts of the progress of the trial for fear they might be influenced by something which was not in evidence, and which had not occurred in the view of the jury, yet the mere reading of a newspaper account of a trial does not necessarily call for the reversal of the case, if the article contained nothing of an unfair or prejudicial character, and gave no intimation to the jury of the effect of any evidence or the weight given to it by the public. *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Gaffney*, 1 Sheldon, 304; *Com. v. Fisher*, 134 Am. St. Rep. 1056, note 6.

A leading case upon the subject of newspapers read by the jurors engaged in a trial, and the effect of such conduct upon the part of the jurors, is the case of *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176, and in this case Justice Atkin-

have returned a false verdict, if some of them had not read the articles in question. Therefore we hold that in the reading of the newspaper articles in question by the jury was not prejudicial error."

So, in *Com. v. Chauncey*, 2 Ashm. (Pa.) 90, the fact that the court was satisfied with the verdict is the only reported reason for the denial of a motion for a new trial in a murder case, made partially on the ground that the jurors had read a newspaper containing an inaccurate account of the proceedings.

In *Burns v. State*, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987, where a newspaper found its way into the jury room with an account of the deliberations of the jury, and stating that one jurymen was persisting against his fellows in holding that the defendant was not guilty, the court declined to set aside the verdict on the ground that they were "unable to reach a conclusion that, had the improper conduct not occurred, the result might within reasonable probabilities have been different."

Miscellaneous.

In *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657, it was held to be cause for a new trial that the jury in a murder case stayed at a hotel, mixed freely with the guests, read newspapers, etc.

In *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799, it was held not to be ground for a new trial in a homicide case that the jury had read a newspaper account of a murder committed in another state.

While without the scope of this note, reference should be made to *State v. McCormick*, 20 Wash. 94, 54 Pac. 764, where it was held to be error requiring a new trial 46 L.R.A. (N.S.)

when the court, without consent of the defendant, gave permission that two letters from a distance and a newspaper should be delivered to a juror, after examining the newspaper and finding that it contained nothing relating to the trial. This was upon the ground that the letters were sealed and might have been used to insert communications to the jury, and that it was not necessary to establish that the letters did contain anything damaging to the defendant.

But this case was criticized as an extreme case and as not reflecting the more modern ideas on the subject in the murder case of *State v. Pepon*, 62 Wash. 635, 114 Pac. 449, where the court held that it was no ground for a new trial in a murder case that jurors were furnished each with a magazine, by consent, and on direction of the court, it not being claimed that there was anything in the magazine concerning the case on trial.

In *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899, where after the jury had been impaneled, and during the taking of testimony the defendant requested the privilege of asking the several jurors some questions in open court as to whether they had read any reports of the trial in the newspapers, and the court refused the request, stating that this was not the time or place for any such inquiry, the appellate court said: "We think the court was right, and that there is no merit in the objection to the action taken."

In *Flanagan v. State*, 64 Ga. 52, where just before the verdict a newspaper was delivered to one of the jurors, but its contents do not appear, the court, while granting a new trial for other reasons, disposed of this objection as not having been prejudicial to the defendant. B. B. B.

son, speaking for the court, said: "The state is jealous of the rights and liberties of its people. When one of its citizens is accused of crime, it throws around him all the safeguards . . . possible, in order to procure for him a fair and impartial trial. It requires the officer who has charge of the particular jury to swear, in substance, in open court, to take them to the jury room, and there keep them safely, and not to communicate with them himself, or suffer anyone else to communicate with them, unless by leave of the court. The law contemplates that when a jury are selected and sworn to try a citizen for felony, they shall be entirely separate from the world, and that no communication whatever shall be had with them from the beginning of the trial until the verdict is reached, unless by leave of the court. It contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try." It will be observed that the oath taken by the officer in charge of the jury in that state is very similar to the oath which the court administers to the officer in charge of the jury upon each adjournment of the court in this state. Section 2390, Kirby's Digest. And the court there further said: "When a juror enters upon the trial of a criminal case, the law contemplates his withdrawal from the public, and makes no provision for addresses to him from outside sources, for his entertainment or otherwise, which are calculated, directly or indirectly, to excite any passions or emotions with respect to the matter upon which he is to sit in judgment. Perfect impartiality in the juror is the object of the law. Anything not legitimate, arising out of the trial of the case, which tends to destroy the impartiality of the juror, should be discounted,"—and in the same opinion the following language was quoted with approval from the case of Cartwright v. State, 71 Miss. 82, 14 So. 526: That "this method of communicating to and impressing upon the jury, or any member of it, the opinions of others is open to the same condemnation which would be visited upon oral expressions of opinion touching a defendant, injected into the body of the jury by some designing intermeddler. . . . The widely read and influential daily journal, speaking for, as well as to, the public, reflecting popular sentiment as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single pri-

vate individual." And in the note to this Style Case, supra, the following language is quoted from the case of State v. Caine, 134 Iowa, 147, 111 N. W. 443: "The accounts were written in a somewhat sensational manner, though not perhaps objectionable as news intended for the general public. They were not confined to verbatim reports of the testimony of the witnesses, but, to a large extent, consisted of condensed accounts of what was testified to by the witnesses and statements of the facts involved, some of them not shown by any evidence in the case. However fair these accounts may have been, and for the most part they were unobjectionable as a current report of the proceedings, they were communications, with reference to the case, which the jurors should not have received. The only discussions of the evidence which the jurors should have an opportunity to consider, before they are secluded for deliberation on their verdict, are discussions in open court, by the attorneys of each party in the presence of those for the other, in which errors of statement may be corrected and improper inferences may be controverted. The jurors should not subject themselves to the danger of misconception and error, which must exist if outside persons, without the checks incident to an orderly trial and discussion in court, are allowed to sum up the evidence, emphasize its particular features, and suggest the conclusions to be drawn therefrom."

It will be observed that the language employed in the first quoted newspaper article is not a verbatim report of the evidence of any witness, but is a statement in narrative form of the reporter's understanding of it. It will be observed, too, that it communicates to the jury the paper's estimate of its sufficiency, for the article in the Times Record contains the statement that the evidence, if not broken down, would send the appellant to the electric chair, and also states the opinion that the evidence of Ellis Capps, a son of appellant, did not materially differ from that given by his sister, although the defense contended that neither the boy nor the girl should be believed because of inconsistencies in their statements and contradiction contained therein. The article in the Southwest American is open to substantially the same objections, and calls especial attention to a circumstance in proof, which was regarded by the state as highly significant, and that is that the can which had contained the oil supposed to have been used in saturating the bed upon which the children had been sleeping, had not exploded, and that, therefore, the oil had been poured out of the can before the fire occurred.

The article in the American also advised the jury that the public was startled by the sensational character of the evidence, and that the appearance of the boy bore mute evidence of his horrible experience and the consequent truthfulness of his story. It also stated that the evidence of the daughter was given without emotion, except towards the closing part she became haughty and snappy, while the theory of the defense was that the girl entertained great animosity towards her father, and had made many conflicting statements. The American's article also contained the statement that counsel for the defense had been unsuccessful in their attempt to shake the stories of the children, but that they had remained firm in them; the inference necessarily being that they were therefore true. We believe these articles were prejudicial, because they were not a mere narration of the evidence connected with the trial which had occurred within the view of the jury, and that their necessary effect was to convey to the jury the information that public sentiment had crystallized into the conviction that appellant was guilty of the horrible crime of which he was charged; that his children had stood the ordeal of a searching cross-examination, and yet remained firm because, as intimated by the papers, their story was true. These were improper influences, and we cannot know what effect they may have had upon the minds of the jury, and no attempt was made to show that the jury was not influenced thereby, and we therefore reverse this judgment, and remand the cause for a new trial.

McCulloch, Ch. J., dissenting:

The testimony in this case is not as strong as is desirable in order to warrant a conviction for a capital crime, but it is undoubtedly sufficient, from a legal standpoint, to justify this court in upholding the verdict of the jury. There are some unsatisfactory features in the evidence, but the jury had the witnesses before them, particularly the testimony of the children of the accused, and a case was made out sufficient to uphold the verdict. I cannot agree to a reversal of the case upon the grounds stated by the court, for I have an abiding conviction that the record is free from any prejudicial error.

It is a sound doctrine, and one supported by authority, to say that, where the jury in a capital case is kept together, the fact that they read newspaper articles of an inflammatory nature is sufficient to raise a presumption of prejudicial effect, and that the burden rests upon the state to remove that presumption. However, we have

the newspaper articles before us which are said to have been read by some of the jurors, and, in my judgment, there is nothing in them that is calculated to prejudice appellant's rights in the minds of those jurors. There is nothing of an inflammatory or sensational character about the articles. They only pretend to relate to events of the trial,—events which occurred in the presence of the jury,—and do not pretend to convey the outside sentiment or the opinion of the editor concerning the weight of the evidence. It is true that one of the articles speaks of the two children giving testimony which, if not broken down, would send their father to the electric chair, but the tone of the article evinces clearly the intention of the writer merely to relate the substance of the testimony, and not to express an opinion as to its weight. I think we ought to attribute to the jurors a fair degree of intelligence, and presume that they are not mere puppets, to be influenced by every flying rumor. They are supposed to be fair-minded men, who will be guided by the testimony adduced upon the witness stand and instructions of law given by the court, and not by mere expressions of others.

As before stated, I do not mean to say that a highly inflammatory newspaper article, which purports to express public sentiment, or which is calculated to convey to the minds of the jury the idea that it represents public sentiment, would not be held to be prejudicial, in the absence of a counter showing on the part of the state sufficient to rebut the presumption. These articles are not of that character, however, and it seems to me that they are not sufficient to raise any presumption that the jurors were influenced by them.

Now, as to the form of the verdict: The court has not passed upon that question; but, in order to justify my conclusion that the case ought to be affirmed, it is proper for me to say something on that subject. It is true the statute, in terms, declares that "the jury shall, in all cases of murder, on conviction of the accused, find by their verdict, whether he be guilty of murder in the first or second degree." Kirby's Digest, § 2409. When the verdict in this case is read in the light of the other parts of the record, it is perfectly clear that the jury have complied with the statute, and have by their verdict declared the defendant to be guilty of murder in the first degree. The whole record, including the court's charge, may be considered in interpreting the verdict of the jury, and if, from the whole, it can be ascertained to a certainty what the jury meant, then the verdict is sufficient. *Strawn v. State*, 14 Ark. 549;

Fagg v. State, 50 Ark. 506, 8 S. W. 829; Blackshare v. State, 94 Ark. 548, 140 Am. St. Rep. 144, 128 S. W. 549. "Whatever conveys the idea to the common understanding will suffice," says Mr. Bishop on that subject, "and all fair intendments will be made to support it." 1 Bishop, Crim. Proc. § 1004, subd. 5, § 1005a. In Fagg v. State, supra, Chief Justice Cockrill, speaking of a verdict for manslaughter which failed to specify the time, said: "Viewing the verdict in this case in the light of the evidence and the court's charge, the conclusion is reasonable, if not irresistible, that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter. If they knew there was such a grade of homicide, it is not probable that they understood that the defendant could be convicted of it in this prosecution." In the present case the court specifically charged the jury as to the form of the verdict, and told them that if they found the defendant guilty of murder in the first degree, the form of their verdict should be, "We, the jury, find the defendant guilty as charged in the indictment." In response to that instruction the jury adopted the precise form laid down by the court. It is very clear, therefore, what the jury meant when we look to the whole record, and the requirement of the statute is fully met.

I think the judgment in this case should be affirmed, and I therefore dissent from the conclusion reached by the majority.

GEORGIA SUPREME COURT.

MRS. M. C. DAVIS, Plff. in Err.,
v.
FIRST NATIONAL BANK OF BLAKELY.

(139 Ga. 702, 78 S. E. 190.)

Judgment — consent — attorney's disobeying instructions — setting aside.

1. Where a suit was brought to cancel a deed, to have the land described in it de-

Headnotes by LUMPKIN, J.

Note. — Power of attorney to bind client by consent decree.

The implied power of an attorney to compromise his client's cause of action is discussed in a note to Gibson v. Nelson, 31 L.R.A. (N.S.) 523, where the question considered was the power of an attorney to effect a settlement of his client's rights out of court without special authority to do so. A reference to that note will show that the cases are nearly unanimous in holding 46 L.R.A. (N.S.)

creed to belong to the plaintiff, to have an accounting, to recover double the usurious interest alleged to have been paid to the grantee, a national bank, and to obtain other equitable relief, if the plaintiff authorized her attorneys to enter into a consent decree fixing the amount required to be paid by her to the defendant, in discharge of all liabilities against her and the property, at \$5,000, and expressly instructed them that she would not consent to a compromise or settlement of the case except upon such terms, to which the attorneys agreed, which instructions were known to the adverse party through its leading attorney, and if, nevertheless, the defendant's leading attorney persuaded the plaintiff's counsel to disregard such instruction, and induced them to consent to a decree fixing such liability at \$15,000, declaring the debt to be hers, and not that of her husband, as she alleged it was, and directing that in default of payment by her the land should be sold as provided therein, a consent decree so entered could be set aside by the client upon proper proceedings therefor, duly commenced.

Same — effect — reinstating case.

2. If the consent decree involved in the present case should be set aside, the former case should be reinstated upon the docket for trial, and the parties should have the rights of prosecution and defense in reference thereto which they would have had before the consent decree was entered, together with any additional right which may be germane to the litigation.

Pleading — striking allegations — tauology.

3. In view of the character of the litigation in which the consent decree was entered, the fact that the allegations of the original petition largely covered the same ground as those now sought to be alleged, outside of the attack made upon the consent decree, and of the vague and contradictory character of many of such allegations in the present petition, other than those attacking such decree, direction is given that all of the allegations and prayers be stricken from the petition, except those attacking the consent decree in the former case. The striking of them on demurrer was error.

(April 17, 1913.)

ERROR to the Superior Court for Early County to review a judgment in de-

that an attorney has no such power under those circumstances.

Power to consent—in general.

The power of an attorney to bind his client by a consent decree by virtue of his general employment in the case has been frequently recognized.

Thus, in Williams v. Simmons, 79 Ga. 649, 7 S. E. 133, the court says decrees rendered with consent of counsel without

defendant's favor in a proceeding to set aside a consent decree which had been entered in favor of defendant against plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Thomas E. Watson and J. B. Burnside for plaintiff in error.

Messrs. Little & Powell for defendant in error.

Lumpkin, J., delivered the opinion of the court:

Mrs. M. C. Davis filed her petition against the First National Bank of Blakely, seeking to have a consent decree which had been previously rendered set aside, and to obtain other relief. Two amendments were made thereto. General and special de-

fraud are obligatory upon their clients, the consent of counsel being in law the consent of the parties they represent.

In *Dobbins v. Dupree*, 36 Ga. 108, the court says that a judgment upon confession by an attorney at law, which has gone to record, should not be vacated except upon the clearest and most decisive proof that the attorney acted without any authority whatever in the case from the party he represented.

And in *Gifford v. Thorn*, 9 N. J. Eq. 722, it is held that to avoid a decree entered by consent of counsel a party must show that the counsel had no authority to appear in the case.

Counsel representing a party litigant is competent to represent his client in agreeing to a consent verdict. *Webster v. Dundee Mortg. & T. Co.* 93 Ga. 278, 20 S. E. 310.

Where the confession of judgment is with the knowledge and at the instance of his client, it is sufficient without any special authorization. *Lyon v. Williams*, 42 Ga. 168.

In *Dougherty v. Andrews*, 19 Ind. 406, the court apparently regards an attorney as having power to consent to a judgment on notes against his client if the latter has been notified of the suit; but if he has not been notified, a judgment entered by consent of the attorney can be set aside.

In *Story v. Hawkins*, 8 Dana, 13, it is held that when a case is depending and in progress, it is competent for the parties, by their counsel, to agree upon the terms of the decree, and their agreements, when entered of record, are binding upon their clients.

In *Talbot v. McGee*, 4 T. B. Mon. 375, the court says that an attorney has power to confess judgment for his client, and therefore necessarily has power to bind him by an admission of facts.

Dangerfield v. Thruston, 8 Mart. N. S. 232, seems to regard an attorney as having authority to consent to judgment against his client; but see *Edwards v. Edwards*, *infra*.

In *Bates v. Bates*, 66 Minn. 131, 68 N. 46 L.R.A. (N.S.)

murrers were filed and were sustained, and the plaintiff excepted.

1. An important question arises as to the authority of an attorney to bind his client by a compromise resulting in a consent decree, in direct opposition to the instructions of his client, and with the knowledge of the leading counsel of the adverse side of such violation of instructions. On behalf of the defendant, reliance is placed upon Civil Code, § 4955, which reads as follows: "They [attorneys] have authority to bind their clients in any action or proceeding, by any agreement in relation to the cause, made in writing, and in signing judgments, entering appeals, and by an entry of such matters, when permissible, on the dockets of the court; but they can-

W. 845, it was held that the trial court did not abuse its discretion in refusing to set aside a judgment for \$1,500, entered by stipulation of the attorney for a defendant in a suit for malicious prosecution, it appearing that defendant did not appear for trial, and the attorney was unable to get into communication with him, and that defendant was probably negligent in the matter.

In *Beliveau v. Amoskeag Mfg. Co.* 68 N. H. 225, 44 L.R.A. 167, 73 Am. St. Rep. 577, 40 Atl. 734, it is held that an attorney of record has power to make final disposition of a cause by an agreement which is entered of record, made an order of court, and executed in good faith by the other party, when no limitation of his authority is or might be known by reasonable inquiry.

In *Clinton v. New York C. & H. R. R. Co.* 147 App. Div. 468, 131 N. Y. Supp. 881, a compromise judgment entered into by the attorneys for the parties was sustained, but it appeared that the judgment did not bar, release, or invalidate defendant's claim.

In *Re Maxwell*, 66 Hun, 151, 21 N. Y. Supp. 209, it was held that the act of an attorney for a creditor in consenting to an allowance to an assignee for costs and allowance on his final accounting was binding on the creditor, the court saying: "When an attorney duly appears in open court, or by a proper notice of retainer, in the absence of fraud or collusion, he must be deemed as representing his client, who must be bound by his acts in the regular line of his duty."

In *Stump v. Long*, 84 N. C. 616, it was held that an order appointing a receiver for a firm, made by consent of an attorney for the members, was binding on a member although it in effect waived his personal exemption, contrary to his intention.

In *Hairston v. Garwood*, 123 N. C. 345, 31 S. E. 653, the court says an attorney has authority to confess judgment and thereby bind his client.

In *Farmers' Trust & Canal Bank v. Ketchem*, 4 McLean, 120, Fed. Cas. No. 4,670, it is held that counsel for parties to a fore-

not take affidavits required of their clients, unless specially permitted by law." This section has been in each Code since the first, which is generally called the Code of 1863, because its operation was suspended from the time when it was first contemplated that it should take effect (January 1, 1862,) until January 1, 1863. In the first Code it appeared as § 382. It did not originate from a legislative enactment, but was a codification of the rule previously existing and arising from the decisions of courts. In such a case it has been held that the decisions will be looked to in construing the section thus codified. *Bush v. McCarty*, 127 Ga. 308, 310, 56 S. E. 430, 9 Ann. Cas. 240; *Calhoun v. Little*, 106 Ga. 336 (3), 43 L.R.A. 630, 71 Am. St. Rep. 254, 32 S. E.

86; *Ocean S. S. Co. v. Way*, 90 Ga. 747, 20 L.R.A. 123, 17 S. E. 57. This section did not confer upon attorneys any new authority, but stated in a terse form the pre-existing general rule derived from the sources to which the codifiers were authorized to look. To take such a general rule and slavishly adhere to its letter, without looking to its spirit and meaning, would be substantially to violate the rule in endeavoring to adhere to it. It is a well-established maxim, *Qui hæret in litera hæret in cortice* (liberally translated by Brougham, "He who considers merely the letter of an instrument goes but skin deep into its meaning"). Let us then look to the derivation of this rule and to the decisions of this and other courts in regard to it.

closure suit have power to consent and stipulate that the mortgaged premises be sold, and a decree entered on such stipulation will not be set aside except on the ground of unfairness or mistake.

However, a considerable number of cases hold that an attorney has no power to bind his client by a consent decree or confession of judgment without his direction, knowledge, or consent. *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369; *People ex rel. Wright v. Lamborn*, 2 Ill. 123; *Wadhams v. Gay*, 73 Ill. 415; *Smith v. Dixon*, 3 Met. (Ky.) 438; *Cetti v. Dunman*, 26 Tex. Civ. App. 433, 64 S. W. 787.

Thus, in *Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396, Chief Justice Marshall said that even though an unauthorized compromise by an attorney has assumed the form of a judgment at law, the injured party, if his own conduct has been blameless, ought to be relieved against it.

In *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159, it is held that a retraxit, being equivalent to a judgment on the merits, must be entered by the plaintiff in person; but a recital that "this day came the parties by their attorneys, and the plaintiff enters a retraxit in this case," was held, on the authority of *Coux v. Lowther*, 1 Ld. Raym. 597, to show that the plaintiff in person entered the retraxit.

In *Preston v. Hill*, 50 Cal. 54, 19 Am. Rep. 647, where the attorney entered into the compromise in defiance of the protest of his client, who, in open court, in the presence of the adverse attorney, remonstrated and insisted that the trial should proceed, the consent decree was set aside.

In *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568, it is held that an attorney is not authorized to settle and dismiss his client's cause of action by the entry of a judgment upon the merits without his client's knowledge and consent.

In *Askew v. Goddard*, 17 Ill. App. 377, it is held that a power of attorney contained in a promissory note authorizing any attorney of the state to confess judgment for the amount of the note, with interest, together with a reasonable attorney's fee, did 46 L.R.A. (N.S.)

not authorize an attorney who was acting for the payee to confess judgment for an attorney's fee in addition to the amount due on the note.

In *Ohlquest v. Farwell*, 71 Iowa, 231, 32 N. W. 277, the court says it is undoubtedly true that an attorney cannot consent to a judgment against his client without special authority, and this is quoted with approval by the court in *Rhutasel v. Rule*, 97 Iowa, 20, 65 N. W. 1013, in which it is held that an attorney under a general employment to prosecute a suit has no authority to dismiss it. These cases are followed in *Kilmer v. Gallaher*, 112 Iowa, 583, 84 Am. St. Rep. 358, 54 N. W. 697, in holding that an attorney under a general employment has no authority to consent to a judgment by compromise against his client, and the earlier case of *Potter v. Parsons*, 14 Iowa, 286, to the contrary, is regarded as being in effect overruled.

In *Goodin v. Tinsley*, 13 Ky. L. Rep. 45, it is held that an attorney employed to defend his client's title to property cannot voluntarily surrender it, and if he consents to a judgment to that effect, the client may have it set aside on the ground of fraud practised by the successful party.

In *Anderson v. Sutton*, 2 Duv. 480, it is held that an attorney appointed to defend for an absent defendant has no authority to consent to a judgment against him.

In *Edwards v. Edwards*, 29 La. Ann. 597, it is held that an attorney has no authority to consent to a judgment against his client without special authority to do so, the decision being apparently based upon a provision of the Code.

In *Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716, a letter from a plaintiff, authorizing his attorney to dismiss a suit, was held not to authorize the entry of a decree on the merits.

In *Hubbard v. Spencer*, 15 Johns. 214, it was held that authority to confess judgment at one time does not authorize an attorney for a defendant to confess judgment at a later time, after plaintiff is out of court by his nonappearance.

In *Timm v. Timm*, 34 Wash. 228, 75 Pac.

In England, after some conflicting discussion, it seems now well settled, by the later decisions, that an attorney, by virtue of his general retainer, has power to compromise a suit, provided he does not violate the instructions of his client in so doing; and that such a compromise will bind his client, even if he does violate instructions, unless the violation is known to the adverse party. A distinction has been drawn between matters directly involved in the litigation and matters collateral thereto. 3 Am. & Eng. Enc. Law, 2d ed. 362; Prestwich v. Poley, 18 C. B. N. S. 806. In America there is some conflict of authority, but the greater number of decisions hold that an attorney has no power to compromise a claim, action, or judgment of his client. Clark v. Randall,

9 Wis. 135, 76 Am. Dec. 252, note, 261, 262; Levy v. Brown, 56 Miss. 83, 88; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42. Where the latter rule prevails, it has been said that the fact that a compromise made by an attorney in excess of his authority has been consummated by a consent judgment entered in pursuance of it does not render the compromise thus consummated binding on the client, although it will make the court less inclined to disturb it, and will render prompt action and a reasonable show of merit on the part of the client necessary to secure its annulment. 3 Am. & Eng. Enc. Law, 2d ed. 362. On the other hand, it has been held that "in an action by a client to set aside a judgment against him, rendered without his authority upon

879, the court held that an attorney, in compromising his client's property rights in a divorce suit, acted beyond his authority, and reversed that part of the judgment which was based upon such compromise.

And in Watt v. Clark, 12 Ont. Pr. Rep. 359, a verdict and judgment entered upon a settlement made by a defendant's solicitor without express authority were set aside.

Effect of judgment by consent of attorney—presumption of authority.

Some courts will presume that an attorney who consents to a judgment has authority from his client to do so, in the absence of proof to the contrary.

Thus, in Davant v. Carlton, 57 Ga. 491, it is held that a confession of judgment by an attorney of record for a party will be presumed to have been authorized until the contrary is found by the verdict of a jury on the trial of that separate and distinct issue.

In Martin v. Judd, 60 Ill. 78, the court makes a distinction between a confession of judgment made by an attorney in vacation and one made in open court, his authority in the latter case being presumed until the contrary is shown, while in the former his authority must affirmatively appear.

In Dockham v. Potter, 27 La. Ann. 73, the court says that an attorney at law who consents to a judgment is presumed to have authority to do so until the contrary is alleged by the client under oath.

And in Williams v. Nolan, 58 Tex. 708, the court says that every reasonable presumption is to be indulged in favor of a settlement made by an attorney duly employed, especially after a court has entered judgment upon it.

—opening or setting aside judgment.

When a judgment has been entered by consent of an attorney without special authority, it will sometimes be set aside or reopened.

Thus, in Dalton v. West End Street R. Co. 159 Mass. 221, 38 Am. St. Rep. 410, 34 N. E. 261, it is held that when an agree-

ment has been made by an attorney against the express prohibition of the client, and the parties may be put *in statu quo*, the court may vacate any judgment founded upon it.

In Blodget v. Conklin, 9 How. Pr. 442, where an attorney appeared and consented to judgment without the authority of one of the defendants, and no disposition was shown to hold the attorney pecuniarily responsible, the defendant was let in to defend the action, and the judgment and levy were left to stand as security.

In Jordan v. Russell, 8 Ohio Dec. Reprint, 467, a verdict and judgment entered upon compromise of a will contest, by an attorney for a contestant of the will, without authority, was set aside.

In Turner v. Fleming, — Okla. —, 45 L.R.A.(N.S.) 265, 130 Pac. 551, it is held that where an attorney compromises a cause without special authority, and causes an order of dismissal as per stipulation based on such compromise to be entered, it may be set aside upon prompt application of the client.

And in Huston v. Mitchell, 14 Serg. & R. 307, 16 Am. Dec. 506, a judgment entered upon an unauthorized compromise was set aside.

As a general rule, however, the courts are reluctant to interfere with a judgment entered by consent of an attorney without special authority unless fraud appears. Adkins v. Bryant, 133 Ga. 465, 134 Am. St. Rep. 211, 66 S. E. 21; Palen v. Starr, 7 Hun, 423; Adams v. First Nat. Bank, — Tex. Civ. App. —, 52 S. W. 642.

Thus, in Saleski v. Boyd, 32 Ark. 74, while the court recognizes the rule that an attorney has no right to compromise his client's case and consent to a judgment or decree against him without special authority, it holds that a consent decree entered by an attorney will not be set aside merely because he had no special authority, but the court will look to the facts, and open the decree if the attorney acted in fraud or under mistake or misapprehension of law or fact, and the interests of the client were thereby seriously compromised.

a compromise of his claim by his attorney at law, his right of recovery in the action in which such judgment was rendered will not be inquired into; but the judgment should be set aside, the suit be again placed upon the docket, and the case proceed in the same manner as if such judgment had never been rendered." *Smith v. Dixon*, 3 Met. (Ky.) 438. See also *Dalton v. West End Street R. Co.* 159 Mass. 221, 38 Am. St. Rep. 410, 34 N. E. 261. It is unnecessary to discuss the limitations upon this rule, such as a failure to make the application within a reasonable time, the question whether the parties can be put *in statu quo*, etc.

Under the English rule the authority of an attorney in regard to the litigation was analogized to that of a general agent. But, where that rule had been adopted, it has generally been declared that an attorney at law cannot make a compromise of a litigation and consent to a judgment or decree to carry it into effect, against the express instructions of his client, when such instructions are known to the other party. Thus, in *Wharton on Agency*, after the author had advocated the English rule,

In *Holmes v. Rogers*, 13 Cal. 191, it is held that there being no allegation of fraud, or that the attorney consenting to the decree was not authorized to appear in the case and answer for defendant, or that the attorney was insolvent, a decree fairly entered into by consent of the attorney will not be set aside, the court saying: "The judgment of counsel is trusted in the management and conduct of a lawsuit. He must decide, in the absence, at all events, of express instructions, whether or how long he will contest, what points he will take, and what abandon."

In *Craven v. Canadian P. R. Co.* 62 Fed. 170, it is held that while a court might not enforce a consent judgment, entered without authority, as between attorney and client, and perhaps should, on equitable principles, reopen a judgment at the same term, entered on agreement, if unauthorized, such a judgment would become final after the term.

In *Bradish v. Gee*, 1 Ambl. 229, 1 Ld. Kenyon, 73, the court says that when a decree is made by consent of counsel, it is binding on the client, though he did not really give his consent, his remedy being against his counsel; but if the decree was by fraud and covin, the party may be relieved against it by original bill.

And in *Harrison v. Rumsey*, 2 Ves. Sr. 488, the court refused to set aside a decree obtained by consent of counsel for both sides, but said it would be different if collusion on the part of counsel could be proved.

—remedy against attorney.

Sometimes a client who is injured by the
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he says (§ 594): "If the opposite party knows that the attorney is without authority, or acts in disobedience to his client, the compromise will not be enforced to the injury of the client." *Beliveau v. Amoskeag Mfg. Co.* 68 N. H. 225, 44 L.R.A. 167, 73 Am. St. Rep. 577, 40 Atl. 734; *Weeks*, Attys. § 228; *Brady v. Curran*, Ir. Rep. 2 C. L. 314, 16 Week. Rep. 514; *Strauss v. Francis*, L. R. 1 Q. B. 379, 12 Jur. N. S. 486, 14 L. T. N. S. 322, 14 Week. Rep. 634, 7 Best. & S. 365, 35 L. J. Q. B. N. S. 133.

Not long before our first Code was adopted, the question of the authority of counsel was the subject of much discussion in England. In 1854 Samuel Swinfen died, leaving a will. Its validity was contested. Sir F. Thesiger, afterward Lord Chelmsford, appeared for the legatee, who was also the executrix of the will. He entered into a written memorandum of compromise, by one of the terms of which the estates were to be conveyed by the plaintiff to the defendant, and the defendant was to secure to the plaintiff an annuity for her life. It was agreed that either party could make this agreement a rule of court. A juror

unauthorized action of his counsel in consenting to a decree is left to an action against the counsel for damages; at least, unless the counsel is pecuniarily irresponsible.

Thus, in *Devenbaugh v. Nifer*, 3 Ind. App. 379, 29 N. E. 923, and *Thompson v. Pershing*, 86 Ind. 303, it is held that the general employment of an attorney to appear in a case amounts to implied authority to agree that judgment shall be taken against his client without express authority, even though he knows his client has a good defense, and the client must look to the attorney for redress if he acts to his injury.

In *Holmes v. Heywood*, 1 Mich. N. P. 292, it was held that if counsel has consented to a decree against his client without sufficient authority, the client must seek the remedy against the counsel, and such a decree will not be set aside unless it is made to appear that the counsel is pecuniarily irresponsible.

In *Dodds v. Dodds*, 9 Pa. 315, the court says an attorney at law doubtless has authority to bind his client by confession of judgment, and when he does so without terms to show he exceeded his authority, the client is concluded by it, and left to an action against the attorney for breach of instructions.

In *Chown v. Parrott*, 14 C. B. N. S. 74, 32 L. J. C. P. N. S. 197, 9 Jur. N. S. 1290, 8 L. T. N. S. 391, 11 Week. Rep. 608, it is held that an attorney who consents to a compromise and entry of judgment against his client is not liable in an action for damages if he acts with reasonable care and skill, and the compromise is not made against his client's express prohibition.

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was thereupon withdrawn, and the compromise was made a rule of the court of common pleas. Mrs. Swinfen insisted that the arrangement had been made not only without her sanction, but directly in opposition to her wishes, and she declined to perform it. A rule nisi was obtained against her to show cause why she should not be attached for contempt for disobedience of the rule. The three judges of the common pleas were of the opinion that she was bound by the consent of her counsel; but they thought that there was not sufficient evidence of a demand for performance and a refusal on the part of Mrs. Swinfen to justify an attachment. *Swinfen v. Swinfen*, 18 C. B. 485, decided in 1856. Another application for attachment was made, Crowder, J., delivered an opinion, declaring that Mrs. Swinfen was not bound by the compromise. Creswell, J., who, on the former hearing, had declared that the client was bound, now stated that, "as the validity of that agreement must be discussed before another tribunal, we are anxious that the question should be as little prejudiced as possible by anything that passes in this court;" but personally expressed his sympathy for the distinguished advocate who had been attacked. *Swinfen v. Swinfen*, 1 C. B. N. S. 364, decided in 1857. After the refusal of the attachment, Swinfen filed his supplemental bill, praying that Mrs. Swinfen be decreed to specifically perform the agreement for a compromise, or, in the alternative, that another issue devisavit vel non be directed. The master of the rolls held that there should be a new trial, and that the prayer for specific performance should be denied. He said: "Upon what principle, then, can it be said that an attorney has an implied authority to compromise the subject-matter of a suit which he is employed to conduct? How far does it reach? Does such implied authority extend so far as to enable him to sell the subject-matter of the suit? Yet, in point of fact, a compromise is nothing more than a sale between the parties, upon certain terms. . . . There may be cases in which questions of very considerable nicety may arise, as to whether a particular matter consented to is or is not properly one relating to the conduct and management of the cause. If it be, then I do not doubt that it is within the scope of the implied authority of the solicitor in the conduct and management of the cause; but, if it be not, then I think that it is not within the scope of his authority." *Swinfen v. Swinfen*, 24 Beav. 549 (1857). On appeal, the general question as to the power of counsel to bind their clients by compromising cases in litigation was not determined, but it was held that, 46 L.R.A. (N.S.)

"under the circumstances of this case," the agreement was not one which a court of equity would enforce. *Swinfen v. Swinfen*, 2 De G. & J. 381 (1858). After this Mrs. Swinfen brought an action against her counsel, who had then become Lord Chelmsford, to recover the costs and expenses to which she had been subjected in the litigation arising out of the compromise. On the hearing in the court of Exchequer, the barons presiding were all of the opinion that, under the facts of the case, the defendant was not liable; but they were not agreed as to all the points involved. *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890 (1860), 29 L. J. Exch. N. S. 382, 6 Jur. N. S. 1035, 2 L. T. N. S. 406, 8 Week. Rep. 545. In so far as the decision involved a difference between the authority of a barrister and that of an attorney in the management of a cause, such distinction is of little or no importance in this country. It will appear from the history of the *Swinfen* litigation that the client was finally held not to be bound to comply with the compromise which had been agreed upon by her counsel against her instruction, and made a rule or order of court; but, under the facts of the case, counsel was held not to be liable for the costs and expenses which had accrued to the client in the litigation arising out of the compromise.

In 1859 the case of *Fray v. Voules*, 1 El. & El. 839, was decided. An attorney of the name of Voules, against the directions of his client, compromised her case, and a consent order was taken therein. She sued him for damages; and it was held that "an attorney retained to conduct a cause, and having express directions from the client not to enter into a compromise, has no power, under such retainer, to enter into any compromise, even though it be reasonable and bona fide and for the benefit of the client; and, if he do so, is liable to an action for damages, though the damage actually sustained be nominal."

These cases have been somewhat fully set out, because shortly thereafter our first Code was framed and adopted, and they throw light upon the existing state of the decisions in England at that time. Three sections of the original Code are relevant to the subject under consideration. Section 382 has already been quoted in full. It referred to the authority of attorneys to bind their clients in any action or proceeding, by any agreement in relation to the cause, made in writing, etc. Section 383 declared that "without special authority attorneys cannot receive anything in discharge of a client's claim but the full amount in cash." Section 385 referred to relieving a party from the results of the

conduct of an attorney who assumed to represent such party without authority.

Let us now review the decisions of this court bearing on the subject of compromises of litigation by attorneys, and their power to bind their clients thereto by consenting to judgments or decrees. It may be stated that the Code and the decisions generally follow the English rule, at least in part; and that the decisions hold that, if an attorney at law consents to the taking of a compromise decree in a case in which he is employed, it is binding upon his client, in the absence of fraud or of violation of express directions given by his client, and known to the adverse party or his attorney. But the writer has found no decision of this court in which it has been held that if an attorney consented to a compromise judgment in direct violation of his client's instruction, and this was known to the adverse party, the judgment could not be set aside. Nor has he found any decision of this court holding that a compromise of a litigation by an attorney would bind his client, in the absence of authority from the latter, except where a consent verdict, judgment, or decree was taken.

In *Lyon v. Williams*, 42 Ga. 168, it was held that a confession of judgment by counsel, without any special authorization to that effect, was sufficient to bind his client.

In *Platen v. Byck*, 50 Ga. 245, it was held that without special authority, an attorney could bind his client by an agreement for the dissolution of a garnishment and the depositing of the fund to await the event of the suit. In the opinion of McCay, J., occurs this significant statement: "It is no answer to say that Mr. Hardin [the attorney for the complaining party] acted unwisely, or even corruptly, in making this agreement, unless Byck [the other party] was a party to or had knowledge of the corruption." The intimation is that, if the other party had been affected with knowledge, it would have made a difference.

In *Glover v. Moore*, 60 Ga. 189, it was held that a married woman, who intrusted the defense of a suit at law to counsel chosen by herself, was bound by his acts to the extent that any other suitor would be; and that if her plea were withdrawn by her counsel on terms executed by the other side, and judgment were rendered against her without any fraud on the part of her adversary or his counsel, such judgment would be binding on her. No question of the making of a compromise by counsel against the express direction of his client was involved.

In *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133, it was again ruled that a decree 40 L.R.A. (N.S.)

rendered by consent of counsel for a married woman, without fraud, would bind her, as it would bind other litigants. In the opinion there are some expressions to the effect that it is no answer to a solemn judgment of a court, rendered by consent of counsel, for the client to come in and say that the counsel misrepresented the client's interests or wishes; and that, if the client were injured thereby she would have an action against the attorney. But such expressions must be taken in connection with the question under consideration. It appears distinctly that no question of any limitation on the authority of the counsel who agreed to the decree was involved, and no knowledge by the other party of any such limitation, though there was knowledge of an absence of express authority, which, under former rulings, was unnecessary. This appears from the statement of what the court construed the allegation of an amended answer under consideration to mean. It was said (p. 653): "She does not intimate that he was not retained as counsel for these causes in her behalf, or that his powers were more limited than the general powers which appertain to the position of counsel. Moreover, she does not allege any fraud on the part of her counsel or any collusion with him."

In *Lewis v. Gunn*, 63 Ga. 542, and *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624, and other similar cases, no question of the violation of an express direction not to compromise, known to the adverse party or his counsel, was involved.

The question of the power of an attorney to bind his client by a consent judgment, in spite of a direction by the client not to compromise, was before this court in *Rogers v. Brand*, 133 Ga. 759, 66 S. E. 1095. The justices at that time constituting the court were evenly divided in opinion, Chief Justice Fish, Presiding Justice Evans, and the writer being of the opinion that the client in that case should not be held bound, but the judgment should be set aside, while Justices Beck, Atkinson, and Holden were of the contrary opinion. The judgment accordingly was affirmed by operation of law. In *Rogers v. Pettigrew*, 138 Ga. 528, 42 L.R.A. (N.S.) 852, 75 S. E. 631, the attorney for the plaintiff in the case last cited, who had made the compromise, sought to foreclose his lien for fees on certain land which was awarded to his client by the consent decree. It was held that an attorney who compromises his client's case against the latter's express direction is not entitled to any compensation. In the opinion Presiding Justice Evans cited *Fray v. Voules*, 1 El. & El. supra, and said: "A litigant has the right to insist that his case be ad-

judicated according to the established rules of law and procedure. When he instructs his attorney not to compromise his case, the attorney is bound by such instructions, and is not at liberty to violate them, even though the attorney honestly believes a compromise settlement would be to the best interest of his client." This judgment was concurred in by all the justices, except Atkinson, J. Between the dates of the two decisions, Holden, J., had resigned, and Hill, J., had been appointed in his stead. It cannot be readily understood how it can be held that a litigant has a right to insist that his case be litigated, and not compromised, and that, when he instructs his attorney not to compromise the case, the latter is bound by such instructions, and is not at liberty to violate them; and yet how it can at the same time be held that, if this want of authority on the part of the attorney is known to the other party or his attorney, such party can nevertheless bind the client by obtaining the agreement of an attorney without authority, who is known to be committing a breach of duty in making such agreement. A general agent can ordinarily bind his principal, within the scope of his agency, by an agreement with a person who is not aware of any limitation on his authority, but the principal has the power to limit his authority by instructions; and, if such limitation is known to the person contracting with the agent, there is no rule of law which will hold the principal bound by such wrongful contract. If a compromise so made by an attorney has taken the form of a consent judgment or decree, this can be set aside on proper proceedings duly instituted by the client.

Section 4955 of the Civil Code does not mean that, when a client employs an attorney to bring or defend a suit, it ceases to be the client's litigation; that he has no power to say whether he will litigate or compromise his suit; and that the attorney becomes the owner or absolute master of the litigation, so as to be able to sell or give away his client's property rights by contract, in spite of his client. This is a very different thing from the management of the litigation and agreements connected therewith, such as agreeing to a reference of the case to an auditor, or a submission of it to arbitration, to allow copies of papers to be used in evidence, to waive notices, and the like. Neither does the statutory lien which an attorney has upon a suit, which ordinarily prevents his client from settling or dismissing the case so as to defeat him of his fee, have the effect to entirely oust the client from the case.

It was contended that fraud, in order to set aside a judgment, must be fraud on 46 L.R.A.(N.S.)

the part of the adverse party or his attorney; and expressions of this sort have been used in some of the decisions. But they were cases where the magistrate forgot to notify a litigant of a time when a case would be heard, as he had agreed to do, or where the fraud alleged was that of some third party. In none of them was a violation of duty by an attorney, with knowledge of the adverse party, involved. If one knowingly obtains from an attorney at law or agent, by agreement, a surrender of the property rights claimed by his client or principal, in spite of instructions to the contrary, what name shall be given to the conduct of the party inducing the agent or attorney to violate his duty? In *Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396, the ruling actually made was that an attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client. In the opinion Chief Justice Marshall makes this pointed statement: "Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that in such a case the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it." If an attorney, under his general implied powers, has authority to compromise a case with one who is not aware of any express limitation on such authority, still this language is applicable if the adverse party knows of the violation of instructions by the attorney in making the compromise.

In the case before us it appears that a suit was brought by a married woman for the purpose of setting aside a deed and having the property described decreed to belong to the plaintiff, and also to have an accounting, to recover against the grantee, a national bank, double the amount of certain usurious interest alleged to have been paid, under § 5198 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3493, and for other equitable relief. By amendments the action was shaped so as to be one to recover such double interest only. It was held by this court that a demurrer to the petition as amended was properly overruled. *First Nat. Bank v. Davis*, 135 Ga. 687, 36 L.R.A.(N.S.) 134, 70 S. E. 246. When the case was returned to the superior court, a compromise was agreed upon by counsel for both sides. The

amendments which had been made to the petition were withdrawn, so that the petition stood as originally filed. A consent decree was agreed upon by counsel for both parties and signed by the court. The plaintiff in the former action then brought the present equitable petition and alleged that her attorneys at law, who conducted the former suit, without her knowledge or consent, and in violation of her special instructions, settled the case by a consent decree which was entered; that her attorneys were expressly instructed that they might consent to a settlement and decree whereby the plaintiff would bind herself to pay the bank the sum of \$5,000 in full settlement of all its demands against her; that this was known to the bank, but through its attorneys, and in collusion with the plaintiff's attorneys, it deliberately perpetrated a fraud upon the plaintiff by consenting to a decree which contained a judgment for \$15,000 against her in favor of the bank; and that she was informed by her attorneys that the consent decree had been taken in accordance with her instructions.

By one of the amendments it was alleged that instructions of the character above stated were communicated to one of her attorneys named, through her husband, on the morning of the day on which the consent decree was entered; that such attorney communicated them to another of her attorneys who was present; that a third attorney of hers was not present and took no part in the management of the case; that she specially instructed her attorneys that she would not consent to a compromise or settlement of the case except on such terms, "and her said attorneys agreed that they would settle in no other way;" and that, through her husband, she had on several occasions just prior to the term of court fully apprised the leading counsel for the bank of the terms on which she would be willing to settle; but that such attorney fraudulently persuaded her counsel to disregard her instructions, and induced them to consent to a decree which was rendered, whereby she was required to pay \$15,000 to the bank instead of \$5,000. A copy of the decree was attached. It declared that the debt was that of the plaintiff, and not of her husband, and that the title to the land was in the bank. It fixed the amount of the indebtedness at \$15,000, which was not to be enforced against her personally, but against the land, and provided, in regard to a restoration of title to the plaintiff upon payment of that amount in partial payments of \$5,000 each, the passing of a certain part of the property to her upon payment of the first instalment, for allowing her to sell parts of the property

at prices satisfactory to the bank, and credit the price on the debt for making sale in case of nonpayment of deferred payments, etc. On demurrer, the allegations of the plaintiff's petition on this subject must be treated as true. Of course we do not mean to express any opinion as to whether they can be sustained by evidence, or are in fact true, but we are dealing with the case on demurrer; and, in so far as the equitable petition sought to set aside the consent decree and to reinstate the parties in the situation which they occupied at the time of its rendition, it was not demurrable. The fact that the defendant had certain other attorneys than the leading attorney, who was charged with knowledge of the instructions given by the plaintiff to her counsel, would not affect the ruling above made.

It was contended that the plaintiff should be held to be bound by the agreement of her attorneys, and that she should be remitted to a suit against them for damages, if she were injured by their conduct. We have seen that the decisions have not held that the client was compelled to elect such a remedy, if there was a violation of instructions as to compromising, which was known to the adverse party. Unfortunately the members of the bar are not always opulent, and are sometimes even insolvent. Daniel Webster is said to have tersely described the career of a lawyer by the words "work hard, live well, and die poor." Leading and honored members of the profession not infrequently accumulate more learning than lucre. If it should be laid down as an absolute rule that a lawyer could in all cases bind his client by a compromise put into the form of a consent decree or judgment, regardless of instructions to the contrary, and regardless of knowledge thereof on the part of the adverse party, it will readily be seen that occasions might arise where a client's entire property involved in litigation might be agreed away, in spite of his protest, and he might be remitted to a suit by which nothing could be realized.

It was argued that the plaintiff had in the former case elected the remedy of suing the bank for double the usurious interest claimed to have been paid to it, and that she was bound by that election. But when the amendments to the former petition were withdrawn, and it was restored to its original condition, the election would seem to have been abrogated. Nor are we prepared to hold summarily, on demurrer in this case, whether or not the consent decree gave to the plaintiff all, or more than all, that she could have recovered under the former suit, with its numerous allegations

and prayers. If the consent decree should be set aside, neither party should be cut off merely by reason of such decree from prosecuting or defending the litigation.

3. The present petition contains a good many allegations rather loosely and vaguely pleaded; some of them asserting that the deed which the plaintiff made to the bank was void for usury, others that she made the deed in payment of a debt infected with usury, in which case it would not be void. *Harris v. Hull*, 70 Ga. 831 (3). Other allegations indicated that the debt which the deed was made to pay was that of the plaintiff's husband, but still others were inconsistent with that theory. One paragraph of an amendment asserts that "she has made sufficient payments to the First National Bank of Blakely to entirely liquidate her own debt to said bank, and the deed to her land now held by said bank is a conveyance of her property to pay her husband's debts; and therefore said conveyances are null and void." It was then alleged that the bank was not an innocent purchaser, "but took such deeds to her land with full knowledge of the fact that they were made to pay her husband's debts." This again is inconsistent with other allegations of the petition, and some of those contained in the former petition, which was attached thereto as an exhibit. Besides, it is uncertain as to when the payments were made; and this was attacked by demurrer.

If the decree stands of force, none of the relief sought can be had. If it should be set aside, the original suit endeavored to include the substantial grounds of complaint sought to be set up in the present case, except certain allegations in regard to payments upon the decree and in regard to rents, issues, and profits. In view of this fact, and of the character of the allegations of the plaintiff's petition, and of the fact that nearly all of them were attacked by special demurrers, we think that the proper disposition to make of the case is to direct that all the allegations and prayers be stricken from the petition, except those in reference to the bringing of the former action, its termination in the consent decree, and the attack made upon such decree; that such striking shall not be an adjudication that the plaintiff has no cause of action or right of recovery in respect to these matters; but that the present case stands as one to set aside the consent decree, and reinstate the former case as it was before such decree was rendered; and we direct that this be done accordingly.

Judgment reversed, with direction.

All the Justices concur.
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Atkinson, J., concurring:

I concur in the judgment, under the allegations made in the petition as amended, but not in all of the reasoning by which the result is reached.

IDAHO SUPREME COURT.

EX PARTE JACOB LOCKMAN.

(18 Idaho, 465, 110 Pac. 253.)

Intoxicating liquor — statutory definition.

1. Section 31 of the local option statute (Sess. Laws 1909, p. 18) defines intoxicating liquors as including "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

Same — proof of intoxicating qualities.

2. Under the definition given by the legislature in § 31 of the local option statute (Sess. Laws 1909, p. 18), all "spirituous, vinous, malt, and fermented liquors" are declared as a matter of law to be intoxicating, and it is unnecessary for the state to prove that any liquor or beverage falling within the enumerated class will in fact produce intoxication.

Same — necessity of proof.

3. Under the provisions of the local option statute (Sess. Laws 1909, p. 18, § 31, thereof), it is necessary for the state to prove the intoxicating quality of all mixtures and preparations used or intended to be used as beverages which do not fall within the enumerated class designated as "spirituous, vinous, malt, and fermented liquors."

Same — purpose of statute.

4. The legislature, in the enactment of the local option statute (Sess. Laws 1909, p. 9), evidently had in mind a twofold object, first, that of discouraging, and as far as possible preventing, intoxication and intemperance in the use of intoxicants; and, secondly, and equally important, that of protecting the youth of the state from acquiring a taste for intoxicants and the habit of indulging in drinks and beverages that contain the intoxicating element.

(August 3, 1910.)

Headnotes by AILSHIE, J.

Note. — *Do statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor.*

This question is the subject of notes in *Luther v. State*, 20 L.R.A. (N.S.) 1146, and *Bowling Green v. McMullen*, 26 L.R.A. (N.S.) 895, and this note is supplementary thereto.

Upon the question whether proof of the sale of beer is sufficient to sustain a conviction under statutes prohibiting sale of

APPPLICATION for writ of habeas corpus to secure petitioner's release from custody to which he had been committed for alleged violation of the local option statute. Proceedings dismissed.

The facts are stated in the opinion.

Messrs. Hawley, Puckett, & Hawley for petitioner.

Messrs. D. C. McDougall, Attorney General, O. M. Van Duyn, J. H. Peterson, and F. A. Hagelin for the State.

Allshie, J., delivered the opinion of the court:

The petitioner, Jacob Lockman, was arrested and taken before the probate court in Canyon county charged with selling intoxicating liquor in a prohibition district contrary to the local option statute. A preliminary examination was held, and the

evidence taken has been made a part of the petition in this case. The petitioner insists that the complaint and depositions fail to show that he has committed any public offense, and that he is therefore held unlawfully and is entitled to his discharge. The undisputed evidence as developed at the preliminary examination shows that the petitioner sold to one Charles S. Paynter at the city of Nampa 4 quart bottles of malt liquor, commonly known as "near beer." It is admitted that Canyon county is a prohibition district within the meaning of the local option statute. *Sess. Laws 1909*, pp. 9-19. It is also admitted that this liquor, called "near beer," is a malt liquor. A chemist who analyzed the near beer purchased from petitioner testified that he found it contained 1.28 per cent alcohol, and 7.1 per cent malt extract. He also tes-

vinous, malt, fermented, or intoxicating liquors, see *People v. Anderson*, 25 L.R.A. (N.S.) 446.

As is shown in the earlier notes, the authorities upon this question are in direct conflict; the weight of authority, taking the view that where the statute expressly forbids the sale of a certain class of liquor, nonintoxicating as well as intoxicating liquors of that class are included within the prohibition. The same may be said of the more recent cases.

Thus, in *LaFollette v. Murray*, 81 Ohio St. 474, 91 N. E. 294, it was held that the statute imposing a tax upon the business of trafficking in "spirituous, vinous, malt, or other intoxicating liquors" included malt liquors, whether intoxicating or not. This decision was approved in *State v. Walder*, 83 Ohio St. 68, 93 N. E. 531. Prior decisions of inferior courts to the contrary must be considered as overruled. *State v. Nunlist* 9 Ohio N. P. (N. S.) 103; *Graham v. State*, 9 Ohio N. P. (N. S.) 174, 20 Ohio S. & C. P. Dec. 91.

The rule in Idaho is the same. See *EX PARTE LOCKMAN*.

Under § 1 of art. 3 of the Oklahoma act approved March 24, 1908 (§ 4180 of Snyder's Comp. Laws), forbidding the sale of "any spirituous, vinous, fermented, or malt liquors, or any imitation or substitute therefor," it is necessary neither to allege nor prove that the liquor sold was intoxicating. The allegation and proof that the liquor sold was a spirituous, vinous, fermented, or malt liquor, as the case may be, or an imitation of or a substitute for one or the other of those liquors, is sufficient, and it will be no defense to show that the liquor was not intoxicating. *Moss v. State*, 4 Okla. Crim. Rep. 247, 111 Pac. 950; *Etter v. State*, 4 Okla. Crim. Rep. 230, 111 Pac. 957; *Childers v. State*, 4 Okla. Crim. Rep. 237, 111 Pac. 958.

The rule in Mississippi is that where the statute prohibits the sale of a certain named class of liquors as intoxicating liquors, such liquors cannot be sold though in fact they

are intoxicating. *Reyfelt v. State*, 73 Miss. 415, 18 So. 925; *Edwards v. Gulfport*, 95 Miss. 148, 49 So. 620; *Fuller v. Jackson*, 97 Miss. 237, 30 L.R.A. (N.S.) 1078, 52 So. 873; *Purity Extract & Tonic Co. v. Lynch*, 100 Miss. 650, 56 So. 316.

The court, however, was apparently inconsistent in holding also that the prohibition of the sale of "alcoholic" liquor does not apply to a beverage which contains less than $\frac{1}{2}$ of 1 per cent of alcohol. *Fuller v. Jackson*, supra.

Proof of a sale of "malt" liquor was held to be sufficient in *Com. v. Burns*, 38 Pa. Super. Ct. 514.

In *State v. Stickle*, 151 Iowa, 303, 131 N. W. 5, following *Sawyer v. Botti*, 147 Iowa, 453, 27 L.R.A. (N.S.) 1007, 124 N. W. 787, cited in the note in 26 L.R.A. (N.S.) 895, it was held that the trial court did not err in excluding testimony to the effect that the liquor in question would not produce intoxication, where it admittedly contained some alcohol and the statute forbade the sale of "any intoxicating liquor which term shall be construed to mean alcohol," etc., "and all intoxicating liquor whatever."

On the other hand, in Kentucky the rule has been adopted that a prohibition of the sale of spirituous, vinous, and malt liquors includes only liquors used as a beverage and when so used will produce intoxication. See *Bowling Green v. McMullen*, 26 L.R.A. (N.S.) 895, to which one of the earlier notes was attached.

This rule was approved in *Com. v. Louisville & N. R. Co.* 140 Ky. 21, 130 S. W. 798, although the question was not definitely at issue. To the same effect, *Gourley v. Com.* 140 Ky. 221, — L.R.A. (N.S.) —, 131 S. W. 34.

So, in *Sizemore v. Com.* 140 Ky. 338, 131 S. W. 37, the court said: "This section only forbids the sale, directly or indirectly, of spirituous, vinous, or malt liquors. It does not prohibit or punish the sale of 'any beverage, liquid mixture, or decoction of any kind which produces or causes intoxication.' An indictment under it should

tified that this beer did not contain enough alcohol to intoxicate anyone, unless it would be in rare instances. He says that a person could not drink enough of it to secure sufficient alcohol to intoxicate him. It was practically conceded on the argument that this drink, designated "near beer," is classed among the "soft" drinks or "temperance" beverages, and is not ordinarily used as an intoxicant.

The only question to be determined in this case is whether or not the liquor or beverage called "near beer" falls within the purview of the local option statute, as the words "intoxicating liquors" are defined in § 31 thereof. That section reads as follows: "Sec. 31. The words 'intoxicating liquors' as used in this act shall be deemed and construed to include spirituous, vinous, malt and fermented liquors, and all mix-

tures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

The petitioner contends that the words, "that may be used as a beverage and produce intoxication," refer to and modify "spirituous, vinous, malt, and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks." In other words, the petitioner insists that the property or quality of producing intoxication is the test that must be applied in every case, whether the liquor be vinous, malt, fermented, or a mixture or preparation thereof, or any other drink. On the other hand, the state contends that the lawmakers have unqualifiedly and arbitrarily defined "spirituous, vinous, malt, and fermented liquors" as intoxicating as a matter of law, whether they be intoxicating as

charge the sale of spirituous, vinous, or malt liquors, and this being so the accused cannot be convicted, unless the evidence shows that he sold, either directly or indirectly, spirituous, vinous, or malt liquors, or a mixture of either with some other beverages, and that the beverage sold was intoxicating or one that the law would presume was. It is not, however, material under what name the manufacturer or vendor sells these liquors, or either of them, or the mixture of either with any other beverage, or by what name they are called or branded, if the evidence shows that the beverage is in fact one of these liquors, or a mixture of either with any other beverage, and is intoxicating or one that the law would presume was. It is what the liquor or beverage is, and not what it is called, that fixes its status. As the liquor or beverage the accused sold was a malt liquor or beverage, the indictment was properly returned under § 2557, and the accused, if it had shown that the 'Malt Mead' was intoxicating, could have been convicted for an offense against that section under the evidence that it was a malt liquor or beverage."

In *Flanders v. Com.* 140 Ky. 38, 130 S. W. 809, rehearing denied, 140 Ky. 659, 131 S. W. 495, the defendant was charged with selling common beer somewhat diluted under the name of "Doctor Fix." The court instructed the jury that if they found that the defendant had sold "ordinary beer, a malt liquor," they should find him guilty, but if they believed from the evidence that the liquor was a nonintoxicating liquor they should find the defendant not guilty. It is evident from the language of the chief justice in denying a rehearing that the court did not intend to depart from the rule laid down by the cases cited above; but the language in the principal opinion would indicate that the court, or at least the judge writing the opinion, took the contrary view. It was there said: "As therefore, the statute in terms prohibits the sale of malt liquors in local option territory,

it is enough to inquire whether the liquor sold is malt liquor; if it is, the guilt is fixed. Whether it intoxicates some people or not, or is only a mild intoxicant, or whether defendant believed that it was an innocent soft drink, are immaterial."

And in *Shreveport v. Smith*, 130 La. 126, 57 So. 652, it was held that the term "malt liquors," as used in the provision of article 229 of the Constitution, which reads, "This restriction shall not apply to dealers in distilled, alcoholic, or malt liquors," and whereby political corporations, throughout the state, are left free to impose license taxes upon the dealers thus mentioned, without regard to the action or nonaction of the state in such cases, must be regarded as applying to malt liquors which are, or may be, used as beverages, and which are intoxicating, and as having no application to malt liquors which are not, or may not be, so used, and are not intoxicating. See also *Shreveport v. Smith*, 130 La. 132, 57 So. 655.

In *State v. Maroun*, 128 La. 829, 55 So. 472, it was held that the term "malt liquors," as used in act No. 4, Extra Session of 1910, to define the meaning of the term "grog or tippling shop," in prohibition districts, must be construed as including only malt liquors that are intoxicating. The intent of the legislature to penalize the sale of nonintoxicating beverages will not be presumed, especially where no such intent is expressed in the title of the act.

To these decisions *State v. Durr*, post, 764, is to be added, in which it was held that where the sale of "beer" is prohibited the defendant has the right to show that the "beer" sold by him was not intoxicating; the court further saying, however, that had the liquor sold been whisky, brandy, rum, gin, etc., the court would take judicial notice that it was intoxicating.

The word "liquor," as used in a statute imposing a tax upon "liquor" dealers, should be construed to apply only to intoxicating liquors. *Austin v. Shelton*, 122 Tenn. 634, 127 S. W. 446.

W. M. G.

a matter of fact or not. The state also contends that "all mixtures and preparations thereof, including bitters and other drinks" are to be tested by the proofs as to whether they will in fact produce intoxication. This case must be settled and determined upon the acceptance and application of one of these two views of the statute and theories of construction.

In support of the position taken by the defendant, he calls our attention to the following among other authorities: *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815; *Stoner v. State*, 5 Ga. App. 719, 63 S. E. 602; *Ex parte Gray*, — Tex. Crim. Rep. —, 83 S. W. 828; *James v. State*, 49 Tex. Crim. Rep. 334, 91 S. W. 227; *Potts v. State*, 50 Tex. Crim. Rep. 368, 7 L.R.A. (N.S.) 194, 123 Am. St. Rep. 847, 97 S. W. 477. An examination of these cases discloses the fact that the Texas and Georgia courts construe somewhat similar statutes in harmony with the view maintained by the petitioner, and take the position that the statutes of those states were intended to prevent intemperance and intoxication, and that the test as to whether the liquor comes within the purview of those statutes is to be determined upon the intoxicating property or quality of the liquor or drink.

The state, on the other hand, calls our attention to a great array of authorities which seem to support its contention. Among the many cases cited, the following seem to be closely in point here: *Sawyer v. Botti*, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787; *Luther v. State*, 83 Neb. 455, 20 L.R.A.(N.S.) 1146, 120 N. W. 125; *State v. Frederickson*, 101 Me. 37, 6 L.R.A. (N.S.) 186, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48; *State v. Gill*, 89 Minn. 502, 95 N. W. 449; *State v. Piche*, 98 Me. 348, 56 Atl. 1053.

In *Sawyer v. Botti*, the supreme court of Iowa as recently as February of this year had occasion to consider a statute somewhat similar to ours, and Mr. Justice McClain, speaking for the court, said: "The statute (Code, § 2382) prohibits the selling or keeping for sale, etc., of 'any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor and all intoxicating liquor whatever,' except as otherwise provided. It is apparent, therefore, that the prohibition is twofold: First, of the sale of any liquor which is in fact intoxicating; second, of certain described liquors, whether intoxicating or not. In the second class are enumerated beer and malt liquor, and if the beverage in question is beer or malt liquor, then the fact that it is so manufactured as not to be intoxicating in its ordinary use as a beverage is immaterial. . . . 46 L.R.A.(N.S.)

The manufacturer cannot bring a malt liquor within the class of liquors not prohibited by the statute, by giving it some name other than that of beer, much less can he do so by adding a qualifying descriptive term to the word 'beer' used in the name. We reach the conclusion without the slightest doubt that the beverage in question, being a liquor manufactured from malted grain by a process involving fermentation, no matter how slight the fermentation may be, and irrespective of the amount of alcohol which it actually contains, and also without regard to whether it is in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited."

In *Luther v. State*, the supreme court of Nebraska had under consideration a statute which provides that "all persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks," without first having complied with the provisions of the act and obtained a license, should be deemed guilty of a misdemeanor, etc. In course of the consideration of that statute, the court said: "It is contended by counsel for plaintiff in error that it was the legislative intent to suppress the sale of intoxicating liquors, and that, although the term 'malt liquors' is used in the act, yet it was not the purpose to prevent the sale of malt liquors or liquids, unless they contained a sufficient quantity of alcohol to produce intoxication; or, stated differently, that the language used in §§ 11 and 20 must be construed to mean as if it read 'intoxicating malt liquor.' I cannot read the statute in that light. As well might we apply the adjective to the words 'spirituous' and 'vinous.' It is my opinion that the legislature realized and appreciated the fact that malt, spirituous, and vinous liquors are equally largely used as a beverage, and are alike injurious to the consumer, if not by producing immediate intoxication when taken in small quantities, by producing the same effect when more is taken and at the same time creating an abnormal appetite which leads to dissipation and inebriety. At any rate, the law prohibits the sale of 'malt liquors' without a license, and we must obey its plain mandate."

We quote the foregoing extracts to show what other courts have said of legislation similar to our own statute. It will thus be seen that courts of distinction and high standing and of states widely separated have taken contrary views of similar statutes. We shall therefore endeavor to ascertain from an independent examination what the legislature intended by the enactment of the statute under consideration, and in

doing so our first consideration should be given to the natural, ordinary, and simple meaning and import of the language employed. The state contends that the words, "that may be used as a beverage and produce intoxication," apply to and modify only the clause in which they are found, and refer to the mixtures and preparations named therein. This construction is in harmony with our understanding of the language used. On the other hand, if we should adopt the view taken by the defendant, we would have to hold that each kind or class enumerated commencing with the word "spirituous" is modified by the phrase, "that may be used as a beverage and produce intoxication." The section written out in full, as defendant contends that it was intended, would read as follows: "Sec. 31. The words 'intoxicating liquors,' as used in this act, shall be deemed and construed to include spirituous liquors that may be used as a beverage and produce intoxication, vinous liquors that may be used as a beverage and produce intoxication, and malt liquors that may be used as a beverage and produce intoxication, and fermented liquors that may be used as a beverage and produce intoxication, and all mixtures and preparations thereof, including bitters and other drinks, that may be used as a beverage and produce intoxication."

We cannot agree with this contention. It is not to be presumed that the legislature would have entered into an enumeration of certain drinks commonly known and understood to contain the element of alcohol and to be intoxicating, if they had in fact intended that the test in all cases should be whether or not the drink is such as will produce intoxication. There would have been no reason for or object in enumerating these various liquors, distilled, vinous, malt, and fermented, if the legislature had intended that in all cases the test should be whether or not the drink is in fact such as will produce intoxication. The legislature, in the enactment of this law, evidently had in mind a twofold object: First, that of discouraging and as far as possible preventing intoxication and intemperance in the use of intoxicants; second, and equally important, that of protecting and preventing the boys and young men of the state from acquiring a taste for intoxicants and the habit of indulging in drinks and beverages that contain the intoxicating element. The legislature likewise recognized the fact that vinous, malt, and fermented liquors all contain, to some extent, the element of alcohol, although it may not be to such a degree as will produce intoxication. They therefore concluded

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when writing this statute defining the words "intoxicating liquors," to declare as a matter of law that all "spirituous, vinous, malt, and fermented liquors" are intoxicating, irrespective of the amount of alcohol they may contain, and whether or not the particular kind of drink will in fact produce intoxication. They must also have had in mind the difficulty that would arise in the enforcement of such a law as they were enacting, if they left it to be proven in every case of the sale of a vinous, malt, or fermented liquor, whether or not the same was in fact such as would produce intoxication. If it were a question of fact in each case, one man might be convicted for the sale of a certain brand of malt or fermented liquor, while another man might be acquitted for the sale of the identical brand of liquor. Under that view of the statute, near beer might be sold in one prohibition district with safety and in another the sale prove to be a violation of the statute. This is a drink that furnishes great opportunities for violation of the statute. It was said by the supreme court of North Carolina, who evidently spoke from the record, in *State v. Danenberg*, 151 N. C. 718, 26 L.R.A. (N.S.) 890, 66 S. E. 301, that "although near beer properly made is a non-intoxicating beverage, the sale of it furnishes extraordinary opportunities for the violation of the state prohibition law; that it is made by those who make beer, sold by those who sell beer, and drunk by those who drink beer; and that 'it looks like beer, smells like beer, and tastes like beer?'"

In our judgment it was the clear and unmistakable intent of the legislature to say, as they had an undoubted right to say (*State v. Frederickson*, 101 Me. 37, 6 L.R.A. (N.S.) 186, 115 Am. St. Rep. 205, 63 Atl. 535, 8 Ann. Cas. 48; *Woollen & T. Intoxicating Liquors*, §§ 5, 114), that all "spirituous, vinous, malt, and fermented liquors" should be treated as intoxicating within the meaning of this statute. The lawmakers also appreciated the fact that there would be many other mixtures and preparations used as a beverage that would produce intoxication, and which the lawmaking power could not specifically enumerate, and so they concluded that with reference to this latter class of drinks and beverages they would fix the test as one of fact in each case as to whether the drink or beverage would produce intoxication. We conclude, therefore, that § 31 of the local option law defining "intoxicating liquors" contains two divisions or classes of liquors or beverages: First, "spirituous, vinous, malt, and fermented liquors" which are declared as a matter of law to be intoxicating, and for which no proof is required except to show

that they come within the enumeration; and, second, all other mixtures and preparations thereof which will in fact produce intoxication. In the latter case the state must prove that the liquor is such that it may be used as a beverage and produce intoxication. It is conceded that "near beer" is a malt liquor. It follows, therefore, from what has been said that it falls within the definition of § 31 of the local option statute, and is declared as a matter of law to be an intoxicating liquor, and cannot be sold in a prohibition district.

We conclude that the petitioner is properly held under process issued from a court of competent criminal jurisdiction. Petitioner is remanded to the custody of the sheriff of Canyon county.

Proceeding dismissed.

Sullivan, Ch. J., concurs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

E. W. DURR, Plff. in Err.

(69 W. Va. 251, 71 S. E. 767.)

Intoxicating Liquor — nonintoxicating quality as defense.

1. In defense of an indictment for selling intoxicating drinks, the article sold being labeled "Temperance Beer," the defendant has a right to show that it is not intoxicating.

Evidence — intoxicating liquor — sufficiency.

2. Upon trial of an indictment for selling intoxicating drinks, if the evidence show a sale of beer, the state has made a prima facie case for conviction, and need not give evidence that the beer is intoxicating; but the defendant may give evidence to prove that the beer sold is not intoxicating.

(April 25, 1911.)

ERROR to the Circuit Court for Randolph County to review a judgment convicting defendant of selling intoxicating liquors. Reversed.

The facts are stated in the opinion.

Messrs. J. L. Wamsley, C. H. Scott, James Cobley, and W. E. Baker for plaintiff in error.

Headnotes by BRANNON, J.

Note. — As to whether statutes forbidding the sale of a certain class of liquor or liquors include nonintoxicating liquors, see note to *Ex parte Lockman*, ante, 759. 46 L.R.A. (N.S.)

Mr. H. G. Kump, for the State:

It is wholly immaterial whether all or any of the liquors are intoxicating or not, and no inquiry as to this fact can be entered into, and it would be no defense if the accused were able to prove that any of the prohibited liquors were absolutely free from all intoxicating qualities. The unlicensed sale of any or all of them is unlawful, because the legislature has so declared, and not for any other reason.

State v. Oliver, 26 W. Va. 422, 53 Am. Rep. 79; 2 McClain, Crim. Law, § 1218; *Black, Intoxicating Liquors*, § 469; *State v. Frederickson*, 101 Me. 37, 6 L.R.A. (N.S.) 187, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48; *Com. v. Bloss*, 116 Mass. 56.

Mr. William G. Conley, Attorney General, also for the State.

Brannon, J., delivered the opinion of the court:

An indictment charged E. W. Durr with selling, without license, spirituous liquors, wine, porter, ale, or beer, and drinks of like nature. He was found guilty by a jury, and judgment for \$50 fine and sixty days' imprisonment was rendered against him.

On the trial the evidence was that he sold a drink called and labeled "Temperance Beer." The defendant offered to give evidence, by persons who knew and who had drunk and tested it, that it was not intoxicating, and that the stomach could not contain enough of it to produce intoxication. The court rejected the evidence proposed. The argument of the prosecution is that beer is specifically named in Code 1906, chap. 32, § 1, as a prohibited drink; that the sale of beer is unlawful without license, and no proof of its intoxicating character is required; that when once it is shown that beer is unlawfully sold the offense is proven, and there can be no evidence by the defendant that it is not intoxicating. I do not conceive that the word "temperance" before the word "beer" is material, any more than would be the word "apple" before the word "brandy." Whisky, brandy, gin, rum, and some other liquors are, by judicial cognizance, known to be intoxicating, and no proof that they are is required; nor is any evidence admissible to the contrary, when it has been proven that such liquors have been sold. 23 Cyc. 61. But we have the question in this case whether beer stands on like ground, though specified in the statutes. Is it, like whisky, to be held conclusively intoxicating? Where the thing sold is not by judicial cognizance known to be intoxicating, it must be proven to be so. "If the liquor be not judicially known as a prohibited liquor, then it must be alleged that it is an intoxicating, spirit-

uous, distilled, malt, fermented, alcoholic, or vinous liquor, if the terms used in describing it are not judicially noticed as being descriptive of such liquor, and these allegations established by proof." Woolen & T. Intoxicating Liquors, § 78. Where whisky, brandy, or other known spirituous liquor is sold, it is not necessary to allege that the particular liquor was sold, because our statute prohibits sale of spirituous liquors, and, such drinks being known to be spirituous, it is not necessary to prove their character.

The cases of *State v. Gillispie*, 63 W. Va. 152, 59 S. E. 957; *State v. Good*, 56 W. Va. 215, 49 S. E. 121, and *State v. Cool*, 66 W. Va. 86, 66 S. E. 740, are not authority on the question before us; that is, can the defendant, selling beer, prove that it is not intoxicating? They do hold that, as to drinks not mentioned in the statute, such defense may be made; they do hold that, as to such drinks, intoxicating quality is the test. They involved drinks called "malt," "senoj cider," and "rikk," not by name mentioned in the statute, and not judicially known to be spirituous and intoxicating, and in such cases the intoxicating quality is the test, and open to proof on both sides; but in this case we have the sale of beer, a drink prohibited by name in the statute, and prima facie intoxicating. We hold that, when it is proven that a liquor called "beer" has been sold, the case is proven prima facie; but, as all beers are not intoxicating, the defense that it is not is admissible. Woolen & T. Intoxicating Liquors, § 76, says: "Whether or not courts will take judicial notice that beer is an intoxicating or malt liquor has been one of much contrariety of opinion, and this arises from the fact that there are many kinds of beer well known to be neither malt nor fermented nor intoxicating liquors. Therefore, upon a proof of a sale of 'beer,' and nothing more, many cases hold that it is not shown that there was a sale of either malt or intoxicating liquor. But by the better line of cases, on proof of a sale of 'beer,' even without additional words, the courts will construe it as a sale of fermented, malted, or intoxicating liquors, and the burden is upon the persons claiming it is not a malted, fermented, or intoxicating liquor to show that fact. These decisions are based on the primary meaning of the word 'beer.' 'Webster,' said the supreme court of Indiana, 'defines beer to be "a fermented liquor made from any malted grain, with hops and other bitter flavoring matter." In other words it is a malt liquor, which the same author declares to be "a liquor prepared for drink by an infusion of malt, as beer, ale, porter," etc. It may,

therefore, be said that beer is a liquor infused with malt and prepared by fermentation for use as a beverage. As a consequence, when "beer" is called for at a place at which intoxicating drinks are sold, the bartender, having in view the primary meaning as well as the common use of the word, is justified in inferring and must reasonably infer that malted and fermented beer is wanted. If any other kind of beer is desired, it is expected that qualifying words will be used, such as spruce beer, root beer, small beer, ginger beer, and the like, thus attaching a remote and secondary meaning to the word "beer" as descriptive of particular beverages. When, therefore, a witness testifies to the sale or giving away of beer under circumstances which make the sale or giving away of any intoxicating liquors unlawful, the prima facie inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the case ought to take judicial notice of the inference which there arises from the use of the word "beer" in its primary and general sense.' So, where the term 'lager beer' is used in testimony, the inference is that an intoxicating beer was meant. In days gone by, when the term 'strong beer' was in use to distinguish it from small beer, courts took judicial notice that it was intoxicating. Where a statute declares that lager beer is an intoxicating liquor, it cannot be shown that it in fact is not; for the legislature has fixed its status by a statute the courts cannot question. The courts cannot, however, take notice that rice beer is an intoxicant; that is a question for the jury."

We know as a court, people know, that there are beers innocent, and not intoxicating, and extensively used, and some that are intoxicating, and it seems consonant with reason, with justice, that one charged with selling "beer" should be allowed to prove that it is of a kind not intoxicating. In every case it is a jury question upon the evidence. *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79, is cited. We do not think it is apposite in this case. It held that sale of cider or crab cider was not unlawful; the reason being that it was not named in the statute, and did not come under the head of spirituous liquors, and not a "mixture" or "preparation" known as "bitters," producing intoxication. As the court held it immaterial that crab cider was intoxicating, the state would use that case in this case to show that whether the beer sold was intoxicating is irrelevant and evidence on that question not admissible; but that case does not so direct in this case. It was under a statute (Laws 1877, chap. 107,

§ 1) prohibiting sale of spirituous liquors, and saying that all "mixtures or preparations known as 'bitters' or otherwise, which will produce intoxication, shall be deemed spirituous liquors." Since then, in 1885, the section (as amended by Laws 1885, chap. 17) was amended by inserting the word "liquors" in addition to "mixtures" and "preparations" (Laws 1887, chap. 29), and now cider would be a liquid, and, if strong enough to produce intoxication, would be, in law, deemed spirituous liquor, and evidence to prove and disprove its intoxicating properties would be admissible.

We think that the Circuit Court erred in rejecting all the evidence proposed to deny the intoxicating quality of the beer.

Judgment reversed; case remanded.

IOWA SUPREME COURT.

PETER PETERSON, Appt.,
v.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY.

(149 Iowa, 496, 128 N. W. 932.)

Servant — unsafe working place — starting machinery.

1. A servant injured while attempting to clean the bottom of the shaft of a coal hoist,

Note. — Starting machinery as act of vice principal or fellow servant.

Upon the general question whether the duty of the master to instruct or warn servants is delegable or nondelegable, see exhaustive note to *Anderson v. Pittsburg Coal Co.* 26 L.R.A. (N.S.) 624.

Upon the question of whether operator of elevator or other hoisting apparatus is a fellow servant of other employees of the same establishment, see note to *Judd v. Letts*, 41 L.R.A. (N.S.) 156.

As to who are fellow servants of linemen, see the note to *Shank v. Edison Electric Illuminating Co.* 30 L.R.A. (N.S.) 47. This note approaches the present note in those cases wherein the relationship of the person in charge and control of the current, to the linemen, is discussed.

Cases involving injury because of the negligence in starting trains have not been included in this note, since they are generally decided by rules which are peculiar to the operation of railroads. Cases involving injuries caused by the starting of an elevator without warning have been included in this note, since the principles governing such cases differ in no respect from the principles governing cases having to do with the starting of other kinds of machinery.

It is to be remembered in all cases turning upon the fellow servant doctrine that the test of the relationship between two

by the starting of the machinery to raise a bucket while he is in a position of danger, cannot hold the master liable for the injury, on the theory that he had not been furnished a safe place to work, where the place was safe except when the machinery was running, which was a matter controlled entirely by another servant of the employer.

Same — act of fellow servant.

2. The act of a foreman in charge of the work at a coal elevator of a railroad company, in starting the machinery to raise a bucket while a servant was in a position of peril in the shaft, is that of a fellow servant of the latter, and not that of the employer.

Same — dangerous place — failure to warn.

3. The rule that a master is liable for any injury to an employee which may result from his being sent into a dangerous place to perform labor without warning of the danger does not apply to render the master liable, where the place is safe except when the machinery installed therein is started, and the only lack of warning is failure to give notice to the servant while he is in a position of danger, of the foreman's intention to start the machinery.

(December 15, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Cass County in defendant's favor in an action brought to

coemployees is in some jurisdictions determined by the grade of the negligent employee and in others by the character of the negligent act. Wherever it is possible in the following note, this distinction has been noted, but in a large number of the cases it is impossible to tell to which test the case is referred.

At common law.

The general rule supported by the great weight of authority is that at common law the mere act of starting machinery is, in the absence of the qualifying elements which are noted below, the act of a fellow servant for whose negligence in connection therewith the master is not liable.

Thus, in *English v. Roberts, J. & R. Shoe Co.* 145 Mo. App. 439, 122 S. W. 747, it was held that where a servant was injured by the negligence of a person who occupied a dual capacity as vice principal and fellow servant in negligently starting a machine, such negligence must be deemed to have been committed in the capacity of fellow servant.

So, in *Baier v. Selke*, 211 Ill. 512, 103 Am. St. Rep. 208, 71 N. E. 1074, it was held that, in the absence of any evidence to show that the starting of the machinery pertained in any way to the duties of the foreman, the master would not be held liable for the negligence of the coemployee in

recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Statement by McClain, J.:

Action to recover damages for personal injuries received while in defendant's employment. At the close of the evidence introduced for plaintiff, the court sustained defendant's motion for a directed verdict, and plaintiff appeals.

Mr. H. M. Boorman, for appellant:

An employee acting under the specific order of one who has authority to direct has a right to assume, in the absence of

starting the machinery while the plaintiff was in a place of danger.

And in *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7, 14 Am. Neg. Cas. 467, the court sustained a demurrer to a complaint based upon the negligence of a foreman in sending a workman into a place of danger near machinery, and then permitting the machinery to be started without warning to the servant, upon the ground that the negligence of the foreman in failing to prevent the starting of the machinery was not shown to have been the omission of a duty expressly or impliedly delegated to him by the master.

So, too, in *Sandusky Portland Cement Co. v. Rice*, — Ind. App. —, 81 N. E. 213, it was said that the starting of machinery was not an act of the master, but that of a fellow servant.

The starting of a printing press by the pressman, whereby his assistant is injured, is merely the act of a fellow servant for which the employer is not liable to the assistant, although he is under the direction and control of the pressman in respect to the running of the press. *Doerr v. Daily News Pub. Co.* 97 Minn. 248, 106 N. W. 1044.

A foreman has no authority to bind the master by an agreement to watch a switch box and keep it open so as to render safe the place of work of a wire man, where, in the absence of such an agreement, there is no rule of law making the defendant liable. *Guest v. Edison Illuminating Co.* 150 Mich. 438, 114 N. W. 226.

In *Vernon Cotton Oil Co. v. Catron*, — Tex. Civ. App. —, 137 S. W. 404, where the employee's place of work in a cotton-seed house was dangerous when the machinery was not running, it was held that it would be the act of a fellow servant to give the signal to the seed house that the machinery was about to stop, because the signal was not a part of the system of work adopted and put into use by the master, nor intended to be used by him, nor relied upon by the deceased as a precaution or timely warning against the transitory danger of seed caving in on the feeder.

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warning or notice, that his superior who gave the order will not, by his own negligence, make the work unsafe.

Labatt, Mast. & S. §§ 542, 580; *Schminkey v. T. M. Sinclair & Co.* 137 Iowa, 130, 114 N. W. 612; *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L.R.A. 584, 16 Am. St. Rep. 371, 22 N. E. 876.

The foreman was a vice principal.

Carlson v. Northwestern Teleph. Exch. Co. 63 Minn. 428, 65 N. W. 914; *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L.R.A. 824, 20 S. W. 472; *Tills v. Great Northern R. Co.* 50 Wash. 536, 20 L.R.A.(N.S.) 434, 97 Pac. 737; *Newbury v. Getchel & M. Lumbar & Mfg. Co.* 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743; *Baldwin v. St.*

So, an employee in charge of a derrick or other hoisting machinery does not represent the master in causing the machinery to start for the purpose of carrying forward the work. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262 (foreman of bridge construction company directed the raising of a large stone by means of a derrick so constructed as to swing over a track at a time when a train was passing); *Adams v. Cabin Branch Coal Co.* 147 Ky. 595, 144 S. W. 759 (servant in charge of a drum by which cars were raised up an incline in a mine); *Berneche v. Hilliard*, 101 Minn. 366, 112 N. W. 392 (foreman in charge of the construction of a building mere fellow servant in signaling engineer to start engine operating the derrick); *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014 (employee in charge of a steam crane used to lift stones out of quarry); *Palmieri v. S. Pearson & Son*, 128 App. Div. 231, 112 N. Y. Supp. 684 (foreman of gang giving signals for movement of traveling crane); *Prengen v. Stone & W. Engineering Corp.* 66 Wash. 204, 119 Pac. 193 (workman giving signals for movements of hoisting derrick).

In a large number of cases it has been held that the master was not liable for injuries caused to one servant by the sudden starting of the machinery by another servant, where the two servants were fellow servants; in the great majority of these cases, however, no mention is made of the peculiar nature of the act nor whether the duty to start machinery is a delegable or nondelegable duty of the master:

The *Harold*, 21 Fed. 428 (winchman and stevedore's helper engaged in shifting coal on vessel); *Dwyer v. Nixon*, 47 C. C. A. 666, 108 Fed. 751 (machinery started by foreman in machine shop while plaintiff was repairing belt); *McCarron v. Dominion Atlantic R. Co.* 134 Fed. 762 (third engineer of vessel held fellow servant of oiler); *Stevens v. San Francisco & N. P. R. Co.* 100 Cal. 554, 35 Pac. 165, 13 Am. Neg. Cas. 349 (engineer of ferry boat, although hiring and discharging his firemen and oilers, is fellow servant to them); *Warren v. Harlan & H. Corp.* — Del. —,

Louis, K. & N. W. R. Co. 63 Iowa, 210, 18 N. W. 884; McGuire v. Waterloo & C. F. Union Mill Co. 137 Iowa, 447, 113 N. W. 850; Beresford v. American Coal Co. 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902; Fink v. Des Moines Ice Co. 84 Iowa, 321, 51 N. W. 155; Crystal Ice Co. v. Sherlock, 37 Neb. 19, 55 N. W. 294; Moylan v. Davids, 49 N. Y. S. R. 327, 21 N. Y. Supp. 249; 4 Thomp. Neg. § 3815.

The master must be held liable.

4 Thomp. Neg. § 3814; 7 Thomp. Neg. § 3815; Fleming v. Tuttle, 98 App. Div. 222, 90 N. Y. Supp. 661; Tills v. Great Northern R. Co. 50 Wash. 536, 20 L.R.A. (N.S.) 434, 97 Pac. 737; Carlson v. Northwestern Teleph. Exch. Co. 63 Minn. 428, 65 N. W. 915; Illinois Steel Co. v. Ziemkowski,

220 Ill. 324, 4 L.R.A. (N.S.) 1161, 77 N. E. 190; McGuire v. Waterloo & C. F. Union Mill Co. 137 Iowa, 447, 113 N. W. 850; 4 Thomp. Neg. § 4072.

The master owed plaintiff the duty of exercising reasonable and ordinary care for his protection, and such duty cannot be delegated in its performance so as to relieve himself from liability resulting from the negligent act of the person to whom such delegation was made.

Hendrickson v. United States Gypsum Co. 133 Iowa, 89, 9 L.R.A. (N.S.) 555, 110 N. W. 322, 12 Ann. Cas. 246; Martin v. Des Moines Edison Light Co. 131 Iowa, 724, 106 N. W. 359; Beresford v. American Coal Co. 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902; Baltimore & O. R. Co. v. Baugh, 149

84 Atl. 215 (employee operating steam hammer in blacksmith shops and blacksmith's helper fellow servants; verdict for plaintiff on ground of master's negligence in keeping incompetent servant in employ); Shickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423 (crane man, fellow servant of helper injured by sudden and unannounced starting of crane); Helgeson v. E. B. Higley Co. 148 Iowa, 587, 126 N. W. 769 (elevator started by general manager who was said to be mere fellow servant); Galloway v. J. W. Turner Improv. Co. 148 Iowa, 93, 126 N. W. 1033 (engineer in charge of engine operating trench-digging machine started engine without customary warning); Bergstrom v. Staples, 82 Mich. 654, 46 N. W. 1035 (engineer in sawmill started engine); Wellihan v. National Wheel Co. 128 Mich. 1, 87 N. W. 75 (foreman in factory started machinery while operator of spoke shave was operating it); Richardson v. Meaker, 171 Mo. 666, 72 S. W. 506 (operator of die and his assistant are fellow servants); Sheehan v. Prosser, 55 Mo. App. 569 (employee injured by negligence of engineer in charge of hoisting shaft); Shaw v. Bambrick-Bates Constr. Co. 102 Mo. App. 666, 77 S. W. 96 (similar facts); Fournier v. Columbian Mfg. Co. 70 N. H. 629, 44 Atl. 104 (spinning frame started while plaintiff was cleaning the gears); Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148, 16 Am. Neg. Cas. 706 (engineer of mill and machinist engaged in repairing it held to be fellow servants); O'Brien v. American Dredging Co. 53 N. J. L. 291, 21 Atl. 324 (captain of dredge held to be fellow servant of deck hand); Vellekoup v. D. Fullerton & Co. 79 N. J. L. 16, 74 Atl. 793 (employees in building who are accustomed to move the elevator themselves as they may need it are fellow servants); Stringham v. Hilton (Stringham v. Stewart) 111 N. Y. 188, 1 L.R.A. 483, 18 N. E. 870) engineer in charge of elevator in storehouse fellow servant of employee removing grain from it); Wilson v. Hudson River Water Power & Paper Co. 71 Hun, 292, 24 N. Y. Supp. 1072 (chemist in employ of paper 46 L.R.A. (N.S.)

mill fellow servant of employees working on fixtures of mill); Ladiew v. Sherwood Metal Working Co. 125 App. Div. 65, 109 N. Y. Supp. 477 (operator of die and his assistant held to be fellow servants); Kirkover v. Lackawanna Steel Co. 134 App. Div. 792, 119 N. Y. Supp. 537 (master not liable at common law for failure of foreman to keep his promise that machinery would not be started); Impellizzieri v. Cranford, 141 App. Div. 755, 126 N. Y. Supp. 644 (engineer operating steam shovel held to be fellow servant of laborer); Branoner v. Traitel Marble Co. 144 App. Div. 569, 129 N. Y. Supp. 761 (sawyer in stone yard held to be fellow servant of assistant engineer); Hanna v. Granger, 18 R. I. 507, 28 Atl. 659 (engineer on steam roller and the flagman are fellow servants); National Fertilizer Co. v. Travis, 102 Tenn. 16, 49 S. W. 832 (man in charge of stationary engine and man putting belts onto pulleys, held to be fellow servants); Hage v. Luedinghaus, 60 Wash. 680, 111 Pac. 1041 (man running donkey engine in logging camp and his signal man are fellow servants); Porter v. Silver Creek & M. Coal Co. 84 Wis. 418, 54 N. W. 1019 (engineer operating machinery of derrick in coal dock and carpenter at work on one of the chutes are fellow servants); Portance v. Lehigh Valley Coal Co. 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875 (operator of machinery used to unload coal, and employee charged with duty to give warning to other employees in hold of the starting of the machinery, are fellow servants of such employees in hold).

As was suggested above, there are several qualifying elements which may enter into cases of this character so as to render the master liable.

In a few cases where the servant was injured by the starting of machinery without warning and the master was held liable, the liability has been predicated upon other grounds.

Thus, in *Matthews v. Bull*, — Cal. —, 47 Pac. 773, 1 Am. Neg. Rep. 206, the master was held liable for injuries caused by the negligence of a stationary engineer in let-

U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Schminkey v. T. M. Sinclair & Co.* 137 Iowa, 130, 114 N. W. 612; 4 Thomp. Neg. § 4664; *Benak v. Paxton & V. Iron Works*, 85 Neb. 836, 124 N. W. 461; *Streicher v. Davenport Brick & Tile Co.* — Iowa, —, 124 N. W. 327.

Messrs. Carroll Wright, J. L. Parrish, and J. B. Rockafellow, for appellee:

The act of a servant in starting machinery without warning is the act of a fellow servant, no matter what his rank is.

Barnicle v. Connor, 110 Iowa, 238, 81 N. W. 452; *Scott v. Chicago G. W. R. Co.* 113 Iowa, 381, 85 N. W. 631; *Helgeson v. E. B. Higley Co.* 148 Iowa, 587, 126 N. W. 769; *Galloway v. J. W. Turner Improv. Co.* 148 Iowa, 93, 126 N. W. 1033.

ting the hammer of a pile driver fall without proper notice to the employee engaged in putting a ring on the pile, but the liability in this case was predicated upon the master's retention, with knowledge, of an incompetent employee as engineer.

And in *O'Donnell v. American Sugar Ref. Co.* 41 App. Div. 307, 58 N. Y. Supp. 648, 6 Am. Neg. Cas. 322, the master was held liable for injuries due to the negligent starting of machinery at the order of a foreman, but the negligence was predicated upon the retention of an incompetent foreman.

So, in *McCall's Ferry Power Co. v. Price*, 108 Md. 96, 69 Atl. 832, the plaintiff was injured by the negligence of an engineer in starting his engine to raise a bucket loaded with sand and other material while the plaintiff was in a place of danger, but the liability of the defendant was predicated upon its negligence in retaining in its employment an engineer who was incompetent and whose incompetence was known to the employer.

Of course if the master himself knows or is chargeable with knowledge of the plaintiff's danger he will be liable. *Model Automobile Co. v. Sterling*, — Ind. App. —, 99 N. E. 51.

In *Latting v. Owasso Mfg. Co.* 78 C. C. A. 183, 148 Fed. 369, the negligent servant was admittedly a coservant of the injured employee, but the negligence complained of was not the starting of the machinery, but rather the manner in which the servant performed the work.

In *Perras v. A. Booth & Co.* 82 Minn. 191, 84 N. W. 739, 85 N. W. 179, 9 Am. Neg. Rep. 328, it was held that whether the act of the defendant's superintendent in moving an elevator was an act of a fellow servant or of a vice principal was, under all the circumstances of the case, a question of fact for the jury.

It seems to be the general rule, supported alike by reason and authority, that where the master or his representative sends an employee into a place of work in close proximity to machinery, which will become

McClain, J., delivered the opinion of the court:

At the time of receiving the injury complained of, plaintiff was in the employment of the defendant as a laborer, engaged in breaking up coal to be elevated in defendant's coal chute at Atlantic. When the coal was sufficiently broken, it was elevated by buckets to bins in the top of the building, from which it might be discharged into the tenders of engines. It was necessary, from time to time, for the plaintiff in the course of his employment to go into the pit at the bottom of the shaft in which the buckets were hoisted, and clean out the loose coal. This work was not dangerous in its nature, unless buckets of coal were being elevated at the same time.

dangerous only if the machinery is started, he owes such servant the duty of using reasonable care to prevent the machinery from starting while the servant is in such place, and the master is liable for injuries caused by failure so to do:

Mathews v. Daly-West Min. Co. 27 Utah, 193, 75 Pac. 722; *Kirk v. Senzig*, 79 Ill. App. 251; *Bradford v. Taylor*, 85 Miss. 409, 37 So. 812; *Western Electric Co. v. Hanselmann*, 70 L.R.A. 765, 69 C. C. A. 346, 136 Fed. 564, writ of certiorari denied in 197 U. S. 624, 49 L. ed. 911, 25 Sup. Ct. Rep. 800; *Cristanelli v. Saginaw Min. Co.* 154 Mich. 423, 117 N. W. 910.

So, in *Hunter v. D. W. Alderman & Sons Co.* 89 S. C. 502, 71 S. E. 1082, the court laid down a general rule that if the master assumes a special obligation to keep a place of labor safe by not starting the machinery, and the machinery was started by the direction of a person who was intrusted by the master with the authority to require an act to be done which would start the machinery, such act would be the act of the master and such person a representative of the master in that particular act.

The master is liable for the negligence of an employee intrusted with the responsibility of looking after the machinery at a mill and keeping it in proper repair, in starting the machinery while another employee was, under his direction, oiling the same and in a position where he could not see the act of the superintendent. *Hughlett v. Ozark Lumber Co.* 53 Mo. App. 87.

The vice principal who orders a workman into a place of danger and then, knowing that he is there and without warning, negligently starts machinery into operation by an act which, under ordinary circumstances, would have been performed by him in the capacity of a fellow servant, must be held to have acted as a vice principal in starting the machine, as well as in the previous act which placed the employee in the dangerous situation. *Cody v. Longyear*, 103 Minn. 116, 114 N. W. 735. To the same effect, *Lohman v. Swift & Co.* 105 Minn. 148, 117 N. W. 418; *Wiggin v. Northwest Paper*

In that event there was danger of coal falling from the buckets upon the defendant, working below. The work was in charge of one Dreager, as foreman, and he had personal charge of the motive power, and determined when the buckets should be operated. On one occasion not long prior to the accident in question, plaintiff had complained to Dreager that buckets of coal were being run up while he was working in the pit below, and he was thereby put in danger; and Dreager had assured him that thereafter the machinery would never be started while plaintiff was at work in the pit. The evidence tends to show that in violation of this promise, while plaintiff was at work in the pit and with knowledge of that fact, Dreager start-

ed the engine, causing a bucket of coal to be elevated, from which a large piece of coal fell, striking the plaintiff beneath and causing him the injury now complained of. The negligence relied upon was in not affording plaintiff a reasonably safe place in which to work and in negligently starting the hoisting apparatus while plaintiff was in a place of danger, thereby occasioning his injury. It is also contended that plaintiff was improperly ordered into a dangerous place to perform labor, without notice or warning as to the danger and hazard involved.

1. It is quite evident that there was no breach of duty on the part of the defendant in furnishing plaintiff a safe place to work. The place in which he was working

Co. 119 Minn. 273, 137 N. W. 1113; Kempfert v. Gas Traction Co. 120 Minn. 90, 139 N. W. 145.

And the master is also generally held liable for the acts of an employee admitted to be a vice principal ordinarily when such act was not performed while the vice principal was actively engaged in assisting the servant in the actual operation of the machine.

Thus, in *Hess v. Adamant Mfg. Co.* 66 Minn. 79, 68 N. W. 774, it was held that the act of a superintendent in turning the power onto an elevator which caused it to descend and injure an employee at work in the shaft below was an act of superintendence in which he represented the master, where his purpose in so doing was to test the power and to see that the machinery was running properly.

So, in *Moore v. King Mfg. Co.* 124 Ga. 576, 53 S. E. 107, it was held that the master was liable for the negligence of a general manager and superintendent in starting a machine while an employee was in a place of danger, if he started the machine while not actually engaged in assisting the plaintiff to operate the machine.

And an electrician in charge of the electrical apparatus in a manufacturing plant is not the fellow servant of his helper engaged in repairing a motor, where the electrician had promised the helper that the current would not be turned on while he was at work there, and the electrician was not himself assisting in the repairing. *Marquette Cement Mfg. Co. v. Williams*, 230 Ill. 26, 82 N. E. 424.

One operating a body maker in a can manufactory, having authority to direct the actions of the machine tender, and therefore representing the master in directing the tender to remove a can body which has caught in the machine, does not, by reason of the fact that it is his duty to start the machinery with his own hand, become a fellow servant of the tender in so doing, so as to relieve the master from liability for injuries to the tender caused by his starting the machinery before the tender has withdrawn his hand from within it. 46 L.R.A. (N.S.)

Norton Bros. v. Nadebok, 190 Ill. 595, 54 L.R.A. 842, 60 N. E. 843. To the same effect, *Roebbling Constr. Co. v. Thompson*, 229 Ill. 42, 82 N. E. 196, affirming 129 Ill. App. 20, where the plaintiff was injured by the sudden moving of the elevator by a foreman as he was putting a wheelbarrow on the elevator in accordance with the orders of the foreman.

A foreman who has full control and supervision over the operation of both the servants who started the machinery and of the injured servant, with power to employ and discharge them subject only to the approval of the president of the defendant company, acts as a vice principal in directing the machinery to be started. *Sullivan-Sanford Lumber Co. v. Cooper*, — Tex. —, 142 S. W. 1168, reversing — Tex. Civ. App. —, 126 S. W. 35.

So, in *Nix v. Texas P. R. Co.* 82 Tex. 473, 27 Am. St. Rep. 897, 18 S. W. 571, it was held that the railroad company would be liable for the negligence of an employee in applying steam to machinery while another employee was in a place of danger, where he had power to hire and discharge the injured employee, and the latter was subject to his orders in respect to the conduct of the work.

Where it is expressly admitted that the negligent employee was the vice principal of the defendant, it is not error not to give an instruction upon the fellow servant rule. *Eastman Cotton Mills v. Suggs*, 136 Ga. 388, 71 S. E. 667.

In holding that a lumber company was liable for the negligence of a sawyer in starting the carriage whereby one of his subordinates was injured, the court in *Evans v. Louisiana Lumber Co.* 111 La. 534, 35 So. 736, said: "In running its mill defendant intrusted the duty of working the saw, running the log carrier, and of applying the steam to the appliance and turning logs to the sawyer. Negligence of the sawyer, its servant in charge of a special duty, became the negligence of defendant."

And the master has been held liable for failure to maintain some system of warning where the motive power was controlled

was entirely safe so long as the machinery used in elevating the buckets of coal was not in operation. The peril involved was in the improper method of performing the work, and not in any improper conditions under which the work was to be performed. The place in which an employee is directed to work is "safe," within the meaning of the law, "when all the safeguards and precautions which ordinary experience, prudence, and foresight would suggest have been taken to prevent injury to the employee while he is himself exercising reasonable care in the service which he undertakes to perform." *Martin v. Des Moines Edison Light Co.* 131 Iowa, 734, 106 N. W. 359. The injury to plaintiff was not due to the character of the place in which he

was put to work, but to the fault of Dreager in starting the machinery while plaintiff was in such position that the hoisting of the bucket of coal would imperil his safety; and it is practically conceded in argument that the method of doing the business did not necessarily require nor involve the operation of the machinery while plaintiff was in such situation. There was nothing omitted, so far as it appears from the evidence, in providing a safe place and a safe method. What was omitted, resulting in the injury to plaintiff, was proper caution on the part of Dreager in starting the machinery under his control while the plaintiff was so situated as to be placed in peril.

2. It is contended, however, that Dreager

at a distance from the machinery, so that the employees about the machinery had no means of knowing when it would be started.

Thus, in *Hunter v. North Iowa Brick & Tile Co.* — Iowa, —, 136 N. W. 515, it was held that a master who maintained two machines for the grinding of clay in one room, which were operated by an engine in another room, must establish and maintain a system of warning whereby the employees around the machinery would know when the engine in the adjoining room was to start.

And a ship carpenter designated by the foreman in charge of the construction of a ship to act as intermediary to transmit signals from him to those in charge of a winch operated by steam, by which cants or framing of the ship are raised to place and held until fastened, and which is needlessly placed out of sight of the foreman, whose signals are necessary to effect the proper adjustment of the cants, is not a fellow servant of the carpenters engaged in fastening the cants in place, and the master will be liable in case he negligently transmits the foreman's signal, in consequence of which the cant falls and injures a carpenter. *Sroufe v. Moran Bros. Co.* 28 Wash. 381, 58 L.R.A. 313, 92 Am. St. Rep. 847, 68 Pac. 896.

So, the operator of a logging engine is not a fellow servant of the men attaching the cable to the logs, where the engine is placed at such a distance from the place where the men are at work that they are unable to see the engineer and to guard themselves against his acts; consequently, the master is liable for the negligence of the engineer in starting the engine without waiting the customary signal from the men. *Conine v. Olympia Logging Co.* 36 Wash. 345, 78 Pac. 932.

The feeder of a machine for making brick, whose duty it is to signal for the starting of the machinery is not a fellow servant of another coemployee who is out of sight of the feeder and so is unable to tell when the machinery may start. *Grosjean v. Denny-Renton Clay & Coal Co.* 62 Wash. 196, 113 Pac. 570.

In *Tijan v. Illinois Steel Co.* 250 Ill. 554, 46 L.R.A. (N.S.)

95 N. E. 627, it was held that the master was liable for the negligence of a servant in setting in operation electrical appliances by means of which were moved the heavy ingot buggies on the track whereby another servant was injured.

In *Sturm v. Consolidated Coal Co.* 248 Ill. 20, 93 N. E. 345, 21 Ann. Cas. 99, it was held that the engineer at the surface of a mine and the cager at the bottom of the shaft could not be said, as a matter of law, to be fellow servants of another employee whose duty it was to grease and keep in order the cable operating the cars.

So, the master has been held liable for failure to give a warning of the starting of machinery, where it is customary so to do and the employees relied upon such warning.

Thus, in *Fitzgerald v. International Flax Twine Co.* 104 Minn. 138, 116 N. W. 475, where it was customary always to give warning before the starting of machinery, it was held that this duty of giving warning was an absolute duty of the master which he could not delegate, and consequently the master was liable for the act of a foreman in starting the machinery without giving such warning.

So, where the servant's place of work will be rendered dangerous by the starting of machinery, and it is customary for a signal to be given whenever the machinery is started, the master will be liable for the act of the persons in charge of the machinery in starting it without giving such warning. *Ondis v. Great Atlantic & P. Tea Co.* 82 N. J. L. 511, post, 777, 81 Atl. 586.

A master engaged in the work of repairing a swinging bridge owes to his employees the nondelegable duty of warning them when the bridge is about to be moved, so that they may get to a place of safety. *Haun v. Cincinnati, C. C. & St. L. R. Co.* 28 Ohio C. C. 422.

In *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232, it was held that the master would be liable for the act of his superintendent in directing the starting of an engine used to draw a car by means of a steel cable, without giving the customary

as foreman was vice principal, and his negligence was chargeable to defendant. For some purposes he may have been vice principal, but as to the particular negligent act on his part which caused injury to plaintiff he was his fellow servant. So far as the negligent act causing the injury was concerned, it might as well have been performed by another servant of equal rank with the plaintiff as by Dreager, who was for some purposes a superior. Such act was not, therefore, an act of the defendant in the discharge of its duty of supervision, but the act of a fellow servant in carrying on the work. If the engine had been in charge of another employee of equal rank with plaintiff, there could be no claim that the negligent act was not that of a fellow

servant in the ordinary course of his employment. In this state we do not treat the relative rank of two employees as of controlling importance, and do not recognize the so-called "superior servant" rule. One who is for some purposes a superior servant or foreman, and authorized to direct the work of the employee who is injured, is nevertheless a fellow servant as to acts which do not involve the exercise of such superior authority. *Scott v. Chicago & G. W. R. Co.* 113 Iowa, 381, 85 N. W. 631; *Barnicle v. Connor*, 110 Iowa, 238, 81 N. W. 452; *Beresford v. American Coal Co.* 124 Iowa, 34, 70 L.R.A. 266, 98 N. W. 902; *Helgeson v. E. B. Higley Co.* 148 Iowa, 587, 126 N. W. 769.

3. The cases principally relied upon for

warning, whereby the cable was straightened out with great force and struck an employee engaged in loading the car.

In Washington the master is generally held liable for the act of a superior servant in starting machinery without giving warning to other servants situated in places of danger, but it is not always possible to tell whether the liability of the master is predicated upon the grade of the negligent employee or upon the character of the act.

Thus, in *Keller v. White River Lumber Co.* 66 Wash. 153, 119 Pac. 4, it was held that the master would be liable for the act of a vice principal in starting the machinery in a negligent manner at a time when the plaintiff was in a place of danger, the same as the master would be liable had the vice principal given the direction to the engineer to start it at such time.

And in giving a warning by the whistle before starting the machinery of a mill, an engineer is performing a nondelegable duty. *Comrade v. Atlas Lumber & Shingle Co.* 44 Wash. 470, 87 Pac. 517.

The master's duty to properly control a cable used to lower tiles into the hold of a vessel is one which cannot be delegated to a fellow servant so as to relieve the master of liability for negligence in the starting of the cable at an unexpected time. *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765.

A blacksmith who is in full control of the operation of a steam hammer and of the servant assisting him to operate it is not the fellow servant of such assistant, so as to relieve the master from liability for injuries caused by his negligently starting the hammer without notice. *Dyer v. Union Iron Works*, 64 Wash. 577, 117 Pac. 387.

In the following Washington cases the lumber company has been held liable for the negligence of a sawyer in starting the machinery of the sawmill without warning while employees were in a place of danger: *O'Brien v. Page Lumber Co.* 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & T. Lumber Co.* 40 Wash. 276, 82 Pac. 273; *Maloney* 46 L.R.A. (N.S.)

v. Stetson & P. Mill Co. 46 Wash. 645, 90 Pac. 1046; *King v. Page Lumber Co.* 66 Wash. 123, 119 Pac. 180.

Under statutes.

Under the employers' liability acts making the master liable for the negligence of a person to whom superintendence is intrusted, the master is liable where the act of the superintendent in causing the machinery to start is done while he is exercising the functions of superintendence.

Thus, where the superintendent of a factory had caused a machine to be stopped and had directed the operator to clean it, and, while the operator was so doing and was in a place of danger, caused the machinery to be started again, the master is liable. *Kushnizki v. New England Biscuit Co.* 210 Mass. 177, 96 N. E. 67.

So, in *Cavagnaro v. Clark*, 171 Mass. 359, 50 N. E. 542, it was held that the master was liable under the employers' liability act for the negligence of a superintendent in ordering an elevator to start while the plaintiff was in a place of danger, or of negligence in not countermanding the order after he had seen the predicament of the plaintiff.

A similar decision was rendered upon similar facts in *Keating v. Hewatt*, 212 Mass. 577, 99 N. E. 479.

And the master is liable for the negligence of an employee who has been charged with a duty of instructing a new employee, where the former, before the period of instruction was over, negligently set a machine in motion while the new servant was in a place of danger. *Greco v. Pratt Chuck Co.* 127 App. Div. 798, 11 N. Y. Supp. 1000, affirmed in 196 N. Y. 543, 89 N. E. 1101.

Under the New York employers' liability act it has been held that the superintendent of a factory is, in starting a machine after it had been stopped by the operator, performing an act of superintendence, so that the master is liable for resulting injuries. *American Mfg. Co. v. Bigelow*, 110 C. C. A. 77, 188 Fed. 34.

appellant are those involving negligence of the employer, acting through a vice principal, in sending the employee into a place which the vice principal knew or should have known was dangerous, without a reasonable appreciation on the part of the employee that such place was in fact dangerous. *McGuire v. Waterloo & C. F. Union Mill Co.* 137 Iowa, 447, 113 N. W. 850; *Schminkey v. T. M. Sinclair & Co.* 137 Iowa, 130, 114 N. W. 612. But here the place in which plaintiff was put to work was not inherently dangerous, either by reason of its natural condition, or the method in which the work was usually carried on. It became dangerous only by reason of the fault of Dreager in starting the machinery without proper warning. It is

true that we have held that the duty to give warning in case of the use of dangerous explosives rests upon the master as a part of his duty of supervision. *Hendrickson v. United States Gypsum Co.* 133 Iowa, 89, 9 L.R.A.(N.S.) 555, 110 N. W. 322, 12 Ann. Cas. 246. But that case has been explained and limited in *Galloway v. J. W. Turner Improv. Co.* 148 Iowa, 93, 126 N. W. 1033, so that it is not applicable to the case before us. Indeed, the opinion in the *Hendrickson* Case itself involves the limitations which make it inapplicable here. The *Galloway* Case is directly in point, in holding that where two employees are co-operating in carrying on a piece of work, although one of them may be superior to the other in authority, yet if the injury

So, the act of a superintendent in starting a machine while the operator thereof had gone to another floor to adjust certain portions of the machinery was held to be an act of superintendence in *Roche v. Lowell Bleachery*, 181 Mass. 480, 63 N. E. 943.

While the running of an elevator in itself involves no "element of superior duty, supervision, or command" (see *Gallagher v. Newman*, 190 N. Y. 444, 16 L.R.A.(N.S.) 146, 83 N. E. 480), yet where a foreman runs an elevator up to a certain floor in a building, and directs the regular elevator operator to deliver a bundle on that floor of the building, and promises him to hold the elevator until he returns, the direction of the foreman and his assurance that the elevator would not be moved are acts of superintendence, and negligence in connection therewith renders the master liable. *Martin v. Cornell*, 136 App. Div. 585, 121 N. Y. Supp. 119.

In *Guilmartin v. Solvay Process Co.* 189 N. Y. 490, 82 N. E. 725, it was held that the act of a foreman in directing some of the men under him to repair a belt without stopping the machinery was an act of superintendence for which the master was liable.

In the following cases, which were decided under the New York employers' liability act, it was held that the master was negligent for the act of the superintendent in starting the machinery:

Smith v. Milliken Bros. 200 N. Y. 21, 93 N. E. 184, affirming 133 App. Div. 903, 117 N. Y. Supp. 285; *Carlson v. United Engineering & Contracting Co.* 113 App. Div. 371, 98 N. Y. Supp. 1036 (foreman superintending repairs on stationary engine); *Boyle v. McNulty Bros.* 129 App. Div. 412, 113 N. Y. Supp. 240 (the signal of one conceded a superintendent to raise an elevator when the natural signal would have been to lower it is an act of superintendence); *Buckley v. Beinhauer*, 136 App. Div. 540, 121 N. Y. Supp. 180, affirmed in 201 N. Y. 572, 95 N. E. 1124 (foreman took place of signalman in giving signals for raising and lowering of hoist). 46 L.R.A.(N.S.)

The mere fact that the superintendent himself performs the manual act of starting the machinery will not relieve the master.

Thus, the master is liable for the negligence of an engineer who directs an oiler to prize an engine off "top center" where the steam would not move it, when the engineer knew that the steam had been turned on and that the engine would turn rapidly the instant it was moved off the center; and the fact that the engineer had himself turned the steam on is immaterial. *Sloss-Sheffield Steel & I. Co. v. Austell*, 161 Ala. 418, 49 So. 685.

So, if a superintendent is negligent in causing an engine to be started, the fact that he himself does the manual work of starting it does not relieve the master from liability. *McPhee v. New England Structural Co.* 188 Mass. 141, 74 N. E. 303, 18 Am. Neg. Rep. 455.

In a few cases the superintendency of the negligent servant has been held to be a question for the jury.

Thus, in *Gallagher v. Newman*, 190 N. Y. 444, 16 L.R.A.(N.S.) 146, 83 N. E. 480, it was held that whether or not the act of a superintendent in starting the machinery while some employees were attempting to put a belt back onto a pulley was an act of superintendence was a question of fact for the jury.

And in *Belding v. Lesure*, 201 Mass. 486, 87 N. E. 904, it was held that it was a question for the jury to decide whether or not there was negligence on the part of the defendant's superintendent in negligently causing a machine to start when the plaintiff was engaged in pointing out defects therein.

Under the employers' liability acts, as at common law, the master is not liable for the act of a mere fellow servant in starting machinery, where such act is done merely to forward the work.

Thus, in *Abrahamson v. General Supply & Constr. Co.* 112 App. Div. 318, 98 N. Y. Supp. 596, the negligent servant was the leader of a gang of structural iron workers

results merely from the failure of such superior to give warning to the inferior of his contemplated act which is a part of the ordinary operation of the work, the negligence in failing to give such a warning is that of a fellow servant, and not that of the master. No appliance can be provided which may not, under some circumstances, if used by one employee with-

out warning or precaution, involve injury to a coemployee; and there was in this case no suggestion of any negligence in the method of doing the work which the master had authorized.

There was no error in sustaining the motion for a directed verdict, and the judgment therein is affirmed.

and received somewhat higher wages than the other members of the gang, but it was held that his act in giving a negligent signal for the starting of the engine was not an act of superintendence rendering the master liable for the resulting injuries, where the extent of his authority was merely to push the work along and to keep the men in his gang intelligently employed.

And, in *Falk v. Havemeyer*, 123 App. Div. 657, 108 N. Y. Supp. 140, it was held that where two employees were set at work to clean the sheaves of an elevator they were fellow servants, although one of them was only a helper and the other was to stand guard and give directions for the moving of the elevator. The court said: "The superintendence intended by the statute involves more than the mere authority to give direction to a helper in respect of some limited detail of the work."

So, the mere act of giving a signal to move an elevator does not constitute an act of superintendence if given by an employee, when every employee is at liberty to give it, and hence it does not come within the assigned duty of a superintendent. *McDonnell v. Andrew J. Robinson Co.* 136 App. Div. 598, 121 N. Y. Supp. 47.

The foreman of a gang of laborers engaged in removing materials from an elevator, who is charged with the duty of giving signals for the moving of the elevator, is not a superintendent. *Croghan v. Hedden Constr. Co.* 147 App. Div. 631, 132 N. Y. Supp. 548.

The act of a car shifter in starting a turntable is not an act of superintendence under the employers' liability act. *Whelton v. West End Street R. Co.* 172 Mass. 555, 52 N. E. 1072, 5 Am. Neg. Rep. 615.

Negligence in the exercise of superintendence intrusted to an employee within the meaning of the Alabama employers' liability act does not exist in the case of an engineer whose duty it is personally to operate the engine, although he usually has a helper, where, in the absence of the helper, by the negligence of the engineer in starting the engine or in failing to prevent a third person from starting it, a person engaged in repairing the engine is killed, since the primary duty of the engineer is not that of superintendent, but that of a laborer. *Dantzler v. DeBardeleben Coal & I. Co.* 101 Ala. 309, 22 L.R.A. 361, 14 So. 10.

So, in *Freeman v. Sloss-Sheffield Steel & I. Co.* 137 Ala. 481, 34 So. 612, it was held 48 L.R.A. (N.S.)

that a stationary engineer who operated the engine which worked a steam shovel was not, in starting the engine, a superintendent within the meaning of the Alabama statute.

And in *McKenna v. Gould Wire Cord Co.* 197 Mass. 406, 83 N. E. 1113, it was held that the starting of machinery might have been an act of superintendence, but that the master could not be held liable therefor, because a reasonably prudent man could not have anticipated that the injured employee would have been in the place of danger where he was injured.

The master cannot be held liable for the unauthorized act of an employee in starting machinery.

Thus, in *Quinlan v. Lackawanna Steel Co.* 191 N. Y. 329, 84 N. E. 73, it was held that under the New York employers' liability act, an act of a foreman in starting machinery which he was unauthorized to do was not an act of superintendence for which the master was liable.

And the master is not liable for the negligent act of an employee in starting machinery, when such employee had no duty to perform in connection therewith and his act was merely a meddlesome act. *Ramsey v. Arbuckle*, 147 App. Div. 685, 132 N. Y. Supp. 579.

In *Joseph v. George C. Whitney Co.* 177 Mass. 176, 58 N. E. 639, it was held that the act of a superintendent in accidentally moving a shipper whereby a belt was shifted from the loose pulley to the tight pulley, was not an act of superintendence under the employers' liability act.

An offer to show that the turning on or shutting off of the power in a factory was an act of superintendence, was rejected in *Gilmore v. Mittineague Paper Co.* 169 Mass. 471, 48 N. E. 623, but chiefly upon the ground that the witness from whom this evidence was to be drawn was not qualified.

The engineer in charge of the engine which operates a pile driver, the connection between the engine and the hammer being made only by a rope, is employed on "another" machine than the employee engaged in ringing a pile in front of the pile driver, within the meaning of the California statute (Cal. Civ. Code, § 1970), so that the master is liable for the negligence of the engineer in letting the hammer fall without notice whereby the other employee is injured. *Korander v. Penn Bridge Co.* 16 Cal. App. 249, 116 Pac. 384.

W. M. G.

KANSAS SUPREME COURT.

HOWARD ILIFF

v.

CUDAHY PACKING COMPANY, Appt.

(83 Kan. 588, 112 Pac. 165.)

Master — safety of elevator pit — duty as to.

A laborer who as a part of his regular duties was ordered to keep the elevator pit in a packing house clean of refuse, was directed to notify the elevator operator whenever he entered the pit to do this work, and was told that the operator would warn him of the descent of the elevator. This was regularly done for some time, after which, when the laborer again entered the pit and notified the operator accordingly, the latter neglected to give the warning, in consequence of which neglect the elevator descended upon the laborer and injured him. It is held: (1) That the ordinary rule relieving the master from liability to a servant for injuries caused by the negligence of a fellow servant does not apply; (2) the master was not relieved from the consequences of neglect to make the place of service reasonably safe by delegating the duty of giving the necessary warning to the operator, who failed to give it.

(December 10, 1910.)

APPEAL by defendant from a judgment of the District Court for Sedgwick County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. H. M. Langworthy, and Warner, Dean, McLeod, & Timmonds for appellant.

Messrs. John W. Adams and George W. Adams, for appellee:

Where a warning is necessary, by custom or otherwise, a master cannot escape liability by failure of a fellow servant to give warning when duty requires it.

Brice-Nash v. Barton Salt Co. 79 Kan. 110, 19 L.R.A.(N.S.) 749, 131 Am. St. Rep. 284, 98 Pac. 768; Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, 19 Mor. Min. Rep. 264; Hendrickson v. United States Gypsum Co. 133 Iowa, 89, 9 L.R.A.(N.S.) 555, 110 N. W. 322, 12 Ann. Cas. 246; Crist v. Wichita Gas, E. L. & P. Co. 72 Kan. 139, 83 Pac. 199, 19 Am.

Headnote by BENSON, J.

Note. — Upon the question whether starting machinery is the act of a vice principal or of a fellow servant, see note to Peterson v. Chicago, R. I. & P. R. Co. ante, 766.
46 L.R.A.(N.S.)

Neg. Rep. 238; Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 78 Pac. 856; Kelley v. Ryus, 48 Kan. 120, 29 Pac. 144; Comrade v. Atlas Lumber & Shingle Co. 44 Wash. 470, 87 Pac. 517; Mullin v. Central R. Co. 77 N. J. L. 241, 72 Atl. 426; D'Agostino v. Pennsylvania R. Co. 72 N. J. L. 358, 60 Atl. 1113, 18 Am. Neg. Rep. 554; Germanus v. Lehigh Valley R. Co. 74 N. J. L. 662, 67 Atl. 79.

Benson, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries. The plaintiff, Iliff, was employed as a janitor in the packing house of the defendant company. His duties were to keep the floors clean and to clear out the refuse from the elevator pit. He was directed to notify the elevator operator whenever he entered the pit for the purpose of cleaning it, and was told that the operator would warn him when the elevator was about to come down. The plaintiff performed this duty for two months or more before he was injured, giving the notice and receiving the warning as indicated. At the time of the injury he had entered the elevator pit, after giving notice to the operator as usual, and was using a scraper and shovel in cleaning out the refuse and filth therein, when, without warning, the elevator descended upon him while thus at work, inflicting the injuries of which he complains. The operator had received the notice, but neglected to give the warning. It was claimed by the defendant that the plaintiff was ordered to clean out the pit only when the elevator was locked at noon, or after the close of the regular work of the day, but the general verdict for the plaintiff determines the issues in his favor, and, evidence having been given to prove the facts as above stated, they must be taken as true.

Errors are assigned upon the order overruling the demurrer to the evidence and in the instructions given. In support of the demurrer it is contended that the plaintiff and the operator of the elevator were fellow servants, and, as the injury was caused solely by the negligence of the operator, the plaintiff cannot recover under the rule relating to fellow servants. On the other hand, the plaintiff insists that, where the negligent act of one fellow servant which injures another violates a nondelegable duty which the master owes to the injured servant, the rule that a master is not liable to one servant for the negligence of a fellow servant has no application.

In Kelley v. Ryus, 48 Kan. 120, 29 Pac. 144, it was said: "It is the duty of an employer in all cases to furnish his em-

ployees with a reasonably safe place at which to work, and with reasonably safe instruments or tools with which to work; and if he delegates these duties to another, such other becomes a vice principal, for whose acts the principal is responsible."

It was said in *Crist v. Wichita Gas, E. L. & P. Co.* 72 Kan. 135, 83 Pac. 199, 19 Am. Neg. Rep. 238: "If the master sends a servant to work in a place of danger, however temporary, and the danger arises from acts or omissions of other servants against which the servant has no means of protecting himself, it is the duty of the master to provide such warnings or to take such other steps as may be reasonably necessary to safeguard the servant so employed; and if another servant of higher or lower degree is delegated by the master to attend to such safeguarding he is performing the functions of the master, and if guilty of negligence the master is responsible." p. 139.

The defendant concedes the rule, but urges that, while ordinarily a master cannot delegate the performance of the personal duties which he owes to his employees so as to relieve himself from liability, yet this rule is subject to the exception that where the duty relates to a mere detail of the work it may be delegated to a fellow servant and the master be relieved from the negligence of the latter. It is urged that this claim is supported by the opinion in *Coffeyville Vitrified Brick & Tile Co. v. Shanks*, 69 Kan. 308, 76 Pac. 856. But in that case it was held that shovelers in a mine were not required to watch for shale thrown down by the drillers, of which warning was required, but was negligently omitted. It was said that "the shovelers were hired to work; not to dodge the drillers." p. 310. It was also said: "But whenever a negligent act violates any duty which the master himself owes to the servant, as, for example, the duty to make the service and the place in which it is performed reasonably safe, that fact controls, irrespective of the rank or grade of service between employees, and notwithstanding the circumstance that they are engaged in a common employment directed to a common end; and if, in the discharge of the master's duty, a warning be necessary, it is not enough for him to say that he has provided a competent person to give it; the warning must be given." p. 310.

In *Brice-Nash v. Barton Salt Co.* 79 Kan. 110, 19 L.R.A.(N.S.) 749, 131 Am. St. Rep. 284, 98 Pac. 768, where the method of carrying on the work involved the occasional dis-

lodgement of masses of salt with such force as to expose employees to danger, and it became necessary to give warning of such dislodgement, it was held that the giving of such warning was a nondelegable duty of the master, and that its omission imposed liability for consequent injuries regardless of the question of coservice.

It is argued that the danger to which the plaintiff was exposed was not permanent, or constantly recurring, and that for this reason the rule requiring the company to make the place reasonably safe for the service does not apply. It will be observed from the quotation given that this view was not approved in this court in the *Crist Case*. It was also said in that case, in immediate connection with the language quoted, that the rule "has no iron-bound limitations as to whether the place be a permanent or a temporary one." 72 Kan. 135, 139. Authorities on this and other closely related subjects are collated in a note in 26 L.R.A.(N.S.) 624-651. The assurance given to the plaintiff that he would be warned when the elevator was about to descend implied that he was expected to continue at his work until the warning was given. It was therefore not only his right, but his duty, to give attention to that work. While doing this he was injured without his fault through the failure of the company to give the warning it had undertaken to give. These facts afforded a cause of action.

It is also contended that the plaintiff should be held guilty of contributory negligence, because his work in the elevator pit was so intrinsically and plainly dangerous that he ought not to have undertaken it at all while the elevator was in use. The service however must be regarded in the light of the provisions for safety promised by the company; that is, upon the supposition that the warning would be given. When so considered, it cannot be said as a matter of law that the work was so glaringly dangerous that none but a reckless person would have undertaken it. The question of contributory negligence was for the jury.

The instructions complained of are in harmony with the interpretation of law as given in this opinion, and are not deemed erroneous.

Finally, it is urged that the verdict, which was for \$2,000, is so excessive as to show passion and prejudice on the part of the jury. After reading the evidence, it is found sufficient to warrant the award.

The judgment is affirmed.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

ANNIE ONDIS, Admr., etc.,

v.

GREAT ATLANTIC & PACIFIC TEA
COMPANY, Plff. in Err.

(82 N. J. L. 511, 81 Atl. 856.)

**Master and servant — failure to warn
— act of master.**

1. When the place assigned by the employer to his employee to work is safe for him, while certain machinery, with which he is obliged to come in contact and over which he has no control, is at rest, but is liable to become a place of great peril to him the instant such machinery is started in motion, and a previous method of warning him of such starting had been uniformly pursued by the employer through the act of another employee, who was in control of the machinery and had undertaken the duty of giving such warning, the neglect of the latter to give the warning is legally imputable to the employer.

Same — fellow servants.

2. Such employees are not to be regarded in law as fellow servants engaged in a common employment.

(November 20, 1911.)

ERROR to the Circuit Court for Hudson County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Griggs & Harding for plaintiff in error.

Messrs. McDermott & Enright, for defendant in error:

The almost certain injury to plaintiff in the event of starting the machinery while he was at work in the trench made it incumbent on defendant to give warning, even in the absence of proof of custom.

Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986, 59 N. J. L. 562, 35 Atl. 1130; Albanese v. Central R. Co. 70 N. J. L. 241, 57 Atl. 447, 18 Am. Neg. Rep. 135; Laragay v. East Jersey Pipe Co. 77 N. J. L. 521, 72 Atl. 57; Polo v. Palisade Constr. Co. 75 N. J. L. 873, 70 Atl. 161; Goessel v. Central R. Co. 81 N. J. L. 17, 78 Atl. 681; Keeley v. Boston Elev. R. Co. 192 Mass. 481, 78 N. E. 490, 20 Am. Neg. Rep. 567.

The negligence resulting in the injury

Headnotes by VREDENBURGH, J.

Note.—Upon the question whether starting machinery is the act of a vice principal or fellow servant, see note to Peterson v. Chicago, R. I. & P. R. Co. ante, 766. 46 L.R.A. (N.S.)

complained of was not the negligence of a fellow servant.

Koneski v. Delaware, L. & W. R. Co. 77 N. J. L. 645, 26 L.R.A. (N.S.) 644, 74 Atl. 516; Polo v. Palisade Constr. Co. 75 N. J. L. 873, 70 Atl. 161; Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, 4 Am. Neg. Rep. 195, 19 Mor. Min. Rep. 264.

Vredenburg, J., delivered the opinion of the court:

Ondis, the plaintiff's intestate, was at work for the defendant in an uncovered pit or trench, about 5 feet deep from the surface of the ground, under the sidewalk curb adjacent to its warehouse premises, in Jersey City, and was killed by the sudden revolution of a powerful screw under his feet, which, in revolving, caught his legs and clothing, and almost instantly tore off his feet.

The deceased was engaged, in obedience to the orders of Mr. Parker, the superintendent of construction and machinery of the company, in bailing water from the bottom of the pit in which he stood, by reaching down and filling pails with water, which he then handed up to Mr. Parker, who was within his reach upon the adjoining bank. In order to retain his footing so as to accomplish this work, he stood within the pit, either upon, or very close to, the screw, which was then stationary, and partly inclosed in a U-shaped iron trough underneath the screw, and in which, when in motion, the screw turned.

The screw was revolved by electrical motors, operated and controlled from a switchboard by the engineer in his engine room, at a distance (not stated in the evidence) away from the pit, but completely out of the sight of any person, whether standing in the pit or on the bank adjoining it. Neither the engineer while in his engine room, nor the employee while in or at the pit, could see each other, nor was there any mechanical or other means of signaling between them.

The place in the pit where Ondis stood while bailing the water was entirely safe, so long as the electrical power was off, and the machinery and screw consequently were at rest; but the instant the power was turned on and the screw revolved, his position became one of immediate peril to his life. It is clear from the engineer's testimony that he was fully aware this machinery could not be started without extreme danger of fatal consequences to the man in the pit. This knowledge that officer expressly admitted. By these admissions it appears that Ondis had, on occasions previous to the accident, worked in the pit.

The engineer testified that on these occasions he would always find out where Ondis was, before he would start the machine; that, if Ondis was bailing water, when he got through with his job he (Ondis) would either come from the pit and tell him (the engineer) that the water was all out, or, if not, that he himself would go out and see Ondis, and see that everything was all right, and then come in and start it; "that he would go out there every time and look if the work was done, because he knew what it was, and knew the piece of machinery it was, and didn't want to see any man there; . . . and that he never turned on the power until he had ascertained in that way that everything was right."

It is thus evident that on all previous occasions when Ondis had occupied the pit, except the fatal one, the engineer's universal practice before starting the machinery had been to find out, either from his own view, or by the presence and statements of Ondis to him, that the latter had left the pit, and this course of practice Ondis must be presumed to have relied upon for his safety. But on the occasion of the accident the engineer, instead of first obtaining personal knowledge of the situation of Ondis, obeyed the order sent to him by Superintendent Parker to start the machinery.

The jury were warranted in finding from the testimony of three eyewitnesses of the occurrence, who were in close proximity to the pit, that Ondis was still standing in the pit, either upon, or in very close contact with, the screw, when it revolved after the machinery had been started. Not only so, but the very nature of the injuries inflicted upon the body of Ondis demonstrated this fact. The person who rescued him from the machinery after the accident said that he was obliged to cut intestate's flesh and clothing in disentangling him from the blades of the screw. These eyewitnesses also testified that no notice or warning of the starting of the machine was given by anyone in their hearing to Ondis before the accident.

It is true that Superintendent Parker, in his testimony, says that before he sent the order to the engineer to turn on the power (which he admits he gave) he had "told Ondis to get out of the pit;" . . . that he "had given him a hand to pull him upon the bank, and saw him upon the bank;" but the jury were plainly justified in coming to a contrary conclusion.

It is but just to the superintendent, in view of his testimony, to add that when he sent the order to the engineer to start the machinery he probably supposed that Ondis had gotten fully out of the pit upon the 46 L.R.A. (N.S.)

bank. Nevertheless, the jury were justified in finding under the evidence that the former was guilty of negligence in ordering the power to be turned on too soon. And the question to be now determined is whether his negligence is legally imputable to his employer.

We think this negligent act of the superintendent, who assumed to act in the place of the engineer, is chargeable in law to the company. As has been fully shown above, the engineer had, in practice, on all previous occasions when Ondis had been at work in the pit, kept in personal touch with him, and had, with the knowledge of Ondis, adopted and acted upon this method or system, under which Ondis' safety was assured. This was the company's method of protecting its employees, and it follows that the failure of Parker (who assumed to act, and acted in this instance, in the place of the engineer), to give Ondis warning that he was about to order the machinery to be started, was the failure of the company, and the former's negligence that of the company.

The case is thus brought within the principles settled by a long line of adjudications of our courts, one of the earliest and most notable of which is that of *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, 4 Am. Neg. Rep. 195, 19 Mor. Min. Rep. 264, followed by *Germanus v. Lehigh Valley R. Co.* 74 N. J. L. 662, 87 Atl. 79, and a reference to the *Digest Annotations* will show how undeviatingly it has since been approved and followed by our courts.

The plaintiff in that case was injured by a piece of rock thrown out from a blast, because the foreman had, through negligence, failed to give timely warning, according to a system or method previously pursued; and it was held that the giving of warning was embraced in the duty owed by the employer to his employees that the place where he sets them to work shall be kept safe; that the failure of the foreman to perform this duty carefully was imputable to the defendant as employer; and that such failure was not one of the obvious dangers of which the plaintiff, as employee, assumed the risk.

The place where the intestate was put to work by the defendant was liable to become one of exceptional peril to the former, and he had the clear right, under the settled rules of a long line of authority, to assume that his employer would take reasonable care to warn him before the danger became imminent and actual, and to proceed with his work in reliance upon this assumption; and, since his employer had assigned to other servants the duty of giving such

warning to him (the intestate), he had the right to depend upon its due and careful performance by them. *D'Agostino v. Pennsylvania R. Co.* 72 N. J. L. 358, 60 Atl. 1113, 18 Am. Neg. Rep. 554; *Burns v. Delaware & A. Teleg. & Teleph. Co.* 70 N. J. L. 745, 67 L.R.A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673; *Albanese v. Central R. Co.* 70 N. J. L. 241, 57 Atl. 447, 16 Am. Neg. Rep. 135; and *Pakusewski v. Ringwood Co.* 81 N. J. L. 552, 79 Atl. 319.

These other servants were not fellow servants engaged in a common employment with him (the intestate), but are to be regarded as acting in this respect as the representatives of the master, and the only question is whether they in fact exercised due care. See page 754 of *Burns v. Delaware & A. Teleg. & Teleph. Co.* supra; *Laragay v. East Jersey Pipe Co.* 77 N. J. L. 516, 72 Atl. 57; *Delaware, L. & W. R. Co. v. Hardy*, 59 N. J. L. 40, 34 Atl. 986; *Polo v. Palisade Constr. Co.* 75 N. J. L. 873, 70 Atl. 161.

The counsel of the plaintiff in error ably argue in their brief that the engineer's testimony brings the case at bar within the principle of the case decided by this court, of *Koneski v. Delaware, L. & W. R. Co.* 77 N. J. L. 645, 648, 26 L.R.A.(N.S.) 644, 74 Atl. 516.

In this case, as it was made by the plaintiff's evidence, it appeared that while he was at work for defendant at night, close to its tracks, shoveling ashes at an ashpit, one of the company's engines, running upon its tracks, struck and injured him; no warning having been given by bell rung, or whistle blown, upon the engine striking him. This court held, in reversing the plaintiff's judgment below, that the railroad's engineer, who had failed to give such warning, was to be regarded as a fellow servant of the plaintiff, for the reason that the duty of giving the warning, under the facts there presented, was merely incidental to his general employment, and his failure to perform that duty was not imputable to the common employer.

But it will be observed by an examination of the reasoning at page 648, of the opinion, delivered by the chief justice, that after a careful analysis of many prior adjudications upon the subject he distinguishes that case from one like the case before us, and I think it important to quote his language, viz.: "In our opinion, the present case comes within the principle of the *Miller Case*, 69 N. J. L. 413, 55 Atl. 245, rather than within the *Belleville Stone Co.* and *Germanus Cases*. If an employee of the defendant had been delegated by it to attend at the ashpit and warn those at work there of the approach of engines, and

his failure to give warning had been the producing cause of the accident to the plaintiff, the case would then, in its legal aspect, have been parallel with those last mentioned." He adds: "But the duty of blowing a whistle, or ringing a bell, which rests upon the engineer or hostler in charge of an engine, is an incident in the operation of the engine, and failure to perform that duty, therefore, does not impose responsibility upon the master for injuries received by another employee in the common work."

This distinction, so pointedly drawn in the *Koneski Case*, is manifestly applicable to the present. The jury were warranted in concluding from the evidence relating to the practice of warning previously pursued and recognized by the defendant, that the engineer in charge of the motors had been delegated by it to personally ascertain whether or not Ondis was at work in the pit, and if in the pit to warn him, before he turned on the electric power. Under such method the intestate was justified in acting upon the belief that the company regarded it as a duty to adhere to that system of warning him to get out of the pit, before the engineer started the machinery. This duty, Superintendent Parker, acting for the company in the stead of the engineer, failed to perform. Neither the engineer nor Parker were engaged, therefore, in a common employment with the intestate, but must be regarded as acting, under the circumstances, as the representatives of the company.

The judgment below, which was for the plaintiff, should be affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

TERA THOMAS

v.

NATIONAL BENEFIT ASSOCIATION.
Plff. in Err.

(— N. J. —, 86 Atl. 375.)

Insurance — insurable interest — orphan taken into home.

A woman who takes a girl from an orphan asylum and gives her a home, under circumstances calculated to raise reasonable expectation of help and care from her during the declining years of the benefactress, has an insurable interest in her life, although she is not formally appointed her guardian.

(March 3, 1913.)

Note. — *Insurable interest in life of foster child or foster parent.*

No other case has been found on the question whether a foster parent has an

ERROR to the Supreme Court to review a judgment affirming a judgment of the District Court of Newark City in plaintiff's favor in an action brought to recover the proceeds of a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Frank E. Bradner and George A. Douglas, for plaintiff in error:

The plaintiff should have been nonsuited upon her own evidence that she had no insurable interest in the life of the insured.

Meyers v. Schumann, 54 N. J. Eq. 414, 34 Atl. 1066; *Vivar v. Supreme Lodge K. P. 52 N. J. L. 469*, 20 Atl. 36; *Dacosta v. Davis*, 24 N. J. L. 319; *Alleghany Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

There should have been a nonsuit upon the ground that the assessments payable were more than four weeks in arrears, and the policy had become void, and there had been no waiver of the forfeiture.

Graham v. Security Mut. L. Ins. Co. 72 N. J. L. 298, 62 Atl. 681; *Robinson v. Boys*, 61 N. J. L. 179, 38 Atl. 813; *Thompson v. Fidelity Mut. L. Ins. Co.* 116 Tenn. 557, 6 L.R.A. (N.S.) 1039, 115 Am. St. Rep. 823, 92 S. W. 1098.

Mr. Richard Stockton, for defendant in error:

No insurable interest is necessary in New Jersey.

Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. 576; *Vivar v. Supreme Lodge*,

K. P. 52 N. J. L. 455, 20 Atl. 36; *Sun Ins. Office v. Merz*, 63 N. J. L. 365, 43 Atl. 693.

There was no forfeiture, as the policy had not lapsed.

Thorne v. Mosher, 20 N. J. Eq. 257.

Gummere, Ch. J., delivered the opinion of the court:

This action was brought in the second district court of the city of Newark to recover the proceeds of a life insurance policy issued by the National Benefit Association upon the life of one Dora Cooper, and payable to Tera Thomas, the plaintiff. The trial of the cause resulted in a judgment for the plaintiff, and on appeal to the supreme court that judgment was affirmed. The propriety of the affirmance is now challenged by the defendant.

The principal contention made by the plaintiff in error, both in the supreme court and here, was that the policy sued upon is void, for the reason that the beneficiary, Mrs. Thomas, had no insurable interest in the life of the deceased; the policy requiring that "the beneficiary must have something more than a pecuniary interest in the insured, as speculative policies are not issued by this association." The uncontroverted proofs submitted at the trial showed that, when the decedent was about seventeen years of age, Mrs. Thomas, who was not related to her in any way, took her from an orphanage asylum, gave her a home, and took care of and supported her until she

insurable interest in the life of a foster child. But there are a number of cases maintaining the insurable interest of a foster child in the life of the foster parent.

Thus, a young woman has an insurable interest in an elderly man sufficient to sustain a policy on his life taken out by him and assigned to her, where he assumed parental relations, although without legal adoption, to the extent of educating her, and gave her other assistance, and, from his conduct and promises, she had a right to believe that the quasi parental relation would continue so long as he lived. *Carpenter v. United States L. Ins. Co.* 161 Pa. 9, 23 L.R.A. 571, 41 Am. St. Rep. 880, 28 Atl. 943.

And in *McGraw v. Metropolitan L. Ins. Co.* 5 Pa. Super. Ct. 488, it was said that, on authority of the *Carpenter Case*, supra, a jury would be justified in determining that a child had an insurable interest in one who had assumed parental relations to her, where it appeared that her father died when she was two and one-half years old, that her mother married again, and that insured, who was her uncle, had raised her and been a father to her all her life; that she had lived with her uncle until her marriage, and since her marriage next door to him, where he resided with his sisters, and that she always helped support them.

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And in *Berdan v. Milwaukee Mut. L. Ins. Co.* 136 Mich. 396, 99 N. W. 411, 4 Ann. Cas. 332, a child was held to have an insurable interest in one who had assumed the relation of parent to him, where the facts were that the child was born out of wedlock, and at the time of his birth was accepted by a husband and wife as a member of their family, through an arrangement made with the infant's mother at the instance of insured, a sister of the wife, who was also a member of the household, and who, on the death of the wife, assumed charge of the household, and from her earnings took care of and supported the child.

The question whether a foster child or a foster parent is within the class of beneficiaries described by by-laws or rules of mutual insurance companies is not within the scope of the present note.

As to who is a member of the "family" within the contract of benefit societies, see note to *Supreme Lodge, O. M. P. v. Nevins*, 3 L.R.A. (N.S.) 334.

As to who is a "dependent" within statutes or rules defining beneficiary of mutual benefit societies, see notes to *Caldwell v. Grand Lodge, A. O. U. W.* 2 L.R.A. (N.S.) 653; *Royal League v. Shields*, 36 L.R.A. (N.S.) 208; and *Goff v. Supreme Lodge, R. A.* 37 L.R.A. (N.S.) 1191.

J. H. B.

was able to maintain herself, and that upon her death Mrs. Thomas took charge of the funeral and paid the expenses thereof out of her own pocket. It further appeared that, notwithstanding that Mrs. Thomas had never formally been appointed guardian of Miss Cooper, the latter looked upon her as such, even after she attained her majority. We think that these facts disclose an insurable interest under the terms of the policy. They show that the relation of the parties had been of such a character that each had reason to rely upon the other in time of need, and especially that Mrs. Thomas had a right to expect help and care during her declining years from Miss Cooper, if the latter was then in a position to render it. Although, as was said by Field, J., in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, it is not easy to define with precision what will constitute such an interest, it may be stated generally to exist whenever the relations between the insured and the beneficiary are such as to justify a reasonable expectation that the continuance of the life of the former will result in advantage or benefit to the latter. It is not necessary, in order to create such an interest, that the insured shall be under any legal obligation, either financial or otherwise, to the beneficiary. It is not even necessary that kinship shall exist between the parties. If the insured is under a moral obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former. *Opitz v. Karel*, 118 Wis. 527, 62 L.R.A. 982, 99 Am. St. Rep. 1004, 95 N. W. 948; *Chisholm v. National Capital L. Ins. Co.* 52 Mo. 213, 14 Am. Rep. 414; *Cronin v. Vermont L. Ins. Co.* 20 R. I. 570, 40 Atl. 497.

The only other ground upon which a reversal of the judgment of the district court was sought in the supreme court was that the policy had lapsed during the life of the insured by reason of her failure to pay various premiums at the times when they respectively fell due, or within four weeks thereafter. The policy containing a provision that such failure should work a forfeiture of all claims under it. The failure to pay these premiums within the time required by the policy was not disputed at the trial; but the trial court found from the evidence submitted that there had been a waiver by the defendant company of its right to enforce the forfeiture, and that, consequently, the delay in the payment of the premiums constituted no bar to the plaintiff's right of recovery. The supreme court, considering that the question whether there had been such a waiver or not was one of fact, to be

determined by the trial court, refused to review its determination thereof, there being, as it found, some evidence in the case to support it. It is now argued before us that there was error in this conclusion of the supreme court, the assertion being that an examination of the case will show no proofs upon which an inference of waiver can be supported. It is enough to say, in disposing of this contention, that we find counsel's assertion to be contrary to the fact.

The judgment under review will be affirmed.

SOUTH CAROLINA SUPREME COURT.

STATE OF TENNESSEE, Appt.,

v.

W. J. MASSEE, Resp't.

EX PARTE W. J. MASSEE.

(— S. C. —, 79 S. E. 97.)

Bail — fugitive from justice — habeas corpus proceeding.

1. One demanded by one state from another as a fugitive from justice, under the Federal statute, should not be admitted to bail in a habeas corpus proceeding to test the validity of the requisition, unless some departure from the requirements of the statute has been made to appear.

Same — showing of hardship.

2. One arrested as a fugitive from justice under interstate rendition proceedings cannot secure his release on bail by showing that, while he had violated the criminal laws of the demanding state, he had been guilty of no moral wrong; that the prosecution was a hardship on him, instituted to collect a debt, and that the governor of another state had refused to issue a requisition.

Evidence — to impeach governor's signature.

3. A requisition for a fugitive from justice under the official signature of the governor, and under the great seal of the state, cannot be impeached by affidavits of strangers that the governor stated that he did not sign the requisition.

Note. — No other case has been found as to the effect of failure of a prisoner who has been released on bail to appear at a hearing on habeas corpus.

As to the appearance by counsel on a charge of misdemeanor as satisfaction of the condition of a bail bond or recognizance, see *State v. Johnson*, 82 Kan. 450, 27 L.R.A. (N.S.) 943, 108 Pac. 793, and the note thereto.

Same — withdrawal of requisition — telegram.

4. The court may, in a habeas corpus proceeding to release one arrested as a fugitive from justice, consider telegrams from the governor of the demanding state and of the state upon which the demand was made, to the effect that the requisition had been withdrawn.

Interstate rendition — release of prisoner — absence from court.

5. One who, having been released on bail under a writ of habeas corpus from custody to which he had been committed in interstate rendition proceedings, as a fugitive from justice, cannot be discharged from custody and have his bond canceled during his absence from court.

(May 24, 1913.)

APPEAL by the State of Tennessee from an order of the Common Pleas Circuit Court for Spartanburg County discharging accused under a writ of habeas corpus from custody to which he had been committed in an extradition proceeding to secure his return to the state of Tennessee, in which he was alleged to have committed a crime. Reversed.

The facts are stated in the opinion.

Messrs. Horace Frierson, Jr., Attorney General, Nicholls & Nicholls, and Harry S. Stokes, for appellant:

Petitioner is charged with violation of the statute against extortion.

The petition must state facts, as distinguished from conclusions of law, so that the court may exercise an intelligent discretion in passing upon the application.

Ex parte White, 9 Ark. 222; Ex parte Walpole, 84 Cal. 584, 24 Pac. 308; Ex parte Voll, 41 Cal. 29; Ex parte Nye, 8 Kan. 99; State ex rel. Sherin v. Goss, 73 Minn. 126, 75 N. W. 1132; State ex rel. Distin v. Ensign, 13 Neb. 250, 13 N. W. 216; Ex parte Deny, 10 Nev. 212; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703; Re Count de Toulouse, 43 C. C. A. 42, 102 Fed. 878.

A person who is arrested as a fugitive from justice, on the warrant of the executive, must be securely held. He is therefore not entitled to bail.

Ex parte Erwin, 7 Tex. App. 288; Ex parte Hobbs, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035; Re Foye, 21 Wash. 250, 57 Pac. 825.

The court could not properly proceed with this investigation under the writ, in the absence of petitioner and over the objection of the state.

Clark, Crim. Proc. p. 423.

The copy of the indictment found or affidavit made before a magistrate which is 46 L.R.A. (N.S.)

required to accompany a requisition must be certified to be authentic by the governor of the state from which the person charged has fled.

Ex parte Powell, 20 Fla. 809; Ex parte Pfitzer, 28 Ind. 450; Kingsbury's Case, 106 Mass. 223; State ex rel. Stundahl v. Richardson, 34 Minn. 115, 24 N. W. 354; Hibler v. State, 43 Tex. 197; Ex parte Hart, 23 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; Re Leary, 10 Ben. 197, Fed. Cas. No. 8,162.

The certificate need not state that the papers are genuine, but only that they are duly authenticated.

Hackney v. Welsh, 107 Ind. 253, 57 Am. Rep. 101, 8 N. E. 141.

The certificate need not be in any particular form, so long as it makes clear the fact that the documents are what they purport to be.

Ex parte Sheldon, 34 Ohio St. 319; Ex parte Dawson, 28 C. C. A. 354, 49 U. S. App. 674, 83 Fed. 306; Ex parte Dickson, 4 Ind. Terr. 481, 69 S. W. 943; Re Manchester, 5 Cal. 237; Hibler v. State, 43 Tex. 197; Ex parte Camp, 8 Ohio S. & C. P. Dec. 681, 7 Ohio N. P. 614; Johnston v. Riley, 13 Ga. 97.

As a governor's duty is absolute, he may not, because of facts which do not appear on the face of the requisition, use his discretion whether to obey it or not.

Ex parte Swearingen, 13 S. C. 74; People ex rel. Draper v. Pinkerton, 17 Hunt. 199; Ex parte Van Vleck, 6 Ohio Dec. Reprint, 636.

The courts should be clearly satisfied that an error has been committed by the executive who has caused the fugitive's arrest, before setting his act aside.

Ex parte Brown, 28 Fed. 653; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; Re Strauss, 63 C. C. A. 99, 126 Fed. 327; Ex parte Dawson, 28 C. C. A. 354, 49 U. S. App. 674, 83 Fed. 306; Bruce v. Rayner, 62 C. C. A. 501, 124 Fed. 481.

The general rules of the law of evidence relating to the burden of proof, presumptions, and the admissibility and sufficiency of evidence, are ordinarily applicable to habeas corpus proceedings.

Barranger v. Baum, 103 Ga. 465, 68 Am. St. Rep. 113, 30 S. E. 524; People ex rel. Nubell v. Byrnes, 33 Hun. 98; Re Renshaw, 18 S. D. 32, 112 Am. St. Rep. 778, 99 N. W. 83; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311, affirming 172 N. Y. 176, 60 L.R.A. 774, 92 Am. St. Rep. 706, 64 N. E. 825; Re Bloch, 87 Fed. 981.

When demand is made in due form, it is the duty of the executive on whom it is

made to receive it, and he has no moral right to refuse.

Cooley's Const. Law, p. 199; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Munsey v. Clough, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282; Re Moyer, 12 Idaho, 250, 12 L.R.A.(N.S.) 227, 118 Am. St. Rep. 214, 85 Pac. 897; Barriere v. State, 142 Ala. 72, 39 So. 55; State ex rel. Arnold v. Justus, 84 Minn. 237, 55 L.R.A. 325, 87 N. W. 770; Ex parte Dickson, 4 Ind. Terr. 481, 69 S. W. 943; Vattel, Nations, bk. 2, chap. 7, §§ 84, 85; Johnston v. Riley, 13 Ga. 134.

Where the defendant fails to appear and plead to an indictment for a mere misdemeanor, his recognizance may then be estreated, before trial, sentence, and issue of bench warrant.

State v. Minton, 19 S. C. 280.

It can make no difference that Massee furnished a doctor's certificate as excuse for his absence, for under the bond it was his duty to remain within the jurisdiction of the court, and not to depart without leave.

Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287.

The principal is bound to appear *de die in diem* until his matter is finally disposed of.

People v. Hanaw, 106 Mich. 421, 64 N. W. 328; Rubush v. State, 112 Ind. 107, 13 N. E. 877.

The fact that the principal departed the court without license works a forfeiture.

Com. v. Teevens, 143 Mass. 210, 58 Am. Rep. 131, 9 N. E. 524; 2 Am. & Eng. Enc. Law, 34.

The very nature of the proceeding in this case required the presence of the respondent, for without it the hearing would have been a mere farce and nullity.

Lowndes County v. Leigh, 69 Miss. 754, 13 So. 854; Nebraska Children's Home Soc. v. State, 57 Neb. 765, 78 N. W. 269; State v. Jones, 32 S. C. 583, 10 S. E. 577.

The same rules of evidence apply in habeas corpus as in other matters.

Re Hardigan, 57 Vt. 100; Re Heyward, 1 Sandf. 701.

The admission of the affidavit of W. D. McNeil, who was an attorney for respondent at the hearing, was palpably erroneous.

Re Reynolds, Fed. Cas. No. 11,721; State v. Lyon, 1 N. J. L. 403; Ex parte Pitts, 35 Fla. 149, 17 So. 76.

An instrument under seal can be revoked only by an instrument of equal dignity, to wit, a sealed instrument.

O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501.

The authentication of the copy of the indictment contained in the requisition of the 46 L.R.A.(N.S.)

governor of Tennessee was conclusive, and evidence could not be heard to disprove it.

Re Manchester, 5 Cal. 237; Hibler v. State, 43 Tex. 197; Barranger v. Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; Re Van Sceiver, 43 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037; Kentucky v. Dennison, 24 How. 106, 16 L. ed. 729; Roberts v. Reilly, 116 U. S. 95, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; People ex rel. Nubell v. Byrnes, 33 Hun, 98; Jackson v. Archibald, 12 Ohio C. C. 155, 5 Ohio C. D. 533; Re Lyon, 24 Wash. L. Rep. 679; Re Voorhees, 32 N. J. L. 141.

Messrs. Sanders & De Pass, C. C. Wyche, and John Gary Evans for respondent.

Woods, J., delivered the opinion of the court:

The petitioner, W. J. Massee, was arrested by sheriff of Spartanburg county under the mandate of his Excellency Cole L. Blease, governor of South Carolina, issued on the 25th day of July, 1912, in accordance with a requisition from his Excellency Ben W. Hooper, governor of Tennessee. On the same day, upon the application of Massee, Hon. T. S. Sease, circuit judge, issued a writ of habeas corpus returnable in the afternoon of that day. The sheriff made return to the writ: "That W. J. Massee is held in my custody under telegram from Governor Cole L. Blease and warrant issued by Magistrate A. H. Kirby, charged with making threats and using duress to induce Robert Williams to dismiss an action in United States court." The record contains this statement of the proceedings before Judge Sease: "Counsel for the petitioner then moved that the petitioner be admitted to bail pending the hearing of the foregoing writ. Counsel for the state objected on the ground that the statutory four days' notice had not been given. This objection was overruled, and his Honor passed the following order admitting Massee to bail, his Honor ruling and holding that appellant was entitled to four days' notice, but that he would admit the petitioner to bail in the meantime." Accordingly, an order was made that Massee be discharged from custody on giving bond in the sum of \$10,000, conditioned for his appearance before Judge Sease on the 27th day of July, 1912. The bond was made, and Massee was discharged. In the meantime, on the 26th of July, Governor Blease, having received a telegram signed by Governor Hooper stating that the requisition had been signed by mistake and was revoked, requested Judge

Sease to continue the hearing until Governor Hooper's telegram could be authenticated under the seal of the state of Tennessee. An order was accordingly made postponing the hearing until the 7th of August, and requiring Massee to appear in person before Judge Sease on the 7th day of August at 10:30 in the forenoon, and continuing the bond in force until that time. In passing this order, Judge Sease considered, without objection of counsel, the telegram of Governor Blease to him, the telegram of Governor Hooper to Governor Blease, and a telegram from James B. Cox, Esq., of Knoxville, to Massee, stating that Governor Hooper had promised to revoke the requisition.

Massee did not appear on the 7th of August, pleading illness as an excuse, and his counsel presented a paper, purporting to be signed by Massee, waiving his right to be present at the habeas corpus proceedings. Counsel for the state of Tennessee objected to the hearing in the absence of the petitioner, on the grounds "(a) that the bond was conditioned upon the personal appearance of the petitioner, W. J. Massee, before his Honor, and, upon the failure of the petitioner to enter his appearance in person, the condition of the bond was broken; (b) that in a habeas corpus proceeding in which *ex vi termini*, and, as the law directs, the body of the petitioner must be brought into court, the personal appearance of the petitioner was a duty, and not a personal right which could be waived." Overruling these objections, Judge Sease proceeded with the hearing, and admitted for his consideration in the matter the telegram from Governor Hooper to Governor Blease purporting to revoke the requisition, the telegram from James B. Cox, Esq., to Massee, stating that Governor Hooper had promised to revoke the requisition, and an affidavit of W. D. McNeil to the effect that, in a conversation with him Governor Hooper gave his reasons for reinstating the requisition, and stated that he did not previously sign the requisition.

In overruling the objection to all these documents, made on the ground that they were mere hearsay, and that the formal requisition of the governor of a state was not subject to collateral attack in this manner, and that counsel were taken by surprise, and had no opportunity to meet the statements of the affidavits of McNeil, Judge Sease held "that, as such had been introduced before him, and considered by him when he passed the order extending the time for the hearing, they were already in, and would be considered by him, as they were referred to in an order previously

passed by him in this matter." Counsel for the prosecution then produced a telegram from Governor Hooper to Governor Blease, dated July 26, 1912, withdrawing the message of the day before purporting to revoke the requisition.

Upon this showing, after argument, Judge Sease made the following findings and judgment: "(1) That the requisition is irregular on its face, and not in conformity with the act of Congress relating thereto, in that no copy of the indictment found by the courts of Tennessee, as required by law, was produced; (2) I find, as a matter of fact, that the requisition was not authorized by the governor of Tennessee, but the same was issued without authority, and is therefore null and void. It is therefore ordered and adjudged that the prisoner, W. J. Massee, be discharged from the custody of the sheriff, and his recognizance canceled of record, and that he be allowed to go hence without delay."

The validity of the requisition from the governor of Tennessee depends on whether the papers transmitted by him to Governor Blease were made out as required by the Federal statute, and we think that Judge Sease was clearly in error in holding that they were on their face irregular and defective. The statute provides: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded of having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Revised Statutes of United States, § 5278, U. S. Comp. Stat. 1901, p. 3597. The objection sustained was that no copy of the indictment found by the courts of Tennessee was produced. The record before us shows that the copy of an indictment charging a crime under the laws of the state of Tennessee was attached to the requisition, and certified therein by Governor Hooper to be authentic. The objection that the certificate of the clerk of the circuit court stated that the paper purport-

ing to be an indictment was a copy of the minutes of the court, and not of the indictment, has no foundation. Even under the strictest verbal test, the certificate can bear no other construction than that the indictment appears in the minute book, and that the indictment itself, not the minute book, was on file in the clerk's office. There can be no doubt that the requisition papers were on their face regular in every respect.

The assigned error next in sequence is the admission of the petitioner to bail pending the hearing, without notice to the attorneys representing the prosecution. The question made is not now a practical one, for the bail bond was taken, and the petitioner released, and it would be impossible for this court to restore the status existing before the bond was taken. But since the point is important, we may state our views of it. Legislation in respect to extradition of fugitives from one state to another being within the power of Congress, the regulations fixed by Federal statutes are paramount to state Constitutions and statutes, and all that a state court can do under habeas corpus proceedings is to determine whether the conditions prescribed by the Federal Constitution and statutes have been complied with. If they have not, the court may release absolutely or on bail, according to its discretion.

The general rule in habeas corpus proceedings is well established, that, pending a final hearing, the judge or court may admit to bail. *Barth v. Clise*, 12 Wall. 400, 20 L. ed. 393; *Re Kaine*, 14 How. 134, 14 L. ed. 357. But extradition laws are enacted on the presumption that the state making the demand will accord to the fugitive his right to bail and all other legal rights, and, when it is remembered that the power of the court or judge under habeas corpus is necessarily limited to the inquiry whether the conditions of the Federal laws have been met, it seems obvious that bail should not be allowed pending the hearing, unless some departure from the Federal law has been made to appear. On this point the reasoning of the Supreme Court of the United States on the subject of international extradition applies with equal force to state extradition. In *Wright v. Henkel*, 190 U. S. 40, 47 L. ed. 248, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386, Chief Justice Fuller said: "The demanding government, when it has done all that the treaty and the law requires it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender, an obligation which it might be impossible to fulfil if release on bail were permitted. The enforcement of

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the bond, if forfeited, would hardly meet the international demand, and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination." *Ex parte Wall*, 84 Miss. 783, 38 So. 628; *Ex parte Hobbs*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035; *Re Foye*, 21 Wash. 250, 57 Pac. 825; 19 Cyc. 96.

But under habeas corpus proceedings the courts may inquire whether the prisoner really falls under the conditions of the Federal statute, that is, whether he is subject to extradition. For example, they may ascertain whether the prisoner is the person charged, whether he is a fugitive from justice, whether the papers show that he was in the demanding state at the time the offense was committed, and whether the act charged was a crime against the laws of the demanding state; but judicial inquiry cannot extend to the motive of the proceedings. The Supreme Court of the United States, in *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544, declared the power of the state courts to inquire, under the writ of habeas corpus, whether the statutes of the United States have been complied with, using this language: "What we decide—and the present case requires nothing more—is that, so far as the Constitution and laws of the United States are concerned, it is competent for the courts of the state of California, or for any of her judges having power under her laws to issue writs of habeas corpus, to determine, upon writ of habeas corpus, whether the warrant of arrest and the delivery of the fugitive to the agent of the state of Oregon were in conformity with the statutes of the United States, if so, to remand him to the custody of the agent of [the state] of Oregon."

In *Pearce v. Texas*, 155 U. S. 311, 39 L. ed. 164, 15 Sup. Ct. Rep. 116, the court approved of the action of the courts of the asylum state in leaving to the courts of the demanding state the protection of the prisoner in his constitutional rights.

In *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311, it was held that the court might discharge the prisoner when it appeared on the face of the extradition papers that he was not in the demanding state at the time the crime was committed; but in *Munsey v. Clough*, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282, the court said: "But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory

evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

The court held, in *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047, that the inquiry in habeas corpus, whether the prisoner was a fugitive from justice, could not extend to an inquiry into his guilt or innocence, saying that "the constitutional and statutory provisions referred to were based upon the theory that, as between the states, the proper place for the inquiry into the question of the guilt or innocence of an alleged fugitive from justice is in the courts of the state where the offense is charged to have been committed."

In *Pierce v. Creecy*, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714, Mr. Justice Moody lays down the limitation of the judicial power of inquiry in habeas corpus in this language: "This court, in the cases already cited, has said, somewhat vaguely, but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required, it would impose upon courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of states with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the states, and fruitful of miscarriages of justice. The duty ought not to be assumed, unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance."

These statements of the principle involved by the tribunal to whose authority, in questions of this kind, all other courts must yield, have made clear the principle that the authority of the courts in extradition proceedings does not extend to inquiry into the motive or into the merits of the case in any respect. The supreme court of this state and other state courts of high authority have explicitly laid down the same limitation.

In *Ex parte Swearingen*, 13 S. C. 74, Mr. Justice McIver, with his usual force and clearness, thus states the rule: "It seems to us that the true rule is that when a requisition comes to the governor of this state for any person found in this state,

which shows upon its face that all the requirements of the act of Congress have been complied with, it is the duty of the proper authorities of this state to recognize the statements of fact made therein as true, and to surrender to the agent of the state making the demand the person demanded, in the fullest confidence that he will receive ample justice at the hands of the authorities of such state. The very fact that there is no mode of enforcing the performance of the duty imposed upon the governor of the state upon which the demand is made, by mandamus or otherwise (*Kentucky v. Dennison*, supra, 24 How. 66, 16 L. ed. 717), makes it all the more obligatory that he should be scrupulously exact and prompt in the performance of such duty, and that the courts should not lend their aid to defeat the provisions of the Constitution so essential to the preservation of that good will which ought always to exist between sister states, by demanding more than is required by the act of Congress." *Re Sultan*, 115 N. C. 57, 28 L.R.A. 294, 44 Am. St. Rep. 433, 20 S. E. 375; *Barranger v. Baum*, 103 Ga. 465, 68 Am. St. Rep. 113, 30 S. E. 524; *Singleton v. State*, 144 Ala. 104, 42 So. 23; *Ex parte Edwards*, 91 Miss. 621, 44 So. 827; *Bruyneel v. Wies*, 153 Iowa, 565, 133 N. W. 1057. See also extended note in 57 Am. Dec. 395; 21 Cyc. 329.

Another established and obvious principle is that, when the extradition papers are regular on their face, every intentment is to be indulged in favor of their validity, and the burden is on the prisoner to show that some one of the conditions of extradition prescribed by the statutes, as above indicated, has not been met. *Marbles v. Creecy*, 215 U. S. 63, 54 L. ed. 92, 30 Sup. Ct. Rep. 32. When the prisoner has made that *prima facie* showing, the court or judge issuing the writ may admit him to bail pending the final hearing on the writ.

Applying these settled rules, it is perfectly clear that the circuit judge erred in admitting the prisoner to bail pending the final hearing. When the application was made, the showing before the judge consisted of the requisition papers of the governor of Tennessee, and the mandate of the governor of South Carolina, all made out in accordance with the statute, and the verified petition of the prisoner. This petition contained nothing but statements that he intended to show that, while the prisoner had violated the criminal laws of Tennessee, he was guilty of no moral wrong; that the prosecution was a hardship on him; that it was instituted to collect a debt, and that the governor of Georgia had refused to issue a requisition. All this had no tendency to show that the extradition stat-

ute had not been complied with, and therefore, under the principle just stated and the authorities sustaining it, furnished no ground whatever for the discharge of the prisoner on bail. This being so, the law required that the petitioner should be remanded to the custody of the sheriff to be thereafter surrendered to the state of Tennessee, according to the mandate of the governor of the state of South Carolina, unless, at the future hearing ordered for 27th of July, a successful attack should be made on the regularity of the proceedings.

It was further contended, on appeal, that the circuit judge erred in admitting the petitioner to bail without four days' notice to the counsel representing the prosecution. The state statute provided: "When it appears, from the return of the writ or otherwise, that the party is imprisoned on a criminal accusation, he shall not be discharged until sufficient notice has been given to the attorney general or circuit solicitor, or other attorney acting for the state, that he may appear and object to such discharge, if he think fit." We are not now concerned with the question whether a judge may not grant bail in cases of emergency, when the prisoner is entitled to bail, under the Constitution, as a matter of course, the only question being as to the amount. Here, as we have seen, he was not entitled to bail as a matter of course, but only when a *prima facie* showing of noncompliance with the requisition statute should be made, and in such a case, while the statute does not prescribe the time, its clear import is that counsel shall have sufficient notice to enable them to resist the application for bail. The time is in the discretion of the circuit judge; but we think that there is strong reason for the position that it was error of law for the circuit judge to grant bail to a prisoner held on extradition proceedings, against the objection of counsel for the prosecution, on a few hours' notice. As the court is not unanimous now even on that point, and its decision is not necessary in this case, it is left undecided. We hold that the circuit judge was in error when he granted bail, because, on the showing before him, the petitioner was not entitled to bail.

The circuit judge erred, also, in admitting as evidence to impeach the requisition of the governor of Tennessee, solemnly made over his official signature and under the great seal of the state, mere affidavits of outside persons, to the effect that the governor of Tennessee had told them that he had not signed the requisition. No argument or authority need be adduced to show that such a method of impeaching an official document is not only contrary to the rules

of evidence, but would be an intolerable impugning by the judiciary of the most solemn communications between the highest executives of sovereign states.

On the other hand, the circuit judge was clearly right in considering the telegram from Governor Blease, and that from Governor Hooper to Governor Blease indicating a withdrawal of the requisition. But even these telegrams were not sufficient authority to warrant the circuit judge's holding that the requisition had been revoked. They were of value only as justifying a continuation of the hearing to a future day, so as to give Governor Hooper an opportunity to withdraw his requisition by a formal communication to Governor Blease to that import. Governor Blease expressed accurately the force to be given to them when he requested Judge Sease to continue the habeas corpus proceedings until he could get the substance of the telegrams authenticated under the seal of the state of Tennessee. This was no doubt the view of the circuit judge also, who had before him, in addition to the documents above referred to, a communication from Governor Hooper to Governor Blease withdrawing the message of revocation, for he does not rest his order of discharge on the ground that the requisition had been withdrawn.

The final question is whether there was error in considering and adjudicating the petition, and discharging the petitioner in his absence. The petitioner did not appear according to the terms of the bond, but submitted a physician's affidavit to the effect that he was too sick to leave his home, in the city of Macon. Whether this affidavit was sufficient to warrant a further continuance would have been in the discretion of the circuit judge, if the petitioner had been properly discharged; but the principle is well settled in this state that, when an accused person gives bail for his appearance at a future time for the adjudication of the question whether his body shall be held in custody or released, he cannot have his right to discharge adjudicated, unless he is actually in the presence of the court, or in the custody of an officer subject to the court's order. If he fails to appear without legal excuse, his bail will be forfeited, and his application for the inquiry as to the legality of his arrest and detention will be considered abandoned. If he offers sufficient excuse for not appearing, then the cause must be continued until it is possible for him to appear. In habeas corpus proceedings, the whole matter before the judicial officer is whether the accused shall be released or remanded to custody. Unless he is present in person or subject to the order of the court, it is manifest the court cannot make effec-

tive its judgment against the person. A preliminary hearing demanded by the prisoner falls under the same principle. In considering the point, as applied to a preliminary hearing, the court said, in *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, 1110, 14 Ann. Cas. 968: "A preliminary examination must have one of three results, dependent on the decision of the magistrate: The discharge of the defendant; the taking of bail for his appearance to answer the indictment; or his imprisonment. It may be the magistrate, in the absence of the defendant, could adjudge his discharge; but to take bail from the defendant or commit him to jail, it was manifestly necessary for him to be present in person. The defendant could not demand that the magistrate go through the empty form of conducting an examination which could have no efficient result. By failing to appear in person, he had forfeited the recognizance (*State v. Minton*, 19 S. C. 280), and he waived his preliminary examination when, by voluntary absence, he made it impossible for the magistrate to enforce his judgment."

The judgment of this court is that the order of Judge Sease be reversed, and that the petitioner be required to appear in person before Judge Sease on a day to be designated by him, and that he then be remanded to the custody of the sheriff of Spartanburg county to be surrendered to the proper officer of the state of Tennessee, unless it shall officially appear that the requisition of the governor of Tennessee or the mandate of the governor of the state of South Carolina has been revoked.

Reversed.

Gary, Ch. J., and Hydrick, Watts, and Fraser, JJ., concur.

Petition for rehearing denied August 25, 1913.

TENNESSEE SUPREME COURT.

G. WORTHEN AGEE et al., Appts.,
v.

D. D. SAUNDERS, Exr., etc., of Mrs. Kate Saunders Agee, Deceased.

(127 Tenn. 680, 157 S. W. 64.)

Executor and administrator — life insurance money — year's support.

Under a statute making life insurance

distributable according to the law of distribution, free from the claims of creditors, it cannot be subjected to the year's support of the widow, which, by statute, is to be set apart out of the money on hand or due, or other assets.

(May 17, 1913.)

APPEAL by complainants from a decree of the Chancery Court for Shelby County allowing a year's support to the executor of the widow of George W. Agee, deceased, out of the proceeds of certain life insurance. Reversed.

The facts are stated in the opinion.

Messrs. Fitzhugh & Biggs and Thomas A. Evans for appellants.

Mr. L. B. McFarland, for appellee:

Life insurance money, collected by the administrator of the estate of the insured, on policy payable to his representatives, is subject to be set aside for year's allowance, where this is the only asset of the deceased, or personalty from which the year's allowance could have been made.

Woerner, Am. Law of Administration, 6, 77; Sanderlin v. Sanderlin, 1 Swan, 441; Graham v. Stull, 92 Tenn. 673, 21 L.R.A. 241, 22 S. W. 738; Rose v. Wortham, 95 Tenn. 505, 30 L.R.A. 609, 32 S. W. 458.

Proceeds of such policies, payable to personal representatives, are simply personal assets of the estate, and have the same legal status as other personal assets, with this exception,—they are not subject to the debts of the husband.

State v. Anderson, 16 Lea, 338; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Rhea v. Greer*, 86 Tenn. 59, 5 S. W. 595; *Hardison v. Billington*, 14 Lea, 346; *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083.

Neill, Ch. J., delivered the opinion of the court:

George W. Agee died intestate, on October 9, 1908, in Memphis, Tennessee, leaving the complainants as his only children, and Mrs. Kate Saunders Agee as his widow. She qualified as his administratrix, and has since died, and the defendant, D. D. Saunders, has qualified as her executor. Mrs. Kate Saunders Agee, as the widow of George W. Agee, applied to the probate court of Shelby county for the appointment of commissioners to set apart to her a year's support under the statute applicable to that subject. The deceased left no property, ex-

Note. — Widow's right to year's support or allowance out of insurance money.

Generally as to the widow's right to proceeds of insurance on her deceased husband's life, payable to himself or his executors or 46 L.R.A.(N.S.)

administrators, see the note to *Burdett v. Burdett*, 35 L.R.A.(N.S.) 964.

As to the widow's right to a year's support or allowance out of a fund recovered for the negligent killing of her husband, see the note to *Broadnax v. Broadnax*, 42 L.R.A.(N.S.) 725.

cept two insurance policies, one of which was payable to the widow, and therefore belonged to her, and the other payable to his estate. The commissioners set apart to the widow for her year's support \$3,000 out of the policy which was made payable to the estate. At the date of the death of the intestate there was due on this policy \$5,749, which was paid to the administratrix, and out of this she appropriated the \$3,000 set apart to her by the commissioners as aforesaid. The residue was divided equally between the two children and herself as distributees; the former reserving the right to sue for and recover their one third portion of the amount which she had retained for her year's support.

The foregoing is the substance of an agreed case submitted to the chancellor. He decreed in favor of the defendant, and the complainants appealed to this court.

The question submitted is whether the insurance policy was properly applied to the payment of the year's support. We are of the opinion that it could not be so used, and that the chancellor's decree was erroneous, and should be reversed, for the following reasons:

Our statute upon the subject of the year's support reads:

"Upon the application of the widow of an intestate, or of a widow who dissents from her husband's will, the county court shall appoint three freeholders, unconnected with her either by consanguinity or affinity, who, being first duly sworn to act impartially, shall set apart so much of the crop, stock, provisions, moneys on hand or due, or other assets, as may be necessary for the

support of such widow and her family until the expiration of one year after the decease of her husband." Shannon's Code, § 4020.

The statute upon the subject of life insurance reads:

"A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors." Shannon's Code, § 4030.

There is another section to the same purport, which reads as follows:

"Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise." Shannon's Code, § 4231.

An insurance policy so left is, according to these sections, exempt property. Such property is not assets. The term "assets" is defined in our Code by exclusion as follows: "Every debtor's property, except such as may be specially exempt by law, is assets for the satisfaction of all his just debts." Shannon's Code, § 3985. The term "assets," therefore, under our law of administration, means, in its largest sense, property subject to the payment of the debts of the decedent. It is divided into personal assets and real assets. There is another division also, known as equitable assets. Personal assets are those which go into the hand of the administrator for the payment of debts, and this is the class referred to in § 4020. Real assets consist of

While the few decisions on this question reach a result contrary to that in *AGEE v. SAUNDERS*, they in no way militate against it, as they involve statutes quite different from that governing the *AGEE CASE*.

In *Re Miller*, 121 Cal. 353, 53 Pac. 906, the court set aside to the widow the proceeds of a policy on the life of her deceased husband, under a statute providing for the setting aside to the surviving husband or wife all the property exempt from execution, apparently the only question being whether the policy was exempt, and the court holding that the fact that it was payable to the insured's executor or administrator did not affect its exemption under a statute exempting all moneys and benefits in any manner growing out of any life insurance on the life of the debtor.

Likewise in *McLean v. Martin*, 155 Ala. 208, 45 So. 295, it was contended that a policy of insurance payable to the husband's estate did not constitute a part of the personal property belonging to the decedent at the time of his death, and that therefore it could not be set apart as exempt for the 46 L.R.A. (N.S.)

use of the widow; but the court pointed out that the statute declared "things in action" to be personal property, and that therefore, since an insurance policy was a chose in action, the proceeds thereof became a part of the estate, and could therefore be set aside to the widow under the exemption law.

Without disclosing the language of the statutory provisions, the court in *Meyer v. Meyer*, 25 S. D. 596, 127 N. W. 595, held that although a policy of insurance made payable to the insured or to his administrators, executors, or assigns might be disposed of by will under the statute, it was nevertheless subject to the statutory allowance of the surviving wife and minor children under another provision, and took precedence over a specific bequest. So, it seems that the proceeds of life insurance fall within the general rule announced in 18 Cyc. 386, that the statutory allowance comes from all personalty belonging unqualifiedly to the decedent, notwithstanding specific or general bequests elsewhere.

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land, which must be subjected by special proceedings. Equitable assets may be either real or personal, but require the aid of a court of equity for their subjection, owing to their nature, usually based on some provision in a will.

It is perceived that under § 4020 the year's support must be taken out of "the crops, stock, provisions, moneys on hand or due, or other assets."

Since an exempt insurance policy is not assets, it does not fall within the terms of the statute.

This reasoning is not impaired by the fact that an administrator, after the debts are paid, must pay to the distributees any of the assets left in his hands, and that the duty also devolves upon him to collect an insurance policy payable as the one involved in the present case, and that he must distribute the amount collected between the widow and children as distributees of the estate. Both funds are subject to distribution, but both are not assets. One falls under the designation of assets left over after the payment of debts; the other, under the heading of exempt property, which is not subject to debts. The latter must be distributed as soon as collected, without regard to debts. The year's support must be taken out of the assets, not out of the exempt property.

The subject is further illustrated by § 4023 of Shannon's Code, which is as follows: "The property exempt by law from execution shall, on the death of the husband, be exempt from execution in the hands of, and be vested in, the widow, without regard to the size or solvency of the estate of the deceased, for herself and in trust for the benefit of the children of the deceased, or of the widow, or of both, and shall not go to the executor or administrator; and, in case there be no widow, and the estate be either solvent or insolvent, such property shall be exempt for the benefit of the minor children under fifteen." This refers to certain articles of personal property specified in our statutes for the benefit of heads of families. No reason appears why property of this class might not be invaded for the purpose of setting aside the year's support equally as well as an exempt insurance fund. The effect of holding that either class of exemptions could be so used would be to reduce exemptions to two classes, while our statutes provide for three, viz., the year's support, the items of exempt personal property, and the insurance fund. If such construction were permitted, it would always be insisted by creditors that the year's support should be taken out of one or the other of the two latter classes of exemptions, thereby causing two to coalesce and thus 46 L.R.A.(N.S.)

serve the creditors at the expense of the widow and children,—a kind of marshaling in favor of creditors against the beneficiaries under our exemption statutes, thereby defeating the letter as well as the spirit of the statute. This would not be permitted in a court of equity, if that court could obtain control of the property in any particular case; but in most instances the matter would rest wholly within the jurisdiction of the probate court, where, under the operation of the rule insisted on, there would necessarily occur daily evasions of the exemption laws.

A decree will be entered in accordance with this opinion. The defendant will pay the cost of the cause.

WISCONSIN SUPREME COURT.

RE DETERMINATION OF INHERITANCE TAX ON ESTATE OF JOSEPH DESSERT, Deceased.

STATE OF WISCONSIN et al., Appts.,

v.

HENRY M. THOMPSON et al., Resp'ts.

(— Wis. —, 142 N. W. 647.)

Tax — succession — gift by aged person.

That a man has reached the age of eighty-six years when he makes a substantial gift of property to his child does not, if he was sound in mind and body, show that it was made in contemplation of death, so as to bring it within the operation of a statute imposing succession taxes.

(Siebecker, J., dissents.)

(May 31, 1913.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Milwaukee County in defendants' favor as to part of the claim in a proceeding to fix the inheritance tax

Note. — Succession tax upon gift in contemplation of death.

In many jurisdictions the statutes do not confine their operation to testamentary gifts or successions *ab intestato*, but expressly extend to at least two other forms of gifts; namely, gifts in contemplation of death, which is the subject of the present note, supplementing the earlier note on the same question appended to *Re Benton*, 18 L.R.A.(N.S.) 458; and, second, to transfers made or intended to take effect upon the death of the grantor. The cases involving this latter part are collected in the note to *Keeney v. The Comptroller*, 38 L.R.A.(N.S.) 1139.

As said in 37 Cyc. 1567, these provisions are intended to prevent evasions of the inheritance tax by distributions of property

upon the estate of Joseph Dessert, deceased. Affirmed.

Statement by Barnes, J.:

This is an appeal from a judgment of the circuit court for Milwaukee county determining the amount of inheritance tax payable by the estate of Joseph Dessert, deceased. The county court determined that the value of the estate, including gifts made in contemplation of death, was \$711,404.62; that the clear value of the estate at the time of Mr. Dessert's death was \$709,704.12; and that the amount of inheritance tax payable thereon was \$17,208.12. The executors appealed from this determination to the circuit court. By agreement of the parties the appeal was heard on the evidence taken in

the county court. The circuit court reversed the determination made by the county court and made findings of fact and conclusions of law, of which the following is an epitome: The deceased at the time of his death in December, 1910, was ninety-two years of age. He made his will April 2, 1891, which will provided for certain specific bequests aggregating \$7,700, and devised and bequeathed the remainder of his estate to Stella D. Thompson, the only child of the testator. The property which she took under the will, after the payment of administration expenses, was of the appraised value of \$207,341.37. Prior to 1904 the deceased was actively engaged in the lumber business at Mosinee for many years. In the spring of that year he removed to Mil-

among the members of a family or others just before death of the owner; and whether or not a transfer is deemed to have been made in contemplation of death is a question of fact in the determination of which the donor's age, his physical condition at the time, and the length of time he actually survives, should be taken into account.

It is shown in the earlier note in 18 L.R.A.(N.S.) 458, that a gift made with the consciousness that death is impending will be deemed to have been made in contemplation of death, irrespective of whether it is a gift *causa mortis*, or a gift *inter vivos* in view of such impending death. That note further shows that this is particularly the view in Illinois, and that while some of the New York courts took the same view, others held that the statute applies only to gifts *causa mortis*; but that the latter courts, notwithstanding this, reached conclusions that would have been reached under the Illinois rule by apparently regarding any gift made *in extremis* as a gift *causa mortis*, or by holding that in any event a gift, even if *inter vivos*, was subject to a tax if made and received with the intent and for the purpose of evading the provisions of the transfer tax act.

But in the New York case of *Re Palmer*, 117 App. Div. 360, 102 N. Y. Supp. 236, Smith, J., expressly indorsing the Illinois view, held that the words, "in contemplation of death," as used in the statute, embraced gifts "*inter vivos*" as well as *causa mortis*, and therefore held the provision applicable where a decedent who was ill of a lingering disease which affected both his mind and body assigned all his property, about three months prior to his death, to a son in trust for the widow and next of kin. One judge dissented and two concurred in the result that the property was taxable, but declared it unnecessary to hold that the gift was made in contemplation of death.

And regarding the *Palmer* Case as holding that the statute embraces gifts *inter vivos* made in contemplation of death, the court in *Re Price*, 62 Misc. 149, 116 N. Y. Supp. 283, indorsed the doctrine of the 46 L.R.A.(N.S.)

former case, and therefore held that the provision applies where a man seventy-six years of age who for two years had been under medical treatment, some of the time in hospitals and sanitariums, conveyed all of his real estate to his adopted son ten days before his death, stating to his attorney at the time that he did not know when his ailment would take a turn for the worse, and explaining that he desired to make such disposition of his property as would save his son the annoyance of the will contest.

In *People v. Burkhalter*, 247 Ill. 600, 93 N. E. 379, 139 Am. St. Rep. 351, the court states in a general way that an owner may give away or otherwise dispose of his property or any part of it in any manner he sees fit, and if such disposition takes effect in possession and enjoyment during his lifetime it will not be subject to an inheritance tax unless made in contemplation of his death. In this case the court held that the statutory provision did not apply, inasmuch as the gift was not made in contemplation of death, but was made in consideration of the donee's contract to care for the donor's daughter during her life.

As to the applicability of the succession tax acts to property conveyed, or agreed to be conveyed, in consideration of the support of the grantor during his life, see the note to *Re Lamb*, 18 L.R.A.(N.S.) 226.

The case of *State v. Pabst*, 139 Wis. 561, 121 N. W. 351, is sufficiently set out in *RE DESSERT*.

In *Re Bullen*, 143 Wis. 512, 128 N. W. 109, 139 Am. St. Rep. 1114, the transfer did not take effect until after the death of the donor, and the court summarily declared that the transfer was made in contemplation of death, and was also intended to take effect in possession or enjoyment at or after such death, thus it seems inadvertently creating the inference that it does not regard the two provisions as mutually exclusive, but regards the provision as to transfers in contemplation of death sufficiently broad to include, among others, transfers intended to take effect at or after such death.

L. A. W.

waukeee and ceased to take an active interest in his business; the same being thereafter attended to by his son-in-law, Henry M. Thompson. The deceased made his home with his daughter the last twenty-two years of his life, during which time he did not contribute anything towards the maintenance of the household or pay anything for the accommodations which he received there. For more than ten years prior to September 10, 1910, he was in continuous good health and his mental faculties were in no way impaired. His physical and mental condition during this period was unusual for a man of his age, and there is no evidence of any condition, except age, which suggests that he had any reason to believe or suspect at any time prior to a few days before his death that death might be imminent or impending. The deceased maintained an active interest in things generally until the first part of September, 1910, at which time he was overtaken with a seemingly slight indisposition, which marked a change in his condition, and after which he gradually declined until he died, having acute symptoms for only a few days prior to his death. During his lifetime the testator made gifts to Stella D. Thompson and to her husband as follows:

July 6, 1903	To Mr. Thompson,	cash	\$ 6,500 00
Dec. 25, 1905	To Mr. Thompson, 75 shares of stock Elkhorn Lbr. Co., face value \$7,500, actual value		15,000 00
Dec. 25, 1905	To Mrs. Stella D. Thompson, 75 shares of stock of Elkhorn Lbr. Co., par value \$7,500, actual value		15,000 00
July 1, 1906	To Mrs. Thompson, securities of the value of		229,971 29
Feb. 11, 1907	To Mr. Thompson, cash		5,000 00
Feb. 24, 1907	To Mr. Thompson, cash		7,100 00
Dec. 25, 1907	To Mrs. Thompson, stock of Dessert Redwood Co., 813 shares, par value \$81,300, actual value		175,852 00
Feb. 21, 1908	To Mr. Thompson, cash		6,000 00
June 5, 1909	To Mr. Thompson, cash		4,000 00
Nov. 27, 1909	To Mrs. Thompson, cash		12,000 00
Oct. 26, 1910	To Mrs. Thompson, cash		12,000 00
Dec. 14, 1910	To Mrs. Thompson, cash		6,000 00
Total amount of gifts prior to death			\$494,423 29

The gifts made as of December 25, 1905 and 1907, were declared to be Christmas presents at the time they were made. The stocks were actually transferred on the books of the corporation two days later. As soon as the gifts of the securities were made they were turned over to Mrs. Thompson, and deceased never received, either

directly or indirectly, any profit or advantage therefrom or exercised any control over them. The same is true in reference to the corporation stocks. None of the transfers of the property of the deceased were made in contemplation of the death of the donor, nor were they intended to take effect in possession or enjoyment at or after such death, except as to the gifts of October 26th and December 14th aggregating \$18,000, in reference to which no contention was made by the appellants. In determining the value of the estate of the deceased and the amount thereof and of the property transferred by the deceased prior to his death, the transfers of which are subject to an inheritance tax, the sum of \$476,423.29 in gifts should be excluded, and the transfer of the property which was the subject of said gifts is not subject to any transfer tax under the laws of Wisconsin, except the two items amounting to \$18,000 above referred to. As a conclusion of law the court found that the appellants were entitled to judgment, and that the value of the estate of the deceased for the purpose of determining the inheritance tax thereon is \$234,741.87, and further adjudged that the clear value of said estate as of the date of the death of the testator, after proper deductions, is \$233,041.37; that the transfers of gifts, legacies, and devises aggregating \$225,341.37 to Stella D. Thompson are subject to the payment of an inheritance tax. The amount of such tax was adjudged to be \$4,723.54, instead of \$17,208.12 found by the county court. From this judgment the state of Wisconsin and the county of Milwaukee prosecute this appeal.

Messrs. W. C. Owen, Attorney General, Walter Drew, and Edward Yockey, for appellants:

The facts show that these gifts were made in contemplation of the death of donor.

The burden of showing expressly that a gift is made in contemplation of death is not upon the state.

Re Palmer, 117 App. Div. 360, 102 N. Y. Supp. 236.

The statute is valid.

Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; Beals v. State, 139 Wis. 544, 121 N. W. 347; State v. Pabst, 139 Wis. 561, 121 N. W. 351; State v. Bullen, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109.

The gifts are taxable under the law of this state.

State v. Pabst, 139 Wis. 561, 121 N. W. 351; Re Palmer, 117 App. Div. 360, 102 N. Y. Supp. 236; Re Loewi, 75 Misc. 57, 134 N. Y. Supp. 679; Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121; Merrifield v. People,

212 Ill. 400, 72 N. E. 446; *Re Benton*, 234 Ill. 360, 18 L.R.A.(N.S.) 458, 84 N. E. 1020, 14 Ann. Cas. 107; *Re Price*, 62 Misc. 149, 116 N. Y. Supp. 283.

Mr. John Harrington also for appellants.

Mr. Lawrence A. Olwell, for respondents:

The question of whether the gifts under consideration were made in contemplation of death is a question of fact of which the finding of the trial court is final.

People v. Kelley, 218 Ill. 509, 75 N. E. 1038; *Re Bullard*, 76 App. Div. 207, 78 N. Y. Supp. 491, affirming 37 Misc. 663, 76 N. Y. Supp. 309; *Re Thorne*, 162 N. Y. 238, 56 N. E. 625, 44 App. Div. 8, 60 N. Y. Supp. 419; *Keilly v. Severson*, 149 Wis. 251, 135 N. W. 875; *Hubbard v. Ferry*, 141 Wis. 17, 135 Am. St. Rep. 27, 123 N. W. 142; *Kola Lumber Co. v. Stoughton Wagon Co.* 143 Wis. 329, 127 N. W. 974; *Spuhr v. Kolb*, 111 Wis. 119, 86 N. W. 562; *Hoff v. Hackett*, 148 Wis. 32, 134 N. W. 132.

The right to impose an inheritance tax must rest upon evidence sufficient in probative force to bring it within the statute, and must show a case from which the law clearly authorizes its imposition.

Re Thorne, 44 App. Div. 8, 60 N. Y. Supp. 419; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Enston* (*People v. Sherwood*), 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798.

The inheritance tax, not being a tax upon property, but upon the right to receive property, in other words, an excise tax upon the transfer (*Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; *Beals v. State*, 139 Wis. 544, 121 N. W. 347; *State v. Pabst*, 139 Wis. 561, 121 N. W. 351; *Re Bullen*, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109), the statute must be strictly construed, being in derogation of common-law rights.

Bailey v. Henry, 125 Tenn. 390, 143 S. W. 1124; *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140; *Re Durfee*, 79 Misc. 655, 140 N. Y. Supp. 594; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Re Enston* (*People v. Sherwood*), 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87.

Where a statute has received a judicial construction in another state and is then adopted, it is taken with the construction so given it.

Re Bullen, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109; *Manitowoc Clay Product Co. v. Manitowoc, G. B. & N. W. R. Co.* 135 Wis. 94, 115 N. W. 390; *State ex rel. Atty. Gen. v. Portage City Water Co.* 107 46 L.R.A.(N.S.)

Wis. 441, 83 N. W. 697; *State ex rel. Rogers v. Wheeler*, 97 Wis. 96, 72 N. W. 225.

In New York, from which state our statute was taken, the words, "in contemplation of death," do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril.

Re Baker, 178 N. Y. 575, 70 N. E. 1094; *Re Spaulding*, 49 App. Div. 541, 63 N. Y. Supp. 694; *Re Mahlstedt*, 67 App. Div. 176, 73 N. Y. Supp. 818; *Re Seaman*, 147 N. Y. 69, 41 N. E. 401.

"Contemplation of death," in order to subject the transfer of property to an inheritance tax for that reason, must be the impelling motive for making a disposition of property.

People v. Burkhalter, 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379; *People v. Kelley*, 218 Ill. 509, 75 N. E. 1038.

Barnes, J., delivered the opinion of the court:

There is no serious dispute on the facts of this case. The burden of proof was upon the plaintiff to show that the gifts were made in contemplation of death. The only substantial question in the case is whether the circuit court was warranted in drawing the inferences which it did from the testimony. If the evidence fairly justified the drawing of such inferences, the decision of the lower court must be affirmed. *Kola Lumber Co. v. Stoughton Wagon Co.* 143 Wis. 329, 127 N. W. 974.

It is undisputed that the deceased was active and healthy in mind and body until about three months before he died. The first large gift was made four and one half years prior to his death, and the second a few days less than three years before death. All of the gifts were made to his daughter and her husband. Deceased had made his home with his daughter for twenty-two years before he died.

The contention of the appellants is that the gifts were made in contemplation of death and were in the nature of a final distribution of the estate, and are therefore subject to the inheritance tax. The following reasons are urged in support of this contention: (1) The gifts were substantially in accordance with the will of the deceased, made in 1891. (2) They included more than two thirds of a large estate. (3) The deceased had reached an extreme old age. (4) He had surrendered the management of his property and business.

The first, second, and fourth reasons assigned are not very significant. The will gave practically all of the estate to the daughter. As she was his only child, this

was a perfectly natural disposition to make of it. If he desired to make substantial gifts, naturally they would be made to her. It is true she would receive the property under the will if the gifts had not been made. She would also receive the estate if no will had been made. These facts do not argue that the gifts were "made in contemplation of death," as that term is used in the statute. The daughter was a woman of mature years when the first large gift was made. Her age is not given, but she had been married eighteen years at the time. Men, like the deceased, who start with nothing and accumulate large fortunes, are naturally desirous that they be neither squandered nor dissipated by their heirs. As hard-headed men of affairs, they appreciate that it is ordinarily undesirable that any considerable sums of money should come into the hands of their children until they have had time to acquire the wisdom and experience which will enable them to take care of it. They appreciate the further fact that it is ordinarily undesirable that large fortunes be placed within their control at one time. If a part only is given and it is prudently handled, then the capacity for handling more is shown. If it is unwisely handled, there is still an opportunity to profit by former mistakes when other sums are forthcoming and before it is too late. It is for these reasons that trust estates are created so that large properties cannot be manipulated by those who have not acquired the maturity of character or business ability to manage them. We apprehend that one of the substantial pleasures in the life of an aged person is to observe the objects of his bounty make a judicious use of what has been bestowed on them.

When the first substantial gift was made to Mr. Thompson, the deceased still had left an estate of over \$400,000. The next large gift was made a year and a half later. In the meantime the deceased had an opportunity to observe whether or not the daughter and her husband had the necessary capacity to handle the estate. At the time of his death the testator still had left an estate of over \$217,000, or a sum large enough so that the income therefrom would greatly exceed his wants. It is also somewhat significant that the first of the two large gifts referred to was made about two years after the plaintiff had intrusted his son-in-law with the active management of his affairs and had had an opportunity to become fully acquainted with his business capacity. Leaving out of consideration the question of old age, there is nothing in the case that distinguishes it from any other where a parent during his lifetime gives a

large portion of his estate to his children. This practice is not uncommon. Men who have built up a substantial business and acquired a competence through their thrift and business capacity frequently desire to be relieved from the cares and worries of their business as they become aged, and they turn the same over to their sons. Farmers frequently dispose of their farms in the same way. The real question is whether a gift made to a child by an aged parent sound in mind and body is subject to an inheritance tax because the donor was advanced in years when the gift was made. If this question is answered in the negative, the further question arises: Should the instant case be taken out of the operation of the general rule because of the unusual age which Mr. Dessert had attained when the gifts were made?

The material part of the inheritance tax statute, § 1087-1, is as follows: "A tax shall be and is hereby imposed upon any transfer of property, real, personal, or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person . . . in the following cases: (1) When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of this state. (2) . . . (3) When the transfer is of property made by a resident . . . by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death."

An act is not done in contemplation of death when the feeling that dissolution is approaching is absent, and is not the cause which impels or prompts the doing of the act. An aged person in good health who has acquired a competency and who desires to retire from active life may desire to distribute a portion of his accumulations among his children without any thought of impending death. He may derive genuine enjoyment from seeing them enjoy the fruits of his accumulations if they put them to good use, and may take pleasure in giving his advice or counsel as to how the business or property turned over should be managed or handled. The question of whether such a person may have a few years or many years to live is not a consideration that has entered into or affected the transaction. He does not give because he is anticipating death, but because it affords him a pleasure in life.

It was held in *State v. Pabst*, 139 Wis. 561, 121 N. W. 351, that the words "in contemplation of death," as used in the statute quoted were, "not used as referring to that expectation of death generally entertained

by every person." Speaking affirmatively, the opinion proceeds: "The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty." In further explanation of the phrase it is said: "A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute." In that case the circuit court held that the gifts made by Captain Pabst were subject to the inheritance tax principally because he was suffering from a serious, if not a necessarily fatal, disease at the time the gifts were made, which ultimately produced death; and this court affirmed the judgment. The definition of the words, "in contemplation of death," given in the Pabst Case, does not differ from that announced by the New York court in *Re Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed in 178 N. Y. 575, 70 N. E. 1094, where it is said: "This court has held that the words, 'in contemplation of the death,' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril." Neither does it differ from the interpretation put upon the words by the Illinois court in *People v. Burkhalter*, 247 Ill. 600, 604, 139 Am. St. Rep. 351, 93 N. E. 379, where it held that contemplation of death must be the impelling motive for making the gift, in order that it be subject to an inheritance tax.

It is only gifts made in contemplation of death that are taxable. A parent has the right to give his property to any proper subject of his bounty, freed from any transfer tax, provided the contemplation of death is not the cause which impels the making of the donation.

It is apparent, therefore, that it would be illogical to hold that proof that a person was aged when he made a gift conclusively establishes that it was made in contemplation of death. This could not be true if the donor might be actuated by any other motive. Common knowledge and experience teach us that aged people frequently give property to their children because of their desire to help them, and without any thought in reference to their own deaths. Mr. Carnegie is an old man in years. He has given away what would make several princely fortunes. It could not be fairly said that the feeling that he must soon die was the cause that actuated him to give.

Instead, it was the pleasure of bestowing a part of his fortune where he conceived it would accomplish much for the uplift and betterment of mankind by furnishing useful and healthful reading matter free of charge.

This brings us to the last question in the case, and that is whether the age of Mr. Dessert was so great when the gifts in question were made as to establish the fact that they were made in contemplation of death. If there is room for conflicting inferences, the decision of the circuit court must stand. The deceased was eighty-six years old when he made the first of the large gifts, and a year and a half older when the second one was made. He died at the age of ninety-two, being sound and active in mind and body until three months before his death. The evidence all tended to show that his physical and mental faculties remained unimpaired until his last illness, except that he was somewhat deaf.

We do not think the court can fix any particular age limit, and say that after it is reached a party can give his property away only in contemplation of death. In a sense, "old age" is a relative term. Some men are old at sixty, although they may have no organic disease. Others are vigorous in mind and body at seventy, and still others long after they have passed their eightieth milestone. There are octogenarians among the members of the Dane county bar at the present time. One is as actively engaged in his professional work as he was twenty-five years ago. Another is creditably administering the affairs of an important office. The third is retired from active labor. Chief Justice Fuller performed his arduous labors until he reached the age of seventy-seven. Justice Harlan did likewise until he was seventy-eight, Justice Field until he was eighty-three, and Chief Justice Taney until he was past eighty-seven. The venerable Ex-Chief Justice Lyon of this court recently died at the age of ninety-one, retaining his bodily and mental vigor until a short time before his death. Ex-Speaker Cannon, now past seventy-seven, is an antagonist who might well command both fear and respect in any forensic encounter in which he might see fit to engage.

Age in itself is not a very important factor in determining the capacity of persons to deal with their property, or in ascertaining the motives which actuated them in disposing of it. The deceased in this case might have made the gifts which he did because he expected to die at any time. But it was just as reasonable an inference for the trial court to draw that he made the gifts without any particular thought of death, and because he wanted his daughter and her family to enjoy the benefits of a

part of his accumulations, and to see her and them use what was given while he was still alive, so that he could observe the uses to which it was put. It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face. The hypochondriac or the pessimist might entertain such an idea, but such a one rarely attains old age. On the contrary, we think it is true that persons who have lived long and who are free from disease generally entertain the feeling that they have a few years longer to live, no matter how old they are, and that they do not regard death as imminent. We are not disposed to say in the instant case that the circuit court did not draw an entirely correct inference from the testimony, much less to say that its decision should be set aside.

The judgment of the Circuit Court is affirmed. Inasmuch as the state is the principal party appellant in interest, no costs will be allowed, except that appellants must pay the clerk's fees in this court.

Slebecker, J., dissenting:

I cannot concur in the affirmance of the judgment of the circuit court. It seems clear to me that the property, amounting to the sum of \$494,423.20, which decedent transferred as gifts to his daughter and her husband at the times designated in the statement of facts by the court, is subject to an inheritance tax. There is no dispute in the facts. The circuit court concluded as a matter of fact that these gifts were not made in contemplation of death in the sense of the inheritance tax law. I am wholly unable to discover any uncertainty as to what the ultimate facts in the case are. There is no dispute in the evidentiary facts, and from their nature and significance they leave, to my mind, no room for drawing different conclusions. In view of this state of the case, the question raised is purely one of law, and the circuit court's opinion of the facts cannot control this court in applying the law to these undisputed facts. The county court and the circuit court had the identical question for determination on the same evidence. The same proposition is presented here, and hence the question for review here, in my judgment, is whether or not the circuit court applied the correct principle of law to the undisputed facts.

Do the acts of decedent constitute a transfer of his property "in contemplation of his death" in the sense these words are used in the statute? As stated in the court's opinion, these words were interpreted in the Pabat Case as referring "to an expectation of death which arises from such a bodily or

mental condition as prompts persons to dispose of their property, and bestow it on those whom they regard as entitled to their bounty." It was there also considered that a gift is deemed to be in contemplation of the event of death when it is made in expectation of it. To my mind, the facts and circumstances of this case clearly indicate that Mr. Dessert from old age was in that bodily and mental state which made him conscious of the fact that his demise must occur in the near future as an unavoidable event pursuant to nature's immutable laws. I think it is the general experience that such condition impresses men with a greater certainty of impending death than to the afflictions of illness. I am unable to escape the conviction that the fact of impending death from old age, under the circumstances shown in this case, actuated Mr. Dessert in making these gifts.

Does it appear that he acted upon this expectation or not? What more conclusive proof can there be that he acted in view thereof, than that he gave the great bulk of his estate to his daughter as he had planned by his will. There is no proof indicating that he gave these sums as remuneration for some obligation he was under to her or her husband, nor is there anything to show he did so in compliance with a plan that he had tested her and his qualifications and worthiness of having such gifts bestowed on them. On the contrary, the acts of transfer are in harmony with and fulfil his express intention declared in the will to bestow his property on those whom he regarded as entitled to inherit it. To my mind all the facts and circumstances point to the one conclusion; namely, that decedent by reason of his extreme old age undoubtedly lived in the thought of expectant death, and was thereby prompted to transfer his property to those on whom he expected to bestow it under the rules for the devolution of property, and that the gifts were in the nature of a testamentary disposition, and hence were subject to an inheritance tax as declared by the county court.

WISCONSIN SUPREME COURT.

HERMAN L. EKERN, Appt.,

v.

FRANCIS E. MCGOVERN et al., Respts.

(— Wis. —, 142 N. W. 595.)

Courts — power to review acts of governor.

1. Plaintiff, while commissioner of in-

Headnotes by MARSHALL, J.

insurance for a four-year term, having three years to run, and prohibited by statute from "serving on or under any political committee or as manager of any political campaign for any party or candidate," was charged before the governor with violation of such duty, in removal proceedings under § 970 of the Statutes of 1911. Upon notice of less than one hour a hearing was had. Under protest of unfairness as to notice, time of and conduct of the hearing, that there was no proof of any breach of duty, and that witnesses were present to testify in the commissioner's favor on the subject, the governor, suggesting undisclosed personal information, and that haste was required in order to close the matter in the few moments to elapse before commencement of the legislative session, which would suspend the removal power, summarily closed the hearing entered an order of removal, and appointed a successor. Possession by the appointee having been refused, the governor, through his agents, sought to place him in possession of the office quarters and accessories by force. This action was commenced to prevent it, temporary injunction being granted, presently terminating the existing violent efforts. Later the trial court refused to continue the restraint except to enable plaintiff to remove the cause to this court. Upon its so reaching, an armistice was agreed upon pending the decision.

Held the following principles of law are applicable and rule the case:

As to mere error of judgment on the part of the governor in the exercise of his lawful authority, his acts are not reviewable by the court. Within his jurisdiction, both he and those who act by his direction are immune from judicial remedies.

Governor — power to remove officer.

2. The governor jurisdictionally has competency to remove the commissioner of insurance from office.

Same — installation of successor.

3. The power of removal does not include, or have incidental thereto, power to forcibly install a successor.

Officer — de facto — determination.

4. In an action by one in possession of an office, to prevent an adverse claimant or those acting in his support, from gaining possession by violence, it is competent to determine whether such person is *de facto* the officer he claims to be.

Same — trying title — equitable action.

5. An action in equity will not lie for the primary purpose of trying the title to an office, that being, as primary matter, a subject for legal relief.

Courts — equitable jurisdiction — source.

6. The judicial power of circuit courts in

Note. — As to power of court to review action of governor in removing officer, see note to State ex rel. Kinsella v. Eberhart, 39 L.R.A. (N.S.) 788, and see also Germaine v. Ferris, post, 857.
46 L.R.A. (N.S.)

the field of equity as regards injunctive authority, temporary or otherwise, is not solely referable to § 2774 of the Statutes of 1911. Such courts have all such authority possessed in chancery at common law and such in addition as the statute confers.

Injunctions — to prevent disturbance of officer.

7. An officer *de facto*, in good faith claiming the right to possession of an office, until the right *de jure* shall have been determined,—if in imminent peril of forcible disturbance by an adverse claimant or those acting in his support,—may maintain an action in equity to prevent such disturbance, and may, and should, have temporary injunctive protection pending determination of the right to permanent immunity from forcible dispossession.

Equity — trying title to office — jurisdiction.

8. An action in equity to try the title to an office is distinct from one under the foregoing rule. The former is equitable and permissible; the latter is legal, and not permissible.

Constitutional law — powers of government — separation.

9. Sovereign authority, under our form of government, is in the people and exercisable through three major co-ordinate agency departments, *viz.*: Executive, legislative, and judicial,—each being, within its particular jurisdiction, answerable only to the people, but subordinate outside thereof to the jurisdiction conferred by the people through constitutional mandate on its co-ordinate department.

Courts — jurisdiction — acts of governor.

10. When a judicial question arises, it is within the competency of the judicial department to deal therewith, not stopping, necessarily, to consider who are the parties. It is not bound to desist because of the alleged wrongdoer being the governor or a person acting by his direction.

Same — limitation of power.

11. The doctrine that the court will not reach the governor in the performance of his duties, or anyone acting under his direction and by his authority in respect to any matter, applies only to acts within the scope of executive authority; outside thereof the principle of equality before the law renders him and his agents liable to judicial remedies the same as any other person, except in so far as the dignity of the place should, and does, protect him and them to some extent from coercive interference by judicial mandate.

Same — coercion of governor.

12. On grounds of public policy the court will not act coercively as to the governor, except in case of extreme urgency.

Same — power over subordinate officers.

13. The public policy which protects the governor as a co-ordinate department of the government, from being interfered with by judicial mandate, except in dire emer-

gency, does not apply with full force to subordinates acting by his authority.

Constitutional law — idea — officers.

14. The basic idea of the state Constitution is that this "is a popular representative government, the officers being mere agents, not rulers of the people,—one where no man is so high as to be above the Constitution, and no one so low as to be beneath its protection."

Action — immunity.

15. Consistent with the stated basic principle, no one is necessarily immune from judicial remedies in case of having violated, or being in an attitude of threatening to violate, the rights of another.

Officer — de facto — definition.

16. A person who is in possession of an office by color of authority,—that is, having that appearance, in that he is performing the duties of the office and is being commonly recognized as entitled to do so,—is an officer *de facto*, whether he has any valid title to the office or not.

Same — reputed officer.

17. "One who has the reputation of being the officer he assumes to be, although he is not such in point of law," if he is in possession of an office, in good faith claiming to be entitled to perform its duties, is, subject to the exception noted in the next rule, an officer *de facto*.

Same — exception.

18. Any person in the good faith possession of an office, as stated in the foregoing rule, holding over after expiration of the term for which he was elected or appointed, is not a *de facto* officer so as to be entitled to equitable protection in his possession as against a person who shall have been, in due course, certified to have been elected or appointed his successor in the particular office, and holds the evidence thereof showing *prima facie* title.

Same — principle of exception.

19. The principle of the foregoing exception to the general rule is that, in the particular circumstances stated, the evidence of the title *de jure* to the particular office for the particular term, afforded by the certificate, on grounds of public policy, has, provisionally, the force of a judicial determination, leaving no room for a good faith resistance thereto, other than by judicial remedies which a court of equity should take cognizance of.

Equity — determining title to office.

20. The rule that an action in equity will not lie to determine the title to an office does not preclude the making of such determination in equity in case of that being incidental to some matter of primary right which is a proper subject for equitable interference, and for which the court has taken jurisdiction and acquired jurisdiction of the parties.

Same — settlement of controversy.

21. In case of an action for equitable relief in the nature of protecting the right of a person in possession of an office from

forcible interference until the title *de jure* shall have been judicially determined, and it appearing that such title must be determined before the entire controversy between the parties can be set at rest, and as matter of fact the title may as well or better be settled in the pending action as in another commenced for legal relief, the court may, and should, proceed to settle the entire controversy.

Same — equitable rule — jurisdiction.

22. The foregoing is within the equitable rule that, where a court shall have obtained jurisdiction of the parties and of the subject-matter for a proper purpose, it may proceed and determine the entire controversy connected with the primary ground for relief which the plaintiff has, or in planting his action in equity in good faith supposed he had.

Officer — unjust removal — protection.

23. An officer entitled to hold an office for a fixed term, subject to removal only for cause, is, by common-law rules, unless the same shall have been abrogated by statute, entitled to protection against danger of unjust removal,—being so entitled by due process of law, which excludes interference with personal or property rights except according to established principles of justice.

Same — right to notice and hearing.

24. The established principles of justice, except as otherwise constitutionally provided by statute, secures to every person the right, before being condemned, as to his person or his property, as to anything materially affecting his constitutional right to life, liberty, and the pursuit of happiness, to reasonable notice of a hearing in respect to the matter, reasonable notice of the charges against him, reasonable opportunity to be heard by himself, his witnesses, and his counsel, to know the opposing evidence, and oppose it with evidence according to the principles of fair judicial investigation, and to have the final determination grounded on evidence in some reasonable view supporting it.

Same — property right in office.

25. The right to an office, though not a vested property right, is property in that broad sense which includes everything of pecuniary value to its possessor; but whether property in the broad sense, or merely a privilege, it is within the protection of the foregoing rule and within the constitutional guaranty of the state Constitution and the guaranties of due process of law and equal protection of the laws of the Federal Constitution.

Constitutional law — due process of law — definition.

26. "Due process of law" means according to the law of the land,—process according to the principles of natural justice, by the rules of the common law, except as constitutionally changed by statute.

Officer — removal — procedure.

27. If no proceeding is provided by statute for exercising a power of removal of an officer for cause, then the common-law

method, which accords hearing before condemnation, is the guaranteed "due process of law." If such proceeding is provided, or the right of removal is by clear legislative intent exercisable at pleasure or in any particular prescribed method, then a proceeding in that manner is the "due process of law" so guaranteed.

Same — removal for cause.

28. In case of an express or inferred statutory right of removal for cause, of an officer holding for a fixed term, it is to be presumed to have been conferred to be exercised under the restrictions of "due process of law" in the common-law sense, unless the contrary expressly or by necessary implication appears to have been the legislative intent.

Same — due process of law.

29. Under the foregoing rule, the power of removal for cause established by "satisfactory proof," under § 970 of the 1911 Statutes, is subject to the guaranty of "due process of law," requiring a hearing and determination according to the principles of natural justice.

Same — procedure.

30. For exercise of the power of removal under § 970 of the 1911 Statutes, in connection with § 1966y, prescribing the duties of the commissioner of insurance, these things are essential:

(1) Jurisdiction of the subject, in general, by assignment of a ground for removal within the specifications of the statute.

(2) Jurisdiction of the particular subject-matter by reasonable notice to the officer of the time and place of hearing and of the charges preferred against him.

(3) Reasonable opportunity of the accused to defend against the case adverse to him in a manner "analogous, in its most essential features, to a judicial hearing and investigation."

(4) Fair judicial consideration of the evidence and determination thereon of the ultimate facts within the boundaries of reason.

Courts — review of removal of officer.

31. While the power of removal of an officer for cause established by satisfactory proof is administrative in character, as distinguished from that judicial power lodged by the Constitution only in courts, it includes that species of judicial power denominated quasi judicial, and, as to that element, the result of exercise of the power is reviewable by the court as to all matters of jurisdiction.

Insurance — commissioner — duties — political committee.

32. The terms "political committee" and "manager of a political campaign" in § 1966y of the 1911 Statutes, as regards the duties of the commissioner of insurance, have the same import as similar terms in the corrupt practices act, § 94-1 to § 94-39, inclusive, of the statutes.

Same — assisting legislator.

33. The terms "political committee" and "manager of a political campaign," as used 46 L.R.A. (N.S.)

in the statutes, do not refer to mere efforts to assist, after election of members of the legislature shall have occurred, an aspirant for the position of speaker thereof to gain the position.

Same — definition.

34. The terms "political committee" and "manager of a political campaign," as used in the statute, refer to a committee for a political party or for a person, or manager of a political party or personal party campaign, such as would be required under the corrupt practices act (Stat. 1911, §§ 94-1 to 94-39) to file reports of expenses with the secretary of state.

Officer — removal — notice — due process.

35. Notice given one hour or so before the time set for a hearing in removal proceedings under § 970 of the 1911 Statutes, of the fact that such hearing will occur, is not reasonable. Neither is closing of such a hearing without affording opportunity for the person accused to present the evidence of his witnesses, and without according to him reasonable opportunity to testify fully and to be heard by counsel, and without affording him knowledge of all the evidence to be considered against him, and fair opportunity to oppose the same with evidence, reasonable.

(Winslow, Ch. J., and Barnes, J., dissent.)

(May 31, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Dane County in defendants' favor in a proceeding to enjoin interference with plaintiff's possession of the office of insurance commissioner. Reversed.

Statement by Marshall, J.:

Action for equitable relief respecting forcible disturbance of the plaintiff in the possession of the office of insurance commissioner.

The case, as primary matter, involved the right of peaceable possession by the plaintiff of the office of insurance commissioner pending determination of the validity of removal proceedings whereby he had been, in form, removed from the office.

The facts being regarded, in some particulars, as peculiar and without precedent, and also to some degree the propositions of law urged upon the court in support of the judgment,—the history of the entire matter as closed by the judgment complained of is given below in its logical order.

Circumstances leading up to the removal proceedings.

In January, 1913, appellant was in possession of the office of commissioner of insurance under § 1966y of the statutes, his

term having some three years to run. The office, aside from some constitutional positions, is one of the most important in the administration of the government. The legislature so created it as to secure good expert ability for the place, by attaching thereto a salary incident of \$5,000 per year, requiring of the appointee special knowledge of all subjects within the broad scope of the proposed administration, creating disability of the incumbent during his term of office for holding any other official position of any kind, requiring him to devote his entire time to his official duties, and prohibiting him from holding any position of trust or profit, public or private, or engaging in any occupation or business interfering with or inconsistent with his duties, or serving on or under any political committee, or as manager of any political campaign for any candidate or party. It was made a place of much honor and power,—subordinate in a sense to that of the governor, but a power greater, by far, than was ever before given in this state to an appointive officer. It took the place of a somewhat similar, but much inferior, elective office which for years had been classed in practical effect with constitutional state offices. It was made greater than any of them with the exception of the office of governor and that of member of this court, as regards the interests of the people to be conserved. It was made appointive by the governor by and with the advice and consent of the senate,—as an assurance that the legislative conception of fitness for the place would be most certainly satisfied,—with power to the executive to fill any vacancy occurring, for the unexpired term, subject to confirmation by the senate, the appointment, in any case, to be in force until acted upon by the senate. No specific provision was made for removal for any cause.

To fill the place the governor appointed appellant, as satisfying the calls of the statute. His fitness was so well known that doubtless the legislature expected such an event would occur when the system was adopted. Whatever provision exists for exercising executive power to remove an incumbent of the office is found in § 970 of the statutes, providing that any officer of the class to which the particular one belonged, “who are or shall be appointed by the governor by and with the advice of the senate, or by the legislature with the concurrence of the governor, may, for official misconduct, habitual or wilful neglect of duty, be removed by the governor upon satisfactory proof, at any time during the recess of the legislature.”

Leading up to the legislative session in 46 L.R.A. (N.S.)

1913, there was much factional strife among those who, generally speaking, were opposed to the Democratic party, culminating in members of one faction, made up of persons antagonistic to their former associates in the Republican party, canvassing to effect selection of a speaker of the house who would be, as near as practicable, in harmony with their views. There were several candidates for the place, the contest being substantially factional; the governor was regarded as in harmony with the movement which aroused the particular strife. Members of the opposition as to such faction canvassed to secure a speaker in harmony with their choice. Appellant made publicly known his preference. It was antagonistic to the faction supposed to represent the governor. In that situation, the latter, on the day before the legislature was to convene, caused charges to be preferred by one of his office force against appellant, looking to his removal from office. These are the charges: “Deponent . . . charges, upon information and belief, that Herman L. Ekern is guilty of official misconduct and wilful neglect of duty as commissioner of insurance in this, that, on and between the 1st day of January, A. D. 1913, and the 7th day of January, A. D. 1913, both inclusive, at the city of Madison, Dane county, Wisconsin, the said Herman L. Ekern did serve as and under the political committee, and as manager of the political campaign for one L. L. Johnson, who was then and there a candidate for the office of speaker of the assembly of the state of Wisconsin, contrary to the provisions of § 1966y of the statutes.”

Mr. Ekern was served with notice of the charges having been filed, about 9 o'clock in the forenoon on the following day, and at such time, at the executive office, a hearing would be had in respect thereto, and that he should appear at that time.

Proceedings on the hearing.

Mr. Ekern, at the time stated in the notice for the hearing, appeared at the governor's office with Aylward & Olbrich, his attorneys. We will not attempt to give anything like a verbatim statement of what was said and of all acts done during the hearing. It will be sufficient to give the same in substance, so as to show, clearly, the circumstances affecting the rights of the parties.

Mr. Aylward: I object to these proceedings because § 970 of the statutes confers authority in such matters, only when the legislature is not in session. That includes the whole of to-day, though the legislature does not convene until 12 o'clock noon.

Governor: The objection is overruled.

Mr. Aylward: I call attention that the notice and charges were served but a few moments before the time for appearance; that up to now Mr. Ekern has not been allowed any time to obtain counsel and prepare for the hearing; that, inasmuch as the charges were procured to be filed by the one who is to sit in judgment, and the subject to be dealt with is, in reality, a co-ordinate branch of the government, and that the matter is very serious, in view of the near approach of the legislative session requiring special attention of the commissioner to important matters to come before it, forcing upon him such a speedy hearing is unjust; and that some reasonable time is necessary to advise with counsel and prepare to present the defense. I request such time to be granted in the interests of the accused, the people of the state, and the executive himself.

Governor: The application is denied. I do not agree with counsel as to the law. The proceeding will go on to a conclusion before 12 o'clock noon, the time for the legislature to convene.

Mr. Aylward: I am here to protect my client's interests. We are in court, are we not? I presume, whether the hearing is concluded by the time stated will depend upon whether the testimony is closed by that time or not.

Governor: I will hear no more argument on this now. If you think you are going to protract this hearing—

Mr. Aylward: For the purpose of preserving a record I wish it to appear that the governor's stenographer is taking down what occurs. May we not present our testimony?

Governor: I have ruled and you will desist from argument on the subject.

Mr. Aylward: I will take such course as I may think ought to be taken before an impartial judge, and to protect my rights as a lawyer.

Governor: I am governor, acting as a judge, and will not allow these proceedings to be unduly protracted.

Mr. Aylward: May we have the usual privilege of filing an answer?

Governor: You may dictate your answer into the record, but there must be no attempt to fritter away the forenoon.

Mr. Aylward: May I have a few moments to confer with our client?

Governor: Yes, sir.

After a brief conference, a verified answer on the part of Mr. Ekern was filed, putting in issue all of the allegations of the charges made against him.

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Mr. Aylward: I request a reading of the record of the proceedings up to this time.

Governor: The request is denied.

Mr. Gifford having been called by the governor, Mr. Aylward interposed by insisting that Mr. Ekern had not yet been afforded any suitable time to prepare for the hearing, and protested against his being compelled to proceed without proper time to consult with his counsel, obtain his witnesses, and prepare to make his defense. The protest was overruled, and the witness testified in response to interrogatories propounded by the governor, substantially as follows: I am proprietor of the Avenue Hotel. On New Year's Day about noon Mr. Ekern inquired, by telephone, about two rooms on the first floor of the hotel, as he wanted them for January 6th and 7th. He did not say anything about the purpose. On the following Monday, he called and informed me that the rooms were for Mr. Johnson. Johnson was a candidate for speaker. They were held for him for the two days. The furniture was not changed, except a few additional chairs were supplied at Mr. Ekern's suggestion. Johnson was not present during my conversation with Ekern. The rooms were in use Monday and Tuesday as Mr. Johnson's headquarters. I do not know of anyone being in the rooms during that time except Mr. Johnson. After the conversation with Ekern I did not see him until this morning. The rooms are closed, but have not been paid for. They were closed last night by Mr. Johnson's orders.

In response to interrogatories propounded by Mr. Aylward, Mr. Gifford said: I did not know I would be needed as a witness until called to testify. The governor requested me to call last Monday in respect to the matter. Mr. Ekern only asked if the rooms were engaged, and, upon being informed they were not, he said to hold them. He had used them before as headquarters. He made no suggestion about them thereafter except what I have stated. Johnson took the rooms. He made the necessary arrangements. No one used the rooms but him, to my knowledge. Ekern made no suggestion as to being chairman of any political committee or manager of any political campaign or party. I supposed he engaged the rooms for some other person. He did not mention Johnson's candidacy. Johnson did not have any committee, so far as I know, nor any manager. I made no charge for the rooms against Mr. Ekern. I think he stepped into the hotel for just a minute, Monday night. When he asked for the rooms he did not say they were for a headquarters. They have been so used many times.

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Mr. Wilbur, in response to the governor's questions, testified substantially as follows: I am clerk in this office. This was said in my presence between you and Mr. Ekern. He said Mr. Hull was hostile to him, because he was supporting Johnson. That he had the caucus nomination to a certainty. You said, Is his hostility because of belief that you are supporting Johnson? Ekern replied in the affirmative. You inquired as to what the fact was. He answered that he favored Johnson and Dr. Goff. You inquired as to what there was in the rumor of his having engaged rooms for the political headquarters of Johnson. He replied that he had engaged the rooms. You inquired whether it was true that he had discussed the speakership matter with members of the legislature, stating that there was a contest between yourself and Senator La Follette, and that, in the speakership contest, members must stand for or against the senator and for or against you, and that he represented those who were against you. He replied in the affirmative. You inquired as to whether he had stated to different members that you were not to have anything to do with the organization of the assembly. He replied in the affirmative. You then stated there was no fight or contest between yourself and the senator, save a fictitious contest used for political purposes by certain men for personal reasons. He replied that he was glad to hear that. You informed him that the statute prohibited the insurance commissioner from being politically active, and insisted that he conform thereto; that he close the headquarters which he had opened, and refrain from further participating in the speakership contest both on the surface and in fact. He replied that Johnson now had the headquarters, and he did not know what Johnson would do about the matter. You replied that you were not asking what Johnson would do. You were simply insisting that that night he close the headquarters which he had opened; that there was but one governor in the state and his offices were in the east wing of the State Capitol, and not the north wing. Then Mr. Ekern got up and said he would endeavor to comply with your wishes, and the interview closed.

The witness testified in response to interrogatories by Mr. Aylward: I talked the matter over with the governor before making the charges. I made the charges on information and belief. I have other information than what has been testified to. In the charges I conformed to the wording of the statute. I do not know as to Johnson having a formally organized committee. He had one in the sense that he had men working

together to promote his candidacy for speaker,—a political committee as generally understood. Ekern was the most active person. Assemblyman Holmes was also active. I do not know definitely as to anyone else. They were acting as a committee for Mr. Johnson as I understood it. I do not know that any statement was filed under the corrupt practices act regarding Mr. Johnson's candidacy, and did not seek any information on that point before filing the charges. The activity I referred to in the charges referred to the actual handling of Johnson's campaign. His neglect of duty mentioned in the charges consisted of his supporting Johnson's candidacy, and of campaigning in his interest. Mr. Ekern came to the governor's office in response to a telephone communication from the governor, transmitted by me at the governor's request. There was some conversation as regards Senator La Follette's attitude in the speakership contest, but the general talk was as to whether the senator was interfering presently. The question came up as to Ekern closing the headquarters which he had opened. He did not say that he had not opened the headquarters. When the closing of the headquarters was demanded, he said Johnson was now in charge and he was not able to say what Johnson would do. The governor demanded that he close the headquarters which he had admitted that he opened. When he referred to Johnson being now in charge, the governor said he would have no splitting of hairs, and that Ekern must close the headquarters and refrain from further participation in the speakership contest, or there would be a new commissioner of insurance. Ekern said that if there had been any activity in the speakership contest on his part, it was unintentional, and he would refrain from anything further, and it was then that the governor assured him that there was but one governor in the state of Wisconsin, and he was located in the east wing of the Capitol.

Mr. Ekern testified in his own behalf, in effect, as follows: I had no substantial opportunity to prepare for this hearing. Just time to call my attorneys by telephone and make my appearance. I have called some witnesses since we appeared and made answer. I have had no opportunity to consult with my counsel prior to appearing at the hearing, nor with any witnesses. It is necessary for a proper presentation of my defense that I should have opportunity to consult with counsel, and to procure and consult with witnesses, and I protest against the hearing in advance of such opportunity. Mr. Johnson, in official work, has been much in my office. I think he was there on New Year's Day. I then talked with Mr. Gif-

ford over the telephone at Johnson's request, in respect to the rooms. I supposed I was doing an act of ordinary courtesy. The next day Gifford asked me what was wanted in the rooms, and I replied, Nothing special except, possibly, some more chairs. I thought then that Johnson would see him right away, and paid no more attention to it. Johnson and I went to the hotel for lunch on Monday, the 6th of January. Gifford was told that the rooms were for Johnson. I never went near them, nor had anything to do with them, nor did I ever visit them while Johnson had them, nor send anyone there, nor assume any responsibility in respect to them. Johnson did not have any political committee to my knowledge or any campaign manager. I did not act in regard to the matter, directly or indirectly. I spoke favorably of Johnson for speaker, and that I personally favored him, and I spoke favorably for Dr. Goff. I asked Mr. Richards to call on me, which he did, and we discussed the speakership matter,—I making known my position in respect to it. I expressed the idea that Johnson was a strong candidate and was likely to win. In talking with members I referred to the general differences between the governor and Senator La Follette, but that was not intended to influence the speakership. It referred to a purely political contest which had been on for some time. When I referred to the subject of taking sides, it had reference to the general contest, the general political situation. What I said to the members of the legislature was not to influence them in favor of the man I wanted elected speaker. I had a broader purpose in mind. I may have mentioned the speakership matter in letters. I have not spoken to many people about Johnson's candidacy. I don't think I ever said that you [the governor] should have nothing to say in respect to who should be speaker. I claim I have a right to have my opinion, the same as anyone else. I never thought expressing of an opinion was managing a political campaign. I helped draw the corrupt practices act, and we didn't understand it would work that way. I have not served on any political committee or as manager of the political campaign for Johnson or any other person. At the conversation I had with the governor, he asked me if I thought Johnson was going to be elected. I replied in the affirmative. He then asked about my running his quarters for him, which I denied. I told him about my connection with engaging rooms at the Avenue Hotel. I confessed freely that I favored Johnson, and that I had said there was a fight on between him and La Follette. I also expressed the opinion that I did not think the

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governor ought to dictate in the speakership matter. He charged me with having violated the law, and demanded that I close the Johnson headquarters, threatening that if I did not he would remove me from office.

Governor: Did you do anything about closing the headquarters?

Ekern: Have I done anything about closing the headquarters? As I said that night, I had nothing to do with it.

Governor: You understood the question, don't repeat it.

Ekern: There was nothing for me to do about closing them.

Governor: The evidence is closed.

Mr. Aylward: I am not satisfied to have the evidence closed here at all.

Mr. Ekern: I appeal for fairness and justice. The governor has just brought out the first part of the conversation. As the governor delivered his ultimatum, as it has been called, which ended our interview, I said you don't mean that. I have been scrupulous in observing the law, and it is my intention to do so. I have complied with the strictest construction that anyone has put upon it, and I propose to do that in the future, and from you, as governor, I am willing to accept the strictest construction that you can put upon it. I am willing to do everything that can be properly done.

Governor: I don't care to hear any more. I know what happened. It isn't as though you were talking to a man not present at the time.

Mr. Ekern: I said I would call Gifford on the telephone, and tell him I had nothing to do with the rooms, if that was what you wished, and you said, No, that was not satisfactory, that I must go to the hotel and close the headquarters that night. I denied I opened the rooms; but you insisted, in spite of that, upon my closing the Johnson headquarters.

Governor: I said, if Johnson is there, you put him there. You opened those headquarters, and you must close them. If someone else opened them, I would ask him to close them. If it inconveniences Mr. Johnson I am sorry; but you must close the headquarters that you opened. I don't care to hear any more testimony, or take any more time in this matter.

Mr. Aylward: I haven't finished Mr. Ekern's testimony, and have present to testify, Assemblyman Johnson, Mr. Beedle, former insurance commissioner, and I want to also present the testimony of Lieut. Gov. Morris. I believe justice affords Mr. Ekern a right to have the testimony of his witnesses taken.

Governor: We would go into the matter

more fully if there was time. We have heard all the testimony which time permits. It must be borne in mind I have personal knowledge which no testimony can modify concerning Mr. Ekern's own admissions on the evening he was here, as to his participation in the management of Mr. Johnson's campaign, and what he did in reference to it, so I shall find—

Mr. Aylward: Mr. Wilbur has testified to that conversation.

Governor: I was here myself and heard the conversation.

Ekern: You refuse to permit my recollection of that—

Governor: You have gone over the whole transaction. You were notified at the outset that the hearing would terminate before 12 o'clock. You were called at 11 o'clock. You have had more than three quarters of an hour to testify. I now terminate this hearing.

Mr. Aylward: One thing more, Governor; it won't take but a minute. The question is about Mr. Ekern being political manager for Mr. Johnson in the speakership contest. Mr. Johnson is present,—the one man above all others who would know.

Judge Rosa: My name has been brought into this, and I think I ought to testify to what happened, from beginning to end.

Governor: You may testify if it will not take over five minutes.

Judge Rosa: It will take more than five minutes.

Governor: A more extended hearing is not allowed now. I would be glad to hear the rest of the testimony, but, of course, you don't know any more about it. I have ended the hearing.

Mr. Aylward: Mr. Ekern has only had three quarters of an hour in which to present evidence respecting the question of whether he shall be dismissed from office. I move that the complaint be dismissed because there is no evidence to sustain the charges.

Governor: The motion is denied.

Mr. Aylward: A person accused, after testimony has been offered, is entitled to be heard by counsel.

Governor: Desist from further argument. It is perfectly apparent you are trying to protract the hearing till after 12 o'clock, and I shall not permit it. I don't intend anything to interfere. My decision is to sustain the charges,—to find Mr. Ekern guilty as charged, and order his removal from office for the reason stated in the complaint and evidenced by the proof submitted to me. I shall sign a written order to this effect as soon as it can be prepared.

An order of removal was duly prepared and signed.

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Subsequent proceedings resulting in the appeal.

Defendant Anderson was appointed successor to appellant, and, having, in form, qualified for the place, demanded possession of the office quarters, books, and papers, and the demand was refused. Forceful compliance therewith, under orders from the governor, being threatened, and seeming to be imminent, appellant caused his complaint to be prepared, setting forth the facts aforesaid, his claim in good faith to be the commissioner of insurance, notwithstanding the removal order, and that such order was made without authority of law, and thereon applied for injunctive protection from being forcibly interfered with in his possession. Under the governor's order, defendant Essmann attempted to forcibly install Anderson in appellant's place. While Mr. Essmann was in the act of beating down the office door for the purpose of gaining entrance to the official rooms, and expelling appellant, and a serious breach of the peace to accomplish such result was impending, the temporary restraining order applied for was granted and served. The efforts to obtain forcible possession of the office thereupon ceased. Thereafter, the complaint was amended, and supplementary affidavits were filed which, in the whole, set forth the facts fully from appellant's standpoint, and that continuance of the temporary injunction was essential to prevent unlawful interference with his possession, and, on the whole record, asked therefor, continuing the injunction pending the final result of the litigation. Upon such record and numerous affidavits filed in defendants' behalf, not changing the appearance materially as to whether appellant was entitled to remain in the undisturbed possession of the office, and that forcible disturbance thereof could only be prevented by judicial authority, the case was submitted to the court, resulting in a decision thus:

The court will not assume jurisdiction to review the acts of a co-ordinate department of the government, unless power to do so be clearly given by law.

If the governor was without power or duty to forcibly dispossess Mr. Ekern in the manner attempted, the court has power to enjoin such interference, regardless of the official status of the offender; but whether such power or duty exists need not be decided because of the conclusion on another point fatal to plaintiff's application for protection.

The court will not interfere to protect a person in possession of an office from being forcibly dispossessed by another having the prima facie right, unless such person is at least an officer *de facto*.

Whether Mr. Ekern has a *de facto* right to the office depends upon whether Anderson has the *de jure* right. The court cannot determine the former without determining the latter by passing upon the validity of the removal, so the rule that precludes trial of the title *de jure* in the equity action also precludes trial of the title *de facto*, as ruled in *Barendt v. McCarthy*, 160 Cal. 680, 118 Pac. 228. It follows that this case is ruled by *Ward v. Sweeney*, 106 Wis. 44, 82 N. W. 169.

From the order thus entered, the appeal was taken. After the cause was submitted for decision, a resubmission was ordered on these propositions:

Question 1. Does § 970 of the statutes require that due process of law, as guaranteed by the Constitution, be pursued in removing an officer?

Question 2. Does due process of law in such a case entitle the officer attempted to be removed to a reasonable notice of the hearing and of the particulars of the charge, a reasonable opportunity to be heard in person and by counsel, to know the adverse evidence to be considered, the right to cross-examine the opposing witnesses, and present all material evidence in his own behalf?

Question 3. If an order for the removal of an officer charged in such a proceeding be made, without according to him these privileges, is it valid?

Question 4. Is it a jurisdictional requirement of an order under the removal statute, that it be based on evidence taken according to the essentials of due process of law, which in some reasonable view sustain the charges against the person accused, which will warrant his removal, and if so, was such a case made as to Mr. Ekern?

Messrs. John A. Aylward and M. B. Olbrich, for appellant:

No commission and no official act of the executive is complete until the same has been countersigned by the secretary of state and the great seal affixed thereto.

State ex rel. Miller v. Barber, 4 Wyo. 409, 27 L.R.A. 45, 34 Pac. 1028; State ex rel. Fleming v. Crawford, 28 Fla. 441, 14 L.R.A. 263, 10 So. 118; Griswold v. Pitcairn, 2 Conn. 85; Church v. Hubbard, 2 Cranch, 187, 2 L. ed. 249; The Santissima Trinidad, 7 Wheat. 283, 5 L. ed. 454; 2 Bl. Com. 346, 347; Story, Conf. L. § 643; Hamilton v. State, 61 Md. 14; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611; Harrington v. Pardee, 1 Cal. App. 278, 82 Pac. 83; People ex rel. Ewing v. Forquer, Breeze (Ill.) 68; Dolan v. 46 L.R.A. (N.S.)

Trevelan, 31 Wis. 147; Brown v. Cohn, 85 Wis. 1, 20 L.R.A. 182, 54 N. W. 1101; Oelbermann v. Ide, 93 Wis. 669, 57 Am. St. Rep. 947, 68 N. W. 393; Marsh v. Nichols, S. & Co. 128 U. S. 605, 32 L. ed. 538, 9 Sup. Ct. Rep. 168; Baxter v. State, 15 Wis. 489; Smeltzer v. White, 92 U. S. 390, 23 L. ed. 508; Jeter v. State, 1 M'Cord, L. 233.

The governor had no jurisdiction to remove Commissioner Ekern.

State ex rel. Gill v. Watertown, 9 Wis. 254; State ex rel. Danforth v. Kuehn, 34 Wis. 229; State ex rel. Kennedy v. McGarry, 21 Wis. 496; State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304; State ex rel. Velie v. Morgan, 130 Wis. 293, 110 N. W. 245; State ex rel. Wagner v. Dahl, 140 Wis. 301, 122 N. W. 748.

A member of the assembly desiring or seeking to be chosen as speaker of the assembly, although he may have friends or members interested or working in his behalf, is not, under the election laws and corrupt practices act of the state of Wisconsin, "a candidate."

Tenney v. State, 27 Wis. 387; State ex rel. Wood v. Baker, 38 Wis. 71; Conger v. Gilmer, 32 Cal. 75; Police Comrs. v. Louisville, 3 Bush, 597; Rogers v. Jacob, 88 Ky. 502, 11 S. W. 513; Speed v. Crawford, 3 Met. (Ky.) 207; Magruder v. Swann, 25 Md. 173; State ex rel. Carson v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; People ex rel. Nichols v. County Canvassers, 129 N. Y. 395, 14 L.R.A. 624, 29 N. E. 327; State ex rel. Mack v. Torreyson, 21 Nev. 517, 34 Pac. 870; State ex rel. Clarke v. Irwin, 5 Nev. 111; Seaman v. Baughman, 82 Iowa, 216, 11 L.R.A. 354, 47 N. W. 1091; Wheelock's Election, 82 Pa. 297; Stinson v. Sweeney, 17 Nev. 309, 30 Pac. 997.

The primary and election laws and the corrupt practices act, except as otherwise specified, relate only to elective offices.

The statutes having provided that the removal may be made "by the governor upon satisfactory proof," this court will examine the record to ascertain if the removal was arbitrarily made, or if there was a clear case of abuse in making the removal.

State ex rel. Danforth v. Kuehn, 34 Wis. 229; State ex rel. Willis v. Prince, 45 Wis. 610; State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304; State ex rel. Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 587; State ex rel. Wagner v. Dahl, 140 Wis. 301, 122 N. W. 748; Atty. Gen. ex rel. Taylor v. Brown, 1 Wis. 513; Gillan v. Normal Schools, 88 Wis. 7, 24 L.R.A. 336, 58 N. W. 1042.

If court will not terminate controversy, it should preserve *status quo*.

2 High, Inj. 3d ed. § 1315; Stenglein v. Saginaw Circuit Judge, 128 Mich. 440, 87 N. W. 449; School Dist. v. Weise, 77 Minn. 167, 79 N. W. 668; Palmer v. Foley, 45 How. Pr. 110; State ex rel. Fairbanks v. Superior Ct. 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741; Neeland v. State, 39 Kan. 154, 18 Pac. 165; Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047; Landes v. Walls, 160 Ind. 216, 66 N. E. 679; Guillotte v. Poincy, 41 La. Ann. 333, 5 L.R.A. 403, 6 So. 507; State v. Alexander, 107 Iowa, 177, 77 N. W. 841; Reemelin v. Mosby, 47 Ohio St. 570, 26 N. E. 717; Pottsville Town Council's Appeal, 1 Monaghan (Pa.) 705, 15 Atl. 730; Kerr v. Trego, 47 Pa. 292; Jackson v. Powell, 119 La. 882, 44 So. 689; Lucas v. Futrall, 84 Ark. 540, 106 S. W. 667; Seneca Nation v. Jameson, 62 Misc. 91; 114 N. Y. Supp. 401; Davies v. State, 30 Ohio C. C. 527; Hardy v. Reamer, 84 S. C. 487, 66 S. E. 678; Casey v. Bryce, 173 Ala. 129, 55 So. 810; Hollar v. Cornett, 144 Ky. 420, 138 S. W. 298; Barendt v. McCarthy, 160 Cal. 680, 118 Pac. 228; Hotchkiss v. Keck, 86 Neb. 322, 125 N. W. 509; Chain Belt Co. v. Von Spreckelsen, 117 Wis. 106, 94 N. W. 78.

Under the certificate of appointment which plaintiff holds, he has yet two years to serve, and it is presumed that he is still entitled to the office.

Rochester & G. Valley R. Co. v. Clarke Nat. Bank, 60 Barb. 234; Kinyon v. Du-chene, 21 Mich. 498; Norris v. State, 22 Ark. 524; Kaufman v. Stone, 25 Ark. 336; Sawyer v. Knowles, 33 Me. 208; Urmston v. State, 73 Ind. 176; State ex rel. Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 587; State ex rel. McCoale v. Kersten, 118 Wis. 287, 95 N. W. 120; State ex rel. Gill v. Milwaukee County, 21 Wis. 443; State ex rel. Rinder v. Goff, 129 Wis. 668, 9 L.R.A. (N.S.) 916, 109 N. W. 628; Ward v. Sweeney, 106 Wis. 44, 82 N. W. 169; Dubuc v. Voss, 19 La. Ann. 210, 92 Am. Dec. 526; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234.

The issuance of the injunction prayed for involves no interference with executive acts.

Re Fire & Excise Comrs. 19 Colo. 482, 36 Pac. 234; Marbury v. Madison, 1 Cranch, 137, 170, 171, 2 L. ed. 60, 71; Atty. Gen. ex rel. Bashford v. Barstow, 4 Wis. 567.

Section 970 of the statutes requires that due process of law, as guaranteed by the Constitution, must be pursued in removing an officer.

Dietz v. Neenah, 91 Wis. 422, 64 N. W. 46 L.R.A. (N.S.)

299; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 Wis. 500; Schiltz v. Roenitz, 86 Wis. 31, 21 L.R.A. 483, 39 Am. St. Rep. 873, 56 N. W. 194; Quimby v. Hagen, 54 Vt. 132; Shurtleff v. United States, 189 U. S. 311, 314, 47 L. ed. 828, 831, 23 Sup. Ct. Rep. 536; Reagan v. United States, 182 U. S. 419, 425, 45 L. ed. 1162, 1164, 21 Sup. Ct. Rep. 842; Ex parte Garland, 4 Wall. 378, 18 L. ed. 370; Lucas v. Futrall, 84 Ark. 540, 106 S. W. 667; Patton v. Board of Health, 127 Cal. 388, 78 Am. St. Rep. 66, 59 Pac. 702; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; People ex rel. Simpson v. Denman, 16 Colo. App. 337, 65 Pac. 455; Benson v. People, 10 Colo. App. 175, 50 Pac. 212; Coleman v. Glenn, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297; Jacques v. Little, 51 Kan. 300, 20 L.R.A. 304, 33 Pac. 106; Page v. Hardin, 8 B. Mon. 648; Renshaw v. Cook, 129 Ky. 372, 111 S. W. 377; Todd v. Dunlap, 99 Ky. 460, 36 S. W. 541; Andrews v. King, 77 Me. 224; State v. Donovan, 89 Me. 448, 36 Atl. 982; Ham v. Board of Police, 142 Mass. 90, 7 N. E. 540; Cull v. Whittle, 114 Md. 58, 78 Atl. 820; Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; Harman v. Harwood, 58 Md. 1; Dullman v. Willson, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112; People ex rel. Metevier v. Therrien, 80 Mich. 187, 45 N. W. 78; Hallgren v. Campbell, 82 Mich. 255, 9 L.R.A. 408, 21 Am. St. Rep. 557, 46 N. W. 381; Townsend v. Sauk Centre, 71 Minn. 379, 74 N. W. 150; State ex rel. Brennan v. Walbridge, 62 Mo. App. 162; State ex rel. Reid v. Walbridge, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457; State ex rel. Denison v. St. Louis, 90 Mo. 19, 1 S. W. 757; State ex rel. Hastings v. Smith, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700; Hagerty v. Shedd, 75 N. H. 393, 139 Am. St. Rep. 725, 74 Atl. 1055; State, Markley, Prosecutor, v. Cape May Point, 55 N. J. L. 104, 25 Atl. 259; State ex rel. Haight v. Love, 39 N. J. L. 14; State, Bradshaw, Prosecutor, v. Camden, 39 N. J. L. 416; People ex rel. Maloney v. Douglass, 195 N. Y. 145, 87 N. E. 1070; State ex rel. Caldwell v. Willson, 121 N. C. 425, 28 S. E. 554; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; State ex rel. Atty. Gen. v. Hoggan, 64 Ohio St. 532, 60 N. E. 627; Biggs v. McBride, 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878; Com. ex rel. Bowman v. Slifer, 25 Pa. 23, 64 Am. Dec. 680; Willard's Appeal, 4 R. I. 597; McDowell v. Burnett, 92 S. C. 469, 75 S. E. 873; State ex rel. Hitchcock v. Hewitt, 3 S. D. 187, 16 L.R.A. 413, 44 Am. St. Rep. 789, 52 N. W. 875; McCully v. State, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134; Honey v. Graham, 39 Tex. 1; People ex rel. Murphy v. McAllister,

10 Utah, 357, 37 Pac. 578; *Gilbert v. Police & Fire Comrs.* 11 Utah, 378, 40 Pac. 264; *State ex rel. McReavy v. Burke*, 8 Wash. 412, 36 Pac. 281; *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777; *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 1 L.R.A. (N.S.) 588, 116 Am. St. Rep. 982, 81 Pac. 795, 82 Pac. 2.

The statute is unconstitutional if it does not provide due process.

State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; *Ex parte Garland*, 4 Wall. 378, 18 L. ed. 370; *Ex parte Heyfron*, 7 How. (Miss.) 127; *People ex rel. Mulford v. Turner*, 1 Cal. 143, 52 Am. Dec. 295; *Fletcher v. Daingerfield*, 20 Cal. 427.

Unless clearly modified by statute or Constitution, the common-law rule that due process of law be pursued still prevails.

Dullam v. Willson, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112; 23 Am. & Eng. Enc. Law, 434; 25 Am. Law. Rev. 199; *Throop*, Pub. Off. § 362; *Coburn v. Harvey*, 18 Wis. 148; *Todd v. Dunlap*, 99 Ky. 464, 36 S. W. 541; *Andrews v. King*, 77 Me. 224; *Stoddard v. Cibus*, 1 Sumn. 263, Fed. Cas. No. 13,468; *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314; *State ex rel. Toepke v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983.

Due process of law in such a case entitled the officer attempted to be removed to a reasonable notice of the hearing and of the particulars of the charge, a reasonable opportunity to be heard in person or by counsel, to know the adverse evidence to be considered, the right to cross-examine the opposing witnesses, and present all material evidence in his own behalf.

Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299; *Schiltz v. Roenitz*, 86 Wis. 31, 21 L.R.A. 483, 39 Am. St. Rep. 873, 56 N. W. 194; *McVeigh v. United States*, 11 Wall. 267, 20 L. ed. 80; *Hagerty v. Shedd*, 75 N. H. 393, 139 Am. St. Rep. 725, 74 Atl. 1055; *McCully v. State*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134; *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873; *Shurtleff v. United States*, 189 U. S. 311, 314, 47 L. ed. 828, 831, 23 Sup. Ct. Rep. 535; *Biggs v. McBride*, 17 Or. 640, 5 L.R.A. 116, 21 Pac. 878; *State ex rel. Atty. Gen. v. Hogle*, 64 Ohio St. 532, 60 N. E. 627; *State ex rel. Denison v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *Benson v. People*, 10 Colo. App. 175, 50 Pac. 212; *Andrews v. King*, 77 Me. 224; *State ex rel. Hastings v. Smith*, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700; *Lucas v. Futrall*, 84 Ark. 540, 106 S. W. 667; *Com. ex rel. Bowman v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680; *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 46 L.R.A. (N.S.)

66, 59 Pac. 702; *Jacques v. Little*, 51 Kan. 300, 20 L.R.A. 304, 33 Pac. 106; *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182; *State ex rel. McReavy v. Burke*, 8 Wash. 412, 36 Pac. 281; *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297; *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 1 L.R.A. (N.S.) 588, 116 Am. St. Rep. 982, 81 Pac. 795, 82 Pac. 2; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500.

It is a jurisdictional requirement of an order under the removal statute, that it be based on evidence taken in accordance to the essentials of due process of law, which in some reasonable view sustains the charges against the person accused.

State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; *Throop*, Pub. Off. § 379; *Mechem*, Pub. Off. § 455; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; *State ex rel. Starkweather v. Superior*, 90 Wis. 612, 64 N. W. 304; *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N. W. 777; *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748; *State ex rel. Augusta v. Losby*, 115 Wis. 57; *State ex rel. Moreland v. Whitford*, 54 Wis. 150, 11 N. W. 424; *State ex rel. N. C. Foster Lumber Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048; *State ex rel. Vilas v. Wharton*, 117 Wis. 558, 94 N. W. 359; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112; *Riggins v. Waco*, 100 Tex. 32, 93 S. W. 426; *State ex rel. Atty. Gen. v. Hogle*, 64 Ohio St. 532, 60 N. E. 627; *People ex rel. Campbell v. Campbell*, 82 N. Y. 247; *People ex rel. Simpson v. Denman*, 16 Colo. App. 337, 65 Pac. 455; *State, Ayers, Prosecutor, v. Police Comrs.* 49 N. J. L. 170, 6 Atl. 659; *State ex rel. Kinsella v. Eberhart*, 116 Minn. 313, 39 L.R.A. (N.S.) 788, 133 N. W. 857, Ann. Cas. 1913 B, 785.

Messrs. A. C. Umbreit and Harry L. Butler, for respondents:

The defendant Francis E. McGovern is in fact and law proceeded against in his capacity as governor of the state.

Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; *Mississippi v. Johnson*, 4 Wall. 475, 501, 18 L. ed. 437, 441.

The governor, as the head of an equal and co-ordinate department of government, is not subject to control by the judiciary, even as to ministerial duties imposed on him by law.

State ex rel. Byrne v. Harvey, 11 Wis. 33; *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513; *State ex rel. Gill v. Watertown*, 9 Wis. 254; *State ex rel. Peck v. Rusk*, 55 Wis. 465, 13 N. W. 452; *People*

ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; Rice v. The Governor (Rice v. Draper) 207 Mass. 577, 32 L.R.A. (N.S.) 355, 93 N. E. 821; Bates v. Taylor, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266; Jonesboro, F. B. & B. Gap Turnp. Co. v. Brown, 8 Baxt. 490, 35 Am. Rep. 713; State ex rel. Latture v. Board of Inspectors, 114 Tenn. 516, 86 S. W. 319; Hovey v. State, 127 Ind. 588, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175; State, Gledhill, Prosecutor, v. The Governor, 25 N. J. L. 331; People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; Western R. Co. v. DeGraff, 27 Minn. 1, 6 N. W. 341; Rice v. Austin, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330; People ex rel. Bacon v. Cullom, 100 Ill. 472; People ex rel. Harless v. Yates, 40 Ill. 126; People ex rel. Billings v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76; Teat v. McGaughey, 85 Tex. 478, 22 S. W. 302; Bledsoe v. International R. Co. 40 Tex. 537; State ex rel. Low v. Towns, 8 Ga. 360; State ex rel. Bisbee v. Drew, 17 Fla. 67; State ex rel. Lockwood v. Kirkwood, 14 Iowa, 162; Re Dennett, 32 Me. 508, 54 Am. Dec. 602; Insane Asylum v. Wolfly, 3 Ariz. 132, 8 L.R.A. 188, 22 Pac. 383; State ex rel. Robb v. Stone, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; Woods v. Sheldon, 9 S. D. 392, 69 N. W. 602.

Courts will not review by certiorari the alleged unlawful acts of the chief executive.

State ex rel. Peck v. Rusk, 55 Wis. 465, 13 N. W. 452; People ex rel. Leo v. Hill, 126 N. Y. 497, 37 N. Y. S. R. 792, 13 N. Y. Supp. 186; 2 Spelling, Extr. Relief, ¶ 1954.

Courts will not restrain by injunction or prohibition the alleged unlawful acts of the chief executive.

Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Western R. Co. v. De Graff, 27 Minn. 1, 6 N. W. 341; Bates v. Taylor, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266; State ex rel. Atty. Gen. v. Huston, 27 Okla. 606, 34 L.R.A. (N.S.) 380, 113 Pac. 190; Frost v. Thomas, 26 Colo. 222, 77 Am. St. Rep. 259, 56 Pac. 899; People ex rel. Alexander v. District Ct. 29 Colo. 182, 68 Pac. 242; State ex rel. Taylor v. Lord, 28 Or. 498, 31 L.R.A. 473, 43 Pac. 471; Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246; Grier v. Taylor, 4 M'Cord, L. 206, 17 Am. Dec. 731; Slack v. Jacob, 8 W. Va. 657.

Officers and subordinates acting under direction of the governor (as his codefendants are here alleged to be) are immune 46 L.R.A. (N.S.)

from injunctive restraint to the same extent as the executive.

Hartman's Appeal, 85 Pa. 433, 27 Am. Rep. 667; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; People ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; Western R. Co. v. DeGraff, 27 Minn. 1, 6 N. W. 341; State ex rel. Taylor v. Lord, 28 Or. 498, 31 L.R.A. 473, 43 Pac. 471.

If jurisdiction judicially to control the governor in the attempted exercise of executive power is to be assumed at all, it should not be permitted in a suit by a private party in a circuit court.

Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913 A, 1147; State ex rel. Hartung v. Milwaukee, 102 Wis. 609, 78 N. W. 756; Ward v. Sweeney, 106 Wis. 44, 82 N. W. 169.

The acts sought to be restrained were within executive power.

Re Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Stephenson v. Little, 10 Mich. 433; Wells v. Nickles, 104 U. S. 444, 26 L. ed. 825; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Buster v. Wright, 68 C. C. A. 505, 135 Fed. 947; Re Matthews, 122 Fed. 248; United States v. Mullin, 71 Fed. 682.

The title to public office is not triable in an equitable action for injunctive relief, nor even in mandamus.

Ward v. Sweeney, 106 Wis. 44, 82 N. E. 169; State ex rel. Lochschmidt v. Raisler, 133 Wis. 672, 114 N. W. 118; State ex rel. Jones v. Oates, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296; State ex rel. McCoale v. Kersten, 118 Wis. 287, 95 N. W. 120.

The holder of a certificate of election is entitled to the possession of an office as against an incumbent who claims that he was in fact elected and entitled to possession, and throws the burden on the latter to establish his title at law; this right of possession of the certificate holder may be enforced by mandamus, though title to the office will not be determined therein.

La Pointe v. O'Malley, 46 Wis. 35, 50 N. W. 521; State ex rel. Jones v. Oates, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296; State ex rel. McCoale v. Kersten, 118 Wis. 287, 95 N. W. 120; State ex rel. Rinder v. Goff, 129 Wis. 668, 9 L.R.A. (N.S.) 916, 109 N. W. 628; State ex rel. Hayden v. Arnold, 151 Wis. 19, 138 N. W. 78; People ex rel. Cummings v. Head, 25 Ill. 325; State ex rel. Jackson v. Howard County, 41 Mo. 247; Crowell v. Lambert, 10 Minn. 369, Gil. 295; Nelson v. Sneed, 112

Tenn. 36, 83 S. W. 786; Olson v. Trego County, 8 Kan. App. 414, 54 Pac. 805; Com. v. Bush, 131 Ky. 384, 115 S. W. 249; Chandler v. Starling, 19 N. D. 144, 121 N. W. 198.

A commission of appointment, like a certificate of election, confers prima facie right to an office.

Elledge v. Wharton, 89 S. C. 113, 71 S. E. 657; Barendt v. McCarthy, 160 Cal. 680, 118 Pac. 228; Re Sells, 15 App. Div. 571, 44 N. Y. Supp. 570; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Hubbell v. Armijo, 14 N. M. 482, 85 Pac. 1046; Beebe v. Robinson, 52 Ala. 66; Casey v. Bryce, 173 Ala. 129, 55 So. 810; State ex rel. Adams v. Herreid, 10 S. D. 16, 71 N. W. 319; Cameron v. Parker, 2 Okla. 277, 38 Pac. 14.

Where power of removal is vested in an officer, and no right of judicial review or appeal is given by statute, the action of the removing officer is final and conclusive, and the sole judicial question is whether the removal was within the power, namely, Was the assigned cause a legal cause?

State ex rel. Kennedy v. McGarry, 21 Wis. 496; State ex rel. Wagner v. Dahl, 140 Wis. 301, 122 N. W. 748; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; State ex rel. Davern v. Rose, 140 Wis. 360, 28 L.R.A.(N.S.) 194, 122 N. W. 751; State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304; State ex rel. Willis v. Prince, 45 Wis. 610; State ex rel. Gill v. Watertown, 9 Wis. 254; Atty. Gen. ex rel. Taylor v. Brown, 1 Wis. 513.

The validity of the order of removal is not affected by fact that it was not sealed or countersigned by the secretary of state.

Const. & Stat. Provisions; State ex rel. Neill v. Page, 20 Mont. 238, 50 Pac. 719; State ex rel. Miller v. Barber, 4 Wyo. 409, 27 L.R.A. 45, 34 Pac. 1028; State ex rel. Bienvenu v. Wrotnowski, 17 La. Ann. 156; Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611; La Pointe v. O'Malley, 46 Wis. 35, 50 N. W. 521; Curran v. Norris, 58 Mich. 512, 25 N. W. 500.

The motives of the governor, or his discretion as to length of notice or scope of hearing afforded, will not be judicially inquired into, and hence averments of arbitrariness are immaterial even in quo warranto.

Atty. Gen. ex rel. Taylor v. Brown, 1 Wis. 513; State ex rel. Gill v. Watertown, 9 Wis. 254; State ex rel. Atty. Gen. v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131.

No notice or hearing was required.

State ex rel. Kennedy v. McGarry, 21 Wis. 496; Nehrling v. State, 112 Wis. 639, 88 N. W. 610; People ex rel. Shipley v. 46 L.R.A.(N.S.)

Mays, 117 Ill. 257, 7 N. E. 660; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Patton v. Vaughan, 39 Ark. 211; State ex rel. Rawlinson v. Ansel, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613; State ex rel. Atty. Gen. v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; O'Dowd v. Boston, 149 Mass. 443, 21 N. E. 949; Trimble v. People, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; People ex rel. Fonda v. Morton, 148 N. Y. 156, 42 N. E. 538; People ex rel. Gere v. Whitlock, 92 N. Y. 191; State ex rel. Hamilton v. Grant, 14 Wyo. 41, 1 L.R.A.(N.S.) 588, 116 Am. St. Rep. 982, 81 Pac. 795, 82 Pac. 2.

The exercise of the removing power is not judicial, but administrative or executive.

State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; State ex rel. Rawlinson v. Ansel, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613; Re Guden, 171 N. Y. 529, 64 N. E. 451.

There is no property right in an office.

State ex rel. Buell v. Frear, 146 Wis. 291, 34 L.R.A.(N.S.) 480, 131 N. W. 832; State ex rel. Wagner v. Dahl, 140 Wis. 301, 122 N. W. 748; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; Donahue v. Will County, 100 Ill. 94; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; Nichols v. MacLean, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347; Bonner v. Belsterling, — Tex. Civ. App. —, 137 S. W. 1154; Trimble v. People, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; Beebe v. Robinson, 52 Ala. 66; Throop, Pub. Off. §§ 18, 19.

Hence, neither the due process clause of the 14th Amendment, nor any provision of the state Constitution of similar effect, is impaired by any provision the state legislature may see fit to make as regards removals from office.

State ex rel. Buell v. Frear, 146 Wis. 291, 34 L.R.A.(N.S.) 480, 131 N. W. 832; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Taylor v. Beckham, 178 U. S. 548, 576-578, 44 L. ed. 1187, 1200, 1201, 20 Sup. Ct. Rep. 890, 1009; Gillan v. Normal Schools, 88 Wis. 7, 24 L.R.A. 336, 58 N. W. 1042; State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; State ex rel. Bannen v. Arnold, 151 Wis. 38, 138 N. W. 85; People ex rel. Clay v. Stuart, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091; Bonner v. Belsterling, — Tex. Civ. App. —, 137 S. W. 1154; Trimble v. People, 19 Colo. 187, 41

Am. St. Rep. 236, 34 Pac. 981; Mechem, Pub. Off. p. 288.

Marshall, J., delivered the opinion of the court:

We will endeavor, so far as practicable, to discuss this case, separating it into logical order of subjects involved, and first give attention to the dominant reason assigned by the trial court for the order complained of.

I

There is no controversy before us but that the decision below, to the effect that the court should not, and cannot, properly interfere with the action of the executive of a state within the scope of his authority, is sound doctrine, as the language used was probably intended to be understood. For mere error of judgment on the part of the governor, in doing what he has a right to do, he cannot be judicially interfered with.

The claim of appellant below that the scope of the governor's authority did not extend to forcibly putting his appointee in possession of the office in dispute, and therefore no immunity of respondent from being dealt with by judicial remedies can be successfully claimed for the illegal act, seems to have been sustained in the course of the trial court's decision. Such an act was, seemingly, thought not to be within the rule above stated, but it was left somewhat involved at the end, and the decision placed wholly on the doctrine of Ward v. Sweeney, 106 Wis. 44, 82 N. W. 169, upon the supposition that, whether appellant was a *de facto* officer depended upon whether Anderson had the *prima facie de jure* right, and therefore neither question was triable in this action for equitable relief, such relief being dependable upon whether appellant occupied a status of at least the dignity of a *de facto* officer.

The idea that it is not competent in an action of this sort, to determine whether the plaintiff is a *de facto* officer, is quite novel. We venture to say neither principle nor authority supports that feature of the trial court's decision. The question of *de facto* right was decided in Ward v. Sweeney, sufficiently for the case, and was one of the grounds for the result, and regarded sufficient. The trial court grievously erred in supposing that Barendt v. McCarthy, 160 Cal. 680, 118 Pac. 228, supports the conclusion. There the person out of was endeavoring to regain possession by a suit in equity against his adversary. The court proceeded far enough to determine that the defendant was at least an officer *de facto* and was in possession. So, it will be seen the 46 L.R.A. (N.S.)

case is authority against, rather than in support of, the position that, in this suit, it was not competent to solve the question of whether appellant had at least a *de facto* right to possession of the office. To determine that did not necessarily involve trying the title *de jure* at all.

Having committed the error aforesaid, the court easily misapplied Ward v. Sweeney and misconceived its purport.

The facts in Ward v. Sweeney were these: There was an officer in possession claiming a *de facto* status. He entered equity against one claiming the title *de jure* and threatening to take possession by force, to determine the question of who had the better title, and, incidentally, to prevent being forcibly dispossessed in the meantime. The case turned on the following points: (a) Can an equity action be maintained to try the title to an office? (b) Is a temporary restraining order proper except under § 2774, Stats., to preserve the *status quo*, and in a proper action to try the title to the office? (c) Is temporary protection by injunction in such an action proper at all, except in case of imminent danger of a forcible disturbance of the officer's possession, detrimental to the public interests? (d) Should such protection be afforded at all in favor of the one in possession, and not appearing clearly to be at least a *de facto* officer?

The writer, with the late Justice Bardeen, dissented from the decision of the court, so far as it might be regarded as holding that equity will not freely protect a *de facto* officer from imminent danger of being forcibly dispossessed by an adverse claimant, in an effort to settle his right by wager of battle, and so far as it was held that the power to grant injunctive protection, under all circumstances, is referable to the statute, and so not proper except as ancillary to an action to try title. Without questioning the decision itself, it is conceded by the court now that some of the reasoning upon which it was based is unsound.

An action in equity, whether instituted by one in or one out of possession of an office, to try the title, is one thing; an action by a person in possession of an office, having at least a *de facto* status, to compel an adversary to vindicate his claim by lawful methods, and restrain him from disturbing the existing state of things in the meantime, is quite another affair. The one involves the adjudication of the title *de jure*. The other merely involves the right *de facto* and to have the claimant proceed lawfully to settle his claim of title *de jure*. All the relief necessary in the latter is within the competency of a court of equity to grant, leaving the real right of the matter respect-

ing the title to the office, if thought necessary or advisable, wholly unsettled.

That an equitable action for the protective measure of relief mentioned is proper was vigorously maintained independently in the Sweeney Case, and not questioned in the opinion of the court, except as applicable to the particular circumstances there dealt with, and, further, upon the theory, that the power to grant temporary equitable relief is restricted to the scope of the Code provision, § 2774 of the statutes. It may be safely affirmed that, in general, an officer *de facto* in possession is entitled to equitable interference to prevent forcible disturbance thereof other than in judicial proceedings. The authorities cited in Ward v. Sweeney would seem ample in support of that doctrine. 2 Beach, Inj. § 1380; 2 High, Inj. 4th ed. § 1315; Sullivan v. Haacke, 5 Ohio N. P. 26, 7 Ohio S. & C. P. Dec. 113; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047; Harding v. Eichinger, 57 Ohio St. 371, 49 N. E. 306; Goldsworthy v. Boyle, 175 Pa. 246, 34 Atl. 630.

Nothing of moment to the contrary of the foregoing is cited by counsel for respondents, while in support thereof appellant's counsel cited many authorities, the following being a few of the most significant: Stenglein v. Saginaw Circuit Judge, 128 Mich. 440, 87 N. W. 449; School Dist. v. Weise, 77 Minn. 167, 79 N. W. 668; Palmer v. Foley, 45 How. Pr. 110; State ex rel. Fairbanks v. Superior Ct. 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741; Neeland v. State, 39 Kan. 154, 18 Pac. 165; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047; Landes v. Walls, 160 Ind. 216, 66 N. E. 679; State v. Alexander, 107 Iowa, 177, 77 N. W. 841; Reemelin v. Mosby, 47 Ohio St. 570, 26 N. E. 717; Jackson v. Powell, 119 La. 882, 44 So. 689; Lucas v. Futrall, 84 Ark. 540, 106 S. W. 667; Hollar v. Cornett, 144 Ky. 420, 138 S. W. 298.

A *de facto* officer has no need of instituting an action of quo warranto or any other action to try a controversy over the title to the office, in order to protect his possession. It is the business of the claimant who is trying to break in to resort to such remedy. The one in possession may use physical means, reasonably, to prevent being dispossessed, or he may resort to the more peaceful remedy of an action in equity for that purpose, as appellant did. The latter is to be preferred, and the court should not do anything to encourage a resort to the former. As remarked in Palmer v. Foley, 4 Jones & S. 14, referred to in Ward v. Sweeney, and often quoted with approval: "The earliest jurisdiction, if not at" one "time the chief business, of the court of chancery, was in assault, trespasses, and a 46 L.R.A. (N.S.)

variety of outrages. . . . In respect to the use of preventative process, the jurisdiction ought to be, and therefore is, the same; and if it is proper in one case to exercise the jurisdiction to prevent a wrong threatened to be done to mere property, how much more proper is it to use the same power to arrest premeditated wrong to the person or personal rights?"

The following from Sullivan v. Haacke, 5 Ohio N. P. 26, 7 Ohio S. & C. P. Dec. 113. is quite appropos to the case in hand:

"The action shows itself to be that, familiar to equity practice, wherein an individual in possession of an office seeks to restrain another who claims the office from by force and violence ejecting him, instead of resorting to the dignified, peaceful, and orderly methods provided by law for gaining possession. . . . A claimant to public office, even though he have title, cannot, through the exercise of physical force and personal violence, divest possession from his predecessor. . . . The spectacle of claimants to high and important public office charging themselves at fistcuffs over who shall have possession, and this at the very portals of the public courts, is not in harmony with the policy of the law, and is not one whereon a peace-loving, law-abiding public delights to gaze; and . . . the courts in the name of the public, for the preservation of the public peace, and in vindication of public dignity, will command peace and obedience to the orderly forms of law."

This further from Palmer v. Foley, supra, is quite appropriate to the case: "The defendant is not in possession of the office. . . . He stands in no better attitude than a mere stranger, except that he may invoke the aid of the attorney general to proceed against the present incumbent to try the title of the office. But at present he cannot have possession of the office, nor can he enforce a recognition of himself as the legally constituted officer. He must wait until the disputed question is determined in his favor by a judgment in a proper action. . . . The plaintiff desires that he . . . may be undisturbed in the office" he claims to legally fill, "and instead of asserting his right by bringing to his aid the maxim of the law, *domus sua cuique est tutissimum refugium*, he had adopted a measure more conformable to peace and order."

The unfortunate occurrence giving rise to this litigation, of the attempted taking of law into one's own hands,—making an assault upon the commissioner's quarters and threatening to use physical violence in a more personal way, to enforce submission, while he was performing his duty as he saw

it, and his duty, in fact, so long as he honestly believed he had not been legally removed from office, a duty not only to himself but to the public,—to defend his possession against an unlawful intrusion,—and what might be the result in the future of the court adopting, as a principle, the idea that it cannot, or will not, exercise its power to compel the settlement of such controversies by lawful methods, must drive conviction home to the judicial mind that what was said independently in *Ward v. Sweeney*, and so emphatically supported in the authorities above referred to, and practically by universal authority, both elementary and judicial, is sound beyond any room for reasonable controversy. The court not only can interfere with its strong injunctive are in such cases, but it would be recreant to its duty not to do so, promptly and firmly. There should be no hesitation in that regard, giving encouragement to such conflicts as occurred in the particular instance, tending to bring the law into disrepute and inflict harm upon the state. The doctrine of *Sullivan v. Haacke* is a very salutary one, that an office is a franchise, and is separate and distinct from the mere office quarters, and that the attempt of a claimant thereof to possess himself of it, by forcibly dispossessing his adversary, should be regarded so odious in a court of equity that, in case of the physical possession of such quarters being so obtained, the act should be regarded, practically, as not placing the offender any nearer the real thing sought after,—the office itself,—than as though he had not committed the unlawful act.

In the foregoing, we have assumed, without discussion or reference to authority, that the governor's official duty did not extend to forcibly putting Mr. Anderson into possession of the office of commissioner of insurance. Neither principle nor authority can be found to support any such exercise of authority. We will not dignify the matter by even discussing it. It is really too plain for reasonable controversy that the governor does not possess any such authority. The learned circuit judge was evidently convinced of that, notwithstanding he left the matter of whether the executive could be interfered with in case of his usurping such authority, undecided, choosing to rest the decision of the case upon a supposed, but not real, fatal infirmity in appellant's competency to obtain in equity the relief sought.

The suggestion made in the *Sweeney* Case, of want of jurisdiction to grant temporary injunctive protection except as given by statute, is so obviously wrong that the court will not let this opportunity

for correcting it go by without doing so. It was doubtless permitted to go into the decision before by mere oversight. We are constrained to say that, since it is contrary to the law as well understood ever since our judicial system was established. Power in equity, as it existed at common law, was lodged by the Constitution in the court. The legislature is powerless to restrict it, and has never attempted to do so. The practice has been in harmony with this from the first. The court as early as *German Evangelical Cong. v. Hoessli*, 13 Wis. 348, held that, "when the complaint lays a foundation for an injunction, it will be granted whether [asked for] as a final judgment or as a provisional remedy, in all cases where it would have been allowed under the old chancery practice." The statute on the subject enlarges rather than restricts the power of the court over the remedy by injunction. See also *Lutheran Evangelical Church v. Gristgau*, 34 Wis. 328. In *De Pauw v. Oxley*, 122 Wis. 656, 13 L.R.A.(N.S.) 173, 100 N. W. 1028, the court remarked on the same subject: The statute "confessedly was intended to enlarge the duty of the court as it existed under former chancery practice."

In the case last cited it was held that, not only all the power existing at common law regarding injunctive relief was vested in the court by the Constitution, but an added power was afforded by statute, and, it was remarked, following previous cases on the subject, where the papers on an application for an order preserving the *status quo* pending the final result of the case show a reasonable probability of plaintiff's ultimate success, it is well nigh an imperative duty of the court to grant such relief. "Not only does the discretionary power exist to protect a party" in such circumstances, "but the duty exists to exercise it." To the same effect are *Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis. 436, 78 N. W. 1096; *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473.

There is nothing to the contrary of the foregoing, we venture to say, to be found in our books, except as suggested in the *Sweeney* Case. Had it not been for the inadvertence there made, and now criticized, possibly this unfortunate litigation would not have arisen. Denial of power, or hesitation to use it until some calamity shall have occurred, are both unfortunate. Power should be used discreetly and efficiently, neither denied where it exists, nor used with such timidity as to bring the administration of the law into contempt and encourage infractions of it.

We may now safely restrict *Ward v. Sweeney*, to this: (a) The court will not recognize a controversy as to title to an office as a primary right constituting a proper major subject for adjudication in equity; (b) the right in such a case being strictly legal, as a primary matter, it must be dealt with by legal remedies; (c) the right of a *de facto* officer to remain in undisputed possession of an office as opposed to forcible efforts of an adverse claimant to gain possession, until the *de jure* right of the latter shall have been judicially established, is a proper primary subject for equitable vindication with all the judicial instrumentalities essential to that end; (d) whether the circumstances in any given case are such as to render use of the injunctive power of the court advisable or demandable is matter of administration, and not of power.

The foregoing is as far as it is necessary to go to demonstrate that *Ward v. Sweeney* does not, as the trial court supposed, rule this case, if the appellant, at the time of the forcible disturbance of his possession, was a *de facto* officer. The court did not there decide, nor has any court decided, and it would be contrary to elementary principles if any court should decide, that, in such circumstances as here, it is not competent to judicially protect the party in possession, if a *de facto* officer. Even if the court would indorse now the degree of hesitancy suggested in *Ward v. Sweeney* to protect an officer in his possession against being unlawfully ejected, all the elements of imminent peril to personal security and public interests, which were supposed to be absent there, or not clearly shown to exist, were present here in a high degree.

So, if appellant was a *de facto* officer,—and of that anon, the circuit judge, as said, did not pass upon the matter, and the fact that the author of the disturbance was the governor did not change the ordinary rule, and of that we are about to speak,—the court not only had power and duty to act as it was invoked to act, but *Ward v. Sweeney* rules the case in appellant's favor, instead of in respondents' favor, and entitles appellant to a reversal as regards any question decided by the circuit court adversely to him.

II.

Thus, it will be seen demonstrated that the supposed safe basis for the judgment appealed from has no sustaining quality, and, unless the result be right because of some question of law erroneously decided by the trial court against respondents, a reversal must follow. Counsel who stand for the judgment appreciate that seemingly, and confidently press upon our atten-

tion a proposition of radical character which does not seem to have received any favor below further than is indicated by the suggestion in the learned judge's decision that "this court has refused to issue temporary restraining orders which would in any way interfere with the exercise of the broad powers vested in the chief executive of a state. The governor is responsible to the people, and not to the courts, for the manner in which he exercises these broad powers." Citing *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513. 522.

The broad language thus used might be very misleading to the casual professional reader, and particularly so to the nonprofessional, without having definitely in mind some important legal principles which will be mentioned. Confined to the literal sense of the words, "exercise of the broad powers vested in the chief executive of a state," illustrated by *Atty. Gen. ex rel. Taylor v. Brown*, which involved the exercise of a power so vested, the language is accurate; extended to the exercise of power not so vested,—to the usurpation of power,—the language rather points favorably to the contention of counsel for respondents which we are about to discuss.

We hesitate to think the learned court intended to go further than to hold that the executive of a state is only answerable directly to the people in respect to the exercise of the power which he possesses; his conduct in that respect being a subject for political consideration at the bar of public opinion and the people at the polls,—leaving him answerable at the bar of the court, as the representative of the people, in respect to violations of law by assumption of power which he does not possess. It is quite certain that the learned circuit judge did not mean "this court will refuse to issue a temporary restraining order which in any way interferes with the exercise" of power assumed "by the executive of a state" to be vested in him, but which he does not in fact possess, and the exercise of which could not occur except by a violation of law,—a usurpation,—because the judge proceeded to consider the subject, and held that the "broad powers vested in the executive of a state" do not include power, personally or by his agent, to violently eject a person from an office when he shall have declared it vacant, and to install his appointee therein as the successor, and to further hold that, in a proper case, an injunction will lie to prevent such an interference, though that was left somewhat involved later.

It were better if the learned judge had carefully, expressly, differentiated between

"interfere with the exercise of the broad powers vested in the chief executive of a state," which plaintiff's counsel was not urging, and interfere with the exercise of assumed power not possessed in fact, which was the subject of complaint. The failure to thus differentiate left the initial decision liable to be considered obscure or contradictory, which has called for this *exposé* in order to do justice thereto.

The full scope of the proposition dealt with below, as above indicated, and now urged with great confidence, is this: The governor of a state, acting in the name of his office, regardless of whether what he does or the manner of doing it is within or without the scope of his authority, cannot be interfered with by the courts. He is answerable only to the legislature under the impeachment feature of the Constitution, or to the people. He is entirely independent of the courts, in acting as governor, regardless of whether his acts be legal or illegal. If he violates private rights, acting as governor, there is no jurisdiction in the court to afford redress for the wrong by interfering with him or his agents.

That is a striking proposition, as it is put up to us for consideration, though not a novel one even here. The boldness with which it is pressed upon our attention, in view of the fact that it was most emphatically condemned here more than fifty years ago, is strange, passing strange. Some authorities are cited to our attention supposed to give some support thereto, without appreciating seemingly that in general they deal with matters decided by the governor within his jurisdiction, and that, anything said suggesting authority outside of it regardless of judicial restraint is mere *obiter*, and not supported by any principle grounded in our system of government; and, further, not appreciating, apparently, that the matter is really not open to discussion here, unless the law is most solemnly declared in 1855 on one of the most, if not the most, significant occasions in the history of the court, is to be overruled.

A brief discussion of our system of government will not be amiss at this point. When it was established, the people had in their keeping the whole power of sovereignty, which was, of old, deemed to be centered in a personal head as the agency of God on earth. Their effort to form a government, to exercise that power, contemplated a new system,—one essentially different from any existing in the Old World. The courts were no longer to be the agencies of a personal sovereign, deriving authority from on high, instead of from the people, but they were to be agencies of the latter. Sovereign authority was to be regarded as in the people, ex-
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ercisable by the people through their chosen agencies, and for the people. It was divided into three grand divisions, *viz.*, executive, legislative, and judicial; each to be the supreme agency within its particular sphere, and to be subordinate outside of it. So the structure was builded. So it exists, and must continue to exist until the people who wrought it see fit to change it.

No right is more sacred under such system than that of an individual to appeal to the judicial forum of his country for redress of any wrong perpetrated upon him. Without that right neither life, liberty, nor the pursuit of happiness would be secure, and the very purpose for which, in contemplation of our Constitution, "governments are instituted among men," would fail utterly. To conserve that purpose, not to destroy it, executive power was conferred on the governor, coupled with the restraint and balance afforded by judicial authority to confine it within its jurisdiction, not to regulate it, by dealing with all judicial questions,—a guaranty which distinguishes our constitutional liberties from the system of old. The executive is absolutely free from judicial interference within the scope of his duties. To that extent, the court will not attempt to invade his realm to enjoin him, to mandate him, or prohibit him. There are a multitude of authorities on this. But when he steps aside from the sphere of his duty, and violates the law, he is amenable to the law, the same as any other person. The scope of his duty does not extend to breaking the law. Within its scope, acting as governor, he is powerful, but outside thereof, though pretending to act as governor, he is but an individual, and must bow to the underlying principles of our system, that all men are equal before the law,—the humblest with the most exalted, the lowliest in legitimate industry with the highest surrounded by all the power which wealth can give, or the highest in agency authority referable to the people; there is no difference in contemplation of our system, and, if courts do their duty, there can be no difference in fact. The courts must settle rights in any controversy respecting violation thereof, whether the violator be the governor or a private individual.

Anything contrary to the foregoing is a relic of an ancient system where there were no private rights, strictly speaking,—only privileges. In the separation from Old World systems and the erection of a new one in this country, the former, contemplating merely graces, was succeeded by the latter, contemplating inherent rights, and among those rights those of life, liberty, and the pursuit of happiness,—a system of

real rights in place of a system of mere privileges enjoyable only through grace.

We must go on at some length, not attempting, however, any full exposition of the Constitution from an original standpoint, as to questions which were long ago supposed to be set at rest, and must now be so regarded, no matter what other courts have said or may say on the subject. To go over it anew and in detail at this late date would be a work of supererogation, and reflect upon generations of our judicial history and those eminent men who embellished it,—Carpenter, Randall, Howe, Orton, Arnold, Ryan, Knowlton, and others at the bar, two of whom subsequently became chief justices of this court, and Cole, Whiton, and Smith from the bench, who so logically placed the matter on record beyond room for reasonable doubt.

The subject in hand is so important in every way, and it is of such moment to refresh the memory of the older members of bench and bar, and to inculcate upon the minds of those of lesser experience the great truths spoken in this court before the days of those now in service, that we feel justified in restating such truths in a general way, and quoting at some length the inimitable, forensic, and eloquent logic with which they were in those early days spread upon our pages.

Under our system, when a judicial question arises, it is within the competency of the court to deal with it, not stopping to consider, necessarily, who are the parties. Whenever there is a violation of law perpetrated or threatened, it is competent for the courts to apply a remedy. It is not bound to desist—indeed it has no right to desist—because, perchance, of the violator being the governor of the state or his agent, for then the offender is outside the scope of his duty, and, as before indicated, he is a mere individual regardless of his name or title.

In the foregoing, as we have already sufficiently indicated, it is not doubted that the governor, within the scope of his authority, is beyond the reach of the courts, but a violation of private rights, we reiterate, is not within such scope, and when that occurs by him or his agents, the wronged party may appeal to the courts of his country for redress.

As said by this court in *Atty. Gen. ex rel. Bashford v. Barstow*, 4 Wis. 742, so long as the court merely proceeds “in the discharge of its appropriate duty of determining and settling the rights of parties, and not creating these rights, then it must go forward to judgment, however unpleasant and delicate a duty that may be, and regardless of any and all consequences that may result from its constitutional action. . . . Here 46 L.R.A. (N.S.)

we must firmly stand to our posts of public trust, until the Constitution fall about us in ruins.” Those words, evincing a lofty conception of judicial duty and courage to do it, after the lapse of over half a century in the history of this court, might well be repeated with emphasis. The idea so eloquently phrased by Justice Cole in those early days, and on that memorable occasion in the court’s administration, is no less pervading here now than then. Notwithstanding assaults upon it then or since or now, upon the theory of a sort of kingly authority vested in the executive department enabling the one chancing to be there to infract the law, and be so above the agency of the people to remedy and prevent wrongs by applying the law that any attempt to question his acts by such agencies would be usurpatious,—it has been and is now no more in danger than “a star in maw of the clouds.” It is grounded on the sovereignty of the people vitalized by a constitutional appointment of the judicial department to vindicate it.

How can one be familiar with *Atty. Gen. ex rel. Bashford v. Barstow* and doubt, for a moment, that the governor, as a violator of law, stands no different than any individual? Arguments similar to those we have heard to the contrary in this case were made then with a logic, eloquence, and force unexampled before in this court, and never equaled since. There the record stands,—an inexhaustible fountain of wisdom on the subject discussed. All the actors at the bar realized that they were engaged in a contest which was to settle for all time in this state the underlying principles of our governmental system,—settle them untrammelled by any false notion which had obtained elsewhere under the misconception that foreign systems furnished a model for it. They were too near the time and circumstances of origin to need to look for precedents. In fact there were no precedents. They were familiar with the systems of the ancients. They knew the purpose of the builders here was to displace it. In the light of the monumental purpose, and with the experience which the official expounders themselves gained in making our Constitution, there was wrought out and pronounced a result which no one need misunderstand.

How the sentiments leading up to and characterizing the final result in *Atty. Gen. ex rel. Bashford v. Barstow* grow as we contemplate them, and fill the soul with admiration for our form of government, and gratitude to those who placed its dominant principles on such an enduring foundation. Some of those sentiments, in the language of that day, may well be repeated here as best voicing our own conception.

"This government is nothing but a division of the powers of the government, nothing more." "Sovereignty is not in one of the departments, but in all of them." This is not only a popular government, but it is a representative government,—one where the officers are but agents, and not rulers, of the people,—one where no man is so high as to be above the Constitution, and no one so low as to be beneath its protection. That was the first significant official evidence here of full appreciation of how widely our system varies from those of old, by which many courts have set the judicial compass to determine the real nature of constitutional rights. It has been followed, with few lapses since. It was followed in *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711, in rejecting the heresy that found early lodgment in the jurisprudence of this country, that there is no natural right to transmit property by will or inheritance; and again in *Dardis's Will*, 135 Wis. 457, 33 L.R.A.(N.S.) 783, 128 Am. St. Rep. 1033, 115 N. W. 332, 15 Ann. Cas. 740, and again in *Rice's Will*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778, rejecting the notion that competency to make a will rests in privilege instead of in a right, and again in *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041, repudiating the claim that there is no natural right to participate in the usual way in making a choice of agents to vitalize the sovereignty of the people in governmental affairs.

It is somewhat strange that, notwithstanding the real logic of the change effected by the declaration and successful conflict or independence on our shores, courts sometimes seem to have failed in appreciation that it was independence of the system of government characterized by individual possession of mere privileges emanating from a personal sovereign, which was declared for, fought for, and won in the smoke and din of battle and by the sacrifice of blood and treasure,—a substitution for the old system, of one based on inherent individual rights, recognizing nothing in the nature of sovereign authority but that inherent in the people, and delegable by the people to co-ordinate departments in such manner as the people might see fit, coupled with constitutional restrictions and guaranties.

Notwithstanding the light of the old notion of personal sovereignty and the system upon which it rested was extinguished in the struggle characterizing the birth of the new system on our shores, which arose in all its unspeakable beneficence from the ashes of the old, like the beautiful flower 46 L.R.A.(N.S.)

from the ashes of Hyacinthus, and has ever since pervaded the land and is fast extending its blessings to include all mankind, the old, like Banquo's ghost, appears in apparition from time to time, called forth, as it were, from the human tendency—product of heredity—reaching back through the ages, to bow at a personification of personal sovereignty. It would be most lamentable if such false conceptions should find any place in our jurisprudence after the early most emphatic rejection of it, and the frequent affirmances of such rejection.

We do not fail to note, at this point, the personal expression of doubt in *State ex rel. Peck v. Rusk*, 55 Wis. 465, 479, 13 N. W. 452, as to the competency of the court to send its writ to the governor of a state or in any way review his acts. But it was not an authoritative saying. It was a mere passing and wholly personal, and, we are constrained to think, rather inconsiderate, remark. It is well to eliminate it expressly from having a cast of judicial decision.

It must not be understood that there is any want of appreciation here of the fact that much deference is due to the co-ordinate department of the government, vitalized by the governor. It is the pleasure and the duty of the courts to pay that deference, and, perhaps, to resolve reasonable doubts as to where mere deference ends, in favor of the executive department. But the court must not go so far as to cast any doubt upon its own authority to deal with all judicial questions, regardless of whether it may necessarily call in question some act of the governor. It may very properly hesitate, and even decline, to use its authority in any coercive way as to him, where there is any measure of discretion to do so, but not even venture to doubt that it possesses the power to act when action is necessary. No one can tell how soon action may be necessary to stay the hand which might accomplish most serious mischief, as was the case giving rise to *Atty. Gen. ex rel. Bashford v. Barstow*.

Some courts have given the weak excuse for doubting their right to send a writ to a governor directly or indirectly questioning his executive act, that the court might be powerless to enforce obedience,—even suggesting the possibility of executive control of the militia having to be contended with; as if a court with knowledge of its constitutional authority would be justified, under any circumstances, in not using it merely because the one who would be otherwise acted upon, even though he be the chief conservator of the law, might commit treason, as it were, rather than submit to duly

constituted authority. This court has never yet acknowledged the existence of either the want of power to enforce its writs, or want of courage to vindicate it.

Judges of great eminence and text writers the most learned have discoursed along the same line as the foregoing. Justice Field, speaking for the court in *People ex rel. McCauley v. Brooks*, 16 Cal. 39, said this: "There is nothing in this distribution of powers which places either department above the law, or makes either independent of the other. . . . There is no such thing as absolute independence." And further in effect, where power is given a department, it is to be implied that there is independence within the scope thereof. If it oversteps its line, the judiciary will vindicate the violated right.

For a further example of the many illustrations in the books of what has been said, Justice Valentine, speaking for the court in *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162, thus expounded the constitutional system: "There is no express provision in the Constitution nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any of the courts, . . . and if any one of such officers is exempt, . . . it must be because of some hidden or occult implications of the Constitution or the statutes, or from some inherent and insuperable barriers founded in the structure of the government itself. . . . In all other cases it is not the rank or character of the individual officer, but the nature of the thing to be done, which governs. No other officer is above the law. . . . The different departments of the government are not independent of each other. . . . It is said that if the governor opposes the order or judgment of the court, it cannot be enforced. . . . But are the courts to anticipate that the governor may not perform his duty? . . . No one should suppose that he would fail to perform his duty. . . . No department should ever cease to perform its functions for fear that some other department may render its acts nugatory. . . . Each of the different departments . . . is superior to the others in some respects. . . . Each department in its own sphere is supreme. But each outside of its own sphere is weak and must obey."

Courts which hold contrary to the foregoing, as said by some text writers, do so without any sound basis for their conclusion. They do so, as before indicated, largely from a false conception of the system of which they form a part.

We indorse, without qualification, the sentiments of the courts to which we have

alluded. We refuse utterly to follow those jurisdictions which would place the gubernatorial office above the law, speak of it as entirely independent of either of the other co-ordinate departments of the government as regards their respective jurisdictions, or hold that it is not subordinate to and subject to obey when the court within its jurisdiction commands. We must refuse to follow the lead which would either deny possession of the authority delegated to courts by the people, or hesitate to exercise it for fear of being efficiently opposed by a breaking of the law by the officer who stands as the ideal personification of government by law. We hold firmly to all the court said and decided on the subject in *Atty. Gen. ex rel. Bashford v. Barstow*. To deny possession of the power plainly lodged in the court by the Constitution, and which is inherent in the system itself, either from want of appreciation of the principle distinguishing such system from the one it displaced, or supposed want of power, on the ground that the governor, from his position, has greater physical power of resistance to the enforcement of the law than the court could lawfully overcome, would be a failure of judicial duty characterized by want of judicial courage. Those who would lean on the latter reason fail to appreciate that no government can be stronger than the people, and that the people may be depended upon to efficiently strengthen the arm of either one of its co-ordinate departments, as necessary to enforce submission to duly constituted authority. The people may always be depended upon, in the last analysis, to support firm vindication of official trust.

We contemplate with much satisfaction that, in the early history of our court, its personnel possessed the learning, the comprehension of the judicial trust, and the courage, to take the firm position on the subject under discussion recorded in *Atty. Gen. ex rel. Bashford v. Barstow*. Then it was suggested by counsel that the court might render a judgment which it would be unable to enforce, and other counsel replied in sentiments indorsed by the court: "I have not seen fit to point the court to the possible consequences of its judgment, still I say it may or may not be executed. The only judgment to be pronounced is the one which law and justice dictate, not that which the executive arm can most easily execute." Three members of this court, two having been fathers of the Constitution, placed upon the records each his exposition of our form of government. With perfect harmony they proclaimed the subordination under the Constitution of the executive office to the sovereignty of the people, represented by the judiciary, on all

judicial questions. The masterly treatment of the matter, and unanswerable logic with which the conclusion was supported, have rendered it unnecessary to rediscuss the subject, and almost inappropriate to attempt it. Such attempt would not have been made even briefly, had not the proposition under discussion been presented and urged with such confidence as to indicate advisability at least of reaffirming the early decision. If the writer could make plainer what was before so clearly pictured, he would gladly embrace this opportunity to do so, but confesses inability in that regard. There stands the picture of our system painted by master hands more than fifty years ago. With the unqualified repudiation then of the claim that executive action, under all circumstances, is beyond reach of the court, we have marveled somewhat that the idea should at this late day be seriously advanced, supported by the same infirm logic as before, with added sanction of some courts which have fallen into error.

Before it was contended upon the one side, in harmony with the ancient system, that the governor occupies a sort of sovereign status removed beyond the reach, directly or indirectly, of the court, and answerable only to the people; that "in city or in the country, in the battle or at the banquet, in anger or in love, he is the governor still."

"The attribute to awe and majesty

Wherein doth sit the dread and fear of kings."

On the other hand, it was contended that sovereignty was in the people and only there, the governor being a mere agent to do the people's will, answerable to them within his jurisdiction, but amenable to the court as the superior agency of the people on all judicial questions, the same as any other individual; that any infraction of the law by him is neither justifiable nor defensible by his mere status as governor, and that what is the law, what a violation of it, and the consequences thereof, are judicial questions.

With inimitable power of logic, the proper place of the judiciary in our system and importance of maintaining it were pressed upon the attention of the court to nerve it to the uttermost in solving the controversy, —these inspiring words being indulged in from the bar: "When discontent, violence, and anarchy shall succeed to law and order, when the people and public officers shall depart from the Constitution and desert the ship of state, I have a hope that the last glimpse that will be caught of organized government will be the judiciary, that courts may be seen as long as any vestige

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of a state shall remain, still ready to direct, still speaking the law with an even mind, dispensing justice with an even hand, sitting serene and unmoved above the influence of fear and of faction, still abiding by that motto so peculiarly their own,—*Fiat justitia, ruat cælum.*"

The result was, as before indicated, unqualified support of the contention for the supremacy of the courts on all questions appertaining to the violation of law and the protection of right, the court saying in terms or effect, "To talk of sovereign departments created by our Constitution is to simply talk, and not to think, and much less to think rationally. We have no sovereign department. We have no triple sovereignty." "Our government is founded on principles not known to the law of any other country. The sovereignty of the commonwealth remains in the people." Each co-ordinate state agent stands for the whole people within its proper sphere. When the court speaks within its sphere, it is not the justices who speak, but the people through their chosen agent, the court. To it is delegated all judicial authority, whether it concerns the executive or any other individual. To that authority all must bow. In that there is subordination, not to the court, not to the justices of the court, but to the sovereignty of the people. Such is the Constitution, the collective voice of the people from whence the sovereign command emanates through each of its agencies, giving to each its measure of representative authority,—to the court all that appertains to the redress of violated rights.

Can there be any doubt in view of the foregoing, of the power and the duty of the court to deal with every question in this case of violated right? Is not the idea that such duty stops at the threshold of the executive office, or anywhere short of its full performance, the veriest heresy?

Many of the authorities cited to our attention in support of the proposition under discussion, rightly understood, are in harmony with what has been said, and, as to those which are contrary thereto, they are not worthy of being followed. As has been clearly indicated in this opinion, *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, upon which some reliance has been placed in support of the proposition urged by counsel for respondents, is in the same class with *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; *Jonesboro F. B. & B. Gap. Turnp. Co. v. Brown*, 8 Baxt. 490, 35 Am. Rep. 713; *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346, and many other cases cited, and still others which might have been.

Therein, with varying phrasings, is found the expression upon which counsel have builded their hopes: "The governor is not answerable to the court for how he has performed or failed to perform his legal or constitutional duties. He cannot be judicially coerced into performing, or controlled as to the manner he shall perform, or prohibited from performing, his judicial duties." True, but is it his duty, acting as a quasi judicial tribunal, to go outside of his jurisdiction and violate the constitutional right of due process of law? The distinguished courts which have so much revealed, so to speak, in language similar to that quoted, have not intended, in general, to be taken as meaning that the executive of a state may not be reached by the department charged with remedying violated rights, in case of his doing something which he has no right to do, or doing what he has a right to do in an illegal manner.

We do not need to go into the subject at length, as to the extent to which the executive may directly or indirectly be reached within the scope of his duties. That he can be as to mere ministerial matters in case of clearly violating a duty, but not in the field of discretion, is strongly supported. Here there was neither ministerial nor discretionary duty to do the act sought to be enjoined; that is, the forcible instalment of Mr. Anderson in the office of commissioner of insurance. Besides the question is raised as to whether there was not actual usurpation in the proceeding itself for the removal of appellant, which will be discussed further on. So the case as to the primary right involved really only deals with matters of jurisdiction. In general, where it is suggested that neither the governor nor his agents can be dealt with whether within or without the scope of executive authority, that the alleged offender being governor or the agent of the governor the gubernatorial office is an efficient shield,—the real point involved did not warrant the argument made in support of it. It was made without thought that jurisdictional defects render an act void, regardless of the tribunal to which they are referable. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60 is often cited, often misunderstood, and often not followed. The real logic of it is that the courts may reach the executive indirectly as to ministerial or jurisdictional matters, and in case of the head, the impediment is referable to matter of policy rather than competency. In *High, Injunctions*, at § 1326, after reviewing at length the authorities, the author remarks: "If the acts which it is sought to restrain are of a strictly ministerial, as distinguished from an executive or political, nature, the fact that

they have been committed to executive officers such as the governor of a state, etc., will not prevent relief by injunction in a proper case." Matters jurisdictional, manifestly, are no further beyond reach than matters ministerial, but, as we have seen, the law for this state is firmly entrenched in *Atty. Gen. ex rel. Bashford v. Barstow*, supporting competency of the court to deal with the governor directly or indirectly for any violation of law.

III.

Counsel for respondents do not seem to insist very confidently or particularly that appellant was not a *de facto* officer. But since, under some circumstances, that question might be very vital to this litigation, it seems best to treat it briefly.

Much might be said as to what is the precise nature of that special status denominated *de facto*. A person may be a *de facto* officer, and have no real title at all to the place he assumes to have the right to. If one is in possession of an office, performing its duties, and entered by right, or such claim of right as not to be classable as a usurper, or has been in undisturbed possession so long as to be equivalent to an entry under claim of right, and still claims in good faith to be entitled to the office, and all surroundings afford an appearance of *de jure* official status, he is, as a general rule, *de facto* what he claims to be. What gives him that status is color of authority,—color of title is not essential, strictly speaking. The latter term is often used, but its infirmity was exposed in the leading case of *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

This broad definition of what constitutes an officer *de facto*, formulated by Lord Holt in *Parker v. Kett*, 1 Ld. Raym. 658, 12 Mod. 467, and given special significance by Lord Ellenborough and the full King's bench in 1865, *Rex v. Bedford Level Corp.* 6 East, 356, 2 Smith, 535, was demonstrated in *State v. Carroll*, to cover the subject under discussion, as it has ever since stood in England, and, generally in this country: "One who has the reputation of being the officer he assumes to be, although he is not such in point of law." The supreme judicial court of Massachusetts added the weight of its sanction thereof in *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335. The text writers give like sanction, expressing the American view to be, that it is color of authority, not color of title, which distinguishes an officer *de facto* from a usurper. *Throop, Pub. Off.* § 623; *Mecham, Pub. Off.* § 317.

The question of whether a person in office has a *de facto* right thereto, it would

seem from the foregoing, can, in all ordinary cases, only safely be solved by principle. It is not best to rely on case law, and tie to some particular adjudication involving facts somewhat similar to those to be presently dealt with. The principle governing the matter is definitely settled in the unwritten law, is plain, simple and easily understood. If one finds another in the apparent enjoyment of an office, having entered by right, or a good faith claim of right, or been in possession so long that there is a presumption in his favor in that regard, that one need not, in general, investigate the title of such other to the office before venturing to transact business with him. He may act on the appearances of official status. For all practical purposes such other is an officer *de jure*. There is no other safe rule to go by. Variations here and there, seemingly without appreciation of the prevailing principle, or moved by the necessity of a particular situation to ingraft an exception thereon, have made some confusion in the authorities.

Prior to *State ex rel. Jones v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296, no attempt had been made here to state any general or even particular limitation of the customary rule; the court being content to deal with each particular situation as it arose. It is significant that, though in many instances prior thereto, commencing with *Tolle v. Stone*, 1 Pinney (Wis.) 230, whether the particular status involved a *de facto* officer was important, the answer was most always in the affirmative. They were not referred to in *State ex rel. Jones v. Oates*, but a rule was made for the peculiar situation in hand in the nature of an exception to the common rule.

One would assume from examination of the many cases preceding *State ex rel. Jones v. Oates*, and the many others subsequent thereto, that there could hardly be conceived a situation of an office *de jure*, and an entry and retention in good faith with all the environments of an officer of that character, without the person in possession being at least an officer *de facto* until such time as an adjudication of his title should occur, so the precise situation giving rise to the particular case is important.

These are the facts of the *Oates Case*: The incumbent of the office and his adversary were rival candidates for the place for a new term. The latter, in due course, obtained the regular certificate of election, his majority being 1 out of a poll of 4,645 votes. The former refused, upon due demand, to surrender possession, claiming, notwithstanding the official canvass, to have received a majority of the legal votes cast. 46 L.R.A.(N.S.)

Mandamus proceedings were instituted to settle the controversy. Thus, the question arose whether an officer holding over after the expiration of the term for which he was elected, and in defiance of the result of an official canvass certifying another to have been duly elected as his successor to the particular place, is an officer *de facto*, and as such entitled to retain possession until the title shall have been judicially settled in proceedings to that end. In short, the question was, Is a person whose term has expired, who really has no right except pending the appearance of a successor having a *prima facie* right to take his place,—one who holds on claiming to be the one elected notwithstanding the legal canvass and declaration of the demandant to have been duly elected to the particular office and for the particular term,—a *de facto* officer?

For the particular situation it was apparent to the court that an affirmative answer might lead to very serious consequences,—that it might make a very harmful rule. The court felt warranted in determining the matter in the negative and without precedent, proceeding to that end to meet the particular emergency by this process of reasoning: "A *de facto* officer is one who is in possession of an office and discharging its duties under color of authority. . . . By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer. . . . Tested by this rule it is apparent that the defendant is in no proper sense a *de facto* officer as against the relator. There has been no canvass or determination by anyone in his favor, nor has he any certificate, commission, or authority from any person, officer, or board purporting to authorize him to discharge the duties of the office."

Thus, it will be seen the opinion in *State ex rel. Jones v. Oates* was confined to a very narrow compass, namely,—Is a person in possession of an office, having no certificate of election or of appointment covering the period of his possession, in opposition to one who has been duly certified to have been elected to take his place in the particular office for the particular term, and the one in possession having no right whatever to the place referable to any evidence he possesses, except to hold the accessories of the place in trust to deliver the same to his successor upon demand, a *de facto* officer?

The case was quite different, it will be observed, from one involving a claimed forfeiture of a term of office by removal for cause, the person in possession of the place,

and alleged to have been removed, having his commission entitling him to remain, and insisting in good faith that the proceedings to annul such commission are invalid.

The general rule, that possession with color of authority and performance of the duty of the office creates the *de facto* status, was not denied in the Oates Case, but rather affirmed, though there was a suggestion that color of authority means "authority derived from an election or appointment, however irregular or informal." It may be that the court, *arguendo*, went rather farther than was necessary in an effort to state a sound basis for the decision, instead of resting it upon the exigencies of the particular situation and upon a permissible exception to the general rule. As said before, courts in general distinguished color of title from color of authority, holding that the former may exist without the other, and that no election or appointment is essential to a *de facto* status,—only those general appearances suggesting and giving confidence to people having occasion to perform official business with the office, that the one in possession, performing the duties thereof and claiming the right in good faith to do so, is the officer in fact which he appears to be. To harmonize with the current of authority, the decision would need to be restrained to the idea that, in the particular circumstances, there can be no color of authority where there is no color of right. That makes a good exception to an old rule, to meet the particular species of mischief the court dealt with in the Oates Case. The effect of it, as there suggested, must be that one may, in some circumstances, have a *de facto* status as to the public,—for example, when he is within the stated exception,—though not such status as regards his personal right.

The first instance of rival claimants dealt with here after State ex rel. Jones v. Oates, and where that was cited, was in Deuster v. Zillmer, 119 Wis. 402, 97 N. W. 31. The officer there held over in defiance of the person who had been elected his successor. The former was held to be an officer *de facto*, though his term had expired, because the latter had not been "declared," as in the Oates Case, "duly elected to that identical office as his successor." It was distinguished from the former case on that ground. The Oates Case was again referred to in State ex rel. Rinder v. Goff, 129 Wis. 668, 9 L.R.A.(N.S.) 916, 109 N. W. 628, but the person having the prima facie right was in possession of the office. It was again mentioned in State ex rel. Manitowoc v. Green, 131 Wis. 324, 111 N. W. 46 L.R.A.(N.S.)

519. There was a successor in that instance, and a holding over without right as against the prima facie title, though not under the precise circumstances of the Oates Case. The person so holding over was held to be the officer *de facto*. Thus, it will be seen, the tendency has been to restrain the Oates Case to its particular facts, and the exception those facts gave rise to.

Applying the foregoing here, it is considered that appellant was the commissioner of insurance, at least, *de facto*, when he sought protection against the efforts to forcibly disturb his possession of the office rooms and records. The case is not within the exception created by State ex rel. Jones v. Oates, because the term for which appellant was appointed had not expired by operation of law, and he had in his possession the commission covering some three years' time yet, which was still in force unless the attempted removal was valid. Anderson had not been certified to have been appointed to the particular office as successor to appellant for a new term, but to take up and continue the work of the term covered by appellant's appointment. The latter was still in office, with all the appearances of still being entitled to the place, and insisting in good faith, upon having such right, and there was a serious question, from a private and a public standpoint, as to whether he was not so entitled,—so serious that it has taken a long time and much labor of two courts, assisted by the industry of eminent counsel for the respective parties, to solve it.

IV.

If the foregoing conclusion be not correct, in my opinion, that did not warrant leaving the rival claimants,—one in possession claiming in good faith to have a right to remain, and the other out of possession claiming the right to enter,—to contend and settle the matter by physical force. The course in State ex rel. Jones v. Oates was by orderly judicial proceedings, not by violence. If the rule there be applicable here, then Anderson had a clear legal right to possession, and a clear legal judicial remedy by mandamus to accomplish that which was sought by an assault upon the office quarters and threatened assault upon appellant himself, if necessary to cause his submission. Would it not be a most serious reproach to our system to hold that, under such circumstances, the courts must, or will, stand idly by and see a respectable, distinguished citizen, in high station, in good faith, possession of one of the most important offices in the state, and convinced of his duty to retain the place, subject to judicial remedies, treated

as an outlaw, while the one seeking possession, and the one seeking to assist the claimant to gain possession, have but to ask in order to have the right vindicated by a judicial remedy, as in the Oates Case, and violently ejected, regardless of the good faith of the aggressors? In such a situation is it not in the interests of all parties concerned, especially under the particular circumstances of this case, in the interests of public order and public welfare and public dignity, that the court should intervene with its "even mind and hand" efficiently commanding peace? No such proceedings as were brought to a close by the temporary injunction in this case should be sanctioned by the courts for a moment, in my opinion, unless in some special circumstances of a person holding possession in a most unreasonable and contemptuous manner, akin to that of an outlaw, who deserves no consideration whatever in a court of equity. If there is a reasonable question whether the retention be right, the rule that there is no wrong without a remedy should apply, and the rule, also, that in a case of legal and equitable remedy as well, the latter should be permitted if the former is not as full and adequate. That is the universal doctrine. It has been vindicated in this court to prevent breaches of the peace and detriment to public interests, where small amounts of money were involved. *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870. The logic of that case demanded injunctive protection in this one, unless appellant is to be regarded as a person who is entirely outside the scope of the law's protection. That the doctrine of protection by law, under all circumstances involving any merit, is the rule of this court, is well evinced by the quotation in *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106, 94 N. W. 78, from *Ward v. Sweeney*. The great power intrusted to the court to command and enforce peace should be used in such circumstances regardless of who is the actor.

Thus, I cannot escape the conclusion that, from any fair viewpoint, appellant had a cause of action in equity when he initiated these proceedings. If he was a *de facto* officer, that must be true. If there was a fair question as to whether he had that status, and he was acting in good faith, of which there can be no manner of doubt, then, in my opinion, it is likewise true. I permissibly step aside momentarily, to express this as a personal opinion. I wish it to so be recorded. I am conscious of some support in such view, though others may not wish to join of record, because what has preceded and what will follow, or either, is sufficient for the case. As to my brethren

who did not join with me on the record, or at all, in this, I have endeavored to speak so as not to cause them any embarrassment.

V.

At this point, it seems best, since a majority concur, to consider the broad question of how far a court of equity may or should go in a case of this sort. That involves the mixed question of how far the court may go as matter of jurisdiction in the technical sense, and how far in the more limited sense of judicial policy; and perhaps the still further element of how far as matter of broader judicial policy, not trenching upon jurisdictional grounds in any sense. True, in view of the decision reached on other questions, this subject might be passed without expression of opinion, but as circumstances might have existed rendering it vital, those who concur on the particular points have concluded that the subject might well be dealt with, and with due deference to those who do not agree with final result, and those who do, yet might prefer not to join in an opinion either way as to the particular matter. It is thought that what is here said is appropriate to the case, will be helpful hereafter, and will not embarrass any member of the court in any event. If it were not thought such could be accomplished, out of deference to anyone who does not agree as to the particular question, or wish to express an opinion thereon in this case, though concurring in the general result reached, the writer and all of the majority would pass the subject without treatment.

The question is this: Should the court rest in a case of this sort, having reached a point calling for judgment vindicating the primary right,—the right to immunity from being forcibly dispossessed by illegal methods,—leaving the more important question, the right to the office, undetermined?

That is an important question. It has been taken largely for granted that either the court is without jurisdiction to, or, in any event, should not, try the title *de jure* in an equity action to quiet the right of possession against forcible attempts to disturb it. Must parties in such a case, though in the court having jurisdiction to settle the whole controversy, depart with but partial relief, and none as to the ultimate matter, and come back, not really in another form of action, because we really have but one, but asking another form of relief,—a part of the same form as before, and, from a practical standpoint, including it? Under our liberal Code of Procedure, rightly understood and administered, is it true that such devotion to mere form is necessary, commendable, or really right? If

there are expressions in opinions which would sustain such course, or even precedents, and there be no jurisdictional impediment in the way, has not the time come, and is this not a good opportunity, to eliminate them from our jurisprudence, and go back to the conception embodied in the Code?

The learned court below supposed its power was included in very narrow limits by the mere form of relief appropriate to satisfy the primary subject of the litigation, the mere right of immunity from forcible ejection, and, even, as we have seen, supposed there was incompetency to determine the matters of fact essential to that right. So it was decided that there was no jurisdiction to look into the merits at all, respecting the right *de jure* between appellant and his adversary. It was supposed at the circuit, and contended here by counsel for respondents, that such was the infirmity of judicial authority in this equity action. Counsel for appellant passed up that phase of the case as to the *de jure* right, on the oral argument, and as was thought at first, in the printed argument, in such a way as seemingly to concede that the court below was right on that question, and that this court would not go into the subject further than to see whether appellant had such reasonable ground for his claim as to entitle him to protection in his possession pending a trial of the title in some other action.

The circuit court relied evidently on *Ward v. Sweeney*, and similar cases, without taking note of the fact that in all such the primary right involved in the litigation was the actual title to the office. Counsel for respondents have been unable to discover any authority on that, as indicated by their few cited examples, other than such as to show that an action in equity will not lie to try title. That must be admitted, but it does not meet the question. This action is not to try the title, but to protect the possession pending trial as to the *de jure* right. As we have before indicated, such right is legal in character, and whenever a judicial question is raised in respect thereto, primarily it is a legal question, and a subject for the appropriate legal remedy. But while a legal right, in case of there being an adequate legal remedy to vindicate it, can only be the subject of a legal action and legal relief, where the right is equitable, or the title is legal and of necessity no legal remedy will reach the mischief of its violation, or threatened violation, or where a legal right is incidental to an equitable cause of action, then the boundless resources of equity will meet the case, and such is the perfection of our system that there is

no wrong within the competency of the individual to commit, which is above the grade of those mere moral infractions which are not recognized as judicially remediable, that equity cannot prevent or redress, if there is no legal remedy to adequately fit the case. That is elementary, and has been declared here over and over again.

Thus, it is plain that the right of possession was the primary right here, not the title to the office. So the ground of the decision below, and of respondents' position here, fails. Another elementary principle comes in at this point. Where a court of equity has acquired jurisdiction of the parties and the subject-matter for one purpose, it may properly adjudicate all cognate questions and settle the whole controversy, though the connecting matters would not, of themselves, form a primary subject for equitable interference. The mere statement of this would seem to be sufficient. There is no principle of equity jurisprudence with which the profession is more familiar. We therefore pass it without citation to support it.

In view of the foregoing principles, it seems very clear, without reference to authority, that there is no jurisdictional difficulty in the way of the trial court finally disposing of the whole controversy between the parties. The right to protection against violent disturbance, pending settlement of the title, was the primary right. The right to the office was incidental thereto, and had to be judicially settled sometime. The questions involved were practically all questions of law. No possible prejudice could arise because of absence of legal methods of reaching the final result. Why then turn the parties out of court to come back upon the same facts and in practically the same action under a different name, and seek primarily a different form of relief? It seems that such a course would be contrary to the letter and spirit of the Code, and contrary to the light in which it has been viewed here in recent years, though it may have been overlooked somewhat at times. When the framers of the Code abolished all old forms of action, and with them the system of distinct courts, and substituted in place thereof unity in form,—one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, denominated a civil action,—no matter of jurisdiction, in the technical sense, was left to vex the courts, and embarrass one in quest of justice as regards whether to ask for relief in any particular form of action, and no matter of right, in the technical sense, subject to violation, except as regards whether the kind of

relief necessary to fit the case required, by common-law rules, jury interference. That right, at common law, did not exist where the controversy, though a proper subject-matter for legal action, was connected with and germane to the primary subject of the appeal for equitable relief. The court, having jurisdiction of the parties and of the primary subject-matter, was competent to settle the whole controversy,—the main issue and all the incidental controversies connected therewith,—in a single decree. 1 Story, Eq. Jur. § 64; Prescott v. Everts, 4 Wis. 314; Akerly v. Vilas, 15 Wis. 401.

That stated principle has been considered so grounded in our jurisprudence that it has been customary, from an early date, to merely state and apply it as occasion arose, without hesitating to justify the application by reference to authorities. The constitutional guaranty of the right of trial by jury was "that such right shall remain inviolate." So it has been held that it extends no further, and restricts the freedom of equity authority no more, than was the case at common law. Thereby, and by removal, through the Code, of jurisdictional difficulties as regards the particular form of action and particular court to vindicate a particular right, all substantial interferences with settling the rights of parties, regardless of the nature of the relief required, once they were in court in good faith, and it had acquired grasp upon the general controversy required to be settled, to do full justice between the parties vanished. Gates v. Paul, 117 Wis. 170, 94 N. W. 55; Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949; Knauf & T. Co. v. Elkhart Lake Sand & Gravel Co. 153 Wis. 306, 141 N. W. 701.

We see no reason why the principle stated may not be applied to a case of this sort. The fact that there has been no such application heretofore here makes no difference. Principles should rule in the judicial field, not mere precedents. In no other way can the law preserve anything like the cast of a science. In High on Injunctions, after discussing the rule that an equity action is not maintainable for the purpose of trying the title to an office, it is said, as a result of reviewing the authorities, the rule applies "only to cases where the title to the office is the sole issue involved, and where the bill is filed for the primary purpose of determining that issue. And where the question as to the title to public office arises merely incidentally to the determination of a suit of which a court of equity otherwise has jurisdiction, the rule has no application." Section 1315a, 4th ed. The author ventures to state that as a logical deduction from the ruling principles of equity jurisprudence. While it is rather against the generally accepted

theory, we see no escape from the conclusion.

In the circumstances of this case, it seems that establishment of the real status of the office is peculiarly within the field of equity jurisprudence. Appellant is in possession. To prove his right, the facts *aliunde* the record had to be examined. No possible prejudice can occur to respondents or to the public by the title being finally quieted in this action. On the contrary, every legitimate private, as well as every public, interest would be best promoted by the entire controversy being brought to a termination at the earliest practicable moment, and without the useless expense and expenditure of money and time which would be involved in another action. Why then should the idea that equity cannot take jurisdiction to try the title interfere with undoubted competency to do so, where it is germane to a proper ground of equity action? The extreme of technicality which would adhere to an idea beyond its necessary limitations, to the manifest useless delay in the administration of justice, is foreign to the modern conception of the requirements of the Code, and inconsistent with the trend towards a restoration of those beneficent features intended by its framers to be incorporated therein.

It seems the court should decide in this case, and as an established principle of our practice, that where the controversy as to the title to an office is incidental and germane to a proper subject of primary right in a suit for equity relief, and the court having the case in charge has all the parties interested before it, it has competency to, and will, settle the incidental, as well as the primary, controversy, where it clearly appears that justice will be best subserved thereby.

VI.

In view of the probability of the last question discussed taking the course indicated, the reargument was had on the question of whether the executive, in administering the power of removal under § 970 of the statutes, is required to proceed by due process of law; whether that, in the circumstances of this case, entitled appellant to reasonable notice of hearing of the particulars of the charge made against him, reasonable opportunity to be heard in respect thereto in person and by counsel and by his witnesses, to know the adverse evidence to be considered, exercise the right of cross-examination, and present all material evidence in his behalf; and, if so, whether such right was denied to appellant, and, if so, whether the result reached was valid; and, further, whether it is a jurisdictional re-

quirement to competency to render a judgment of removal in such a case, that the evidence in some reasonable aspect warrants finding existence of the cause for removal charged. We will now proceed to discuss the case in respect to those matters.

If results already reached were not sufficient for the case, there is a still broader one than any heretofore discussed, except, possibly, that of the constitutional power of this court in its relations to the executive department of the state. As the case developed in our consultations, it assumed such magnitude and character that the particular right involved sank somewhat into insignificance. The constitutional question before referred to, and the general features of the case, challenged our attention to the right of the individual as guaranteed by the fundamental law. So, on the one hand, there was questioned the power of the judicial department to deal with violations of private rights when it came to questioning the validity of executive action; and on the other, there was raised, by the very nature of the transactions in evidence, the question of whether the constitutional guaranties of private rights had not been violated. If we passed the danger respecting the proper place of the judicial department in our system being invaded, there was left the danger of private rights being held successfully violable, and a precedent being established greatly weakening the dignity of such rights, at the very foundation thereof. Neither of the parties in this litigation would wish to prevail as to the particular right at so great peril to the public welfare as that of having that question decided wrong or even passed unnoticed. The distinction and high character and patriotic devotion to the people's own high ideals of government by the people through their chosen agents, which they must be assumed to conceive to be founded in our fundamentals, is proof enough for that. So the parties and the particular alleged violated right seemed to form but a mere background to the questions the situation gives rise to, and to almost be obscured by the paramount importance of the inquiries to be solved in reaching a final result being solved right. In appreciation of that, the court rested from the labor of considering the case as at first submitted by counsel for the respective parties, and ordered a resubmission upon four propositions which appear at length in the statement of facts, and may be epitomized to this:

1. The validity of an order of removal under section 970 of the statutes dependable upon the constitutional guaranty of due process of law being observed, and, if so, are the common-law requirements a part of the statute

as to hearing upon reasonable notice to the party interested of time, place, and questions involved, and proceeding with substantially the essentials of a fair judicial investigation and determination, to and inclusive of a result supported, in some reasonable view, by evidence,—especially in case of an office for a fixed term?

If the stated proposition be resolved in the negative, then we manifestly have a condition in this state not dreamed of when our system of statutes was originated. Then there were but few officers within the particular removal provision. Now there are hundreds. A system of government, largely by commissions with membership both as to the major and subordinate factors, composed of men of high character and special attainments, has been developed. A maximum of special knowledge on the part of the incumbents is required, with a minimum of political interference, if the complicated system is to have any fair opportunity to attain somewhere near to the ideal of efficiency its originators designed to accomplish, and all hoped for. In view of that, as well as of the overshadowing importance of preserving the integrity of constitutional guaranties of private rights, the question of whether the executive possesses the power of summary removal as to the vast number of important public offices, unrestrained by those principles of natural justice which characterize the common law,—a power which might be used to build up a personal following from the utter dependence of the individuals upon the discretion of the head,—is of immeasurable importance.

The proposition, as stated, might be further narrowed without sacrificing any of its essentials, and might be greatly expanded so as to develop many important details. To take the latter course, and discuss each of such details at length, would extend this opinion to a very great length without, perhaps, any corresponding added dignity or element of demonstrated truth as to the result. However, the discussion will unavoidably extend to considerable detail, though attempting to tie as closely as practicable to the real gist of the matter as indicated in the proposition stated.

Notwithstanding expressions here and there which would give rise to doubt if one were not grounded in the real philosophy of the law, courts in general hold, and this court has held, as we shall see in the course of this opinion, that neither any personal nor property right, in the broad sense of those terms, not even a status, or anything which can be the subject of rightful, private possession to enjoy, valuable in a pecuniary sense, or in promoting any fundamental

right, except in case of a mere granted privilege, subject to be recalled by the terms of its acquirement, can be taken from its possessor against his will, without the due process of law of the Constitution,—a proceeding, judicial in character, characterized by the common-law safeguards against injustice,—unless some other procedure is provided by the written law. Why does that not apply to the right to hold and enjoy an office, with its honor and emoluments, to which one has been elected or appointed?

Counsel for respondents answer the foregoing in the negative, in part upon the theory that an office is not property, and therefore that the due process of law of the Constitution does not apply, and that such contention has support in *State ex rel. Starkweather v. Superior*, 90 Wis. 612, 64 N. W. 304, where, it is said, *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112, much relied on here by counsel for appellant, was not followed.

Much confusion, it seems, has arisen from a confusion of terms in the cases dealing with the subject under discussion. True, in the *Starkweather Case*, to show that one of a statutory removal tribunal is not disqualified because he is not so circumstanced as to be competent to exercise that judicial power conferrable only on courts after the manner of the common law, it was said that the power to remove public officers is not judicial, but administrative, to be exercised in a judicial manner, and that the right to an office is not property or a vested right,—evidently meaning, not property in the sense that it is not of such a nature that it cannot be taken away arbitrarily and except upon rendering just compensation, but may be taken upon any condensation of its bestowal. The opinion of the court, when carefully read, seems to express that idea very clearly. That is in perfect harmony with *Dullam v. Willson*, as will be seen, by a careful study of that case. There the power of removal for a cause specified in the written law, and established by investigation, and found by application of judgment to proof, was said to be judicial, and that such essentials, by necessary implication, and as plainly as if written into the law in unmistakable words, require the power to be exercised with all the common-law and ordinary safeguards, founded in natural justice, for the protection of private rights so required by the constitutional guaranty of due process of law,—hearing upon reasonable notice of time, place, and charges, and after the manner of fair judicial investigation. What was called judicial power in the one case was called administrative

power exercised judicially, in the other,—the power generally denominated quasi judicial; and what was called property in one, because a valuable right of which one could not be deprived except in some manner constitutionally provided by law, was said not to be property in the other. It was thus said evidently to distinguish the right to an office from a thing which is subject to absolute ownership, and not for the purpose of expressing the idea that such right is not of any pecuniary value. On the real essentials, as regards this case, the *Starkweather Case* and *Dullam v. Willson* are in harmony. More will be said later in respect to the character of the power of removal, and the nature of the right to an office as regards whether classable as property or not, though, as we shall see, that is not very important in this case.

The broad principles of natural justice, which, as indicated, require hearing before condemnation, are older than this court or the courts of this country. They obtained here before the Revolution through grace of the sovereign, embodied in *Magna Charta*. "No freeman shall be taken or imprisoned, or disseised or outlawed or banished, or in any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." It was incorporated into our fundamentals by the general declaration upon which the Constitution was grounded, and pervades in its spirit the whole instrument. It is inherent in the very system, as said by an eminent text writer. *Story, Const.* 5th ed. § 1938. No special guaranty was necessary, as in the 5th and 14th Amendments to the national Constitution, as regards the inviolability of liberty or property except by due process of law, and under the protection of the principle of equality before the law.

No court has dignified the ideas above expressed more constantly or conspicuously than our own, as we shall see in the course of this opinion. When we carefully analyze our adjudications, avoiding mere reference to any expressions here or there or a particular case, to fit a particular matter in hand, harmony will be found throughout, as what follows will indicate.

What is due process of law? There is nothing very technical about it when we view the subject broadly. Due process of law means, in brief, the law of the land,—including the unwritten law. It is simply that which must be followed in depriving anyone of anything which is his to enjoy until he shall have been devastated thereof by and according to the law of his country. Whether the proceedings relate to liberty or property in the technical sense, and be

of a strictly judicial nature, or to mere privilege, immunity, status, or anything else of value, which commonly are of a quasi judicial nature, incidental to or as a part of administrative authority, and reviewable by courts as to jurisdictional matters, or, of a purely ministerial nature where the thing is a mere creature of the law granted upon condition of being so dealt with,—due process of law pervades and rules them all.

The mistake has influenced some courts, that due process of law calls for the interference of a court—judicial proceedings, in the technical sense,—and therefore that it only appertains to property in the sense of things of absolute ownership, things which may be bought and sold and passed by will or inheritance. By or according to the law of the land covers the whole field,—everything appertaining to right is to be dealt with according to law, administrative power, such with the concomitant of quasi judicial authority, legislative methods, judicial power in the technical sense,—each in its proper sphere,—is due process of law. In *Kennard v. Louisiana*, 92 U. S. 480, 481, 23 L. ed. 478, 479, in dealing with a fixed term of office and power of removal for cause, on appeal from the state court presenting questions similar to those discussed here, the test applied was whether a hearing had been afforded to the officer according to the essentials of the common law, except as the same might have been changed by statute, it being taken for granted that such was necessary in the absence of some clear, constitutional provision in the written law enacted to take its place. Due process of law is, as the court said approvingly "due course of legal proceedings according to the rules and forms which have been established for the protection of private rights." It was not doubted there that the right to an office not terminable at the pleasure of some legislative agency is within the protection of the fundamental law and the methods established in the common law or expressly by statute, including the right of a fair hearing according to the principles of natural justice. The general effect of the decision, in harmony with the authorities in general, is that due process of law contemplates legal proceedings of the sort provided by the unwritten law, in case of there being no abrogation thereof by written law, but not necessarily confined to proceedings in courts.

Further illustrating the subject, the supreme court of Michigan in *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 359, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611, said, in effect: If one accepts office from which, by the law of the land, he is subject to be

removed in any particular way, then deprivation that way is due process of law. If he takes an office which is in the power of the legislature to abolish, and he is thereby deprived of it, his removal is by due process of law.

The suggestion that the special guaranty as to liberty and property does not extend to the right to an office because it is not, strictly speaking, the one or the other, is far too narrow a view of the constitutional idea, as what has been said, sufficiently shows. The special guaranty, as phrased, was adopted, doubtless, as distinguished commentators have said, to cover in a particular way all that is included in the general declaration forming the substructure of all American Constitutions. Under the general and the special guaranties as well, no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to those principles of natural justice which afford due process of law and the equal protection of the laws,—a fair hearing and judgment upon evidence, unless the written law constitutionally otherwise provides. For emphasis, we reiterate this idea. The interference, as before indicated, may be by that quasi judicial authority which the legislature may delegate to an individual or a board, but whether the power be exercised by a court or a quasi judicial tribunal, unless otherwise clearly provided, the essential features are substantially the same.

That the protection of due process of law extends to rights, in the broadest sense of the term, has always been fully recognized here, and most significantly in *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500. The court there said: "One of the fundamental principles of our system of government is that no one shall be condemned, as to his person or property, without due process of law. That is well within the letter, and manifestly within the spirit, of the 14th Amendment to the national Constitution, within our constitutional guaranty as to a firm adherence to the fundamental principles of justice (§ 22, art. 1, Wis. Const.) and that comprehensive, basic guaranty making the Constitution as a whole a recognition and pledge for the preservation of all [inherent rights, and especially] the rights to life, liberty, and the pursuit of happiness. . . . Due process of law does not mean merely according to the will of the legislature, or the will of some judicial or quasi judicial body upon whom it may confer authority. It means according to the law of the land, including the Constitution with its guaranties and the legislative enactments and rules duly made by its au-

thority, so far as they are consistent with constitutional limitations. It excludes all mere arbitrary dealings with persons or property. It excludes all interference not according to the established principles of justice, one of the most worthy of them being the right and opportunity for a hearing, to meet opposing evidence and oppose with evidence, according to the established principles of fair investigation to determine the justice of the case, before judgment affecting personal or property rights shall be pronounced."

The foregoing only puts in another form the idea as phrased by the most eminent of our elementary expounders of the Constitution as to the scope of the constitutional guaranties. At §§ 1928 and 1950, Story on the Constitution, 5th ed. it is said: Due process of law "covers every right to which a member of the body politic is entitled under the law. The limbs are equally protected with the life, the right to the pursuit of happiness in any legitimate calling or occupation is as much guaranteed as the right to go at large and move about from place to place. . . . The word 'liberty' . . . implies the opposite of all those things which, besides the deprivation of life and property, were forbidden by the Great Charter. . . . None . . . [of our liberties] are to be taken away except in accordance with established principles; none can be forfeited except upon the finding of legal cause after due hearing."

It would seem that what was said by the court in the Chittenden Case should be considered a sufficient answer to any contention which is or could be now made, that the right to a public office, whether considered as property in the technical sense, or merely in the broader sense of a thing of value to the possessor, or just a right which the possessor is at liberty to possess and which is promotive of his legitimate desires and his happiness,—a right not within the field of property at all,—is under the protecting guaranty of the Constitution.

From the foregoing it will be seen that we must distinguish between an office held subject to summary right of removal for cause satisfactory to the removal officer or tribunal, and an office having the incidents of a fixed term, but subject to be terminated for due cause, or some particular cause, required to be established by proof. Due process of law in the one case may not require a common-law hearing, while it does in the other; that being supposed to have been in contemplation of the lawmaking power as an absolute requirement of the common law, and to be regarded as read into the statutes, in the absence of any ex-

press indication to the contrary or something equivalent thereto.

The distinction mentioned is noted by all the text writers. For example: "The general rule is that where a definite term of office is not fixed by law, the officer or officers by whom a person was appointed to a particular office may remove him at pleasure, and without notice, charges, or reasons assigned. . . . It is conceded, in all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal." Throop, Pub. Off. § 354. At common law in all cases except where an office is held absolutely at pleasure, "an officer could be removed only for cause and after a hearing." Throop, Pub. Off. § 362. "In this country, the rule is that where an officer holds his office for a certain number of years, 'if he shall so long behave himself well,' he cannot be removed, even for misbehavior, without notice and a hearing. So where he is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice, and an opportunity to be heard," Throop, Pub. Off. § 364. To the same effect are Dill. Mun. Corp. 4th ed. § 473; Mechem, Pub. Off. § 454.

One might call the roll of all the highest courts of the country which have dealt with the subject in support of the foregoing. It is no exaggeration to say, as was said at the bar, that there is practical unanimity in the adjudications in this country in respect to the matter, that courts which started wrong have retraced their steps and taken a position in harmony with courts in general, and that the instances now and then where a court still stands in opposition are inconsequential,—so much that way as not to be entitled to any consideration whatever. Counsel for appellant have cited to our attention a large number of well-selected judicial authorities, a few of which, and some others, we will incorporate herein. *People ex rel. Schumann v. McCartney*, 34 App. Div. 19, 53 N. Y. Supp. 1047; *Murdock v. Phillips Academy*, 12 Pick. 244; *United States ex rel. Turner v. Fisher*, 222 U. S. 204, 56 L. ed. 165, 32 Sup. Ct. Rep. 37; *People ex rel. Jordan v. Martin*, 152 N. Y. 311, 46 N. E. 484; *People ex rel. Kasschau v. Police Comrs.* 155 N. Y. 40, 49 N. E. 257; *Hallgren v. Campbell*, 82 Mich. 255, 9 L.R.A. 408, 21 Am. St. Rep. 557, 46 N. W. 381; *People ex rel. Metevier v. Therrien*, 80 Mich. 187, 45 N. W. 78; *Speed v. Detroit*, 98 Mich. 360, 22 L.R.A. 842, 39 Am. St. Rep. 555, 57 N. W. 406; *Field v. Com.* 32 Pa. 478; *Com. v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680; *Page v. Hardin*, 8 B. Mon. 648; *State ex rel. Denison v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *State ex rel. Withers v. Stonestee*, 99 Mo.

361, 12 S. W. 895; *People ex rel. New York v. Nichols*, 79 N. Y. 582; *Bergen v. Powell*, 94 N. Y. 591; *Willard's Appeal*, 4 R. I. 595; *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; *State ex rel. Atty. Gen. v. Hoglan*, 64 Ohio St. 532, 60 N. E. 627; *Collins v. Tracy*, 36 Tex. 546; *State ex rel. Reid v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457; *Biggs v. McBride*, 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878; *Ken-nard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Ex parte Hen-nen*, 13 Pet. 230, 10 L. ed. 138; *Chase v. Hathaway*, 14 Mass. 222; *Meade v. Deputy Marshal*, 1 Brock. 324, Fed. Cas. No. 9,372; *State v. Donovan*, 89 Me. 448, 36 Atl. 982; *Ham v. Board of Police*, 142 Mass. 90, 7 N. E. 540; *Cull v. Wheltle*, 114 Md. 58, 78 Atl. 820; *Townsend v. Sauk Centre*, 71 Minn. 379, 74 N. W. 150; *State ex rel. Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554; *Mc-Cully v. State*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134; *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873; *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128.

For the better appreciation of the cited cases we will quote from a few of them.

In *Page v. Hardin*, while the power of removal was held exercisable by the governor, it was nevertheless said that the proceedings, in conformity with fundamental principles of justice, were required to be judicial in their general characteristics. "We shall not," said the court, "argue to prove that in a government of laws a conviction whereby an individual may be deprived of valuable rights and interests, and may, moreover, be seriously affected in his good fame and standing, implies a charge and trial . . . with the opportunity of defense and proof. . . . Such a proceeding for the ascertainment of fact and law, involving legal right, and resulting in a decision which may terminate the right, is essentially judicial, and has been so considered here and elsewhere."

This language, spoken for the court in *State ex rel. Reid v. Walbridge*, is particularly applicable here: "In the case presented, the power to remove the officer is 'for cause,' and no notice is mentioned as requisite to be given to the officer to be proceeded against. But the law, in accordance with the principles of justice,—principles which are fundamental and eternal,—will require that notice be given before any person be passed upon, either in person or estate or any other matter or thing to which he is entitled. And though the statutes do not in terms require notice, the law will imply that notice was intended. . . . And what the law will imply is as much part and parcel of a legislative 46 L.R.A. (N.S.)

enactment as though set forth in terms. . . . Notice in this case . . . had been given and charges preferred, and this court, following the authorities elsewhere, has decided that even where the removal is 'for cause,' that still notice must be given. . . . But . . . if an officer be removed, it belongs to the courts to determine the sufficiency of the cause alleged."

Further on the same subject from *People ex rel. Schumann v. McCartney*, quoting from *People ex rel. Kasschau v. Police Comrs.*: "The relator . . . was not subject to removal except for some legal cause, to be ascertained and adjudged as matter of fact upon a hearing. . . . The proceeding was judicial in character, and hence the tribunal before which the investigation was had could not dispense with the usual form of procedure. . . . When a party is protected in the enjoyment of a public office . . . from removal except for cause to be ascertained and adjudged upon a hearing of a judicial nature, and it appears that he has been removed without any proof of the necessary facts upon oath, the determination . . . is clearly erroneous as matter of law."

And the court further said for the particular case: "The relator cannot be deprived of his position upon evidence satisfactory to the commissioner, unless that evidence is procured in the course of a judicial investigation, where the relator has been informed of the charge against him, and has had an opportunity of examining the witnesses against him, and of presenting evidence in his own behalf. On the hearing, at which the 'evidence satisfactory' to the commissioner was elicited, . . . the entire proceeding was a mere mockery of justice."

The following from *Field v. Com.* is peculiarly applicable: The court differentiated between *Ex parte Hennen*, 13 Pet. 230, 10 L. ed. 138, where the circumstances did not exist as in this case, and those where such circumstances do characterize the subject, and observed as to the latter by quoting the language of Lord Campbell in *Re Poole* (*Reg. v. Archbishop of Canterbury*, 28 L. J. Q. B. N. S. 154), then said to be a late English case: "There could be no doubt his grace had acted most conscientiously, but . . . he had taken an erroneous view of the subject. . . . He was bound to hear the appeal, and he had not heard it. It was one of the first principles of natural justice that no man should be convicted without first being heard. . . . That had been the uniform principle on which this court, from the most ancient times, had acted; and he recollected hearing a very aged judge once say, and not irreverently

that the Almighty and Omniscient Being would not condemn our first parents without their being heard. 32 L. T. 127."

The following is from the opinion of Justice Campbell in *Dullam v. Willson*, 53 Mich. 409, 414, 51 Am. Rep. 128, 19 N. W. 120, 123: "The action of all persons, official or private, which is in violation of constitutional rights, is simply null and void, and usually needs no reversal. . . . The fact, then, that the statute and the Constitution, in giving the governor power to remove, prescribe no methods of examination, can in no way relieve him from the necessity—even if he is to pass personally on the facts—of having specific charges of misconduct communicated to the officer, and established by proof, with full opportunity to the respondent to examine and cross-examine witnesses, and be heard on the facts and the law."

In *People ex rel. Metevier v. Therrien*, the point was urged upon the attention of the court, as in this case, that the act of the governor could not be inquired into, and the court replied: "The governor cannot foreclose the right of the courts to preserve to such officers their constitutional rights. . . . The right to hold this office is just as sacred in the eyes of the law to Metevier as the right to hold the property he has earned. It is a property right, and one of which he can only be deprived by a strict conformity to the statute." In other words, as the court said, by due process of law.

We have thus quoted at much length from authorities elsewhere, because our own court has not dealt with the subject under discussion very frequently, and not, perhaps, significantly, except as to the requisite in general of due process of law in order to deprive anyone of any valuable right, and that due process of law requires a common-law hearing, in the absence of a statute expressly or by necessary inference providing to the contrary, and that, it seems, was an emphatically declared in *State ex rel. Milwaukee Medical College v. Chittenden*, as anywhere in the books. The early declaration on the subject by Dixon, Ch. J., in *Seifert v. Brooks*, 34 Wis. 443, may well be added: "That every man is entitled to his day in court, and must have it, and cannot be affected in his person or his property unheard or without the privilege secured to him of appearing or being represented in his own defense, if he so desires, is a maxim the force and importance of which every good lawyer appreciates, and one which no court ever surrenders."

Since some confusion has arisen, as before indicated, respecting whether a proceeding of the nature of that under consideration is judicial or administrative in character,

all referable, it seems, to the remark in *State ex rel. Starkweather v. Superior*, and repeated in *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748, and supposed by counsel for respondents to be applicable to this case, that the power is not judicial, but on the contrary is administrative, though required to be exercised in a judicial manner, we will give some further attention thereto, though, as said before, and must clearly appear upon principle and authority heretofore cited, it is essentially judicial, wanting only the circumstance of being exercisable by a court, and the different terms are merely different methods of describing the same thing. The better term to use is quasi judicial. That accurately describes the power. A brief review of the adjudications in this court will leave no room for doubt as to its judicial character, or but that the idea pressed upon us that it is administrative, so far as affecting the right of a common-law hearing under the removal statutes, is quite illogical. It is unfortunate that the various terms, judicial, quasi judicial, administrative, and administrative judicially exercised, have been used in some decisions while speaking about one and the same thing. Our own decisions are to the effect that any person or board required to determine any matter in public affairs requiring investigation, findings of fact upon proof, and the application of legal principles thereto, if not acting as a court, is acting as a tribunal in the exercise of quasi judicial power, the result being reviewable by the court as to all jurisdictional questions.

In *State ex rel. Gill v. Watertown*, 9 Wis. 254, the power of removal for due cause was held to require due cause in some reasonable view in the judgment of the court; that what constitutes due cause, in the ultimate analysis, is purely a judicial question. There, as here, counsel, to support the contrary, relied on *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, in respect to the power exercised under the law respecting removals for cause, being so far removed from judicial character that the result was not reviewable by the courts. It was replied thereto that, within its jurisdiction, a removal body, competent to act for due cause, cannot be interfered with by the courts, but that what constitutes due cause is a judicial question; that to assign a cause and pronounce upon its existence is one thing, and whether the assigned cause answers to the call for due cause is wholly a legal question, to be determined, in the last analysis, by the courts; that the initial tribunal cannot make an innocent matter due cause by assigning it as such. There was the clearest of indication that a removal tribunal

required to exercise discretion possesses judicial power in a proper sense, and that its determination as to all jurisdictional questions is a subject for review under the superintending control power of the courts.

In *Randall v. State*, 16 Wis. 340, 342, the court was more emphatic. Exercise of the governor's removal power was said to require him to act "in a judicial capacity,"—to "inquire into the truth of the charges, and examine into and weigh the effect of testimony. If the charges are sustained by satisfactory testimony, he can remove the delinquent officer and appoint another in his stead."

In *Larkin v. Noonan*, 19 Wis. 82, the court was still more emphatic, holding that the removal power of the governor is analogous to that exercised by a court in the trial of a case. "He is required," said the court, "to furnish the accused with a copy of the charges made against him, and give him an opportunity of being heard in his defense." True, in the particular case, a hearing was required by statute, but, as we have seen, and shall further see, that, by necessary implication, is written into every power of removal for cause which is required to be established by proof, especially in case of the office being for a fixed term. "This," continued the court, "involves as a consequence a trial,—a legal investigation into the truth of the charges. Witnesses may be subpoenaed, . . . sworn, and examined. Testimony must be taken, weighed, and considered. And although the proceeding is summary, and no trial by jury allowed, yet it conforms in important particulars to proceedings in judicial tribunals. If the charges are sustained by satisfactory testimony, the governor may remove the delinquent officer. If the charges are not proven, the officer must be acquitted. Hence, in the hearing of causes of this nature, the governor acts in a quasi judicial capacity, . . . and the proceeding is analogous, in its most essential features, to a judicial hearing and investigation."

In *State ex rel. Getchel v. Bradish*, 95 Wis. 205, 37 L.R.A. 289, 70 N. W. 172, the court further advanced,—stepping, perhaps, beyond safe boundaries, in holding a quasi judicial body to have such characteristics of a court that what would disqualify a judge to preside in the latter, and render a judgment void rendered therein, if it did, would have the same effect in case of a participant in a quasi judicial hearing,—applying that to a judgment forfeiting a privilege, and distinguishing the case from *State ex rel. Starkweather v. Superior*. Thereafter it became necessary to limit that decision in order to produce harmony with the 46 L.R.A. (N.S.)

Starkweather Case. *Wood v. Chamber of Commerce*, 119 Wis. 367, 96 N. W. 835; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964. In doing so there was no attempt to limit it as regards the principle of *Larkin v. Noonan*, and, of course, no thought in any of the cases to change it.

So it is plain that the power of removal under § 970, stat., is judicial in character; it is of the same nature as the power called by the Michigan court in *Dullam v. Willson* "judicial," and it is misleading to differentiate between the term "judicial power" and "administrative power judicially exercised," they mean the same thing as applied to proceedings of the nature of those under consideration. To the same general effect are *Gaertner v. Fond du Lac*, 34 Wis. 497; *Oshkosh v. State*, 59 Wis. 425, 18 N. W. 324, and many other cases decided by this court, to which reference might be made.

VIIb.

Before proceeding to the last vital question involved in the resubmission, we will recur to the subject of whether the right to an office once obtained, with its honors and emoluments, is property in the constitutional sense. That is not essential to the solution of the final result, as we have seen, but it has been much argued both to support the idea that the due process of law feature of the Constitution does not include it, and the idea that removal proceedings are not judicial. The case might turn on those contentions if they were sustained. So it is manifestly appropriate, even though not necessary, to discuss the matter. Whenever, conceding for the case the result upon one proposition is not efficient, there is another thought to be decisive, and it is suggested for consideration, then its solution is legitimate and often advisable, though not necessary. *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, may be mentioned as a good illustration. There the last of four alternatives has become, I venture the opinion, in the course of time, the most important of all, although it was long treated as mere *obiter*.

I marvel that, after the extraordinary pains taken by the fathers of our system to make its principles so broad as to encompass in its protecting folds every right of every character essential to or promotive of human liberty and happiness, there should be any attempt to narrow it by construction, instead of viewing them in the broad spirit which led to the Constitution. As said by commentators, it was not supposed, in the beginning, that anything in the na-

ture of protection of private right from tyrannical aggression, other than the principles of the common law, was needed, so the general declared purpose of the effort to form a new government was included, and in the detail statement of principles the special guaranty as to private rights was omitted. The danger involved in that led, in the very beginning of the administration under the Constitution, to the addition of ten Amendments supposed to be broad enough to cover all such matters. That the intention was not to leave any of them out is most manifest. Among those added specific guaranties is that as to due process of law, and that other as to taking of property for public use without just compensation. Later, because of changed conditions giving rise to the thought that, possibly, the principles so definitely declared might, by some narrow construction, not be wholly efficient, the guaranty as to due process of law was repeated, amplified, so to speak, by guarantying against the making or enforcing any law abridging the privileges or immunities of citizens of the United States, and against denying to any person equal protection of the laws. When it came to forming our state Constitution, it was supposed that the safety of human rights was sufficiently provided for by the general declaration and the detail provisions associated therewith, emphasized by the significant admonishment as to the "importance of a frequent recurrence to fundamental principles." So no special guaranties were added, as has been the case in most state Constitutions.

Now, in contemplation of the industry thus exercised to afford protection to the individual from injustice of any sort, can it be possible it was thought the terms "liberty" and "property" would not include more than freedom from unjust physical restriction and things subject to be bought and sold, or stop short of freedom for one to possess anything and to enjoy it as property, if valuable in any sense, which may lawfully administer to his reputable desires and happiness? Why stop with tangible things,—things subject to transfer and measurement accurately in money? If a thing has a pecuniary value or a real value to its possessor, it seems it has a property element in the constitutional sense, and freedom to enjoy it is liberty in a broad sense. I think it is dealing with technicalities to restrict "property" so as to exclude the right to an office, once acquired, until deprived of it by law,—acquired, perhaps, by years of effort in preparation for its duties, and by the legitimate expenditure of money. We may adhere to all that was said in *State ex rel. Starkweather v. Super-*

rior and State ex rel. Wagner v. Dahl, 140 Wis. 301, 122 N. W. 748, that it is not a vested property right. Certainly it is not,—in that, by the very terms of its bestowal, it is subject to be taken away, and has neither assignable nor inheritable features; but it has a pecuniary value, and that is sufficient. The framers of the Constitution did not intend any narrow conception of the terms "liberty" and "property." They intended, as all history shows, directly and circumstantially, to include everything valuable to the individual as regards the dominant right to the pursuit of happiness.

I think the disposition, on the one hand, to take the broad view above indicated, and on the other, to take a narrow view which would minimize the scope of the constitutional guaranties, and the tendency of some judicial writers to combat principle with mere argument in reaching for logic to support a decision which needs no support, but some elementary principle, as would be seen by searching for it, instead of relying on argument rather than on thinking, has caused unfortunate confusion. That, I think, will be quite well illustrated before I close this discussion.

If I do not accomplish anything more in this treatment, I hope to remove anything like confusion as regards the terms under consideration in our own decisions, and demonstrate the position of our court on the side of the broad progressive view of the Constitution which renders its principles, as was intended, adaptable to the protection and conservation of every right which concerns legitimate human welfare. Many distinguished courts have referred to an office as property, while others, and a minority, I think, hold that an office, or the right to an office, often confusing the two terms, is not property. Many text writers have added to the general confusion. It cannot well be said that both sides have used the term "property" in the same sense. There must be some line of harmony. Where is it? That is the question. To find it, and bring it into sufficient significance to pervade even here, so it will not be thought there is any want of harmony between the various expressions used, or between them and the court's general conception of constitutional principles as found in its definitions, is sufficient to warrant this effort.

An examination of the decisions leads to the conviction that, in the early instances of controversy over the right to deprive one of an office, either by legislative abolishment of the place or by removal under the written law, it was said in support of a decision sustaining the deprivation, that the thing involved was not property or a vested right

of property, and so it could be taken away. In support of a determination that the due process of law feature of the Constitution applies to the deprivation of office, it came to be frequently said that the thing is property because it is of pecuniary value. In support of the contrary theory, and that the power to remove an officer for cause is not judicial, it was said that an office, or the right to an office, is not property,—though not venturing to say that it is not a thing of value to its possessor. Where an effort was made in the initial stages of the confusion, to support the latter view by something in the nature of logic, it was said that the thing is not property because not subject to absolute vestment, and to be bought and sold and pass by inheritance. And again, that it is a mere agency, terminable by choice of the agent, or by legislative will, and has no element of gain except contingent upon service previously rendered. The teaching of the old masters of the law, Coke and Blackstone, that the right to an office and to take the emoluments thereof is property, has been carelessly, it seems, brushed aside by the mere statement that conditions under which they wrote were different than those existing under our system; that the distinction renders that which was formerly properly denominated property not so now,—the feature generally referred to being that an office then was a hereditament, while it has no such element now. That demonstrated the very extreme of argument based on false logic, sometimes indulged in as an easy method of constructing a basis for an ultimate conclusion to be pronounced. It often happens, where the superstructure is suspended upon mere assertion at first, and then there is effort to create a support in reason, that the reason is more the product of desire than of principle. That is well illustrated when we refer to the text of Blackstone, and see that the right to an office and to take its emoluments—not the office contemplated as a place—was denominated property, and not necessarily with reference to any of its features which some judicial writers have said rendered it then of a property nature, but not now. Blackstone divided property into tangible and such intangible things, or incorporeal things, “as can neither be seen or handled,” creatures of the mind, and existing only in contemplation. All were classed under the broad term “property,” and not necessarily because they were subjects of traffic. 2 Cooley’s Bl. Com. 37. In the details as to the intangible class of property we find an almost boundless field. It extends to substantially everything of any value, pecuniary or otherwise, to the individual,—including the “right to exercise an office and

to take the fees and emoluments thereunto belonging.” It was said that was classable, as within the intangible sphere, because one might have an estate, that is, a right, therein, among other things, “for a term of years or during pleasure only,” “though no public office, in general, is a subject of sale.” 2 Bl. Com. 37. Thus, the word “estate” was used in the broad sense of a rightful possession at pleasure, for life, or for years, upon conditions subsequent or without condition, and property was regarded as including everything with it in the broad sense of the term, whether tangible, or intangible and only existing in contemplation of the senses, if valuable to the person in any sense. Who can doubt but that this conception was in the minds of the framers of the Constitution while they were not in the peril of seeking information from an unreconcilable undigested mass of judicial sayings,—just had the teachings of the old philosophers of the law for their guidance.

Thus, the efforts to give support to the idea that the right to an office is not property seems futile. They originated in such an early case as *Connor v. New York*, 5 N. Y. 285, to sustain the right of the legislature to deal with an office regardless of the will of the officer. It was followed in *Donahue v. Will of County*, 100 Ill. 94, to sustain the position that the right to an office is not under the protection of due process of law. That case is cited by most text writers, while conceding, by the reasoning, that a distinction must be made between an office and the right to an office, and that many courts hold that the latter is essentially property. *Throop*, Pub. Off. § 18. In *Wammack v. Holloway*, 2 Ala. 31, the court said that the right to an office is “as much a species of property as any other thing capable of being held or owned,” citing Blackstone and Bacon. It is no less property now than in the olden times, because it is not a “hereditament.”

In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347, that view was adopted, upon the elementary principle that an office is of pecuniary value to its possessor, and that, having such value, in the broad sense, it is property. Andrews, J., speaking for the court, said: “The right to hold an office,” till terminated by lawful methods, “is as perfect as the title to real and personal property.” It is not “property in the sense that chattels or lands are property of the owner.” But “an office has a pecuniary value, although primarily it is an agency for public purposes.”

To the same effect are *People v. Wells*, 2 Cal. 198, 203; *State ex rel. Childs v. Wadhams*, 64 Minn. 318, 324, 67 N. W. 64; *People ex rel. Metevier v. Therrien*, 80 Mich.

187, 196, 45 N. W. 78; *State ex rel. Jennett v. Owens*, 63 Tex. 261; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 17, 25 Am. Dec. 677; *Plimpton v. Somers*, 33 Vt. 283; *State ex rel. Police Comrs. v. Pritchard*, 36 N. J. L. 101; *Page v. Hardin*, 8 B. Mon. 672; *Com. ex rel. Bowman v. Slifer*, 25 Pa. 28, 64 Am. Dec. 680; *King v. Hunter*, 65 N. C. 603, 6 Am. Rep. 754; *Balling v. Board of Excise*, 79 N. J. L. 197, 74 Atl. 277, and many other cases that might be referred to.

By an examination of a large number of cases where the contrary of the foregoing is suggested, we find little attempt to review the line of authorities cited, and no instance where the real nature of the right was vital to the case. That it is not property in the sense of the right thereto being protected by the guaranty against deprivation of property without just compensation may be freely admitted. That it is a right held upon condition subsequent may be freely admitted. Why was not right to deprive one of an office referred to that condition,—which was a perfectly logical reason,—instead of to the illogical one that it is not a property right in any sense? In many jurisdictions it is found that the right has been, at times, spoken of as property, and at others as not property. Many of the citations made to support the position of the nonproperty idea do not deal with the matter at all, as for example we find *State ex rel. Kennedy v. McGarry*, 21 Wis. 496, and *State ex rel. Willis v. Prince*, 45 Wis. 610, cited over and over again. They do not mention the matter, and, when rightly understood, they have not the remotest bearing thereon. They are merely to the effect that a legislative office is subject to be taken away according to the conditions inhering in the right when it was bestowed and accepted.

That is the logical basis for all to rest upon. Subject to termination of the right by due process of law, it is property.

In view of the foregoing it seems best that the broad view of the terms "liberty" and "property," as it must have been entertained in the beginning, should prevail, instead of restricting it for the purpose of supporting the idea of control over legislative office, which needs no support but the simple one that the person who takes such a thing at the hands of the people does so with the condition subsequent inhering in the right. Nothing but that need have been referred to in sustaining the decision in any of the cases where the nonproperty idea was adopted.

So we may safely bring together the apparently conflicting ideas. An office, as a place, is not property. The right to hold an office and to take its emoluments until deprived thereof upon condition subsequent—

due process of law—is property, in the broad sense which includes everything of every nature, tangible, intangible, corporeal, or incorporeal, valuable, pecuniarily or otherwise, to its possessor. In the sense incorporated into the fundamental guaranties, it is property; but as a thing which may be bought and sold, and one may have an absolute estate in which cannot be taken away by the state without his consent or the rendering of just compensation, it is not property. We may adhere firmly to the doctrine that it is not a property right in the technical sense, or the right to hold an office a vested property right, in the sense of ownership without being subject to conditions, divestment according to law without compensation to the divestee; but the latter sense will be found, in my opinion, immaterial to the disposition of any question which may arise. It has no necessary connection with the public right to terminate an office, or to deal with a mere privilege, even as in *State ex rel. Getchel v. Bradish*, granted subject to conditions subsequent express or implied; while the broader view may be vital in many cases, since the effort to narrow it in all cases is directed, in effect, to the weakening of constitutional guaranties.

The result is, it seems, that, for all the purposes of this case, even if the result were to depend upon it, the right to an office and to take its emoluments is property, as much as anything of value which anyone could be possessed of subject to contingencies by which it might be taken from him, and that the right cannot be constitutionally violated except according to the law of the land.

VII.

From what has preceded it remains to be seen whether the common-law right as to the manner of exercising the power of removal of an officer having a fixed term, for cause established by proof, from his position, was abrogated by § 970, statutes, as to officers therein mentioned. If not, it must be considered, as authorities already referred to abundantly show, as part of the statute.

The repeal of the common law may be express or implied. That there was no express repeal in this case is indisputable. Whether there was an implied repeal depends upon construction. Therefore some rules for construction are important.

One of the cardinal rules for construction of a statute, especially where it affects private rights, when so obscure as to require the meaning to be read out of it by construction, is that it should be viewed favorable to continuation of the common law rather than as a repeal of it, where

there is a permissible choice between the two. Another such rule is that we may look to the whole of the act of which that to be construed forms a part, to the conditions to be dealt with from the standard of the lawmakers at the origin of the enactment, the history of the legislation, especially in case of its adoption from another state, and the more, in case of its having been judicially construed there before adoption here, and, further, the effects and consequences.

In view of those rules, courts in general as we have already seen, hold that the common-law manner of proceedings, said to be grounded in the principles of natural—of eternal—justice, must be held to be still in force, in the absence of either an express repeal of it, or a repeal by very clear, or as sometimes said necessary, inferences. That the repeal must be very plain, the discussion which has preceded amply demonstrates.

So it seems, if the argument of counsel for respondents, on the theory that a repeal of the common law is fairly inferable from the statute, be conceded, it is far from sufficient. But it hardly seems just or reasonable to say of the statute that something not in its letter is there in spirit, which would be such an invasion of the most cherished of all common-law rights,—the right of a fair hearing upon fair notice, and with ordinary safeguards to prevent injustice, before one is passed upon in his personal or property rights,—the one above all other essential to safeguard against aggression and oppression. No court heretofore has ventured to say that, or attempted to do so. Courts have often been pressed to do so, in support of authority claimed to exist under circumstances the same and similar to those we now have to deal with, but never, so far as we can discover, in any significant instance, with success.

If there is nothing else to produce the conclusion that the legislature did not intend to abrogate the constitutional safeguard, the very consequences of the contrary would justify, yea require, searching in the obscurity, if obscurity exists, for some meaning which would avoid the peril. The fact that a very good despot may make the very best of governments, and that the peril suggested is so very remote that the thought of it should not have efficiency does not meet the case. Experience has shown, how very fair men lose their balance and become unsafe in times of great public excitement; that then their acts often do not so much "wait upon their judgment" as upon the passions, the prejudices, the selfishness, the ambitions, and intoxication of place. Hence, the importance of that wise admonition: "The blessings of a free government can only
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be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and a frequent recurrence to fundamental principles." There is no more important of such principles than the one that private rights should be guarded, so far as feasible, beyond even the possibility of arbitrary unjust interference, and, to that end, that all the checks upon abuse of power and balance between powers found in the Constitution, read in the light of the unwritten rules of natural justice, should be maintained in all their integrity, and with all the "vigilance" which the experience of the past has taught "is the price of liberty."

The causes suggested above were deemed by the Michigan court in *Dullam v. Willson*, to compel rejection of the theory of implied statutory repeal in such circumstances as we have here. We can no better point what has been said than by quoting this language of that court: "The exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of free institutions. . . . If it exists it places it in the power of the governor, at his mere will or caprice, to remove all the state officers, except legislative and judicial, and to fill their places with his own partisans, thus revolutionizing the whole administration of the state. . . . It is no argument to say it may never be done. It is sufficient to know that it could be done. . . . The impossibility of sustaining the governor's action here . . . appears by comparing its necessary results with the rest of our constitutional scheme of government. If he could remove respondent as he did, . . . every officer of the government may be removed as soon as the legislature adjourned, and every office can be filled by the governor's nominees and the whole elective system will be annulled."

There are many authorities to the same effect. A good selection of them appears in appellant's brief: "If the intention of the legislature is clear, the courts, as in duty bound, will give it effect, but if it is doubtful, the doubt will be resolved against the existence of arbitrary power, and in favor of a trial before judgment." *People ex rel. Maloney v. Douglass*, 195 N. Y. 145, 87 N. E. 1070.

"It is a dangerous principle to imply power when it is not conferred by legislative authority in clear and distinct terms." *People ex rel. Brown v. Woodruff*, 32 N. Y. 355. Other courts have spoken in the same way in support of the view that a repeal of the common-law safeguards in such a situation as the one under discussion requires clear,

express legislative action or its equivalent. The books are replete with such illustrations as are given. This is so manifest that we will not refer further to authorities for support. It may safely rest upon principle and logic, which speak more efficiently than the language of judges or the circumstances of cases.

Turning now to the history of the statute, it is this: The system embodied therein, if it did not originate, existed, in New York, when the work was done for adoption here prior to 1849. It was incorporated into the revision of that year at chapter 11. Doubt was expressed on the argument whether it came directly from the New York model, article 4, title 6, chap. 5, Rev. Stat. of N. Y. 1836, or indirectly, being copied from chapter 15, Rev. Stat. Mich. 1846; but we see little, if any, reason for doubting the former. The phraseology and general arrangement follows much more closely, and the ideas as well, the New York than the Michigan statutes. Moreover, it is almost certain there was little acquaintance with the latter when the work was done here. The time between the two was brief. There was a later revision in New York (1846), but the time was too brief between its promulgation and the work here to afford opportunity for familiarity.

The general scheme of Michigan was doubtless taken from New York. All features—particularly provision for exercising the power of removal without specifying the manner of executing the power being associated with sections as to minor offices containing such specification—are in the Michigan statute, much the same as in ours. That feature was referred to by counsel for respondents in support of the view that a repeal of the common law was intended. That was the condition when the Michigan court dealt with the subject of removals in *Dullam v. Willson*. True, the statute was then declared unconstitutional upon the theory that it contemplated exercise of judicial power, and the governor had no such power under the Constitution when the statute was enacted, and it was not validated subsequent to the grant of such power. In that the court failed to do what this court, and courts in general before and since, have done, distinguish between quasi judicial power which may be delegated to tribunals other than courts, and appreciate that judicial power of the express words of the Constitution, the power to redress and prevent wrong, which at common law was lodged wholly in courts. *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500. The real essentials of exercise of the power as decided by the Michigan court were not governed by whether

exercisable by a court or a quasi judicial tribunal, but by the nature of the power itself. After the adoption of the amendment to the Michigan Constitution, clothing the governor with power to exercise the function of removing officers for cause, he was still not a court, but a quasi judicial tribunal. There was no specific delegation of judicial power, but merely delegation of power to do the thing which in its very nature was said by the court to be of judicial character. That was called the conference of judicial power.

From what has been said it is evident that all the Michigan court said in *Dullam v. Willson* as to the necessity for a common-law hearing in executing a power like the one in question would have occurred just the same had the statute on the subject of removals been held valid. It was just as applicable to the statute as to the constitutional provision. It related to the nature of the power, and not to the manner of expressing it. That shows, by necessary inference, that the idea did not receive any favor at all that a part of a system of statutes phrased like ours, even when associated with other parts providing for manner of exercising the power, could be properly read as inferentially repealing the common-law method of dealing with rights. On the contrary, such idea was most emphatically repelled.

Recurring to the New York statutes, which like ours contain the association of provisions above referred to, it does not seem to have been supposed there before adoption of the plan here, or thereafter, that the common-law method of exercising the power had been repealed by the statute. Had it been so supposed, it is quite certain some evidence thereof could be discovered. The indications are all to the contrary. Counsel for respondents seem to have failed to find any favorable to their contention, and we have been likewise unsuccessful. They cite many cases under different statutes and applicable to different conditions which make for a plausible argument, but come far short of making such a clear case as would warrant the belief that the legislature, in such a very important field, intended to repeal the common law.

It is useless to review in detail the citations by respondents' counsel in support of their contention. We will refer especially only to the three relied upon from our own jurisdiction. They are the best of all, particularly because of inclination to follow closely our own decisions in case of the court having spoken upon the particular subject.

First in order is *State ex rel. Kennedy v. McGarry*, 21 Wis. 496. The statute there concerned the removal of a minor county officer. It was a special statute dealing only

with the administration of affairs in Milwaukee as to the inspector of the house of correction. It provided that "said board shall also appoint one inspector for said house of correction, who shall be the principal keeper of said house of correction, and who shall hold his office for the term of two years, commencing on the first Monday of January succeeding his appointment, unless sooner removed by said board for incompetency, improper conduct, or other cause satisfactory to said board. The cause of such removal shall be particularly assigned in writing, and entered upon the minutes of said board, with the ayes and noes upon the adoption of the vote for such removal."

Note that the officer was made expressly subject to removal for specified cause, conditioned only upon "the cause of such dismissal being particularly assigned in writing and entered upon the minutes of such board, with the ayes and noes upon the adoption of the vote for such removal,"—indicating, pretty clearly, that the legislature contemplated only such protection of the officer and the public against abuse of the removal power, as would be afforded by record affording a judicial review if desired as to whether the assigned cause was one within the statute. Emphasis was put by the court on the phrase "satisfactory to said board," and the necessity for the jurisdictional feature to be complied with. The decision turned on those features,—thought to show a clear legislative intent that the officer should hold his place wholly subject to the judgment of the county board respecting any matter rendering him unsuitable for the place. The nature of the office, the broad power to deal therewith, in good faith, wholly in the discretion of the board, conditioned merely upon making the required record, settled the matter as to what the legislature intended, in the judgment of the court. Rightly understood it seems the case throws little or no light in respondents' favor on the question under discussion. It has been cited over and over again elsewhere, without appreciating that it does not announce any general principle broader than this: When a power of summary removal without notice or hearing is clearly given by the written law, notice and hearing after the manner of the common law are not required. Much improper use has been made of this case both by text writers and courts.

Next we have *State ex rel. Willis v. Prince*, 45 Wis. 610. That involved power of a county board to remove its clerk "when, in their opinion, he is incompetent to execute properly the duties of his office, or when, on charges and evidence, it shall appear to said board that he has been guilty

of official misconduct, or habitual or wilful neglect of duty, if, in the opinion of said board, such misconduct or habitual or wilful neglect shall be a sufficient cause for removal."

All the statutory steps requisite to execution of the power seem to have been followed. Nevertheless the trial court reviewed the judgment of the board upon its merits, taking evidence, and reversed the board's order.

This court found no jurisdictional defects. The proof of the charge was of such nature that the board, as matter of course, could take judicial notice of it, so to speak, as a court in general can of matters in its own official record. The cases showed that the board acted upon the refusal to satisfy all the conditions of its records. There was no question but that a statutory cause was assigned, and that the evidence to support that cause was before the board, and all rights to which the officer was entitled had been accorded him. This court necessarily reversed the circuit court upon the ground that, since the county board did not commit any jurisdictional error, and acted upon its "opinion" with the facts before it, as it was expressly empowered to do by the statute, its decision was final. We are unable to see why counsel for respondents see anything in the case, as it appears in the published report, or aided by the briefs used on presentation of the case here, which in any way affects the question in hand in favor of respondents.

The last case is *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748. That involved a removal under the civil service law as to state employees having more or less of an official status. The power was given to the appointing officer to remove "for just cause," the act of removal to be characterized by his furnishing the person removed "his reasons for the same, and allow him a reasonable time in which to make an explanation. The reasons for removal and the answer thereto shall be filed in writing with the commission." The statute, as will be seen by its very language, repelled the idea that any notice or opportunity for a hearing before removal was contemplated by the legislature. The case was clearly of the same class as *State ex rel. Kennedy v. McGarry*, which was cited in support of the decision. The various citations in the opinion are merely to the point that, when an officer or body is given power to act by the exercise of judgment in a quasi judicial way, whatever he does, acting within that jurisdiction is final though he may err in judgment,—a very familiar rule. Thus the statute in the *Dahl Case* is very unlike the one before us.

The New York model, as before indicated, empowered the governor to remove any of a specified class of officers, saying nothing whatever as to the manner of administering the power. While as to a class of officers having to do with handling of public moneys, the most summary power of removal was given to the governor "in case it shall appear to him, on the report of the comptroller, that such treasurer or other officer has, in any particular, wilfully violated his duty." Note the words, "appear to him." In this the peril of having a person, after having shown unfitness for handling public moneys, in place at all, was appreciated. The statute dealt with a class of situations requiring prompt action,—not waiting for anything except the report of the officer who, from his position, would most likely be correctly advised of the incompetence.

The feature aforesaid of the New York statute was adopted here in § 7 of the 1849 statute. There was no change except such as was necessary to adapt it to difference in conditions. There was no such office here to conserve the interests of the state in respect to its finances as comptroller. The feature made prominent in the New York statute by the words, "appear to him on the report of the comptroller," was preserved with like prominence by the words "may be removed by the governor in case it shall appear to him on sufficient proofs," etc.

Substantially all the officers mentioned in the next section of our act of 1849 were, by the New York act, made removable by the senate on the recommendation of the governor,—no specification as to cause being made. That was there associated with another section giving the governor power to remove any officer appointed by him, no requirement being made as to cause or manner of executing the power. That scheme was changed for our system as to a class of officers, including the one in question, making them, for specified causes, subject to be "removed by the governor upon satisfactory proof," while counsel for respondents argue that there is no difference between the terms "in case it shall appear to him on sufficient proof," in the section which deals with officers with respect to which the public interests would naturally require quick action, and the term "upon satisfactory proof," in respect to officers where no such harsh action would be likely to be necessary, still our judgment is not convinced. The latter class of officers includes important positions of public as well as private interests. Time would naturally be required for investigation, deliberation, and the careful application, in a judicial way, of judgment to proof, in case of exe-

cuting the powers of removal as is customarily required in the exercise of such powers, and was required, quite universally, at the time of the adoption of the statute as to important officers. For those the term was fixed: "Be removed by the governor upon satisfactory proof." We cannot escape the conclusion that a different method of executing the power may have been intended as to the first class than the second. True, it is the governor, in the one case, as a tribunal who is to be satisfied in any event; but why did the legislature use the term confining the opinion specifically to the governor in one case, and inferentially in the other? Does it not seem that their purpose was to distinguish between mere personal opinion in the former, and the distinctly judicial or tribunal opinion in the latter? Must we not assume that such a change of significant words had some definite purpose, especially in case of a statute carefully prepared, as this was, by a specialist, and adopted without change to provide a comprehensive system dealing with various situations? There were ten sections in all, relating to the subject of removals, the same number as in the New York statute. It seems that the legislature attached some considerable significance to the difference in phraseology between the two sections. At least, the legal presumption that one section was enacted in special contemplation of its being supplemented by common-law requirements, so that, in the removal proceedings, a record would be made and the decision would be distinctly that of a quasi judicial tribunal, instead of a personal opinion, is much strengthened by the peculiar difference in phraseology between the two sections. In this we do not intend to decide that the common-law feature of a removal procedure was repealed,—even as to the first class of officers dealt with.

The result of our study of the statute which has been told in the foregoing, quite briefly, considering the labor put upon the question, is that we cannot see in it any implied repeal of the common-law requirement for administering the power granted. If we could indulge in the premise with which the learned counsel for respondents started, that the repeal should or may be found if it be fairly inferable, and proceed to the end uninfluenced by "effects and consequences," the rather striking difference between the two sections, and the dignity which the foundation principles of the common law and of the Constitution as regards protection of property and personal rights against aggression and spoliation should have, must have, in dealing with such a subject, we might discover the legislative

intent in the statute which the learned counsel so ably contended for in the printed argument and at the bar. But we cannot start or proceed along a process of reasoning with our eyes blinded to the obstacles mentioned, which, in the whole, very clearly preserve the common-law requirement, respecting the execution of the power granted, as part and parcel of the statutes, as plainly as if incorporated therein. While, because of the importance of the case and the earnestness with which this particular phase of it was pressed upon our attention, it has received as much care as if it were really an original matter, it is not. The result reached follows elementary principles laid down by the most learned writers after long judicial experience. For example, Judge Dillon (2 Dill. Mun. Corp. 5th ed. 480): "The proceeding in all cases where the motion is for cause is adversary or judicial in its character, and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed."

VIII.

Thus we have seen the governor, under § 970, Stat., is a quasi judicial tribunal, exercising administrative with added judicial functions, and his acts are, to a certain extent, reviewable by the courts under "supervisory control power,"—the power as to circuit courts being conferred by § 8, art. 7, of the Constitution. *State ex rel. Milwaukee Medical College v. Chittenden*; *People ex rel. New York v. Nichols*, 79 N. Y. 582. An officer exercising such power necessarily, as we have seen, acts in a quasi judicial capacity, and the matter of procedure must be of a quasi judicial character, and as the officer is an inferior tribunal, as such he must be amendable to the court when acting in excess of the jurisdiction conferred. As other courts have said, it is of little consequence what name is given to the power. The name cannot relieve it of its essential character. Neither this nor any of the numerous authorities go further than to hold that excess of jurisdiction is jurisdictional; that want of full opportunity to be heard according to settled requirements for the protection of private rights is jurisdictional; that cause for removal within those prescribed by statute, where it covers the subject, is jurisdictional, and that proof to establish the claim is also jurisdictional,—all in harmony with the decisions of this court.

To preserve logical order of decision, the scope of superintending control power as regards quasi judicial tribunals may well 46 L.R.A. (N.S.)

be restated here. It is no different when the governor acts as the tribunal than in any other case. His competency to exercise the power is one thing, and exercise of it in a particular case without the conditions precedent thereto is another. The former is legal, while the latter is not. Such a tribunal may have jurisdiction of certain subjects, but that alone does not give competency to act in any particular instance. There must be jurisdiction of the kind of subject. That, in general, is referable to the written law. There must also be jurisdiction of the parties and the particular matter, obtained as provided by the written law in case of provision being made therein, otherwise by the unwritten law. Having acquired jurisdiction in the particular instance, in proceeding to and inclusive of the finality, the tribunal must keep within its jurisdiction. Full exercise of the power involves application of honest judgment—reasonably fair human judgment—to the situation in hand to and inclusive of the close. No one with competency to act can properly do so in an arbitrary, unreasonable manner, or beyond the scope of the authority. Action within the power is exercise of legal discretion. Action outside of it is not exercise of such discretion as the law permits, but is abuse of it. In the former field, errors, regardless of how numerous, are merely judicial, and not the subject of review before any court. In the latter field, errors are jurisdictional, the acts those of usurpation, and result void,—subject to be challenged directly as such by writ of certiorari or any other proper judicial instrumentality, or treated as void, collaterally. It forms no bar to the object of a proceeding either by way of attack or defense.

Thus the proceedings of our quasi judicial tribunals are subject to the superintending control judicial power, which extends to preventing usurpation, coercing activity without acting upon the judgment as to how to act, keeping the tribunal within its jurisdiction, and correcting excesses of it. This broad field of activity, as is apparent, does not invade at all the doctrine that the discretionary acts of such a tribunal are not the subject of judicial review. There can be no discretionary acts except within the discretionary field. The extent of it is overstepped when the boundary of jurisdiction is passed. Entrance there is into a forbidden field, and all acts therein are, as indicated, violations of law and void.

The doctrine stated is elementary, though its emphatic restatement at this time, and even reiterations of it for purpose of emphasis, seem appropriate to the case under

its peculiar circumstances. Such doctrine has been applied here in a great variety of situations, as the following significant instances will show: *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 9 Am. Rep. 591; *State ex rel. Moreland v. Whitford*, 54 Wis. 150, 11 N. W. 424; *State ex rel. Wood County v. Dodge County*, 56 Wis. 79, 13 N. W. 680; *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N. W. 777; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; *State ex rel. Augusta v. Losby*, 115 Wis. 57, 90 N. W. 188; *State ex rel. N. C. Foster Lumber Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 517, 107 N. W. 500.

These cases amply illustrate that the dividing line between the field of judicial review of decisions of a quasi judicial tribunal, and that of immunity therefrom, is the one between error in the exercise of discretion and error in assuming the right to exercise it when it does not exist at all, or exists to be exercised in the particular way or under the particular circumstances. As said in *State ex rel. Milwaukee Medical College v. Chittenden*, to appreciate the foregoing, there must be a proper conception of the significant distinction between judicial error by a court proceeding according to the course of the common law, and such error by a mere tribunal exercising quasi judicial authority. "In the former, jurisdiction of the party and subject-matter being established, the determination cannot be successfully challenged for such error, though the basic questions of fact rest upon insufficient evidence, or have no foundation whatever therein." To that broad scope, such tribunal, under such circumstances, has jurisdiction to commit error, while in the latter, where findings of fact must be based on evidence, a determination without evidence, or not warranted by the evidence in any reasonable view of it, is "a clear violation of law in reaching a result within the power of the tribunal to reach, proceeding properly, [and] is jurisdictional error. In the former, the evidence is not reviewable at all. In the latter, it may be reviewed, but only to the extent of determining whether there is evidence upon which the tribunal could reasonably . . . have reached the conclusion which it did. . . . In the first a conclusion without any credible evidence to support it, or any evidence at all, is mere judicial error. In the second, want of credible evidence, which, in case of the verdict of a jury, would be sufficient upon appeal to require a reversal, is jurisdictional error; 46 L.R.A. (N.S.)

error committed outside of jurisdiction, instead of in the exercise of jurisdiction."

The power of supervisory control in the situation suggested may be used in many ways to secure an adjudication as to the void act. It may be dealt with directly by either of the jurisdictional writs, or indirectly, in peculiar circumstances, by injunction, or treated as void where, in passing, it would otherwise bar the way to any legitimate act. The following cases illustrate all those phases: *Lutheran Evangelical Church v. Gristgau*, 34 Wis. 328; *State ex rel. Metevier v. Therrien*, 80 Mich. 187, L.R.A. (N.S.) 916, 109 N. W. 628; *Speed v. Detroit*, 98 Mich. 360, 22 L.R.A. 842, 39 Am. St. Rep. 555, 57 N. W. 406; *People ex rel. Metevier v. Therrien*, 80 Mich. 187, 45 N. W. 78; *People ex rel. New York v. Nichols*, 79 N. Y. 582; *State ex rel. Denison v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *Poyntz v. Shackelford*, 107 Ky. 546, 54 S. W. 855; *State ex rel. Reid v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457.

Thus, upon principle and authority, in this form of action, or any other, where the matter becomes material, all questions which go to the validity of the decision may be considered, and such decision affirmed or reversed according to whether jurisdictional error was committed or not. All other questions are foreclosed by the exclusive jurisdiction of the tribunal. In *Speed v. Detroit* it was said, no matter how the question comes up, the thing forming the subject of the controversy being vital, it would be a reproach to the law if courts were so infirm as to be obliged to treat it as valid, or even voidable. The void act being the result of excess of jurisdiction of a quasi judicial tribunal, it is of very little consequence how its validity may be challenged, whether directly or indirectly.

There is no principle more sanctified by time and universality than the foregoing. As applied to the circumstances here, the language of Lord Campbell in *Ex parte Ramshay*, 18 Q. B. 173, has been regarded as among the classics, and it is found quoted over and over again as expressing the rule in the absence of some unmistakable written law to the contrary: "This instrument [the order of removal] is not absolutely conclusive. . . . The exercise of the authority to dismiss from the office . . . is subject to the control of this court. . . . We may presume that the chancellor has duly exercised his jurisdiction till the contrary is proved. But we think that it would have been open to Mr. Ramshay to show that he was removed without notice of any charges against him, or without an opportunity of his being heard in his defense, or that no evidence

was adduced to support the charges or that the complaints against him were not for inability or misbehavior in his office, and were of such a nature that, if proved or admitted, they could not disqualify him for his office," within the meaning of the act of parliament. "The chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice. . . . He cannot legally act upon such an occasion without some evidence being adduced to support the charges. . . . Where the party complained against has a fair opportunity of being heard, where the charges if true amount to inability or misbehavior [within the meaning of the law], and where evidence has been given in support of them, we think we cannot inquire into the amount of evidence or the balance of evidence, the chancellor, acting within his jurisdiction, being the constituted judge upon this subject."

The jurisdictional requisites were phrased by Chief Justice Shaw in *Murdock v. Phillips Academy*, 12 Pick. 244, about this way:

(1) Citation to the officer to appear and reasonable time therefor; (2) notice to him of the charges to be answered; (3) reasonable time assigned for proofs; (4) liberty of counsel to defend his cause and except to proofs and witnesses; (5) conclusion upon the proofs and answer. They may otherwise well be stated in language commonly used here thus: (1) Reasonable notice of time, place of hearing, and of charges constituting a proper subject for investigation; (2) reasonable opportunity to defend, characterized by full disclosure of adverse evidence according to the established principles of fair judicial investigation to determine the justice of the case; (3) a decision upon proofs of record supporting it in some reasonable view.

Testing the situation by the jurisdictional features suggested, it would be doing the greatest injustice to the governor to suppose he entertained the idea that the power of removal was required to be exercised in compliance therewith. He appreciated that at the hearing he sat as a court, because he so declared, but assumed he had competency to act substantially *ex parte* and in the quadruple capacity of informer, trier, prosecutor, and witness. He was simply mistaken, acting, we do not doubt, in good faith, in the belief that under § 970 of the statutes he possessed all the power exercised, and which it was suggested there was competency to exercise, under the statute considered in *State ex rel. Kennedy v. McGarry* and *State ex rel. Wagner v. Dahl*, and that anything less harsh was matter of grace, and not of right.

That several serious jurisdictional errors
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characterized the proceedings is too plain for argument. No one would seriously claim that such proceeding had hardly a semblance of the common-law requirement,—a proceeding after the manner of such before a quasi judicial tribunal. A conclusion that such a hearing was requisite to validity of an adverse determination practically ends the matter. There were these radical departures from the field of authority:

(a) There was practically no notice of a hearing with reasonable opportunity to prepare for and make a defense. The time of notice was less than an hour. Nothing short of a full day would do under ordinary circumstances. There were no extraordinary circumstances warranting a shorter time, but rather there were circumstances demanding a longer time. The officer was one of the most important, as we have said, in the state, and the proceedings were instituted at a time of great official activity and requirement. The power of the governor in such a case is a substitute for the power of impeachment. What would be thought of the legislature if, upon one hour's notice, it should proceed against the governor in face of his solemn protest of unpreparedness for the occasion for want of reasonable opportunity therefor, to try him on articles of impeachment?

The precedents are few as to what is a reasonable notice and time to prepare for a hearing in a case of this sort, but there are some. A notice somewhat exceeding twenty-four hours was held sufficient in *People ex rel. Donovan v. Fire Comrs.* 77 N. Y. 153. The same time was passed without comment in *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478. In *People ex rel. Schumann v. McCartney*, 34 App. Div. 19, 53 N. Y. Supp. 1047, four hours' notice was said to be equivalent to no notice at all. In *People ex rel. Jordan v. Martin*, 152 N. Y. 311, 46 N. E. 484, a rule requiring two days' notice was treated as reasonable. A few hours' notice is not consistent with due process of law. *United States ex rel. Turner v. Fisher*, 222 U. S. 204, 56 L. ed. 165, 32 Sup. Ct. Rep. 37. In a serious matter one should not be required to answer the same or even the next day. *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

Nothing further need be said on this branch, except that it must be considered that there was the merest mockery as to the element of notice.

(b) The right of appellant to a fair hearing, with reasonable opportunity to defend according to the essential of fair judicial investigation, was plainly violated. The governor had no right to act upon personal

information not disclosed so as to afford fair opportunity to meet it. All should have been disclosed to appellant and made a matter of record. *People ex rel. Hogan v. French*, 119 N. Y. 502, 23 N. E. 1058; *Rex v. Faversham*, 8 T. R. 352, 4 Revised Rep. 691; *Capel v. Child*, 2 Crompt. & J. 558, 2 Tyrw. 689, 1 L. J. Exch. N. S. 205. As said in *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500, the law contemplates that the members of such a tribunal will "proceed with the dignity and fairness commonly expected of tribunals exercising judicial or quasi judicial authority;" that they will "act upon proof of some sort reasonably appropriate to the case and made a matter of record; not necessarily . . . in all cases act regardless of personal investigation, but that in case of reliance thereon, the result of the investigation will be made a matter of record; that opportunity will be afforded to the party affected . . . to know of and to rebut the evidence produced against him, if he so desires. In short, that they will exercise their judicial function judicially, and that their decisions will be open to review by the courts for jurisdictional error, including that involving the question of whether the basis for the decision indicated by the record constitutes reasonable ground therefor."

A reasonable opportunity to be heard in such an important matter, especially since no time for preparation was afforded, was not satisfied by the period of part of an hour, in defiance of appellant's sworn statement that such time was entirely inadequate for him to suitably present the evidence and the law. Reasonable opportunity to present evidence was not satisfied by closing the hearing while appellant's most important witnesses were present and waiting to testify. That competency to condemn appellant was about to expire, by the intervention of a co-ordinate branch of the government, affords no excuse for the refusal to accord appellant his constitutional rights. The governor could not properly thus run a race with the approaching intervention without imperiling his jurisdiction. To do so intentionally, to the manifest prejudice of appellant, could not appear otherwise than illegal. Purposely rushing such an important matter, one of the most important that could engage executive attention, to a finish before the legislature could have time to convene, frankly proclaiming his purpose in that regard as an excuse for cutting off appellant without opportunity to present his most important evidence, is too clearly jurisdictionally unfair to be consistent with the right to a fair hearing.

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We will not pursue this matter. It seems certain the governor, who is a lawyer and man of judgment, had no idea appellant was entitled to a hearing of a judicial character, and that he accorded the sort of hearing which occurred more as a matter of justifying the disturbance of such an important office, than as a recognition of any right of the officer. Whatever regard for the latter possessed the executive mind evidently took the form of merely extending a courtesy. From the standpoint of what a hearing should be, there was no hearing in a judicial sense. As said by Justice Field in *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914: "Wherever one is assailed in his person or his property, there he may defend, for the liberty and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." A violation of right in this respect "is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

(c) If we were able to reach this stage of the case without discovering a fatal jurisdictional defect, there would be left the question of whether there was any legitimate basis in the evidence for the finding of fact upon which the removal order was grounded. I will now turn briefly to that.

The charge against appellant was in these words, following substantially the language of the statute: "Said Herman L. Ekern did serve on and under the political committee, and as manager of the political campaign" for one L. L. Johnson, who was then and there a candidate for the office of speaker of the assembly of the state of Wisconsin, contrary to the provisions of § 1966y of the statutes.

It will serve no valuable purpose to restate the evidence. It appears in substance in the statement of fact which heads this opinion. Suffice it to say that I fail to discover proof to sustain the charge in any reasonable view of the statute. Certainly, it seems, the legislature did not purpose preventing the commissioner from having his choice among aspirants of his own party for the mere office of speaker, or even from making that known, and, in a purely personal way, asking friends among members of the legislature to support such choice. That it did not purpose tying his hands so as to disable him from extending the ordinary courtesies commonly indulged in between gentlemen and friends belonging to the same party, such as engaging rooms by request, even with the knowledge of their intended use for political purposes, and that is the very word of appellant's offending. His refusal to close the rooms upon the ground that he did not control them, as he

was commanded to do on peril of being removed from office, instead of being evidence to sustain the charges, was evidence to the contrary, in the light of undisputed evidence that he had no authority to comply with the command. He denied, in the most emphatic manner and in most satisfactory detail, that he was or had been a member of, or had served on or was serving on, a political committee, or as manager of a political campaign, for Mr. Johnson. There was nothing definitely produced to the contrary, while there stands the summary refusal to take the corroborating evidence of Mr. Johnson and others on the subject. The only reasonable explanation of the proceeding seems to be that it was supposed that personal undisclosed supposed knowledge of the governor was a proper basis for action.

On the face of the record, I feel bound to say there is no real basis for the decision that appellant violated the statute.

If the proof justified a finding that appellant acted for Mr. Johnson, in the nature of a committee or as member of a committee, in the promotion of his candidacy, still I think there is no proof of there having been a political committee or manager in the statutory sense. The law must be restricted to the common, ordinary meaning of words. Notwithstanding the ingenious argument of counsel to the contrary, it seems the legislature evidently used the term "political committee" in the sense of managing committee for a political party, and the term "manager of a political campaign" to characterize a manager for a political party, in the technical sense, in such a campaign. The statutes in many places deal with political parties, political committees, and political campaigns. Section 1966y was passed about the same day as the corrupt practice act, wherein such terms are used many times. Provision is made therein for such committees, they are given a sort of quasi official status, and regulated with much detail. Similar committees have been dealt with in this state for some twenty-five years as a proper subject for regulation under the police power, as significantly indicated in *State ex rel. Cook v. Houser*. It seems quite plain, I think, that political parties and the associate terms were used in § 1966y in the sense of similar terms in §§ 94—1 to 94—39 of the statutes. That accords with the construction of the term "political committee" elsewhere. Revised Laws of Mass. (Supp. 1902-1908) chap. 11, § 1. It gives sensible effect to the statute. To apply the term as used in § 1966y, to a person who may, of his own volition or by request, favor someone of several persons elected to the legis-

lature as result of a political campaign—someone of the aspirants within his own party—for presiding officer, would be to render the statute absurd.

I am of the opinion not only that there was no evidence to reasonably support the charge against appellant from any fair viewpoint, but that the charge itself was not within the statute. The governor unwittingly traveled into the realms of doubtful construction, and that is not permissible in any case, especially not to maintain such an extraordinary power as that asserted. A meaning was adopted which it seems the legislature did not contemplate putting into law. Otherwise hardly any man of sufficient individuality to be competent to fill the high and responsible office of Commissioner of insurance would be found to take it. Practical construction has, so far as it has progressed, rejected any such meaning. Notwithstanding the bitter factional contests for the position of speaker of the legislature, candidates for speaker, or for head of any committee of the legislature, treated the corrupt practice act as having no reference to a canvass for such position.

I am conscious that this opinion has been extended to a very great length,—I trust not too great. The questions, as I have before remarked, are of such overshadowing importance that the particular right involved, though of much dignity, is of little importance beside the proper decision of the important questions upon which its conservation depends. I have endeavored to the best of my ability, to do justice to the court, to such questions, and to the vindication of that broad construction of private rights and the inviolability thereof believed to be laid down in the Constitution, and the judicial power and willingness to use it to vitalize such conception.

We must remark, in closing, that we have not been unmindful at any time of the regard which this court should have for the high office of governor. A solemn duty rests here in that regard. It is a matter of great delicacy to deal with the governor's action and condemn it as void, but when duty requires it, the duty must be performed. Anyone who would hesitate when the duty is plain, because of the exalted station of the co-ordinate department of government, is unworthy to be a trustee of the judicial power delegated by the people. With due deference to the co-ordinate department, and full appreciation of its independence, within the scope of its authority, we must, with the courage which should characterize the supreme judicial office, vindicate the paramount authority here to determine what the law is, what acts constitute a violation thereof, and what are

the legal consequences. The moment it shall be established that either of the other departments is independent of the judiciary in that field, the guard which the people placed in the Constitution to conserve private rights will have been broken down, and the pathway for usurpation will be open and plain. We entertain no thought that the governor had any purpose to violate the law. He is human, and so is liable to err. Error often occurs, as we think it did here, without consciousness of any ulterior influence, and yet some strong feeling springing from provocation, may so have had the field as to subvert the judgment.

To recapitulate the points in this opinion:

The governor within the scope of his authority is independent of the judicial department of the state. He can neither be compelled to act or not to act, nor his act called in question.

If the governor acts beyond the scope of his authority and violates private rights, the injured party may appeal to the courts for redress, and be entitled thereto regardless of the official status of the wrongdoer, though such status may have much to do with the manner of redress.

The courts, except in some extreme cases of hardship not admitting of any other remedy, will not act coercively in respect to the governor; that not from want of power, but on grounds of public policy.

The public policy which shields the governor from judicial coercion, except in dire necessity, does not apply to his agents, though the court will not, from the same policy, act then coercively to restrain the vitalization of the executive will, unless there is some clearly contrary to law apparent necessity therefor.

If a person takes office by lawful means, and remains therein in good faith believing that he has *de jure* right to do so, and his possession is characterized by all the usual appearances of right, he has color of authority, and has *de facto* status until the end of his term and some other has been duly declared successor to him in the particular office.

A person in possession, under the circumstances before stated, does not lose his *de facto* status before the end of the term for which he was elected or appointed, by reason of the formal, premature, adverse termination thereof, and the appointment or election of a successor, so long as he remains in possession, doing business as before, in good faith and upon reasonable ground challenging the validity of interference.

Subject to the exception suggested, a per-
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son in good faith possession of a public office, and to all appearances entitled thereto *de jure*, is at least a *de facto* officer.

If a person has possession of an office and is entitled thereto *de jure* or *de facto*, or there is a fair question as to whether he has not, at least, the latter status, he is entitled to protection by injunction against being dispossessed by violent and unlawful means.

The remedy by action for injunction may be used in the circumstances stated in the foregoing, though there be no action pending to try the title to the office, and the only purpose is to preserve the existing condition of things until the adverse claimant shall have established his right by legal means.

A controversy between rival claimants for an office, as to which has the title, is not a proper primary subject-matter for equitable interference, but the right to immunity from being dispossessed by violent and unlawful methods is such a subject-matter.

Though an equitable action will not lie to try title to an office, where the question of title is incidental and germane to some proper subject-matter of primary interference in equity, the incidental matter may be litigated to effect, under the rule that a court of equity having jurisdiction of the parties and a proper primary subject-matter for a legitimate purpose may retain jurisdiction to do full justice between the parties, including all the incidental germane matters, and even, when the action is grounded in good faith at the start, if the primary subject-matter entirely drops out for failure of proof.

Where the power of summary removal from public office exists, the officer clothed with the power may execute it without judicial interference before or after. Where a person holds a public office *ad libitum* purely, he may be removed at the pleasure of the officer having the power of removal. Where the power of summary removal is expressly or by necessary inference conferred by statute, the removal may occur without hearing except such as the statute expressly requires. Where a person holds office for a term fixed by law, but is subject to removal for cause, or a particular cause, unless the written law expressly or by necessary implication provides to the contrary, the power of removal must be exercised upon charges satisfying the calls of the statute, reasonable notice of the charges and the time when the hearing will be had in respect thereto, reasonable opportunity to be heard in person, by counsel, and by witnesses, to meet the adverse witnesses, hear their testimony and cross-examine them, and know all of, and have opportunity to meet, the proofs to be considered,—

in short, a hearing after the manner for fair judicial investigation and determination accordingly.

The right to hold and enjoy a public office is of pecuniary value, and in a broad sense is a property right and matter of personal liberty within the protection of the declared purpose of the Constitution, within article 5 and § 1, art. 14, of the Amendments to the Federal Constitution.

Due process of law, within the constitutional guaranties, limits the exercise of the power of removal to those proceedings expressly provided by statute, or, where none are so provided, to the methods which by the common law are required according to established principles of natural justice.

Whether the governor, exercising the power of removal, acquired jurisdiction to act, and proceeded to a finality without excess of jurisdiction, may be inquired into whenever the result is called in question collaterally or directly.

In exercising the power of removal for cause and upon notice and hearing, the governor acts as a tribunal, and the same as any other inferior body exercising quasi judicial authority, his act may be reviewed, under the supervisory control power of the court, for jurisdictional error whenever the same comes in question directly or collaterally.

Whatever a quasi judicial tribunal does within its jurisdiction, regardless of the mere judicial error committed, is final, but any material excess is jurisdictional, and renders the result void.

An inferior tribunal, required to decide upon evidence, commits a clear violation of law in deciding without any evidence or contrary to any reasonable view of the evidence, and such violation is jurisdictionally fatal to the result.

The prohibitory clause of subdivision 2, § 1966y, as to the commissioner of insurance not serving on or under any political committee, or as manager for any political campaign, has reference to those committees and campaign activities recognized and regulated by statute, particularly by the several sections of the corrupt practices act (§ 94—1 to § 94—39). It has no reference to mere personal preferences or favors or activities, for one of a body elected as the result of a political campaign, as presiding officer of the body.

The facts upon which the decision is grounded, as to the governor's jurisdiction to make the order of removal, are undisputed and undisputable. All that is shown by the record as made in behalf of respondents. Therefore it would be a useless delay in the administration of justice, and prejudicial to public interests, to remand this

case for any less purpose than a speedy termination of the litigation by judgment on the merits according to the prayer of the complaint, and, as germane thereto, judgment that, at the time of the commencement of the action, appellant was *de jure* commissioner of insurance.

So ordered.

Barnes, J., dissenting:

The order appealed from should be affirmed for two reasons: (1) Because the certificate of appointment held by Mr. Anderson gave him the *prima facie* right to the office and the right to the possession thereof until the question of title was tried in an appropriate proceeding brought for that purpose; and (2) because the governor had the right under § 970, Stat., to remove Mr. Ekern, without hearing or notice, and the courts have no jurisdiction to pass upon the sufficiency or insufficiency of the evidence on which action was taken, and Mr. Anderson was both the *de facto* and *de jure* commissioner of insurance.

Practically every substantial question of law involved in the case, with possibly a single exception, has already been passed upon by this court. This being so, the decisions of foreign jurisdictions are of little consequence, unless they suffice to convince the court that it should overrule its former decisions. I think our decisions and our statute law meet the case we have before us fully and fairly; hence this dissent.

The title to a public office cannot be tried in an equity action. *Ward v. Sweeney*, 106 Wis. 44, 82 N. W. 169; *State ex rel. Lochsmidt v. Raisler*, 133 Wis. 672, 114 N. W. 118; *State ex rel. McCoale v. Kersten*, 118 Wis. 287, 95 N. W. 120; *State ex rel. Jones v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296; *State ex rel. Rinder v. Goff*, 129 Wis. 668, 9 L.R.A.(N.S.) 916, 109 N. W. 628.

An injunction will not lie to preserve the *status quo* in favor of a person in possession of an office and making a good faith claim of title thereto, unless it clearly appears that such party is in fact entitled to the office. *Ward v. Sweeney*, supra. While two members of the court did not agree to all that was said in the opinion in that case, the entire court did agree that the law was as above stated. See opinion of court, 106 Wis. pages 49, 50, concurring opinion of Mr. Justice Marshall, 106 Wis. pages 55, 63, and concurring opinion of Mr. Justice Bardeen, 106 Wis. page 63. Such is the law generally in reference to the issuance of injunctions *pendente lite* in equity actions. *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Warden v. Fond du Lac County*,

14 Wis. 618; Pettibone v. La Crosse & M. R. Co. 14 Wis. 443; Cobb v. Smith, 16 Wis. 661; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756, 9 N. W. 615; Converse v. Ketchum, 18 Wis. 203, 206; T. B. Scott Lumber Co. v. Oneida County, 72 Wis. 158, 39 N. W. 343; Walker v. Backus Heating Co. 97 Wis. 160, 72 N. W. 230; Tiede v. Schneidt, 99 Wis. 201, 211, 74 N. W. 798. There is but one well-recognized exception to this general rule, which is found in such cases as Valley Iron Works Mfg. Co. v. Goodrick, 103 Wis. 436, 78 N. W. 1096; Glassbrenner v. Groulik, 110 Wis. 402, 404, 85 N. W. 962; Quayle v. Bayfield County, 114 Wis. 108, 80 N. W. 892; Bartlett v. L. Bartlett & Son Co. 116 Wis. 450, 460, 93 N. W. 473, and Milwaukee Electric R. & Light Co. v. Bradley, 108 Wis. 467, 486, 84 N. W. 870. Manifestly the instant case does not fall within the exception.

The holder of a certificate of election is entitled to the possession of an office pending the trial of title thereto, as against an incumbent possession who makes a good faith claim of title. This was expressly decided in *La Pointe v. O'Malley*, 46 Wis. 35, 55, 50 N. W. 521, 524, where it is said that when the canvass "shows the election of an individual to a particular office, and he qualifies within the time and in the manner prescribed by law, he is entitled to the office as against every other person laying claim thereto, until the result of the election so declared is set aside by the judgment of some competent court, in a direct proceeding for that purpose. In such case, the person declared to have been elected is not required to institute a proceeding to have the judgment which has already been given in his favor confirmed by the judgment of a court, before he can enter upon the duties of the office."

The same question came before the court in *State ex rel. Jones v. Oates*, 86 Wis. 634, page 638, and it was again held that a certificate of election carried with it the prima facie right to the office as against an incumbent in possession claiming title, and that such prima facie right included the right to the possession to the office pending the trial of title thereto. After stating the rule, the court uses the following language: "To this, we think, there is but one exception, and that is when the office is already filed by a *de facto* officer." This exception is carried into some of the subsequent cases: *State ex rel. McCoale v. Kersten*, 118 Wis. 289 op., 95 N. W. 120; *State ex rel. Riuder v. Goff*, 129 Wis. 683, op., 9 L.R.A. (N.S.) 916, 109 N. W. 628. It is fair to assume that the court in these cases used the language of the *Oates* Case in the light of the explanation there given as to what was

meant by it. It is there said in effect that the words "*de facto* officer" did not refer to one who might be a *de facto* officer as to the general public. *Oates* was in possession and was clearly such an officer, and he was ousted by mandamus in favor of the relator, who held the certificate of election. He was ousted because it was said that, as to the relator, *Jones*, he was not a *de facto* officer. So the decision is that a claimant in possession is not a *de facto* officer as against the certificate holder, and therefore has no right of possession as against him. Not only are the cases of *La Pointe v. O'Malley* and *State ex rel. Jones v. Oates* direct authority to the point that the holder of a certificate of election is entitled to the possession of the office pending a trial of title thereto, as against an incumbent in possession, but the subsequent cases of *State ex rel. McCoale v. Kersten* and *State ex rel. Riuder v. Goff*, supra, and *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78, when correctly read, are to the same effect.

These cases state the law as it should be. Where there is a controversy between an incumbent in possession and one holding a certificate of election, one or the other should hold the office until the controversy is settled. Possession at best is only slight evidence of title. As between two such claimants, it is eminently just and reasonable to give some effect to the certificate of election, and to say that it carries the right to the possession of the office until the title is determined. This is not only a just rule, but one that avoids unseemly struggles to obtain or retain possession. The party in possession forfeits no rights and suffers no injury by surrendering possession *ad interim*. Every one had the right to suppose that the rule of law was firmly grounded in our jurisprudence until the present controversy arose.

I do not think that any satisfactory reason can be given why the rule referred to should not apply here. A certificate of appointment from the executive, where the law empowers him to appoint, is entitled to the same weight and effect as is a certificate of election from a canvassing board in the case of an elective office. If one gives the right of possession, surely the other does. So far as I have been able to ascertain there is no conflict in the cases on the point. In fact the decisions go further and hold that mandamus will lie to put the holder of a certificate of appointment in possession of the office pending the trial of title thereto, and will oust the party in possession although he claims to be legally entitled to the office. *Re Sells*, 15 App. Div. 571, 44 N. Y. Supp. 570; *Conklin v. Cunningham*, 7

N. M. 445, 38 Pac. 170; Beebe v. Robinson, 52 Ala. 86; Casey v. Bryce, 173 Ala. 129, 55 So. 810; Hubbell v. Amijo, 13 N. M. 482, 85 Pac. 1046; Cameron v. Parker, 2 Okla. 277, 38 Pac. 14; Elledge v. Wharton, 89 S. C. 113, 71 S. E. 657; State ex rel. Adams v. Herried, 10 S. D. 18, 71 N. W. 319.

It has been urged that in the O'Malley and Oates Cases the terms of office under which the incumbents gained possession of the offices had expired, and that the controversies arose over new terms, while in the instant case Mr. Ekern's term had not expired, and that therefore there is a well-grounded distinction between the former cases and the present one. A number of the cases just cited dealt with removals made during a term of office. The logic of the argument is not convincing. The governor had the right to terminate the term of office of the incumbent for certain causes. His order of removal is entitled to as much weight and consideration as is his certificate of appointment. There had been a *prima facie* valid removal of Mr. Ekern, as well as a *prima facie* valid appointment of Mr. Anderson. Until the *de jure* right could be determined, no injunction should issue to preclude the appointee from taking office.

For the reasons stated, if for no other, the circuit court properly dissolved the injunction. I think it was Mr. Ekern's duty under the law to have surrendered the office under protest, and then to bring his action in an orderly way to try title. If successful, he would lose no right by so doing, not even the right to collect the salary and emoluments of the office while he was out of possession.

The next and the only question which I desire to discuss at any length is one of statutory construction. At the request of the court a reargument was made on the question of whether due process of law was observed in removing Mr. Ekern. I have never conceived that the question of due process of law was involved in the slightest degree. If the governor followed the statute in making the removal, it was valid. If he did not, it was a nullity. The legislature which creates an office has plenary power to provide how removal shall be made. Whoever accepts an office so created accepts the burdens as well as the benefits. He is entitled as a matter of right to so much consideration as the legislature sees fit to give him,—no more, no less. Gillan v. Normal Schools, 88 Wis. 7, 14, 24 L.R.A. 336, 58 N. W. 1042. It may provide for removal without notice or hearing or the assignment of any cause. In such a case removal may be made without notice or hearing or the assignment of cause. It may provide for removal without notice or hearing

for specific causes. In such a case removal may be made without notice or hearing, but a cause must be assigned, and it must be one specified in the statute. It may provide for removal on notice and hearing for specific causes, in which case a reasonable notice and hearing must be given. and the removal must be made for a cause found in the statute. It would seem to me to be almost absurd to deny this power to the legislature, and yet it seems to be done in many jurisdictions; some courts holding that the right to hold office is a property right protected by the due process clause of the Federal Constitution, and others that the power to remove is judicial and must therefore be exercised in a judicial manner. Still others seem to entertain no very well-defined reason for denying the power of the legislature, and proceed on general principles to apply the same rules to removals of incumbents of offices of legislative creation that are sometimes applied to the case of officers provided for by Constitutions. I do not care to discuss these foreign cases, nor the statutes under which they arise. The fundamental principles involved have been settled, and rightly settled, by this court. This much may be said, however, that wherever the legislature evidences an intent that notice and hearing need not be given, that intent will control. Coleman v. Glenn, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297; Cull v. Whittle, 114 Md. 58, 78 Atl. 820, 824; Hallgren v. Campbell, 82 Mich. 255, 9 L.R.A. 408, 21 Am. St. Rep. 557, 46 N. W. 381, 383; Field v. Com. 32 Pa. 478, 481; State ex rel. Hastings v. Smith, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700; People ex rel. Maloney v. Douglass, 195 N. Y. 145, 87 N. E. 1070; State ex rel. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554, 561; s. c. on appeal, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Andrews v. King, 77 Me. 224; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; McDowell v. Burnett, 92 S. C. 469, 75 S. E. 873; People ex rel. Murphy v. McAllister, 10 Utah, 357, 37 Pac. 578, 580; State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281; State ex rel. Hamilton v. Grant, 14 Wyo. 41, 1 L.R.A. (N.S.) 588, 116 Am. St. Rep. 982, 81 Pac. 795, 799; Reagan v. United States, 182 U. S. 419, 45 L. ed. 1162, 21 Sup. Ct. Rep. 842; Shurtleff v. United States, 189 U. S. 311, 47 L. ed. 828, 23 Sup. Ct. Rep. 535.

An office is not property, nor is the right to hold office a vested right. State ex rel. Starkweather v. Superior, 90 Wis. 612, 619, 64 N. W. 304; State ex rel. Cook v. Houser, 122 Wis. 534, 603, 100 N. W. 964; State ex rel. Wagner v. Dahl, 140 Wis. 301, 303, 122 N. W. 748; Crenshaw v. United States, 134 U. S. 99, 33 L. ed. 825, 10 Sup. Ct. Rep. 431.

and cases cited. The guaranty of due process of law by the 5th and 14th Amendments to the Federal Constitution is extended only to life, liberty, and property. The right to hold an office created by legislative act does not involve any of these three things. If due process of law is involved at all in the present case, then a removal in whatever manner the statute provides is due process of law. As is well said in *State ex rel. Buell v. Frear*, 146 Wis. 201, 298, 299, 34 L.R.A. (N.S.) 480, 131 N. W. 832, 833: "The privilege of holding a public office is not in its nature of the class of rights which are guaranteed by the Constitution as the natural and inalienable rights of every citizen. It has never been treated as a natural right in our governmental system. It is in its nature a privilege which is extended to the citizens of the state upon such conditions and terms as the people in their sovereign capacity may determine."

Again it was held in *Gillan v. Normal Schools*, 88 Wis. 7, 24 L.R.A. 336, 58 N. W. 1042, that a statute empowering the board of regents to remove a teacher at pleasure was as much a part of the contract of employment as if it were written into such contract, and that a removal might be made under it without notice or hearing. The power of eviction from office is not a judicial one under the law of Wisconsin, but is administrative, at least as to all officers whose removal is not provided for by the Constitution. Many courts hold that the power of removal is judicial, and starting with this premises they reach the conclusion, logically enough, that it must be exercised in a judicial manner, which comprehends the giving of notice to the accused officer of the charges against him and a full opportunity to be heard thereon. *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 10 N. W. 112, is a typical case of this class, and contains an able and elaborate presentation of the reasons for so holding, as well as a review of the authorities upon which the court based its conclusion. This court, however, refused to follow the Michigan decision in the *Starkweather Case*, although urged to do so, and said: "The better authority, however, is clearly to the effect that the power to remove officers for cause, though to be exercised in a judicial manner, is administrative, not judicial." If it were held otherwise, the court would have been compelled to reach an opposite conclusion in the case, because by no stretch of imagination could it be held that the relator in that cause had a judicial hearing. One of his judges was a person who would succeed him in the office of mayor in case of re-

moval, and another was the person who presented the charges against him.

The *Starkweather Case* does not conflict with what is said in *Larkin v. Noonan*, 19 Wis. 83. There the court held that a sheriff was entitled to be served with a copy of the charges against him, and to a right to be heard in his defense, because § 4 of article 6 of the Constitution expressly required these things. The court proceeds to hold that, a hearing being so required, it should be carried on after the manner of court procedure. *Randall v. State*, 16 Wis. 341, is to the same effect, and goes no further. The same thing is said in the *Starkweather Case*. The case of *State ex rel. Getchel v. Bradish*, 95 Wis. 205, 37 L.R.A. 289, 70 N. W. 172, was distinguished from the *Starkweather Case* in that it was there decided that a license to sell liquor was a vested property right of which the owner could not be deprived without due process of law, and that in a proceeding to revoke the license, the town chairman, who had hired a minor to purchase liquor, was disqualified from sitting on the trial of the saloon keeper.

The decision in the *Starkweather Case* was vigorously attacked by the able counsel who appeared for the relator in *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964, and was just as vigorously defended by the court, speaking through Mr. Justice Marshall. The discussion will be found in the opinion on pages 573 to 581 of 122 Wis. I may be pardoned for quoting a few excerpts from it: "We recognize the doctrine of the *Starkweather Case* to be now, after the lapse of nearly ten years and the approvals thereof indicated, firmly established. The maxim, *Stare decisis et non quieta movere*, must prevail against all efforts to disturb it." 122 Wis. pages 574, 575. And again: "Can there be any possible doubt as to the truth of the proposition that what belongs to the people to do with as they deem best, those things respecting which their will is unrestrained by any constitutional limitation, they can grant upon the condition, among others, that the enjoyment thereof shall be solely secured by such remedies and administered by such tribunal as they may see fit? If there is, then the scores of boards and councils and commissions which every day act judicially in respect to such matters, without a thought on the part of anybody conversant with the law that their decisions are subject to judicial review, should have immediate legislative attention. Does not every board of review pass upon, or have power to do so, the valuation, for purposes of taxation, of the property owned by the relatives and business associates of its

members? And how about the assessor, who sits as a member of such board, though its function is to pass upon, in a judicial way, his own work? Many other illustrations quite as striking could be given, all demonstrating the decision in the Starkweather Case is in perfect harmony with the existing order of things generally, and showing that the disquisitions found in some judicial literature respecting purity of judicial methods as to members of a tribunal such as the one in question, applying to them the test for a judge as to qualifications for the performance of his official duties, are all wrong. Such things sound well to the ear, as do all lofty sentiments regarding the preservation of spotless judicial integrity and shielding the courts even from danger of every opportunity for a well-grounded suspicion as to their decisions being influenced by ulterior matters; but when illegitimately applied to a mere ministerial officer in the performance of administrative duties, merely because he is clothed with some discretion in the matter denominated quasi judicial authority, are liable to lead to judicial error, and to promote harmful impressions among the people." 122 Wis. pages 575, 576.

Speaking further of the nature of the power of a political committee to determine who were the nominees for office, the discussion proceeds: "But we choose to rest the competency of the members of such committee on the broad doctrine of State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304. It was a mere administrative body, not a court in any sense, nor were its members expected to exercise the functions of judges, strictly speaking. The matter to be dealt with was a mere legislative privilege, grantable upon any condition the legislature saw fit to impose. The tribunal was given unqualified authority in respect thereto, so long as it proceeded within its appropriate sphere. None of the rules disqualifying judges or jurors have any application to such a situation." 122 Wis. page 581.

If it were possible to approve of the holding in the Starkweather Case, that the power to remove an officer was administrative, by emphatic iteration and reiteration, the doctrine was approved in State ex rel. Cook v. Houser. It had already been quoted with approval in Nehring v. State, 112 Wis. 637, 639, 88 N. W. 610, and was subsequently approved in State ex rel. Wagner v. Dahl, 140 Wis. 303, 122 N. W. 748. The point expressly decided in the cases referred to was decided *sub silentio*, or else overlooked, in State ex rel. Gill v. Watertown, 9 Wis. 254. State ex rel. Kennedy v. McGarry, 21 Wis. 497, and State ex rel. Willis 46 L.R.A.(N.S.)

v. Prince, 45 Wis. 610. The question should be at rest in this state, in so far as the courts are concerned, if the doctrine of *stare decisis* means anything. It is true it is said in the Starkweather Case that the administrative power of removal must be exercised in a judicial manner. This expression can mean nothing more than that, when notice and hearing is required by law, as it was in that case, the proceeding should be carried on somewhat like court proceedings.

So I think that clearly the only question arising on the point under consideration is: Does the statute require the giving of a notice of hearing and an opportunity to be heard as a condition precedent to removal? If it does not, whatever was accorded to the plaintiff in the way of a notice and hearing was given as a matter of grace, and not of right, and he has no cause to complain about the inadequacy of the opportunity afforded to be heard. In this connection it will be observed that the statute does not expressly provide for notice or hearing, and if either is required it must be read out of the statute by implication. It may be further observed that such requirements cannot be interpolated into the statute, unless it is apparent that the legislature intended they should be. When we consider the history of this legislation, it is about as certain as anything of the kind can be, that there was no such legislative intent. To my mind that conclusion is as inevitable as the result of a mathematical demonstration.

Section 970, Stat., under which the plaintiff was removed, was first enacted by the legislature of 1849 as part of a comprehensive scheme governing and regulating removals from office. It has been continuously on our statute books since that time without material amendment. The legislative intent with which we must deal is that of the legislature which enacted the original law. The entire enactment referred to embraces §§ 4 to 10, inclusive, of chapter 11, Rev. Stat. of 1849, and is as follows:

"Section 4. The governor may remove from office any sheriff, coroner, register of deeds, or district attorney, giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.

"Section 5. The judge of the circuit court shall have authority, in term time or in vacation, to remove any clerk of the circuit court in any county within his district, when in his opinion he is incompetent to execute properly the duties of his office; or when on charges and evidence such judge shall be satisfied that he has been guilty of official misconduct, or habitual or

wilful neglect of duty, if, in the opinion of such judge, such misconduct or neglect shall be a sufficient cause for removal; but no such clerk shall be removed for such misconduct or neglect, unless charges thereof shall have been preferred to said judge, and notice of the hearing, with a copy of the charges, delivered to such clerk, and a full opportunity given him to be heard in his defense.

"Section 6. The board of supervisors of any county may remove the clerk of their board, when in their opinion he is incompetent to execute properly the duties of his office; or when on charges and evidence it shall appear to said board that he has been guilty of official misconduct, or habitual or wilful neglect of duty, if, in the opinion of said board, such misconduct or neglect shall be a sufficient cause for removal; but no such clerk shall be removed for such misconduct or neglect, unless charges thereof shall have been preferred to said board, and notice of the hearing, with a copy of the charges, delivered to such clerk, and an opportunity given him to be heard in his defense; and in no case shall such removal be made unless two thirds of all the supervisors entitled to a seat in such board shall vote therefor.

"Section 7. Any collector or receiver of public moneys, appointed by the legislature or by the governor by and with the advice and consent of the senate, or of both branches of the legislature, except those officers for whose removal provision is otherwise made by law, may be removed by the governor in case it shall appear to him on sufficient proofs, that such collector or receiver has in any particular wilfully violated his duty.

"Section 8. All officers, except Senators in Congress and those specified in the preceding section, who are or shall be appointed by the governor by and with the advice and consent of the senate, or of both branches of the legislature, or by the legislature without the concurrence of the governor, may, for official misconduct, or habitual or wilful neglect of duty, be removed by the governor upon satisfactory proofs, at any time during the recess of the legislature, and the vacancy filled by appointment made by him, until such vacancy shall be regularly supplied; but no such appointment shall extend beyond twenty days after the commencement of the next meeting of the legislature.

"Section 9. All officers who are or shall be appointed by the governor for a certain time, or to supply a vacancy, may be removed by him.

"Section 10. All officers, except Senators in Congress, who are or shall be appointed
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by the legislature, or by either branch thereof, may be removed by such body or branch making the appointment."

Section 4 of the above statute is now § 968 of our Revised Statutes; § 5 is amended and incorporated in our present § 973; § 6 corresponds to our present § 974; § 7 to our present § 969; and § 8 to our present § 970, being the section under which the plaintiff was removed. The words "or of both branches of the legislature," contained in the original act, are not now found in § 970; otherwise the two statutes are identical. Section 9 corresponds to § 971; and § 10 to § 972.

It will be observed that § 4 covers the constitutional offices of sheriff, coroner, register of deeds, and district attorney, which were also elective offices. It was there expressly provided that the removal could only be made after such an officer was furnished a copy of the charges against him, and was given an opportunity to be heard in his defense. So that the matter of requiring a notice and hearing when they were considered desirable was sharply called to the attention of the legislature in the 1st section to the act which dealt with removals. This provision was in fact drawn in the language of § 4 of article 6 of the Constitution, which had been adopted the preceding year.

Section 5 also provided for the removal of a constitutional and elective officer, to wit, the clerk of the court. The Constitution was silent as to how he should be removed, so that the legislature might make such provision for it as was deemed wise. See § 10, art. 13, Const. The section provided for two classes of causes for removal: (1) Incompetency; (2) Official misconduct, or habitual or wilful neglect of duty. It was clearly the purpose of the legislature to authorize the summary removal of the clerk for incompetency without notice or hearing, because the statute required neither when removal was made for this cause. As to the second class of causes, however, the statute carefully specified that the clerk could not be removed for misconduct or neglect unless "charges thereof shall have been preferred," and "notice of the hearing with a copy of the charges" be "delivered to such clerk, and a full opportunity be given him to be heard in his defense." Here, again, the question of notice and hearing was immediately in the mind of the legislature, and the law expressly provided that notice and hearing were required on such causes of removal as the legislature desired they should be given on. Could it in reason or common sense be said that a notice and hearing was intended before a removal could be made for incompetency, when the law

did not say so, but did say in the same section and in the same sentence that notice and hearing should precede a removal for other causes? The answer is obvious. It might be observed in passing that the causes for removal on account of which a notice and hearing was required by § 5 are the identical causes for which removal might be made under § 8, our present § 970, and which pertinently omits the requirement as to notice and hearing, no doubt because it was considered wise to throw greater safeguards around removals from elective than from appointive offices.

Section 6 dealt with the removal of county clerks, and vested the power of removal in county boards. Here, again, if the removal was made for incompetency, no notice or hearing was required. If made for "official misconduct, or habitual or wilful neglect of duty," it could only be made on notice and hearing. We have in this section a plain statement that notice and hearing should be given in the case where it was desired that they should be given, and an omission of any reference to either in the case where manifestly it was not intended that they should be required.

Section 7 brings us to appointive officers, and provides for the removal by the governor of any collector or receiver of public moneys appointed by the legislature, or by the governor with the advice and consent of the senate, except as otherwise provided for, "in case it shall appear to him on sufficient proofs" that such officer "has in any particular wilfully violated his duty."

In making a removal for incompetency under § 5, the circuit judge could act on his own knowledge. The county board could do likewise in making a removal for the same cause under § 6. Under § 7 the governor could act on any proofs that were satisfactory to him. No notice or hearing was provided for as in the preceding sections. The power of removal was vested in the head of one of the departments of government, where there was no likelihood that it would be abused. It dealt with officers who were handling public funds, and as to whom peremptory removals might be absolutely necessary to save the state from loss, where a dishonest official was squandering or stealing the money of the state. Is it supposable that the legislature intended that such an officer might continue to embezzle state funds until he could be served with a copy of the charges against him, and be given what might be deemed a sufficient time to prepare his defense? If so, why did not the legislature say so, as it did in the preceding sections, when it desired that notice and hearing should be given? We have § 7 on our statute books to-day as § 969, Rev. Stat. 46 L.R.A. (N.S.)

If it is learned that such an officer has stolen money of the state, and is liable to steal more, must notice and hearing be given and proceedings be carried on in their usual leisurely way before thefts can be stopped? I do not think the legislature ever had any such intention, and I think it is very clear that it had not. I also think that, if the court had such case presently before it, instead of the one pending, it would not hesitate to so hold. And yet if the requirement of a notice and hearing cannot be read into § 7, it cannot be read into § 8, the one with which we are concerned.

Section 8 of the act of 1849, being our present § 970, under which the governor acted in the instant case, provided that all officers, with certain designated exceptions, who are or shall be appointed by the governor with the advice and consent of the senate, may "for official misconduct, or habitual or wilful neglect of duty, be removed by the governor upon satisfactory proofs, at any time during the recess of the legislature." The difference between §§ 7 and 8 in reference to the method of removal is one of verbiage only. Under § 7 the governor may remove on "sufficient" proofs, and under § 8 on "satisfactory" proofs. The two words in this connection are practically synonymous and interchangeable. What is sufficient in the way of proof is ordinarily satisfactory, and what is satisfactory is sufficient. If this be not so, and there is a difference in the degree of proof required in the two cases, there is nothing in their use which indicates that a notice and hearing must be given in the one case, and may be refused in the other. The proofs required must be sufficient or satisfactory to the governor, and to no one else. They may be both sufficient and satisfactory, and even conclusive, without either notice or hearing. If the legislature had intended that notice and hearing should be required under § 8, it would have said so, as it did in reference to all removals made under § 4, and as it did as to two of the three causes for removal under §§ 5 and 6. The matter of notice and hearing was present in the legislative mind when the original law was passed. The fact that they were required in some cases and omitted in others is proof conclusive that the legislature did not desire to require them in cases where they were not expressly provided for. In such a case silence is as plainly exclusion as the use of express words would be.

I can only read out of the law of 1849 the conclusion that sheriffs, district attorneys, coroners, registers of deeds, clerks of the courts, when removed for official misconduct or wilful neglect of duty, and county clerks,

when removed for like causes, could only be removed on notice and hearing, because the legislature has said so in plain words, and that all other officers whose removal was provided for might be removed without notice or hearing, because the legislature carefully refrained from requiring either. This latter statement is also true as to clerks of the courts and county clerks when removed for incompetency.

The scheme for removals was comprehensive and carefully worked out. As to elective and constitutional officers, safeguards were thrown around removals, with two exceptions. Clerks of the courts did their work under the eyes of the circuit judges, and when a judge became satisfied that a clerk was incompetent he might summarily remove him. Clerks of county boards did their work under the eyes of county boards, and such boards were empowered to summarily remove for incompetency. As to appointive offices created by the legislature, the power of removal as to all officers provided for in §§ 7, 8 and 9 was vested in the chief executive officer of the state. As to those provided for in § 10, the power of removal was vested in the legislature itself. Removals under §§ 7 and 8 could only be made on sufficient or satisfactory proofs. Removals under §§ 9 and 10 might be made at will, without proofs and without notice. I think there is just as much reason for saying that a removal made under either of the two latter sections must be made on notice and hearing, as there is for saying that notice and hearing is required under § 7 or § 8, or for removals for incompetency under §§ 5 and 6.

It is fair to assume that the legislature thought that a person who could be trusted to fill the office of governor could be trusted to deal fairly with officeholders whom he was empowered to appoint, and that cases might arise where prompt action was necessary for the public good, and that it was not wise to tie the hands of the governor when such action might well work to the detriment of the state. Governmental power must be vested somewhere, and the fact that it may be abused does not prove that the power must not be conferred. It would seem quite as logical to give a notice and hearing to candidates for appointments before a selection is made, as to require them in case of removal.

It has, I think, been the uniform practice of the legislature to expressly provide for a notice and hearing as a condition precedent to removal from office, where it was intended that no removal should be made without such notice and hearing.

By § 381, Stat., the board of regents of the State University have the power to re-

move the president or any professor, instructor, or officer of the university when in their judgment the interests of the university require it.

Subdivision 3 of § 404 confers a like power on the board of normal school regents. This latter statute was construed in *Gillan v. Normal Schools*, 88 Wis. 7, 24 L.R.A. 336, 58 N. W. 1042, and it was held that the power of removal was plenary and could be made at pleasure and without cause.

Section 397 provides that any normal school regent may be removed for cause, upon reasonable notice, by a vote of two thirds of all the regents.

Section 507 provides for the removal of school district officers, and that they must be removed on written charges, which must be served on such officers, and can only be removed after a notice and hearing upon the charges.

Section 772a provides that the supervisor of assessment may be removed by the county board for incompetency, fraud, or wilful neglect of duty, on charges preferred and ten days' notice in writing of the hearing thereon, and that a copy of the charges must be served with the notice.

Section 925—36 provides for the removal of certain city officers by the common council. It expressly states that no such officer shall be removed except for cause, nor unless charges are preferred against him and opportunity given him to be heard in his defense.

Section 925m provides for the removal of certain officers in cities operating under the commission form of government, where such officers are elected by the council, and they may be removed by a majority of the members of the council. This statute requires neither cause, notice, nor hearing.

Section 976 provides for the removal of town officers, and requires that removal be made only after notice and hearing.

Section 990—22 provides for the removal of persons in the employ of the state under the civil service law. The appointing officer is required to furnish his subordinate the reasons for removal, and to allow him a reasonable time in which to make an explanation, and such reasons, with the answer thereto, are required to be filed with the civil service commission. The cause of the removal must be neither religious nor political. This statute was construed in *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748, and it was held that the power of the removing officer was plenary, so long as legal cause for removal was specified.

Section 975 provides for the removal of a county superintendent of schools. The statute requires it to be made on notice and hearing.

Section 1059a and 1059b provide for the removal of assessing officers and members of boards of review, and the following section provides that such removal be made after notice and hearing.

Section 1231 empowers the supervisors of a town to remove the superintendent of highways for neglect or refusal to perform his duties. It contains no requirement for either notice or hearing.

Section 1747—3 provides for the removal of grain and warehouse commissioners "for cause, by the governor, in the same manner as county officers may be removed."

Section 1747—30 provides for the removal of grain inspectors by the grain and warehouse commission, whenever they have been guilty of any improper official act, or are found to be inefficient or incompetent. The statute provides that in such case the removal may be immediately made.

Section 1707—1 provides for the removal of railroad commissioners, and that such removal must be made on notice and hearing.

There are a number of other statutes which provide for removals, but these serve to illustrate that the legislature has had in mind the matter of requiring removals to be made on notice and hearing when it was considered desirable that they should be so made, and the inference is very strong that in cases where neither notice nor hearing is provided for none need be given. *State ex rel. Wagner v. Dahl*, *supra*.

In the very first case which arose in this state under a statute like our § 970, Chief Justice Dixon, speaking for the court, stated clearly and concisely just what the power was of the body in which the right to remove was vested. The board of supervisors of Milwaukee county removed the inspector of the house of correction during his term, which was fixed by law at two years. The board was authorized to remove for "incompetency, improper conduct, or other cause satisfactory to the said board." The court held that the words "other cause satisfactory to said board" meant a kindred cause, so that in fact the statute permitted a removal for incompetency, improper conduct, and other like causes. The statute was silent in reference to giving a notice and hearing to the accused official. McGarry insisted that he was entitled to have the removal proceedings carried on in a judicial way, and that the order of removal was void because this had not been done. Unsworn statements prejudicial to the accused were received, and the right of cross-examination was denied. If a hearing means anything, it means that the right to cross-examine exists. The court disposed of the contentions made in the only logical way in which they could be disposed of, in 46 L.R.A. (N.S.)

the following language: "That part of the answer in which it is alleged that persons were examined and made statements before the board touching the charges made against the defendant, but without being sworn as witnesses, and that the defendant was not permitted to cross-examine them, is also irrelevant. It was certainly very proper for the board to notify the defendant of their intended proceedings, and to allow him to appear and take part in them, and to produce and examine witnesses, which it seems he did do; but the board was not bound to do so. It might have proceeded to order his removal *ex parte*, and without notice to him, and without any examination of witnesses, formal or otherwise; and if it could have done that, then it could dispense with the oath to those persons who were examined, or refuse to allow the defendant to cross-examine. The most that can be said of it is that it was a refusal to extend to him the same degree of consideration and favor which was shown when he was notified to appear and permitted to examine witnesses in his own behalf. The justice or injustice of the proceeding are not matters which can be examined here." *State ex rel. Kennedy v. McGarry*, 21 Wis. 499.

I cannot think that there is any such difference between the statute involved in the Kennedy Case and the one involved in the present case, as would justify the placing of a different construction on the latter from what was placed on the former. Section 970 provides for removal for official misconduct and for wilful or habitual neglect of duty. The statute in the McGarry Case provided for removal for incompetency, improper conduct, and other like causes. Section 970 provides that the removal must be on proof satisfactory to the governor. The other law contained no such provision. But, as already stated, proof satisfactory to the governor does not mean proof taken after a notice is given and a hearing is had. The notice and hearing that is required by many statutes is for the protection of the officer, not for the information of the governor. That officer is the sole judge of what proofs are satisfactory to him, and as to the manner in which they shall be taken, unless the statute otherwise provides.

The other cases in this court dealing with the question are in entire harmony with the McGarry Case. A review of them will be found in *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748. I think the case of *Nehrling v. State*, 112 Wis. 637, 88 N. W. 610, is in harmony with the other decisions of this court. Under the statute there involved, a removal might be made for "misconduct, incompetency, or inattention to

the duties" of the office. The statute was silent as to how the proceeding should be carried on. The plaintiff was permitted to be heard, but made pretty much the same complaint about the character of the hearing that McGarry did in his case. The court said: "The act nowhere requires or suggests that any witness shall be produced, much less sworn and examined, in the investigation resulting in such removal. The act seems to contemplate a summary investigation by the trustees,—of course giving such official an opportunity to be heard." This last clause is clearly *obiter*, and is no less clearly ill-considered and inconsistent with what precedes it. An investigation is not summary where a party is given an opportunity to be heard, and giving such an opportunity is wholly inconsistent with the idea that the party may not produce or swear witnesses in his behalf.

The discussion on this branch of the case has already been carried to too great a length. Under what I believe to be a fair construction of § 970, I do not think the plaintiff is entitled as of right to a notice and hearing, no matter to what extent fairness would demand it in the instant case. The question is one for the legislature to settle, and not the courts. The decisions of this court I think fully justify my interpretation of the statute. This case should not be confounded with cases involving property or vested rights, such as the Chittenden Case, 127 Wis. 468, 107 N. W. 500.

Where the law confers the administrative duty upon an officer to remove another from office for a specified cause or causes, and no provision is made for a review of his decision on the questions of fact involved, such conclusion is final, and the only judicial question is whether the cause assigned was a legal cause. *State ex rel. Kennedy v. McGarry*, 21 Wis. 497; *State ex rel. Gill v. Watertown*, 9 Wis. 254; *State ex rel. Willis v. Prince*, 45 Wis. 610; *State ex rel. Wagner v. Dahl*, 140 Wis. 301, 122 N. W. 748; *State ex rel. Davern v. Rose*, 140 Wis. 360, 28 L.R.A. (N.S.) 194, 122 N. W. 751; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964; *State ex rel. Starkweather v. Superior*, 90 Wis. 612, 64 N. W. 304; *State ex rel. Coffey v. Chittenden*, 112 Wis. 589, 88 N. W. 587; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. If notice and hearing were not required in the instant case, the only question which the court could inquire into was whether or not the cause for removal specified in the order was a lawful one.

Where the governor removes an officer and assigns a statutory cause for removal, the courts will not place him on trial in ref-
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erence to the motives which actuated him, and will not pass upon his bad faith or alleged arbitrary action in making the removal. Where a co-ordinate department of government performs an authorized duty, the courts have no more right to impugn the motives which actuated such department than would the department in question have the right to impugn the motives of this court in deciding a case which properly came before it. This was decided at an early day in reference to the legislative department of government in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162, and has never been departed from by the courts. It was also decided at an early day in this court in reference to the governor, in *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, 522, where it is said: "But it would be alike unbecoming and unwarranted on our part to inquire into the motives of the governor, in the exercise of a discretion given to him alone, in any case. He is responsible for his acts in such case, not to the courts, but to the people; and whenever experience shall have demonstrated the impolicy or impropriety of clothing the chief executive officer of the state with a power of removing inferior officers at his discretion, or 'when he shall believe the best interests of the state demand such removal,' it may then be the time for the people, in whose hands alone is the remedy, to eradicate the supposed evil. But courts are created to construe the laws as they are, not to declare what they should be. It is no part of our duty to impugn the action of the governor in such a case; but, on the contrary, we are bound to hold him justified in whatever conclusion he may have formed. In this case, therefore, whatever may have influenced the executive in the removal of Mr. Taylor has no claim to our attention; it is wholly foreign to the question before us, and can have no bearing upon it."

The case is an important one, dealing as it does with the power of a co-ordinate department of the government. It would be more satisfactory if the decision could be made by a unanimous court. The case has been very fully considered, and no doubt each member of the court has given it the best thought and study he is capable of. I cannot bring myself to see the law as does the majority of the court, and duty impels me to say so, and to refuse to assume responsibility for the decision reached. I have not sought to follow or discuss the reasons or arguments contained in the elaborate opinion of the court. I simply desire to state my own reasons in my own way for reaching the conclusion that the order appealed from should be affirmed.

I may be wrong, but it seems to me that

the opinion of the court ruthlessly slaughters a number of our decisions in order to reach the conclusion arrived at. To be sure the decisions are not expressly overruled, but they are limited, qualified, and misconstrued so that their authors would hardly recognize them. I refer particularly to the cases of *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, *State ex rel. Kennedy v. McGarry*, 21 Wis. 496; *State ex rel. Willis v. Prince*, 45 Wis. 610, *La Pointe v. O'Malley*, 46 Wis. 35, 50 N. W. 521, *State ex rel. Jones v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296, the *Starkweather Case*, 90 Wis. 612, 64 N. W. 304; *Ward v. Sweeney*, 106 Wis. 44, 82 N. W. 169, and *State ex rel. Wagner v. Dahl*, 140 Wis. 303, 122 N. W. 748. Anyone who has sufficient curiosity to draw a parallel between what is said in reference to the *Starkweather Case* in the present decision, and what was said by the same learned judge in reference to it in *State ex rel. Cook v. Houser*, 122 Wis. pages 574, 575, 576, and 581, 100 N. W. 964, will understand what I mean. The case of *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112, is glorified in the opinion, and it is said that the opinion in the *Starkweather Case*, when carefully read, is in harmony with it. The present chief justice, in writing the opinion for the court in the *Starkweather Case*, did not seem to think so, because the court utterly repudiated its doctrines and declined to follow it. To do otherwise would have been fatal to the respondent's case. The entire court entertained this opinion at the time.

As before stated, I do not care to go into an analysis of the court's opinion. There are many propositions stated in it with which I am in accord. There are many others which I cannot assent to. I summarize my own conclusions as follows:

1. The certificate of appointment held by Mr. Anderson gave him the *prima facie* right to the office of insurance commissioner, and the right to its possession until the *de jure* title was settled.

2. Upon its production it was Mr. Ekern's duty to vacate the office under protest, and commence an action to try title to the office.

3. An injunction should not issue against the person having the *prima facie* right to the office, nor in any event in favor of the incumbent, except on a clear showing that he had the better title to the office.

4. Where an injunction is sought in such a case, the court will inquire into the merits of the case as disclosed by the motion papers, to ascertain whether the party in possession is clearly entitled to the office.

5. An office created by the legislature is not property, and the right to hold it is not a vested one.

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6. The legislature may prescribe any method of removal from such an office it sees fit, and a removal made by the prescribed method is due process of law.

7. Where no provision of the Constitution or of statute law requires that notice and hearing be given before a removal can be made, neither notice nor hearing is a necessary condition precedent to a valid removal.

8. It was clearly the intention of the legislature, when it enacted what is now § 970, Stat., that the governor might remove the officers which he was thereby authorized to remove without notice or hearing.

9. When the determination of a question of this kind is vested in some tribunal other than the courts, and no appeal from or review of the decision reached is provided for by statute, such decision is final and conclusive, if such tribunal acts within its jurisdiction.

10. The only inquiry left open to the courts in this proceeding is whether the cause assigned for removal is one for which the statute authorizes a removal to be made. If it was, the governor acted within his jurisdiction in making it, no matter how grievously he might err in judgment.

11. The order of removal in this case assigns a statutory cause for removal, and it is therefore conclusive on the courts.

12. Injunction will not lie against a coordinate and equal branch of the government, and neither will the courts inquire into the motives of the legislature or the governor in performing an official act.

I do not wish to be understood as assenting to everything in the opinion of the court not covered by the foregoing propositions. I simply set forth the salient points on which I base my conclusion.

Timlin, J., concurring:

I concur in the opinion of Mr. Justice Marshall to this extent:

(1) Section 970, Wis. Stat., under which the removal of the appellant was attempted, authorizing removal for cause proven, must be construed to require due process of law, *i. e.*, charges, notice thereof, and a hearing. *State ex rel. Hastings v. Smith*, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700.

(2) There was in this case less than an hour's notice, and the governor refused to hear the appellant's witnesses Johnson and Rosa. This was insufficient as to notice and inadequate as a hearing; consequently the attempted removal was without jurisdiction and void. *United States ex rel. Turner v. Fisher*, 222 U. S. 204, 56 L. ed. 165, 32 Sup. Ct. Rep. 37.

(3) There being no lawful removal, there was no vacancy; hence no power to appoint

a successor. The appellant is the *de jure* commissioner of insurance, and entitled to an injunction to restrain trespasses, actual and threatened, for the purpose of seizing upon his office, the property and emoluments thereof.

(4) The governor has no power, jurisdiction, or authority as against even a *de facto* officer in possession of the office, to install the appointee of the former before a judgment in quo warranto in favor of such appointee.

To avoid unseemly clashes between co-ordinate branches of the government, and to avoid the condition which must necessarily ensue should the governor personally violate the injunctive order, the court will not unnecessarily issue an injunctive order against the governor. But the appellant is entitled to such order against the subordinates acting under the order of the governor in the unlawful attempt to wrest from appellant by force his said office. To this extent the order appealed from should be reversed.

There is doubtless much good law and much elevated and inspiring sentiment in the opinion of Brother Marshall; but I have not had time to go over it with that care which ought to be preliminary to a formal approval of all that is said therein.

Winslow, Ch. J., dissenting (filed June 2, 1913):

I fully agree with Mr. Justice Barnes. I think he states accurately the law as it is, or rather the law as it was before the decision of this case.

If I could agree with my brethren of the majority, that § 970, Stat., requires notice and hearing, I should have no doubt that the attempted removal was wrongful, because of the absence of sufficient notice and hearing. I cannot, however, so construe § 970, for the reasons stated by Judge Barnes.

I wish to add a few words of a general nature. I am no worshipper of precedents. I have joined in the slaughter of precedents on numerous occasions, and felt that I was rendering good service to the commonwealth. Nor do I attribute any special sanctity to decisions in which the opinions have come from my own hand. If they be wrong in principle, or have outworn their usefulness, owing to changed conditions or increasing knowledge, let them have short shrift.

State ex rel. Jones v. Oates and State ex rel. Starkweather v. Superior are no more my progeny than they are the progeny of the entire court, except that I was chosen to cut and fit their verbal clothing. I shall have some difficulty in recognizing them in

the future in the new garb in which they are henceforth to appear, but doubtless I shall become accustomed to the change. I confess that it had never occurred to me as possible that the Starkweather Case and the case of Dullam v. Willson could be harmonized. I should have said that it was impossible. However, one can hardly refuse to believe when confronted by the actual fact. The accomplishment of this remarkable result seems to demonstrate that the word "fail" is no more entitled to recognition in the lexicon of age than in the lexicon of youth.

The most serious infirmity in the decision in this case, as I regard it, is, not that it refuses to follow precedent, but that it is really a step backward, a signal to retreat rather than to advance. The present case is a case where a very important state office is at stake, but the principles decided apply as well to every ministerial officer, however insignificant, whose removal is provided for by a statute similar to § 970, and there are many of them. Every such officer is by this decision fortified and intrenched in his office. Proceedings to remove him on the part of his superior will be of little avail, so far as immediate results are concerned. If he can persuade a court that he is acting in good faith, he can practically deny the power of his superior to remove him, and remain in his office for months, while the necessarily slow processes of the law in circuit and supreme court are reaching a result. The arm of the superior officer will be rendered nerveless, and the man who is charged with responsibility for results will have practically no certain means of achieving results, because unable to command efficient service from his subordinates. Such is not the genius of the democracy of to-day, much less of the democracy of the future. That democracy will unquestionably elect a few men as the heads of its various departments, and demand of them results. While making this demand it will perforce give those heads full power to remove subordinates. That democracy will cease to attempt the impossible task of electing every minor official by vote of the people, but will adopt the short ballot, elect a few men to the important positions, invest them with plenary authority over their subordinates, and demand in return efficiency of service in each department. The subordinate official, intrenched in an office from which he cannot be removed save by judicial trial, will in my judgment disappear. The head of the department will be responsible to the people; the subordinate in the department will be responsible to the head. Thus, the people will retain their power by retaining control of the head, not

by attempting the impossible task of selecting fit occupants of all the subordinate governmental positions.

And so I say that this decision is a step backward; it tends to hamper the responsible heads of departments of the government; it seeks to return to the exploded idea that there is some private property right in an office, whereas the true idea is that it is simply an opportunity to serve the state. The idea that some designing man will build up a despotism on the ruins of our liberties, if he be given the right of removal from office without notice or hearing, cannot be seriously entertained. There is no such danger in these days. It is the merest myth. The danger is rather that the responsible head of a governmental department will not have authority enough over his working force to perform the duties which the people have placed upon him, and for the performance of which he is directly responsible. For this reason I regard the present decision as an unfortunate step in the wrong direction. I have no fear that it will have any very serious results; the legislature can always provide in express terms for removal without hearing, and doubtless will do so more and more as time goes on and the true theory of efficient government becomes more fully understood.

MICHIGAN SUPREME COURT.

WILLIAM D. C. GERMAINE

v.

WOODBIDGE N. FERRIS, Governor.

(— Mich. —, 142 N. W. 738.)

Courts — power to review acts of governor — removal from office.

The court has no power under a Constitution dividing the government into departments, to review by direct proceedings the action of the governor in removing a mayor for cause under authority conferred by statute, although the proceeding for removal is quasi judicial.

(July 18, 1913.)

MOTION for an order to quash a writ of certiorari issued to review the action of respondent as governor in removing petitioner from the office of mayor of Traverse City. Writ quashed.

The facts are stated in the opinion.

Note. — For power of court to review action of governor in removing officer, see note to State ex rel. Kinsella v. Eberhart, 39 L.R.A.(N.S.) 788. And see also Ekern v. McGovern, ante, p. 796. 46 L.R.A.(N.S.)

Mr. Grant Fellows, Attorney General, for respondent, in support of the motion:

The governor is not amenable to the orders of this court when discharging either a political or a ministerial duty.

People ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; People ex rel. Ayres v. State Auditors, 42 Mich. 422, 4 N. W. 274; Midland County v. Auditor General, 27 Mich. 165; State, Gledhill, Prosecutor, v. The Governor, 25 N. J. L. 331; Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; Bates v. Taylor, 87 Tenn. 320, 3 L.R.A. 316, 11 S. W. 266; People ex rel. Billings v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; State ex rel. Robb v. Stone, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; State ex rel. Bisbee v. Drew, 17 Fla. 67; Hartranft's Appeal, 85 Pa. 433, 27 Am. Rep. 667; Rice v. Austin, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330; State ex rel. Oliver v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76; Re Dennett, 32 Me. 508, 54 Am. Dec. 602; Hovey v. State, 127 Ind. 588, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175.

Mr. John J. Tweddle, with Mr. Parm O. Gilbert, for petitioner, *contra*:

The action of the governor in removal proceedings is subject to review by this court.

Dullam v. Willson, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112.

The governor's action in removal proceedings partakes of the nature of judicial action, and is not one of the duties falling legally within the executive department of the government.

Ibid.; Stockwell v. White Lake, 22 Mich. 341; Speed v. Detroit, 98 Mich. 360, 22 L.R.A. 842, 39 Am. St. Rep. 555, 57 N. W. 406; Merrick v. Arbela Twp. 41 Mich. 630, 2 N. W. 922; Throop, Pub. Off. § 379; Andrews v. King, 77 Me. 224; People ex rel. Burnham v. Jones, 112 N. Y. 597, 20 N. E. 577; People ex rel. New York v. Nichols, 79 N. Y. 582; Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611.

This court has the right to review quasi judicial proceedings taken by any officer or any department of the government, including the executive.

Throop, Pub. Off. §§ 392, 394; People ex rel. McCauley v. Brooks, 16 Cal. 11; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 15 L.R.A. 369, 31 Am. St. Rep. 284, 28 Pac. 1125; Tennessee & C. R. Co. v. Moore, 36 Ala. 375; State ex rel. Whiteman v. Chase, 5 Ohio St. 528; Martin v. Ingham, 38 Kan. 641, 17 Pac. 162; State ex rel.

Bates v. Thayer, 31 Neb. 82, 47 N. W. 704; Merrick v. Arbela Twp. 41 Mich. 630, 2 N. W. 922; McGregor v. Gladwin County, 37 Mich. 388; Crawford v. Seio Twp. 22 Mich. 405; Ekern v. McGovern, — Wis. —, ante, 796, 142 N. W. 595.

Kuhn, J. delivered the opinion of the court:

This is a motion to enter an order quashing a writ of certiorari heretofore issued by this court. The reasons urged in support of the motion are as follows: "(1) That this court has no jurisdiction to review, by writ of certiorari directed to the governor, any action of the governor in the discharge of his official duties under the Constitution and laws of the state. (2) That under the Constitution and laws of the state of Michigan the executive and judicial branches of the state are co-ordinate, and that the action of the executive department of the state government is not subject to review by the judiciary upon writ of certiorari directed to the executive branch of the state government. (3) Because the action of respondent here sought to be reviewed was the exercise of an official discretion belonging to the executive, and not reviewable upon certiorari."

The respondent, as governor of the state, by virtue of authority given him by § 1159 of the Compiled Laws of 1897, made an order removing the petitioner from the office of mayor of Traverse City. The section reads as follows: "The governor may remove all county officers chosen by the electors of any county or appointed by him, and shall also remove all justices of the peace and township officers chosen by the electors of any township, or city or village officers chosen by the electors of any city or village, when he shall be satisfied from sufficient evidence submitted to him, as hereinafter provided, that such officer is incompetent to execute properly the duties of his office, or has been guilty of official misconduct, or of wilful neglect of duty, or of extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it shall appear by a certified copy of the judgment of a court of record of this state that such officer after his election or appointment shall have been convicted of a felony; but the governor shall take no action upon any such charges made to him against any such officer until the same shall have been exhibited to him in writing, verified by the affidavit of the party making them, that he believes the charges to be true, with a statement of the prosecuting attorney of the county, that in his opinion the case demands investigation. But no such officer shall be removed for such misconduct or neglect unless charges thereof

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shall have been exhibited to the governor, as above provided, and a copy of the same served on such officer, and an opportunity given him of being heard in his defense." The power conferred by this statute was not granted to the person who is the incumbent of the executive office as a private person, but it is conferred upon the governor in his official capacity. The power pertains to the office of governor, and when he acts by virtue of the statute it is an executive action, and it is none the less an official act of the governor because the power might have been intrusted to some other person or authority.

It is urged that the governor in this proceeding acted judicially, and that therefore such action is subject to review by certiorari; and in support of that position the case of *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112, is relied upon. In that proceeding, however, no process was issued against the governor direct, and the validity of the removal proceedings was raised by quo warranto. This is the first instance called to our attention in our state where an attempt is made to review the action of the governor of the state by a writ of certiorari. Granting that the contention of counsel for petitioner is correct, that the function performed by the executive in the removal proceeding is quasi judicial in character, the fact still remains that it is an official action of the governor; and the question arises whether an effort to review his action by proceeding directly against him would not involve the fundamental proposition that such review would be an invasion by the judiciary of the executive functions of our government.

Article 3 of the Constitution of this state, on the subject of the division of the powers of government, provides:

"Section 1. The powers of government are divided into three departments: The legislative, executive, and judicial.

"Sec. 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

The question of whether mandamus will lie to compel the governor of a state to perform duties imposed upon him has been raised in this state and in many other jurisdictions. It is well settled by all authorities that mandamus will not lie to compel the governor to perform duties of a purely executive or political character, but the decisions are not uniform as to the power of the court to compel the governor to discharge those duties which, as to other officials, are usually called ministerial. However, this question has been settled in this state by the very instructive case of *People*

ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89. The application in this case was for mandamus to require the governor to issue his certificate showing that the Portage Lake and Lake Superior ship canal and harbor had been constructed in conformity with the acts of Congress making a land grant for the same, and the acts of the legislature of this state conferring the grant upon a corporation which the relators claimed to represent; and it was urged that the act sought to be compelled by mandamus was a purely ministerial one. Mr. Justice Cooley, in the able opinion in that case, discusses at length the question of the jurisdiction of the court to review the action of the executive by proceeding directly against him, and declined to distinguish between those acts which are political and those which are ministerial. His reasoning is so clear and instructive and so controlling of the present question that we quote the following (29 Mich. on pages 322-325): "There is no very clear and palpable line of distinction between those duties of the governor which are political and those which are to be considered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which it

is manifest that the governor is left to no discretion, the present is certainly not among them; for here, by the law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department. We are not disposed, however, in the present case, to attempt on any grounds to distinguish it from other cases of executive duty with a view to lay down a narrow rule which, while disposing of this motion, may leave the grave question it presents to be presented again and again in other cases which the ingenuity of counsel may be able to distinguish in some minor particulars from the one before us. If a broad general principle underlies all these cases and requires the same decision in all, it would scarcely be respectful to the governor or consistent with our own sense of duty that we should seek to avoid its application and strive to decide each in succession upon some narrow and perhaps technical point peculiar to the special case, if such might be discovered. And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties. It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest. The legislature prescribes rules of action for the courts, and in many particulars may increase or diminish their jurisdiction; it also in many cases may prescribe rules for executive action and impose duties upon or take powers from the governor, while in turn the governor may veto legislative acts, and the courts may declare them void where they conflict with the Constitution, notwithstanding, after having been passed by the legislature, they have received the governor's approval. But in each of these cases the action of the department which controls, modifies, or in any manner influences that of another, is had

strictly within its own sphere, and for that reason gives no occasion for conflict, controversy, or jealousy. The legislature in prescribing rules for the courts is acting within its proper province in making laws, while the courts, in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal. It has long been a maxim in this country that the legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist; and, if the legislature could in like manner override executive action also, the government would become only a despotism under popular forms. On the other hand, it would be readily conceded that no court can compel the legislature to make or to refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the duty to take it be made ever so clear by the Constitution or the laws. In these cases the exemption of the one department from the control of the other is not only implied in the framework of government, but is indispensably necessary if any useful apportionment of power is to exist."

Again, 29 Mich. on page 330 of the opinion: "And while we should concede, if jurisdiction was plainly vested in us, the inability to enforce our judgment would be no sufficient reason for failing to pronounce it, especially against an officer who would be presumed ready and anxious in all cases to render obedience to the law, yet in a case where jurisdiction is involved in doubt it is not consistent with the dignity of the court to pronounce judgments which may be disregarded with impunity, nor with that of the executive to place him in a position where, in a matter within his own province, he must act contrary to his judgment or stand convicted of a disregard of the laws. But it is said that this conclusion will leave parties who have rights, in many cases, without remedy. Practically there are a great many such cases, but theoretically there are none at all. All wrongs, certainly, are not redressed by the judicial depart-

ment. A party may be deprived of a right by a wrong verdict or an erroneous ruling of a judge; and, though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the state may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and, when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which, under the Constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."

The reasoning in this case seems to us to establish the rule in this state that no process of the court can be issued against the governor of this state in any proceeding seeking to review any action performed by him as governor under power conferred upon him either by the Constitution or legislative enactment. In the case of *People ex rel. Ayres v. State Auditors*, 42 Mich. 422, on page 426, 4 N. W. 274, in citing the *Sutherland Case*, this court said: "It has also been held that we cannot interfere with the discretion of the chief executive of the state or subordinate him to our process." See also *Midland County v. Auditor General*, 27 Mich. 165.

The decisions in those states that have held that a writ may issue to control a ministerial act of the governor rest chiefly upon the case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60. In speaking of these decisions, Justice Cooley, in *People ex rel. Sutherland v. Governor*, supra, 29 Mich. at page 327, said: "These cases for the most part are rested upon the *dictum* of Chief Justice Marshall in *Marbury v. Madison*, supra, that one of the heads of department in the Federal government might be compelled by mandamus to perform a mere ministerial duty, a *dictum* which cannot be understood as expressive of the opinion of that eminent judge that the President was subject to the like process, but which is wholly inapplicable to a case like the present, unless it goes to that extent.

For it cannot justly be claimed, when Federal and state governments have been formed, so far as distribution of power is concerned, on the same general plan, that the Executive of the Union can claim immunity from judicial process any more than the governor of one of the states. In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and, as regards such an officer, we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance. When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the chief executive himself; but where a ministerial act is required to be done by him, independently of the executive, though in a certain sense he is an executive officer, it would be as idle to dispute his responsibility to legal process as it would be to make the same claim to exemption on behalf of an officer intrusted with similar duties of a lower grade. This is emphatically the case under the Constitution of this state, which provides for the election of state and inferior officers alike by the people, and makes the chief officers of state below the governor as independent of his control in the performance of their duties as are the officers of the counties or of the townships."

The following instructive cases from other jurisdictions, with similar holdings, have been called to our attention and examined: *State, Gledhill, Prosecutor, v. The Governor*, 25 N. J. L. 331; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *People ex rel. Billings v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *State ex rel. Robb v. Stone*, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 26 S. W. 376; *State ex rel. Bisbee v. Drew*, 17 Fla. 67; *Hartranft's Appeal*, 85 Pa. 433, 27 Am. Rep. 667; *Rice v. Austin*, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330; *State ex rel. Oliver v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *Re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *Hovey v. State*, 127 Ind. 588, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175.

In the case of *Bates v. Taylor*, 87 Tenn. 320, 323, 3 L.R.A. 316, 11 S. W. 266, the *Sutherland* Case is cited with approval, and the court said: "The courts of Ohio, Alabama, California, Maryland, and North Carolina are together in holding that the gov-

ernor may be required by mandamus to perform duties of the latter class, while the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey, and Rhode Island have uniformly held the contrary upon the ground that the powers of government in the states are distributed among three departments, which, under the organic law, are to be and remain independent of each other. High, Extr. Legal Rem. §§ 118, 119, 120, and 121. This author cites the cases from the different states mentioned. We have examined them and also a very instructive case from Michigan (*People ex rel. Sutherland v. The Governor*, 29 Mich. 321, 18 Am. Rep. 80) which is in accord with those from the states last mentioned, and we are fully persuaded not only that the weight of authority, but also the weight of reason, is against the power of the courts to coerce the chief executive of a state into the performance of any official duty."

The attorney general, representing respondent, makes no claim that in a proceeding between A and B, in which A asserts some right by virtue of executive action, that the courts cannot determine the validity of that executive action. This court held in *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112, that in such an action the validity of the governor's proceedings could be reviewed and the rights of a person who had been removed from office by the governor, without proper compliance with the requirements of the statute with reference to removals, would be protected. That decision fully lays down the rule applicable in such cases, and, in our opinion, affords ample protection against any unwarranted or illegal act on the part of the executive in removal proceedings.

The writ was improvidently issued and must be quashed.

CALIFORNIA SUPREME COURT. (Department No. 2.)

PHILIP H. FLOOD, Resp.,
v.

JOSEPH PETRY
and
NATIONAL BANK OF THE PACIFIC,
Appt.

(— Cal. —, 132 Pac. 256.)

Bills and notes — pledge — failure of consideration.

That a bank, when taking a note payable a certain time after a future date, as collateral for a present loan, knows that it is given in accordance with a building contract, by which it is not to be executed

until the building has been completed and all liens paid, does not entitle the maker to set up nonperformance of the building contract as a defense to the note, if it was made negotiable and delivered to the payee before the time called for by the contract, and the pledgee did not know that the contractor could not or did not intend to perform his contract.

(April 14, 1913.)

APPEAL by the defendant bank from an order of the Superior Court for the City and County of San Francisco, awarding a new trial after judgment in its favor in an action brought to cancel a promissory note. Reversed.

The facts are stated in the opinion.

Note. — Failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration.

- I. Scope, 862.
- II. General principles, 862.
- III. Illustrative cases.
 - a. Miscellaneous executory contracts, 865.
 - b. Executory warranties, 868.
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I. Scope.

This note is confined to cases where the paper and the transfer are both of the character protected by the law merchant. Cases of nonnegotiable paper, of transfers after maturity, and of assignments without indorsement, are therefore excluded. Cases which involve the rights of holders with knowledge that the notes are secured by mortgage are also excluded, as such notes may be the subject of equities where strictly commercial paper would not be. *Jewett v. Tucker*, 139 Mass. 566, 2 N. E. 680. Phases of this problem have already been considered in a note to *Brooke v. Struthers*, 35 L.R.A. 536, on Negotiability of note secured by mortgage, as affected by provision in mortgage, and in a note to *Zollman v. Jackson Trust & Sav. Bank*, 32 L.R.A.(N.S.) 858, on Recital in note as to security, as affecting its negotiability. Other notes in this series which should be consulted are: What circumstances are sufficient to put a purchaser of negotiable paper on inquiry in order to secure rights of a bona fide holder (*Mee v. Carlson*, 29 L.R.A.(N.S.) 351); Failure of consideration as defense to action on a purchase-price note (*Daniels v. Englehart*, 39 L.R.A.(N.S.) 938); Contemporaneous agreements and their breach as a defense to a promissory note (*American Gas & Ventilation Mach. Co. v. Wood*, 43 L.R.A. 449); Effect of knowledge of consideration by purchaser of note which

Messrs. Gavin McNab, Bronte M. Atkins, and R. P. Henshall, for appellant:

Failure of consideration is not a defense open to a maker as against an indorsee for value, even though that indorsee knew that the note was given to evidence an indebtedness that would become due if an executory promise were performed, and which might never be performed.

Splivallo v. Patten, 38 Cal. 138, 99 Am. Dec. 358; *Spurgin v. McPheeters*, 42 Ind. 527; *Johnson County Sav. Bank v. Kramer*, 42 Ind. App. 548, 86 N. E. 84; *Zollman v. Jackson Trust & Sav. Bank*, 238 Ill. 290, 32 L.R.A.(N.S.) 858, 87 N. E. 297; *Stouffer v. Erwin*, 81 S. C. 541, 62 S. E. 843; *National Park Band v. Saitta*, 127 App. Div. 624, 111

did not indicate the nature of its consideration as required by statute (*Benton v. Sikyta*, 24 L.R.A.(N.S.) 1057).

II. General principles.

The courts generally are agreed that the failure of an executory consideration for the giving of a promissory note or for the acceptance of a bill of exchange is not a defense against purchasers of the note or bill for value before maturity, with knowledge of the character of the consideration, but without notice of its failure.

Kinkel v. Harper, 7 Colo. App. 45, 42 Pac. 176 (promissory note); *Bank of Commerce v. Barrett*, 38 Ga. 126, 95 Am. Dec. 384 (promissory note); *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688 (promissory note); *Wilensky v. Morrison*, 122 Ga. 664, 50 S. E. 472 (promissory note); *Morrison v. Hart*, 122 Ga. 660, 50 S. E. 471 (promissory note); *Brooks v. Floyd*, 12 Ga. App. 530, 77 S. E. 877 (promissory note); *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 859, 15 Ann. Cas. 605 (promissory note); *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88 (promissory note); *Miller v. Ottaway*, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665 (promissory note); *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461 (bill of exchange); *Mabie v. Johnson*, 8 Hun, 309 (promissory note); *Bank of Sampson v. Hatcher*, 151 N. C. 359, 134 Am. St. Rep. 989, 66 N. E. 308 (promissory note); *Craig v. Sibbett*, 15 Pa. 238 (bill of exchange); *Detroit Sav. Bank v. Towers*, 42 Pa. Super. Ct. 246 (promissory note).

There is a *dictum* to the contrary in *Thrall v. Horton*, 44 Vt. 386, where the court said that as the indorsee of a note knew that a part consideration was that a suit against the maker was to be discontinued, he took it subject to any defense, so far as the consideration was concerned, which might have been made to it if he had taken it when overdue; but held, following *Farrar v. Freeman*, 44 Vt. 63, that a partial failure of consideration could not be set up as a defense to a note except as per-

N. Y. Supp. 921; Harger v. Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Heuertematte v. Morris, 101 N. Y. 71, 54 Am. Rep. 657, 4 N. E. 1; Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366; Dan. Neg. Inst. §§ 532, 534; 7 Cyc. 947; Splivallo v. Patten, 38 Cal. 138, 99 Am. Dec. 358; Anthony v. Slonaker, 18 Ind. 273; Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461; Parsons v. Parsons, 17 Colo. App. 154, 67 Pac. 345; Brown v. Feldwert, 46 Or. 363, 80 Pac. 414; McDonald v. Randall, 139 Cal. 246, 72 Pac. 997; Kinkel v. Harper, 7 Colo. App. 45, 42 Pac. 173; Siegel v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 587, 19 Am. St. Rep. 51, 23 N. E. 417; Saddler v. White, 14 La. Ann. 173; State Nat. Bank v. Cason, 39 La. Ann. 865, 2 So. 881; Pavey v. Stauffer, 45 La. Ann. 353, 19 L.R.A. 716, 12 So. 512; Adams v. Smith, 35 Me. 324; Dow v. Tuttle, 4 Mass. 414, 3 Am. Dec. 226; Patten v. Gleason, 106 Mass. 439; Miller v. Ottaway, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; Nichols v. Sober, 38 Mich. 678; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Savage v. Ball, 17 N. J. Eq. 142, 2 Mor. Min. Rep. 579; Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461, affirming 4 E. D. Smith, 565; Maas v. Chatfield, 90 N. Y. 303; Ferdon v. Jones, 2 E. D. Smith, 106; Craig v. Sibbett, 15 Pa. 238; Siebe v. Joshua Hendy Mach. Works, 86 Cal. 390; Haight v. Joyce, 2 Cal. 64, 56 Am. Dec. 311; 2 Randolph, Com. Paper, 1019; 1 Dan.

mitted by the act of November 21, 1867, which did not extend the right therein granted beyond the original parties to the note.

And this contrary view is upheld in Howard v. Kimball, 65 N. C. 175, 6 Am. Rep. 739, where the court says that a purchaser of promissory notes, knowing from the recital on their face that they were given for the purchase price of a specified tract of land, and being aware of the fact that the vendor had given the maker a bond to make title upon payment of the purchase price, is charged with notice of the maker's equity in case the title turns out to be defective. "If a vendee executes a plain note of hand," said the court, "this equity may be defeated by a transfer of the note, before it is due; but when he takes the precaution to set the fact out in the face of the note, unless it has the effect of notice, the vendor may in every instance defeat the equity of the vendee by making haste to dispose of the note, and thus the vendee will be deprived of an equity without default on his part."

These cases have not been permitted to pass unnoticed. "An examination into the facts of that case [Howard v. Kimball, supra] will disclose," said the court in Bank of Sampson v. Hatcher, 151 N. C. 359, 134 Am. St. Rep. 989, 66 N. E. 308, "that the assignee of a note which expressed upon its face that it was given as purchase money of a certain tract of land not only had actual notice of the defect of title at the time he purchased, but he had taken a deed for such defective title from the original vendor, and held same, to be conveyed to the vendee when the note was paid. The case, therefore, is undoubtedly well decided; but in so far as the opinion gives countenance to the position that a defect of title is available against an indorsee for value of a note for the purchase money, from the fact, and from that alone, that the note on its face is expressed to be for the purchase money of land or a given tract of land, the case is not in accord with the better-considered decisions. As an authority for such a position, it was in effect disapproved by a subsequent decision of this court in First 46 L.R.A. (N.S.)

Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855, in which a note of that kind was held to be 'negotiable;' the term 'negotiable' being used in the sense that an indorsee for value, without notice, *ultra*, became the owner of the note, unaffected by the equities and defenses existent between the original parties to the contract."

Both Thrall v. Horton and Howard v. Kimball, supra, were disapproved in Adoue v. Tankersley, — Tex. Civ. App. —, 28 S. W. 346. Answering the argument contained in the quotation from the opinion in Howard v. Kimball, hereinbefore set forth, the Texas court says: "The maker of the note, if he desires to secure himself in his defenses against a transfer of it to an innocent purchaser, need not give to it a negotiable form. When, however, by the form of his obligation, he makes it payable to bearer, or to the order of the payee, he evinces his purpose that it shall circulate as a negotiable instrument under the rules of the commercial law, and third persons may deal with it on that assumption. Having given it this character, he does not destroy the effect of the terms used by simply stating the consideration for which it is given. That fact does not imply that his obligation to pay is any the less perfect and binding than it would be if no consideration were expressed. Instruments possessing the quality of negotiability are supposed to carry advantages and a value which do not go with ordinary contracts, and in any transaction in which one has put such paper in circulation it should be presumed that he has received the benefit of its superior character, and third persons, dealing with the holder of it, may assume that the maker has protected himself in his transaction with the payee."

Howard v. Kimball, supra, was further disapproved in Ferriss v. Tavel, 87 Tenn. 386, 3 L.R.A. 414, 11 S. W. 93, and in Dollar Sav. & T. Co. v. Crawford, 69 W. Va. 169, 33 L.R.A. (N.S.) 587, 70 S. E. 1089.

If the rule is as above stated when there has been a failure of the executory consideration at the time of the purchase, we

Neg. Inst. 748; 1 Edw. Bills & Notes, § 519; *Mabie v. Johnson*, 8 Hun, 309; *Ferdon v. Jones*, 2 E. D. Smith, 106; *Porter v. Pittsburgh Bessemer Steel Co.* 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; *Wade*, Notice, 2d ed. § 94a; *Bond v. Wiltse*, 12 Wis. 611; *Adams v. Smith*, 35 Me. 324; *Ruble v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135; *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; *Tiedeman*, Com. Paper, § 201; *Norton, Bills & Notes*, p. 282; *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194, 52 L.R.A. 430, 60 N. E. 429; *Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; 1 Dan. Neg. Inst. 5th ed. § 797; *Savage v. Ball*, 17 N. J. Eq. 142, 2 Mor. Min. Rep. 579; *Fox v. Citizens' Bank & T. Co.* — Tenn. —, 35 L.R.A. 678, 37 S. W. 1102; *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688.

Mr. Nat Schmulowitz also for appellant.

Messrs. Sullivan & Sullivan and Theo. J. Roche, for respondent:

The note and contract were signed at the same time, as parts of one transaction, and the consideration specified in the contract must be held to be the only consideration for the note.

Phelps v. Mayers, 126 Cal. 550, 58 Pac. 1048; *Braly v. Henry*, 71 Cal. 481, 60 Am. Rep. 543, 11 Pac. 385, 12 Pac. 623; *Grand Island Sav. & L. Asso. v. Moore*, 40 Neb.

should expect to, and do, find this doctrine uniformly applied where the failure of consideration happens afterwards. *Splivallo v. Patten*, 38 Cal. 138, 99 Am. Dec. 358; *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238; *Siegel v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; *Sadler v. White*, 14 La. Ann. 173; *State Nat. Bank v. Cason*, 39 La. Ann. 865, 2 So. 981; *Adams v. Smith*, 35 Me. 324; *Patten v. Gleason*, 106 Mass. 439; *Miller v. Ottaway*, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; *Hakes v. Thayer*, 165 Mich. 476, 131 N. W. 174; *Whitehead v. Purdy*, 172 Mich. 31, 131 N. W. 684; *Houston v. Keith*, 100 Miss. 83, 56 So. 336; *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; *Ruble v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135; *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194, 52 L.R.A. 430, 60 N. E. 429; *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; *Alderson v. Cheatham*, 10 Yerg. 304; *Fox v. Citizens' Bank & T. Co.* — Tenn. —, 35 L.R.A. 678, 37 S. W. 1102.

Knowledge on the part of an indorsee of a note that the maker's obligation grew out of an executory contract will not affect his rights as a bona fide holder, where there was nothing in such contract restricting the negotiability of the notes, nor indicating fraud or imposition or an existing breach. *Bank of Sampson v. Hatcher*, 151 N. C. 359, 134 Am. St. Rep. 989, 66 N. E. 308.

The presumption is that the executory contract will be carried out in good faith and the consideration performed as stipulated. *Siegel v. Chicago Trust and Sav. Bank*, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; *Houston v. Keith*, 100 Miss. 83, 56 So. 336.

"It cannot affect the negotiability of a note," said the court in *Sadler v. White*, 14 La. Ann. 173, "that its consideration is to be hereafter realized, or that from some contingency, it may never be enjoyed. Anyone having sufficient confidence in another to give his written obligation for something to be given or enjoyed hereafter is at lib-

erty to do so, and the maker cannot censure any future holder of the note for having purchased it, and for seeking to hold him liable, for it was the faith of the maker in the payee, that he would execute his promise and allow no obstacles to defeat it, that created the note and gave currency to it."

"A great part of the improvement of the country, and of business generally," said the court in *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148, "is carried on with money raised by the discount of notes given upon executory contracts; and if the maker could be allowed to defend against such notes, in case of a breach of contract, on the ground that the indorsee, though in other respects bona fide, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed and such business would be paralyzed. By making and delivering a negotiable note the maker is held to intend that it may be put in circulation, and that no defenses against it exist. In purchasing such note, no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity."

"It is common knowledge," said the court in *Miller v. Ottaway*, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665, "that in many executory contracts, involving large sums of money, such as drafts drawn against bills of lading, and also such as the purchase of real estate, lumbering contracts, construction of buildings and roads, and other business dealings, notes are given, and often negotiated to those familiar with the terms of the contracts; and it would unnecessarily hamper the transfer of such paper, and affect its value injuriously, to hold that the purchaser, before breach of such contract, although he had notice of the contract under which it was given, takes such paper subject to any damages that may arise to the maker from failure of the payee to perform such contract. There is neither reason nor necessity for so holding."

686, 59 N. W. 115; Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; Norfolk Nat. Bank v. Nenow, 50 Neb. 429, 69 N. W. 936; Hill v. Huntress, 43 N. H. 480; Hickman v. Rayl, 55 Ind. 551; Allen v. Nofsinger, 13 Ind. 494; 7 Cyc. 956; Strong v. Jackson, 123 Mass. 60, 25 Am. Rep. 19; Jewett v. Tucker, 139 Mass. 566, 2 N. E. 680; McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; Mace v. Kennedy, 68 Mich. 389, 36 N. W. 187; Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79; Zebley v. Sears, 38 Iowa, 507; Brown v. Tom, — Tex. Civ. App. —, 26 S. W. 297.

Though the corporate defendant was an indorsee before maturity, it took with full notice of the absolute want of consideration

Should a breach of an executory contract forming the consideration of a promissory note have occurred to the knowledge of the indorsee before his purchase, he would, of course, not be protected. *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59; *Wilson v. Carter*, 4 Ga. App. 349, 61 S. E. 494; *Bryant v. Sears*, 16 Ill. 288; *Smith v. Munch*, 21 Ill. App. 323; *Miller v. Ottaway*, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; *Wagner v. Diedrich*, 50 Mo. 484.

The same result would follow if he knew or should have known that the consideration would fail. *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59; *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.* 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Zebley v. Sears*, 38 Iowa, 507.

Proof of the failure of an executory consideration for a note is admissible against an assignee if he had actual notice of the facts, or was fairly put upon inquiry in relation to them before his purchase of the note, and on this issue matter on the face of the note showing the nature of the consideration is admissible in evidence in connection with the other facts. *Smith v. Munch*, 21 Ill. App. 323; *Henneberry v. Morse*, 56 Ill. 394.

III. Illustrative cases.

a. Miscellaneous executory contracts.

Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461, affirming 4 E. D. Smith, 565, is a leading case. Here the breach of an executory contract to repair a vessel, which formed a part of the consideration for the acceptance of a bill of exchange, was held not to be a defense in whole or in part against indorsees who took the bill for value, with notice of the contract, but without notice of a breach. "The plaintiffs were not bound to inquire," said Denio, J., "whether the vendors of the vessel had performed their agreement. A party receiving a bill is not put upon inquiry unless circumstances of suspicion have come to his knowledge; 46 L.R.A. (N.S.)

for the note, and the note in its hands was subject to the same defenses as if held by Petry.

Russ Lumber & Mill Co. v. Muscupitbe Land & Water Co. 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59; *Brady v. Henry*, 71 Cal. 481, 60 Am. Rep. 543, 11 Pac. 385, 12 Pac. 623; 1 *Parsons, Bills & Notes*, 183; *Sutton v. Beckwith*, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79; *Fink v. Chambers*, 95 Mich. 508, 55 N. W. 375; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; *Mace v. Kennedy*, 68 Mich. 389, 36 N. W. 187; *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19; *Roblee v. Union Stock Yards Nat. Bank*, 69 Neb. 180, 95 N. W. 61; *Consterdine v. Moore*, 65 Neb.

and I have already said that there was nothing suspicious or out of the common course of business, in the circumstances out of which this bill arose. The agent of the acceptors chose to rely upon the personal responsibility of the vendors of the vessel so far as the repairs were concerned. As they gave their acceptance upon time, which they knew might be transferred to a bona fide holder the next day, so it is presumed they would have parted with their money upon the personal engagement of the vendors if a delay in payment had not been material to them. It would not, in my opinion, alter the case if it could be shown that the vendors, the payees of the bill, had broken their contract respecting the repairs before they negotiated the paper to the plaintiffs, it being found that the latter had no notice of the breach. The plaintiffs were not bound to follow up the transactions between the original parties to the bill. To hold otherwise would attach an inconvenient and repugnant condition to such an acceptance. By accepting simply and unconditionally a negotiable bill, the defendants are to be held as intending to give it all the qualities of commercial paper, one of which is that it shall circulate freely for the purposes of business, and be available in the hands of any holder for value. To decide that one who proposed to purchase it, and who had a knowledge of the nature of the transaction upon which it was given, must await the consummation of that transaction, would essentially impair its character and legal effect. But in this case it was not known to anyone that the payees had broken their agreement when the plaintiffs took the bill. The payees insisted that they had sufficiently repaired the vessel before she was sent to sea, and the plaintiff's agent, though he distrusted her condition as to seaworthiness, concluded to receive and despatch her on her voyage to New York. Before she arrived at her destination the plaintiffs purchased the bill. After that it was demonstrated by the event that the repairs were insufficient, for she leaked to such an extent as to damage the cargo, and required extensive re-

291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; Jewett v. Tucker, 139 Mass. 566, 2 N. E. 684; Norfolk Nat. Bank v. Nenow, 50 Neb. 429, 69 N. W. 938.

The corporate defendant was not a purchaser in good faith.

Atlas Nat. Bank v. Holm, 19 C. C. A. 94, 34 U. S. App. 472, 71 Fed. 489; Matthews v. Poythress, 4 Ga. 287; Harris v. Nichols, 26 Ga. 413; Kneeland v. Miles, — Tex. Civ. App. —, 24 S. W. 1113; Stalker v. M'Donald, 6 Hill, 93, 40 Am. Dec. 389; Hagan v. Bigler, 5 Okla. 575, 49 Pac. 1011; Limerick Nat. Bank v. Adams, 70 Vt. 132, 40 Atl. 166.

Melvin, J., delivered the opinion of the court:

This is an appeal by the defendant from

pairs upon her arrival. If, therefore, the plaintiffs had made inquiries when the bill was offered to them they would have learned that the plaintiff's agent had accepted the brig as a seaworthy vessel and had sent her to sea. So far from casting suspicion upon the bill this intelligence would have confirmed them in the belief that it ought to be paid according to its tenor. I conclude, therefore, that there were no merits in the defense."

Where the consideration of a negotiable promissory note was certain services to be performed by the payee to the maker, failure of performance of the services was no defense to an action on the note, brought by a purchaser thereof for value, and before its maturity, though he knew of the consideration, but not of its failure, when he purchased. Wilensky v. Morrison, 122 Ga. 664, 50 S. E. 472; Morrison v. Hart, 122 Ga. 660, 50 S. E. 471.

The acceptor of a bill of exchange cannot defeat a recovery by the indorsee because the latter knew that the bill represented the unpaid balance of the purchase price of a sugar mill constructed by the drawers for the payee, and that such mill, being badly constructed and defective in workmanship and materials, the drawers, at the time of the acceptance, promised to make the necessary repairs at some future time, although the promised repairs were never made. Arthurs v. Hart, 17 How. 6, 15 L. ed. 30.

A default in the performance of an executory contract to deliver certain corporate stock, which was the consideration for a note, will not defeat the right of the holder to recover against the maker, though he may have been advised of the existence of the agreement. Kinkel v. Harper, 7 Colo. App. 45, 42 Pac. 176.

A recital in a note that it is given for two shares of stock "as agreed to under contract" does not charge a bona fide holder with notice of a failure of the consideration arising out of a breach of this contract, nor put him on inquiry as to whether or not the consideration expressed has failed. Brooks v. Floyd, 12 Ga. App. 530, 77 S. E. 877.

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an order granting a motion for a new trial. The action was one for the cancellation of a certain promissory note. There were two counts in the complaint, one alleging want of consideration and the other averring failure of consideration. The plaintiff, Philip H. Flood, entered into a contract with one Joseph Petry, by the terms of which the latter was to erect a building on land belonging to plaintiff for the sum of \$22,500. There were to be seven progress payments, according to the terms of the contract, six in cash, but the final one partly in cash and partly by a note for the principal sum of \$3,500, payable in eighteen months. The seventh payment was to become due when thirty-five days should have expired after the date of acceptance of the building, pro-

Knowledge from the face of a note that it was given for stock in consideration of an agreement to consolidate and reduce such stock does not preclude a bona fide holder for value, without notice of the failure of such consideration, from enforcing the note. Bank of Commerce v. Barrett, 38 Ga. 126, 95 Am. Dec. 384. The court said: "Notice of the consideration alone is nothing. Why should that affect him? That the note was given for money, or a horse, or a house, is wholly immaterial. How can the knowledge that a note was given for a horse be notice that the horse has proven worthless? One can, perhaps, imagine a case in which the mere knowledge of the consideration would involve also the knowledge of its failure,—as when the failure was matter of universal notoriety, or was caused by the party charged, etc.; but so far as appears, this is not such a cause."

Knowledge by the purchaser of a note that it was given to secure a change in the course of a suburban electric railway, and in reliance upon an agreement of indemnity and reimbursement in case the railway should not be constructed and put into operation within a year, does not affect the character of the purchaser as a bona fide holder, where no breach of said agreement had occurred at the time of purchase. Whitehead v. Purdy, 172 Mich. 31, 137 N. W. 684.

The recital in a note that it was given for the construction of certain improvements thereafter to be made can in no way affect the right of the purchaser for value before maturity, as he has the right to assume, in the absence of knowledge to the contrary, either that the payee has performed his part of the agreement, or that it will be performed. Houston v. Keith, 100 Miss. 83, 56 So. 336.

Indorsees of a promissory note are not put upon inquiry as to a subsequent failure of consideration by a statement or recital in the note that it was given for the privilege of displaying advertising signs in street cars after a certain date, for a stated term, which will not expire until after the maturity of the note. Siegel v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 537, 19

vided no liens nor claims against the building, lot, or premises should have been filed or recorded. At the time of executing the contract, however, plaintiff signed and delivered to Petry a note which was in the following terms:

\$3,500.

San Francisco, Cal., March 15, 1907.

Eighteen months after October 12, 1907, for value received I promise to pay to the order of Joseph Petry the sum of \$3,500, with interest thereon in like gold coin from date until paid, at the rate of 6 per cent per annum, and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or

discount and without any relief or benefit whatever from stay, valuation, appraisal, or homestead exemption laws. Due April 12, 1909.

Philip H. Flood.

Petry borrowed \$2,000 from the defendant corporation, gave his own notes for that amount, and pledged the note above described as security.

The trial court made findings among which were the following: "That the said promissory note was the note provided in the said contract to be made and delivered to the said defendant Joseph Petry as a part of the seventh payment provided in the said contract to be made, and that the sole consideration for the making, signing, and

Am. St. Rep. 51, 23 N. E. 417. The court said: "The most that can be said of a recital in the instrument itself of the consideration upon which it rests is that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient of itself to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and in connection with other facts amount to notice;" and added, "here the money was payable absolutely on the 1st day of July, 1887,—a time when the contract for the advertising could not have been complete. If the instrument had remained the property of the payee, and upon its maturity . . . suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired [and for the reason that the promise of the makers was based upon the promise of the payee to perform his undertaking at a time subsequent to the day fixed for payment]. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel [the payee] would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be that the contract would be carried out in good faith, and the consideration performed as stipulated. The 46 L.R.A. (N.S.)

makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel; and we are aware of no rule by which they can hold the indorsee for value, before due, and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed."

Knowledge on the part of a bank when discounting drafts that they were given in consideration of a promise to deliver coal in the future will not affect its right to enforce payment of them, although the promise is not fulfilled, if it took the drafts for value before maturity, and before the time for delivery had arrived. *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194, 52 L.R.A. 430, 60 N. E. 429.

Knowledge by a person discounting a bill of exchange in the regular course of business that the bill was drawn against flour supposed to have been shipped in a regular course of dealing between the drawer and acceptor does not defeat his right to recover, although the bills of lading on the faith of which the bill was accepted proved fraudulent. *Craig v. Sibbett*, 15 Pa. 238.

But failure of an executory consideration for a note, such as a breach of an agreement by the payee to procure certain agencies for the maker, may be pleaded as a defense to an action by an indorsee who had notice of the breach at the time of the transfer. *Bryant v. Sears*, 16 Ill. 288.

And a total breach of the payee's agreement, forming part of the consideration of a note given for patent-right territory, to furnish experienced men to canvass for the makers, and to sell enough rights in the territory to pay off the note before maturity, is a complete defense to a suit brought by a holder who bought the note with notice of the breach. *Wilson v. Carter*, 4 Ga. App. 349, 61 S. E. 494.

So, in *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.* 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995, allegations in

delivery of the said promissory note was the execution of the said contract by the said defendant Joseph Petry. . . . That at and prior to the time the said promissory note of the plaintiff was indorsed and delivered by the said defendant Joseph Petry to the said defendant the National Bank of the Pacific, the said defendant the National Bank of the Pacific had notice that the sole consideration for the making, signing, and delivery of the said promissory note by the plaintiff to the said defendant Joseph Petry was the execution of the said contract by the said defendant Joseph Petry, and had notice of the terms and conditions of the said contract. That at the time the said promissory note of the plaintiff was given, made, signed, and delivered by the plaintiff

to the said defendant Joseph Petry, and at the time the said promissory note of the plaintiff was indorsed and transferred by the said defendant Joseph Petry to the said defendant the National Bank of the Pacific, the said defendant the National Bank of the Pacific had notice that no portion of the work to be done by the said defendant Joseph Petry under and pursuant to the terms of the said contract between the plaintiff and the said defendant Joseph Petry had been done by the said defendant Petry, and had notice that the said work had not been commenced." It was also found that Petry abandoned work on the building on May 22, 1907, after he had received two of the payments for which the contract provided. The court likewise found that the consideration failed as to defendant

the answer in an action by an indorsee upon certain promissory notes that the plaintiff had knowledge and notice prior to the transfer of the notes to it that the sole consideration thereof was an agreement of the payee to deliver water to the maker for irrigation purposes; that plaintiff had notice and well knew of the payee's false representation as to its ability to fulfil its contract; and had notice and knowledge of the insolvency of the payee, and of its inability to meet its obligations and to carry out its contract,—were held to present a sufficient defense to require that the demurrer to the answer be overruled.

In *Brown v. Willis*, 13 Ohio, 26, the note in suit was to be assigned to a third person when the latter should pay a specified sum of money and perform a certain amount of labor, this forming the consideration of the note. The note having been assigned to him, although he had not paid the money nor performed the labor, the court held that he could not enforce the note, there having been a total failure of consideration. Here, of course, there must have been knowledge on his part not only of the nature of the consideration, but of its failure.

In *Harris v. Nichols*, 26 Ga. 413, it was held that the transferee of a note given for corn could not recover where the corn was subsequently levied upon under executions against the payee, and sold, so that the maker got none of it, the transferee not only knowing the consideration, but that there was some doubt about the corn, having told the maker that if he did not get the corn, he would not have to pay.

A note made to enable the payee to pay a third person, and applied to that purpose, thus fulfilling the object of the transaction, is valid in the hands of the latter, although he knew before he received it that it was originally given on the promise of the payee to give stock for it on the next day, and that such promise remained unfulfilled. *Ferdon v. Jones*, 2 E. D. Smith, 106.

b. Executory warranties.

One who purchases for value and before maturity, and in the ordinary course of

business, negotiable paper given as part consideration for a jack purchased by the makers from the payee, with knowledge that it was made in consideration of an executory contract of warranty as a foal getter, but without knowledge of the failure of the warranty, or of facts sufficient to put him on inquiry until after his purchase, takes it free from any defense by the maker because of the breach of warranty. *Rublee v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135. The court said: "At the time the notes were indorsed to the plaintiff it was not known to the makers that there would be a breach of warranty, so had inquiry been made of the defendants, at or prior to the purchase of the paper, the plaintiff would not have ascertained that any defenses existed against the same. Although the plaintiff knew when he bought the notes for what they were given and that the jack was warranted, that fact alone is not sufficient to prevent the plaintiff from being a bona fide holder. To have that effect, he must also have known when he bought the notes that the warranty had failed, or possessed knowledge of the facts sufficient to put him upon inquiry, which, if followed, would have led to its discovery. This the record fails to disclose. It only inferentially appears that there has been a breach of the warranty, and there is no finding of fact as to the actual value of the jack. Unless he was entirely worthless and possessed no value, there could not have been an entire failure of the consideration given for the notes. While it is doubtless true that the value of a jack depends largely upon his capability to produce foals, yet we cannot take judicial notice that where a jack is not a sure foal getter he has no marketable value."

Mere knowledge that a note was given in consideration of an executory agreement or contract of the payee, such as a warranty on the sale of a cow, for the purchase price of which the note was given, that such cow was a breeder, and was thereafter to be bred and delivered in calf to the maker, will not deprive an indorsee of the character of a bona fide holder if he has no notice of a breach of that agreement or contract. *Mc-*

Petry (who had not answered, and against whom a default had been entered).

Respondent insists that the motion for a new trial was properly granted, because the consideration for the note was not the execution of the contract by Petry, but was the completion of the building in accordance with the terms of the contract. Appellant contends, however, that the findings are sustained by evidence in which there is no substantial conflict, and that failure of consideration is not a defense open to a maker as against an indorsee for value, even in a case where the indorsee knew that the note was intended to be the evidence of an indebtedness that would become due if an executory promise were performed. In behalf of his contention, respondent,

Dr. Flood, contends that since the note and contract were executed at the same time, and since there is evidence tending to establish the knowledge of that fact by the defendant corporation, the whole transaction must be considered together, its parts must be construed as forming one agreement, and that therefore the consideration of the note must have been that mentioned in the building contract, the completion of the structure, and its acceptance free from all liens. This was the view taken by the justices of the district court of appeal, but we find ourselves unable to agree with them. It seems to us that the delivery of the promissory note (which by its express terms was made negotiable) long before the time mentioned for the pay-

Night v. Parsons, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 859, 15 Ann. Cas. 665.

A breach of the agreement of the payee in a note given for the purchase price of a stallion to replace him with another should be prove not to be a reasonably sure foal getter, as warranted, there being no evidence of any breach prior to the transfer of the note to a bona fide purchaser, does not affect his right to enforce the note against the makers, although he had full knowledge of the original consideration. Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174. The court said that there was no evidence of notice or knowledge of the breach of the contract in so far as the failure of the horse to comply with the warranty was concerned before the transfer, and added: "The purchaser of notes may have knowledge of a collateral agreement, but he is not obliged to inquire whether the seller has performed his agreement or will be able to perform the agreement into which he has entered."

Knowledge of a warranty on a sale of live stock in which a promissory note was given for the purchase price will not affect the rights of a bona fide purchaser of such note for value, before maturity, if he had no knowledge of the breach of the warranty. Miller v. Ottaway, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665.

A breach of the manufacturer's guaranty of a machine, for the purchase price of which a note was given, is not a defense to a suit by the purchaser of the note for value and before maturity, although he had full knowledge of the terms of the contract of sale. Detroit Sav. Bank v. Towers, 42 Pa. Super. Ct. 246.

The words "for one Hinckley Knitting Machine, warranted," expressed the consideration of the note. Giving to the words the broadest possible meaning, said the court in *Mabie v. Johnson*, 8 Hun, 309, they do not imply that there has been a breach of the warranty by which the maker has sustained damages. They cannot be construed as notice to the purchaser of a defense to the note in the hands of the payee. If they do it must be because the law will 46 L.R.A. (N.S.)

presume a breach wherever there is a warranty. That would be preposterous.

Knowledge on the part of an indorsee that the note was given in a transaction in which the makers had bought from the payees the right to sell a safety sash lock which the payees guaranteed would be manufactured "as per sample" does not affect the character of the indorsee as a bona fide holder where there was no evidence tending to establish any breach of such agreement at the time he became indorsee. Bank of Sampson v. Hatcher, 151 N. C. 359, 134 Am. St. Rep. 989, 66 N. E. 308.

Mere knowledge on the part of an indorsee for value and before maturity that a guaranty to be performed by or before a date two months after the note matures was the consideration is not sufficient to put him on notice that the payee had failed or would fail to perform. Hudson v. Best, 104 Ga. 131, 30 S. E. 688. The court said that if the maker, when he told the indorsee of the guaranty, had told him at the same time that the payee had failed to perform, and that for this reason he had a defense to the note, this might be sufficient.

c. Future rent.

In *Splivallo v. Patten*, 38 Cal. 138, 99 Am. Dec. 358, it was held to be no defense to an action upon a promissory note brought by an assignee in good faith, for value, before maturity, that the original consideration for the note was the rent for one year of certain lands of which the payee claimed to be the owner, and of which one of the makers was in possession, and that after about four months of such term the title of the payee failed, by reason of which a partial failure of the original consideration for the note resulted, and that the assignee had, at the time of the assignment, full knowledge of the consideration for which the note was given.

Knowledge by the holder that the note was given for future rent for a hotel will not defeat his right to recover against the maker because the rented premises were afterwards sold to satisfy an outstanding mortgage and vendor's privilege, thus de-

ment of the final instalment upon the building, precludes the maker of the instrument, upon the simplest principles of estoppel, from asserting that its only consideration was the completion of the building. The plaintiff's own account of the matter is, in substance, that he and the architect met at the latter's office; that Petry, the contractor, was there also; that after he had signed the contract and blueprints, the architect said, "About this note;" and that thereupon the note was passed to Dr. Flood, who signed it and handed it back to the architect, who delivered it to the contractor. Dr. Flood denied the statement made by the contractor in his testimony that the latter said during this conversation that he might want to borrow money

on the note or to use it for security. It was in evidence that Petry exhibited the contract to the president of the defendant bank before that document was signed and had some conversation about wishing to borrow money if he could obtain a note from Dr. Flood. For the purposes of this appeal we must, of course, take the version of the transaction most favorable to the plaintiff. We then have this state of facts: Dr. Flood delivered to the contractor at the time of the execution of the contract a note which, under the terms of that agreement, he was not required to execute until after the completion of the building and the payment of all liens; he said nothing, but the note contained the declaration in terms that it was negotiable.

stroying the lease, and compelling the maker to rent the property from the purchaser at the sale. *Saddler v. White*, 14 La. Ann. 173. The court said: "In the present case, there was a valid consideration promised for the obligation, and it could not be known with certainty that it would fail, until the hotel was sold, for the payee could, up to the sale, have satisfied the debt due for the price of the hotel, and have satisfied the consideration by allowing defendants to occupy the same. The case would present a different aspect if the allegations of the answer had been, not that plaintiff knew there might be, but that there were equities between the original parties to the note, or that he knew not that the consideration might never be enjoyed, but that it could not or would not ever be realized."

Knowledge by the purchaser from the face of the notes that the consideration was rent is not sufficient to charge him with notice that the consideration might fail by reason of the failure of the payee, who was himself a lessee, the maker being a sublessee, to pay his rent, and thus require the maker to pay rent to the owners if they should elect to recognize him as their tenant. *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238.

The recital in a note that it was given for future rent does not charge a purchaser with notice of a possible eviction under a foreclosure sale, where he had no notice prior to his purchase of the pendency of the foreclosure suit. *Adoue v. Tankersley*, — Tex. Civ. App. —, 28 S. W. 346.

The knowledge on the part of a purchaser, derived from the face of the note, that it was given for future rent for a term which would not expire until after the note would mature, does not charge him with notice of a possible failure of consideration by the foreclosure of a vendor's lien on the premises, which might require the maker to attorn to the purchaser at the foreclosure sale. *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077.

d. Failure of payee's title.

The breach of a bond to give a deed free from all liens and encumbrances, which 46 L.R.A. (N.S.)

forms the consideration of a promissory note, is not a defense in whole or in part against an indorsee who took the note for value before maturity, although he knew the nature of the consideration, where the breach occurred subsequent to the transfer, and he could at the time have had no knowledge of it. *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751.

The failure of the payee in a note given for the purchase of a share in his interest in a Mexican land grant, to perform the condition upon which he was to be entitled to such interest, only amounts to a failure of consideration, and cannot affect the previously acquired rights of an indorsee who knew the nature of the consideration. *Alderson v. Cheatham*, 10 Yerg. 304.

Knowledge by an assignee in due course of a negotiable note that it was given for the purchase price of a specified quantity of land, at a specified price per acre, is not notice to him that the payee's title to the property will fail, or that there is a shortage in quantity. *Dollar Sav. & T. Co. v. Crawford*, 69 W. Va. 109, 33 L.R.A. (N.S.) 587, 70 S. E. 1089.

The recital in a note that it is given for part of the purchase price of certain described real property, though fully notifying the assignee or purchaser of the true consideration, is not of itself sufficient to advise him that there was or would necessarily be a failure of the consideration, but it is evidence in connection with other evidence to be considered by the jury on the question of notice. *Henneberry v. Morse*, 56 Ill. 394.

Knowledge that the notes were given for land, and that there was a lien on such land for unpaid purchase money, and that there might thereafter occur a partial failure of consideration by an enforcement of the lien, does not render the purchaser subject to all the equities that may thereafter arise between the original parties. *Merchants' & P. Bank v. Penland*, 101 Tenn. 445, 47 S. W. 693. In this case the purchaser was evicted, and his grantor became insolvent, but both after the transfer.

So far as *Howard v. Kimball*, 65 N. C.

Assuming that the president of the defendant bank knew all of these facts, the note would simply appear to him as an advance payment on an executory contract. If Dr. Flood had said to Petry, "Take this note, and, if you like, negotiate it," the bank, knowing that fact, would have been justified in accepting it for a valuable consideration before maturity and before breach of the executory contract. But he did say substantially the same thing more emphatically than by word of mouth. He wrote it. It was to that extent a waiver of the terms of the building contract, and was a payment before performance, upon an executory agreement. There is no pleading nor assertion that Petry could not or did not intend to perform, and that the offi-

cers of the bank knew of his incapacity. On the contrary, it appears without contradiction that Petry did undertake and did partially execute the work on the building. The bank was therefore a bona fide holder of the note for value.

It has long been the law in California that a failure of consideration in whole or in part after a bona fide assignment of a promissory note is no defense to a suit by the assignee against the maker, notwithstanding the former's full knowledge of the original consideration for which the note was given. In the case of *Splivallo v. Paten*, 38 Cal. 139, 99 Am. Dec. 358, the original consideration for the note in suit, according to the complaint, was the rent of certain premises for one year. Before the

175, 6 Am. Rep. 739, is authority for the doctrine that promissory notes expressing on their face that they are given for the purchase price of a specified tract of land charge a purchaser of the notes, who knew that the vendor of the land had given a bond to make title, with notice that the notes cannot be collected unless a good title be made, it is, as is shown in subd. II, *supra*, of this note, discredited even in the court which decided it. But as the facts in that case show that the purchaser had positive notice of a defect in the vendee's title before he purchased the notes, and had taken a deed for the land in trust to make title on payment of the purchase money, thereby taking upon himself the relation of vendor toward the maker, the court was doubtless correct in holding that he could not enforce the notes as against the maker.

A purchaser of a note knowing that it was given by the maker as the last payment for land purchased by him from the payee, that the latter had entered into a written contract to execute a deed to the maker upon the payment of such note, that the payee was a married man at the time of making such contract to convey, and that his wife had not joined him in such contract and was then living, is charged with knowledge of the legal right of the maker to insist upon a complete conveyance by the grantor and the wife, or to accept the deed of the grantor alone, and retain so much of the purchase money as shall be equivalent to his wife's interest. This right of the maker and vendee was an equity which attached itself to the note in the hands of the payee that could be made available in an action on the note by him. The indorsee of the note, with full knowledge of the facts out of which this equity arises, can occupy no better position than the payee. *Zebley v. Sears*, 38 Iowa, 507.

One who purchases for value from a vendor the obligation of his vendee, and obtains the latter's promissory note, payable to himself, as evidence of such obligation, with full knowledge that it represents the final payment on the purchase price of land which he knows the vendor has conveyed with covenants of warranty and against encum-

brances, that he knows were broken when made, takes the note subject to the right of the maker to reduce the amount of recovery thereon by the amount of the damages sustained by reason of the partial failure of consideration, brought about by the defects in the title. *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1.

The fact that the indorsee of a note given for the purchase price of land paid nothing for the note, holding it for collection only, is sufficient to account for the ruling in *Bronson v. Silverman*, 77 Pa. 94, that a breach of the agreement of the payee to make, execute, and deliver to the maker a written contract as his title thereto was a good defense against the indorsee, who took the note with full knowledge of the consideration and the circumstances under which it was given.

In *Anthony v. Slonaker*, 18 Ind. 273, it appeared that the maker of the note had successfully defeated a suit by the indorsee on the ground that the note was given in part consideration for a piece of land, and that the payee had neither conveyed nor offered to convey the land according to the terms of his agreement, whereupon the indorsee sued his immediate indorser. The latter contended that it was the duty of the indorsee, knowing the consideration for which the note was given, to see that the payee made or offered to make a conveyance of the land; but the court said that this was a matter about which the indorsee was under no obligation to trouble himself; that he had a right to sue the maker on the note, and if a legal defense was successfully set up, his right of action against his indorser was perfect.

e. Insurance cases.

A breach of an agreement on the part of the payees forming part of the consideration for a promissory note, that they should procure an insurance for the amount of the note on the adventure or charter of a certain brig belonging to the maker, for his benefit, and, in case the vessel should be lost, should collect the amount due on the policy for the maker's benefit and payment

expiration of the term the landlord's title failed. Defendant alleged that the assignee of the note, having full knowledge of the consideration for it, was in the same position as the landlord would have been if he had not indorsed and delivered the note to the plaintiff. This court sustained a judgment entered after a demurrer to the answer had been sustained. The same rule is stated in 7 Cyc. at page 947, and *Spilvallo v. Patten*, supra, is cited in support thereof.

In *Davis v. McCready*, 17 N. Y. 232, 72 Am. Dec. 461, it is held that the breach of an executory contract which formed the consideration for the acceptance of a bill of exchange is not a defense against indorsees who took the bill for value with notice of

the contract, but without notice of its breach. In that case Judge Denio, delivering the opinion of the court, said: "If one will issue his negotiable paper and send it into the world, in consideration of an engagement of the party with whom he deals to do some act for his benefit in future, he declares in effect that he will pay the note or bill according to its terms to anyone who shall become the holder for value in the course of business, and rely for his own indemnity upon the promise he has received as the consideration for issuing it." See also *Patten v. Gleason*, 106 Mass. 439; *Rublee v. Davis*, 33 Neb. 781, 29 Am. St. Rep. 509, 51 N. W. 135; *Alderson v. Cheatham*, 10 Yerg. 304.

The rule announced above has been de-

of the note, or should assign the policy to the maker, is no defense to an action against the maker, brought by an indorsee for value and before maturity, who knew of the existence of the agreement. *Patten v. Gleason*, 106 Mass. 439. "If the payees had brought an action upon this agreement against the defendant, the facts alleged," said the court, "might have constituted a defense *pro tanto*. But the plaintiffs in this action being indorsees of a negotiable note given for good consideration, and negotiable before any valid defense existed, and before its maturity, hold it by an independent title not subject to equities that might arise subsequently. It is not alleged that they became liable for the performance of the contract of the *Lewisohn Company* [the payees]; and certainly they are not subject to an oral agreement varying the terms of the note."

The indorsee of a negotiable note, purchasing it for value before maturity, may recover in an action against the maker, though, when taking the note, he knew that it was given in payment of a premium of a policy of marine insurance which contained a stipulation that, in case of loss, the note was not to be paid, but its amount was to be deducted from the amount of the loss, and although before maturity such contingency actually occurred. *Adams v. Smith*, 35 Me. 324.

Where one makes a written application for a policy of life insurance, and executes a promissory note, the proceeds of which are to be used to pay the first premium, and the purchaser of the note takes it with notice that the policy has not at that time been issued, such purchaser, though he purchases the note for value and before maturity, incurs the risk of a possible failure of the insurance company to deliver to the maker such a policy as is described in the application. *Shedden v. Heard*, 110 Ga. 461, 35 S. E. 707. Same case on second writ of error, 113 Ga. 162, 38 S. E. 387. "It was contended by counsel for plaintiff," said the court in the decision on the first writ of error, "that the fact plaintiff knew, when this note was purchased, for what consideration it was given, cannot be considered

as charging him with any notice of a failure of that consideration. This is unquestionably true as a general principle of law; but we do not think it is applicable to this case. It appears from the record that the plaintiff, when he purchased this note, not only knew of its consideration, but also knew that at that time the policy applied for, and for which the note was given, had not been delivered to the maker; for the plaintiff himself forwarded the money to the company in order to get that policy. We think, therefore, with a knowledge of these facts, the plaintiff, when he purchased the note, manifestly incurred the risk of the defendant's not receiving the policy for which he applied; and if the company had not sent to the applicant such a policy, but one entirely different, the plaintiff in this case could not have pleaded that he was an innocent holder as against this defense. For instance, if one should purchase a negotiable note before maturity, for value, and at the time of the purchase knew not only its consideration, but further knew the fact that the article or thing of value, for which the note was given, had not been delivered to the maker, such a purchaser would necessarily incur the risk of a failure of consideration of the note by a possible nondelivery of the thing purchased. While the answer in this case does not specifically say that the plaintiff bought this note when he knew the policy had not been delivered, and probably was open to special demurrer on this ground, yet the answer does contain allegations from which such knowledge might be inferred on the part of the general agent of the company; and we therefore cannot say that the court erred in overruling the general demurrer. This knowledge, however, upon the part of the plaintiff, was uncontradicted. It clearly appeared from the testimony, and had there been a special demurrer, it could have been readily met by amendment."

Knowledge by a bank cashier that a note indorsed to the bank by a life insurance solicitor was given for the first premium on a proposed policy, and was to be returned to the maker should his application be rejected, charges the bank with knowledge of

clared to be the true one in cases where the holder of the note knew of the contract, but not of the breach thereof, at the time of taking title to the negotiable paper. It is, of course, equally applicable where a person has acquired a note in good faith, for value, before maturity, knowing that the consideration was an executory agreement on the part of the payee which might be broken, and which was in fact violated after the transfer of the note. In *Kinkel v. Harper*, 7 Colo. App. 53, 42 Pac. 176, the court said: "Whenever a bill or note is disposed of for a valuable consideration, the holder is not bound to inquire whether the indorser has performed or will be able to perform the agreement into which he has entered, so long as there is nothing sus-

picious or out of the usual course of business in the circumstances attending its issue. *Miller v. Ottaway*, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; *Adams v. Smith*, 35 Me. 324; *Patten v. Gleason*, 106 Mass. 439; *State Nat. Bank v. Cason*, 39 La. Ann. 865, 2 So. 881; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461; *Craig v. Sibbett*, 15 Pa. 238; *Bond v. Wiltse*, 12 Wis. 611." A very instructive case is *Siegel v. Chicago Trust & Sav. Bank*, 131 Ill. 570, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417. The note which was discussed in that case expressed as the consideration the privilege of placing advertising signs in certain cars for a definite period. The consideration wholly failed after the transfer of the note to defendant. That was

the defective title, and a breach of faith, and fraud of the payee in negotiating the note, and the bank was therefore not a bona fide holder, and could not enforce the note against the maker, where he failed to pass the medical examination, and the insurance policy was for that reason not issued. *Citizen's State Bank v. Garceau*, 22 N. D. 576, 134 N. W. 882.

f. Bohemian oats and similar cases.

There is nothing in the Bohemian oats, Red Lyon wheat, and other similar cases which militates against the doctrine of the foregoing decisions. They are readily explainable either on the theory that, the transaction being so blatant a fraud, knowledge of the nature of the consideration charged the purchaser with knowledge that it would fail, or that, the whole transaction being against public policy, and the purchaser having knowledge thereof, he could not enforce the notes.

The latter explanation is the one adopted in *Hakes v. Thayer*, 165 Mich. 476, 131 N. W. 174, where the court says that the Bohemian oats cases have no application to the question under consideration, because "knowledge of those contracts or bonds was knowledge of fraud, and of contracts made in violation of law, and against public policy." This is also the opinion of *Sherwood, Ch. J.*, in *Sutton v. Beckwith*, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79, where, in a special concurring opinion, he says: "The contract under consideration was a gross fraud from . . . beginning to . . . end, and, on the part of the parties procuring it, was even worse,—it was criminal in character,—and furnishes no case for the application of the just and equitable principles underlying and controlling commercial law, and to attempt to apply them to a case like this is a perversion of the doctrine; and an appeal to the adjudicated cases establishing this doctrine is only giving colorable dignity to one of the worst swindles perpetrated upon the present generation, and should be treated by all courts as such. The transaction is one wherein

the intention to cheat and defraud is apparent to all upon the face of the contract sought to be enforced, except to the ignorant and unsuspecting, and, in my judgment, is against public policy and void. If there were any doubt upon this subject, the recent legislation in this state, making the transaction a felony, should be regarded as conclusive. Certain it is that no person owning and holding or having knowledge of the entire contract can be considered as a bona fide holder of the paper, and it is questionable whether a holder of any part of the contract should be so regarded."

There is no claim, said the court in *Merrill v. Hole*, 85 Iowa, 66, 52 N. W. 4,—a Bohemian oats case,—that mere notice by the holder that the consideration for the note was the sale of oats and a bond to sell the maker's crop on commission would be notice of want or failure of consideration, but the claim is that notice of this kind of sale and bond would be, because of their being illegal and void. The court held that if the holder's agent knew of newspaper notices giving the details of Bohemian oats transactions, and knew that the note in question was given in such a transaction, and made no inquiry, he would be a purchaser in bad faith.

Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79, is typical of this class of cases. Here knowledge by the purchaser of a note that it was given for Bohemian oats at \$10 a bushel, and upon the consideration set forth in a contemporaneous agreement to sell for the makers 80 bushels of oats at that price before calling for payment of the note, was held to defeat the right of the purchaser to enforce the note against the maker, although there had been no breach of the agreement at the time of the purchase of the note. The court said: "It is evident that the consideration of the note in suit was not the 40 bushels of oats at \$10 per bushel, but the agreement or bond executed and delivered at the same time as the note. The transaction as a whole appealed to the cupidity of the maker. He was to receive \$800 for 80 bushels of oats before he was to pay \$400 for the 40 bushels delivered to him. This agreement

held to be no defense against the holder for value. The court uses the following language at pages 572 and 573 of 131 Ill.: "There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is that, where the parties insert a specific date of payment, the instrument is then payable at all events,—and this, although, in the same instrument, an uncertain and different time of payment may be mentioned, as that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like. *McCarty v. Howell*, 24 Ill. 341, and authorities supra." Again, at page 574 of 131 Ill., speaking of the breach of the agreement by Dalziel, the payee, the court said further: "The makers had put their promissory note into

the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. *Wade*, Notice, § 94a; *Loomis v. Mowry*, 8 Hun, 312; *Davis v. McCreedy*, 17 N. Y. 230, 72 Am. Dec. 461." Appellant's contention is supported by abundant authority. Indeed, as was said by Chief Justice Weaver of the supreme court of Iowa in *McNight v. Parsons*, 136 Iowa, 392, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 859, 15 Ann. Cas. 665: "The courts quite universally hold that knowledge that a note was given in considera-

was what he acted and relied upon, and formed the consideration of this note. He would never have given it for the 40 bushels of oats independent of the promise in the bond. The oats he received cut but little figure in the dealing in the mind of the defendant."

This decision was followed in several similar cases, such as *Mace v. Kennedy*, 68 Mich. 389, 36 N. W. 187, and *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218, in the latter of which cases the court said: "It is not intended to run counter to the rules of the law merchant governing negotiable instruments, but we have taken the note and bond together as forming the contract between the parties, and construing them together as though written upon the same piece of paper, and as between the original parties and those purchasing with notice, we hold such contracts void." And in the later case of *Ward v. Doane*, 77 Mich. 328, 43 N. W. 980, the court said: "It is a fact of which courts have taken knowledge that notes known as Bohemian oats notes are all obtained and given up on a scheme or arrangement similar one to the other, and void as against public policy between the makers and the payee or any other person having knowledge or information of the scheme upon which they are based and by which they are procured;" and held that where the purchaser testified that he had read of this Bohemian oat scheme and knew that some farmers were getting into it, the jury should have been told that if they found that he knew the note was given for Bohemian oats, or was so informed before his purchase, he could not enforce the note against the maker.

So, in *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901, the court approved an instruction in an action on a Red Lyon wheat note, brought by an indorsee against the maker, that "if the jury find that the consideration upon which the note was given was the bond of a company whereby the company agreed

to sell ordinary wheat under the fictitious name of Red Lyon wheat, at the speculative value of \$15 per bushel, whereas its real value was not to exceed \$1 per bushel, then such notes are void and plaintiff cannot recover if at or before the time he purchased it he had knowledge that this note was given on such consideration."

"It would seem strange," said the court in *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019, "that a man of average intelligence, after all that has been said through the public press of Bohemian oat and Red Lyon wheat deals, and the frauds practised upon the unwary by sharpers engaged in such questionable transactions, should not, when making a purchase of \$900 worth of notes, and being told that they were given in a wheat deal, make some inquiry, at least of the seller, what the wheat deal was. These matters are of such common knowledge that a jury would naturally take with some degree of suspicion the statement of a purchaser who is informed that a note is given in an oat deal or a wheat deal, and yet claims to have made no further inquiry, and insists that he is an innocent purchaser. It may be true; but it would, under proper circumstances, be a question of fact, for the determination of the jury. The facts that came to his notice were that \$900 in notes had been taken from parties in the sale of wheat. These notes were against different parties, the defendant's note among them. An ordinarily prudent business man would naturally inquire why these men were buying wheat, and why the sellers were taking notes for a commodity which has a present cash value, and for which there is always a ready market for cash. It is a staple production, and represents so much cash; the values being quoted in the market from day to day, and very rarely sold in such quantities on time. These facts, with the almost common and universal knowledge that wheat and oat deals were being fraudulently made, are circumstances which the jury should be permitted

tion of the executory agreement or contract of the payee which has not been performed will not deprive the indorsee of the character of a bona fide holder, unless he also has notice of the breach of the agreement or contract." Other authorities which state substantially the same doctrine are *State Nat. Bank v. Cason*, 39 La. Ann. 866, 2 So. 881; *Pavey v. Stauffer*, 45 La. Ann. 354, 19 L.R.A. 716, 12 So. 512; *Craig v. Sibbett*, 15 Pa. 240; *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 196, 52 L.R.A. 430, 60 N. E. 429; *Black v. First Nat. Bank*, 96 Md. 414, 54 Atl. 88; *Jennings v. Todd*, 118 Mo. 305, 40 Am. St. Rep. 373, 24 S. W. 148; *Fox v. Citizens' Bank & T. Co.* — Tenn. —, 35 L.R.A. 678, 37 S. W. 1102.

In 2 *Randolph on Commercial Paper*, in § 1019, the rule is thus formulated: "Knowledge of an executory consideration is not knowledge of its failure, or of a breach

of the agreement which formed the consideration. And *a fortiori*, notice of the agreement is not notice of equities arising out of it after the transfer of the note. But, if the purchaser knows that the consideration has failed, he is not a bona fide holder." In support of the last statement the learned author cites *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.* 120 Cal. 522, 65 Am. St. Rep. 186, 52 Pac. 995, a case upon which the plaintiff here seems to place great reliance. An examination of that case shows, however, that it is not in conflict with the case of *Splivallo v. Patten*, supra. In the *Russ Case* the court was considering a pleading in which it was averred that the holder of the note given in consideration of a promise to furnish water in the future had full knowledge when he took the paper that the transaction was fraudulent, and that the payee of the note was

to take into consideration in determining the bona fides of such purchasers."

Knowledge by the purchaser of a note that it was given for Bohemian oats under an agreement that the note was not to be paid unless the payee should sell for the maker 100 bushels of his crop at \$10 a bushel prevents the purchaser from enforcing the note against the maker where the condition has not been fulfilled. *Johnson v. First Nat. Bank*, 24 Ill. App. 352. The court said that the purchaser stood in the shoes of the payee, and that the case differed from those where the consideration of a note simply rests on the covenant or agreement of a third party to do or perform some act, and the agreement does not make the consideration of the note invalid in case it is not performed.

Watson v. Blossom, 18 N. Y. S. R. 726, 4 N. Y. Supp. 489, is another Bohemian oats case where the main consideration for the note was an agreement to sell for the maker on commission 68 bushels of oats at \$15 a bushel. There was evidence tending to show that the indorsee was advised before his purchase of the deal and contract pursuant to which the note was given, and understood the fraudulent character of the seller's transactions. This is, the court held, sufficient to present the question to the jury as to whether he was chargeable with notice of the fraud, and as a consequence should be denied the character of bona fide purchaser or holder.

Similar to the Bohemian oats fraud was the Hulless oats swindle, an example of which is found in *Griffith v. Shipley*, 74 Md. 591, 14 L.R.A. 405, 22 Atl. 1107. Here the payee gave a bond to sell for the makers on commission 40 bushels of Hulless oats at \$10 a bushel. In an action by the indorsee against the maker the court said: "As between the original parties to the note, and as against all who subsequently took it after maturity, or who took it by transfer before maturity, with notice or knowledge of the facts of the transaction out of which the note had its origin, the

bond and note must be taken together as forming parts of one and the same contract, and must be construed together as constituting the entire contract between the parties. It is very apparent that the note would not have been given without the bond, and that the bond formed the principal, if not the entire, inducement to the making of the note. The stipulations of the bond have not been performed, and, with the knowledge of the deception in regard to the oats, it is most improbable that the party giving it ever supposed that the bond could be performed. The consideration for the note, therefore, has utterly failed; or rather, no valid or substantial consideration for it ever existed; and therefore no holder of the note is entitled to recover thereon, except a party who may have in good faith acquired title to the note before maturity and for value."

Differing in kind but not in intent is the swindle disclosed in *Fink v. Chambers*, 95 Mich. 508, 55 N. W. 375, where the consideration for the note was a contract to establish a local fence manufactory, appoint the maker a local sales agent, keep the manufactured fence in stock, and aid in effecting sales. The evidence justified a finding, said the court, that the contract was part of a fraudulent scheme to obtain this and other notes without any consideration, and hence if the indorsee knew that there was a fence contract behind the note, that was sufficient to put her on inquiry, she having bought other similar notes.

Similarly, where the purchaser for less than face value of a note payable six months after date at a specified fence factory in the purchaser's own town, which he knew had no existence, had notice that the note was given for some kind of a township right by some sort of contract, it was held that he was put on inquiry and was affected with knowledge of all that the inquiry would disclose,—in this case, fraud and failure of consideration. *Farthing v. Dark*, 109 N. C. 291, 13 S. E. 918.

W. W. N.

insolvent, and never intended to keep the agreement to furnish water for irrigation. The plaintiff was found not to be a bona fide holder of the note for value and without notice of the equities. In this case there was no pretense that the bank was a party to any fraud or knew of Petry's inability to perform the stipulation of his contract.

Respondent contends that the contract in this case should be regarded in the same light as a mortgage given for future advances, and the note as an adjunct thereto, and that the equities must therefore prevail against the bank just as they might prevent the assignee of a non-negotiable note supported by a mortgage upon the security of which nothing had been advanced, from enforcing the payment of such non-negotiable instrument if he had taken it with notice or means of knowing that no advances had been actually made. It is true that, whether negotiable in form or not, a note secured by a contemporary mortgage on land, executed as a part of one transaction, is subject to the equities and is not in fact negotiable if taken with notice of the existence of the mortgage. *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Briggs v. Crawford*, 162 Cal. 129, 121 Pac. 381; Civ. Code, § 1642; *National Hardwood Co. v. Sherwood*, — Cal. —, 130 Pac. 881. And if, in the present case, the note had been placed in escrow for delivery after the completion of the building which was to be constructed under the contract, and the defendant corporation, knowing that fact, had taken it, the rule announced in the cases cited above might be applicable; but, as was held in the case last mentioned, the maker of a note, even if ordinarily it would be subject to the defense of want of consideration, may by his conduct waive the benefit of such defense. In the present case, the note, although made payable at a time subsequent to a certain mentioned future date, did not for that reason bear on its face any evidence of non-negotiability. True, that method of computing the time of maturity of an instrument is not usual, but in and of itself that fact gave no hint of the contract for building a house. Moreover, the note bore the deliberate declaration that it was negotiable, and it was not marked in any way as a part of the final payment to be made under the building contract. By placing it in the hands of Petry, as we have indicated, Dr. Flood gave to the contractor the means of using it improperly if Petry had not intended to construct the building. All of the circumstances of the case gave to the bank the right to conclude that the instrument was delivered as an advance payment on the contract, and

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brings the case within the rule that, "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543.

It is conceded by the appellant corporation, as of course it must be, that a trial court has the very widest discretion in the matter of granting a motion for a new trial; but it is submitted that no other rational conclusions could have been reached by the superior court under the evidence than those indicated by the findings. With this position of the appellant we agree.

The order granting a new trial is reversed, and the cause is remanded, with instructions to the lower court to enter the judgment originally given.

We concur: Sloss, J.; Lorigan, J.; Henshaw, J.

Shaw, J.:

I concur in the judgment solely on the ground that the conduct of Flood in executing the note, under the circumstances stated in the opinion of Justice Melvin, and the terms of the note itself, show that it was his intention that the note was to be negotiated by Petry, if he chose, before its maturity and prior to the completion of the building contracted for, and that these facts create an estoppel against Flood which prevents him from asserting the failure of the consideration of the note against a third person who took it for value with knowledge of the fact that the consideration was the completion of the building free from liens or claims, provided, as was the fact here, the person took the note before the failure of consideration occurred. I think the building contract and the note constituted the parts of a single agreement, and that, under the terms of the agreement as a whole, the consideration of the note was not the mere promise of Petry to erect the building, but the actual erection thereof free from liens or claims; and that the failure to so complete it would have been available to Flood as a defense to the note if it had remained in the hands of Petry.

Petitions for rehearing having been filed, the following *Per Curiam* response was handed down May 14, 1913:

The judgment hereinbefore entered is amended by striking therefrom the words, "And the cause is remanded with instructions to the lower court to enter the judgment originally given." This clause was inadvertently inserted in the judgment of this court. The previous part of the judgment having reversed the order granting a new trial, and there having been no appeal

from the judgment, the original judgment was thereby left wholly unaffected and it stands as the judgment of the court below as of its original date. The clause stricken out was unnecessary.

The petition for rehearing is denied.

KANSAS SUPREME COURT.

AMY CAREY

v.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.

(84 Kan. 274, 114 Pac. 197.)

Master — injury to employee seeking shelter under car.

A number of workmen were employed in uncovering rock in a quarry operated by a

Headnote by MASON, J.

Note. — Negligence in going, without previous notice, under or between cars liable to be moved at any time.

As to contributory negligence in attempting to cross a train standing on a crossing, see notes in 13 L.R.A.(N.S.) 1066, and 34 L.R.A.(N.S.) 466.

For liability of railroad for injuries to one not an employee, by closing gap between standing cars at point other than a highway crossing, see note to Brackett v. Louisville & N. R. Co. 19 L.R.A.(N.S.) 558.

As to negligence of employee of railroad in stepping between moving cars, see note to Korab v. Chicago, R. I. & P. R. Co. 41 L.R.A.(N.S.) 32.

As to walking in front of moving car to prepare coupling as negligence, see note to New York, C. & St. L. R. Co. v. Hamlin, 10 L.R.A.(N.S.) 881.

For contributory negligence as defense to servant's action for injuries from a violation of the master's statutory duty, where the statute excludes the defense of assumption of risk, see note to Dumphy v. New York, N. H. & H. R. Co. 13 L.R.A.(N.S.) 1152.

A case very similar on the facts to CAREY v. CHICAGO, R. I. & P. R. Co. is Mitchell v. Chicago, R. I. & P. R. Co. — Ark. —, 151 S. W. 520, where a brakeman injured by the moving of a car under which he had crawled to get in the shade while guarding a work train against approaching trains was held guilty of negligence, his failure to look out for approaching trains imperiling his position being an act of negligence barring recovery, notwithstanding any negligence on the part of other train men. This seems to be the only case where, like in CAREY v. CHICAGO, R. I. & P. R. Co., the person was injured while seeking shelter under a car.

It is generally held that a railroad employee when about to put himself in such a position with respect to a stationary car

railroad company, their duties not involving loading or handling the cars. Several loaded cars awaiting removal were standing upon a spur track near where they were at work. On account of a rain all but one of them entered the cars; he took shelter beneath a car and was run over and killed when a freight train backed into the cars in the process of picking them up. His widow recovered a judgment, the jury finding that the railroad company was negligent in failing to give proper warning of the approach of the train. Held, that the defendant owed no duty to the deceased to give such a warning, and that his own conduct constituted negligence as a matter of law.

(March 11, 1911.)

APPEAL by defendant from a judgment of the District Court for Morris County in plaintiff's favor in an action brought to recover damages for the death of her hus-

that, if it should be moved unexpectedly, he would in all probability be injured, is bound to notify all other employees whose work may, in its progress, produce a movement of the car, or put out a flag or other signal which will show them where he is. Thus, this rule has been applied to a car inspector or repairer injured while working under a car (Alabama G. S. R. Co. v. Roach, 110 Ala. 266, 20 So. 132, 13 Am. Neg. Cas. 70, later appeal 116 Ala. 360, 23 So. 52; Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250; St. Louis, I. M. & S. R. Co. v. Dupree, 84 Ark. 377, 120 Am. St. Rep. 74, 105 S. W. 878; Southern P. Co. v. Pool, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; O'Rourke v. Union P. R. Co. 22 Fed. 189; Chicago, B. & Q. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383; Elgin, J. & E. R. Co. v. Herath, 129 Ill. App. 416, affirmed in 230 Ill. 109, 82 N. E. 610, second appeal, 149 Ill. App. 268; Whitmore v. Boston & M. R. Co. 150 Mass. 477, 23 N. E. 220; Hanrahan v. Brooklyn Elev. R. Co. 17 App. Div. 588, 45 N. Y. Supp. 474, 3 Am. Neg. Rep. 581; Cypher v. Huntingdon & B. T. M. R. Co. 149 Pa. 359, 24 Atl. 225); and to a car inspector (Norfolk & W. R. Co. v. Cofer, — Va. —, 76 S. E. 909), employee of coal dealer (Montague v. Chicago, M. & St. P. R. Co. 27 C. C. A. 180, 49 U. S. App. 627, 82 Fed. 787), brakeman (Davis v. Western R. Co. 107 Ala. 626, 18 So. 173), or other employee (Koke v. Andrews Steel Co. 149 Ky. 627, 149 S. W. 968) injured between cars; also to fireman (Young v. St. Louis, I. M. & S. R. Co. 100 Ark. 380, 104 S. W. 584; Crane v. Chicago, M. & St. P. R. Co. 93 Wis. 487, 67 N. W. 1132) and engineer (Seldomridge v. Chesapeake & O. R. Co. 46 W. Va. 569, 33 S. E. 293) working under engine, and to engineer caught and killed between spoke and driving rod while inspecting engine (Gibson v. Burlington, O. R. & N. R. Co. 107 Iowa, 596, 78 N. W. 190, 5 Am. Neg. Rep. 325).

The same is true where the injury is

band, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. M. A. Low, Paul E. Walker, M. B. Nicholson, and W. J. Pirtle, for appellant:

The duty of a railway company to give warning of the approach of trains at crossings or other places where persons have the right or license to use their tracks does not extend to trespassers or those not authorized to use the track at the places in question, or those using the track elsewhere.

Davis v. Chesapeake & O. R. Co. 116 Ky. 144, 75 S. W. 275; Louisville & N. R. Co. v. Redmon, 122 Ky. 385, 91 S. W. 722; Chesapeake & O. R. Co. v. Nipp, 125 Ky. 49, 100

S. W. 246; Missouri, K. & T. R. Co. v. Saunders, 101 Tex. 255, 14 L.R.A.(N.S.) 998, 106 S. W. 321, 16 Ann. Cas. 1107; Schackelford v. Louisville & N. R. Co. 84 Ky. 43, 4 Am. St. Rep. 189; Batchelder v. Boston & M. R. Co. 72 N. H. 528, 57 Atl. 926; Williams v. Chicago & A. R. Co. 135 Ill. 491, 11 L.R.A. 352, 25 Am. St. Rep. 397, 26 N. E. 661; Thompson v. Cleveland, C. C. & St. L. R. Co. 226 Ill. 542, 9 L.R.A.(N.S.) 672, 80 N. E. 1054; Hortenstein v. Virginia-Carolina R. Co. 102 Va. 914, 47 S. E. 996; Melton v. Chesapeake & O. R. Co. 64 W. Va. 168, 61 S. E. 39; Lynch v. Great Northern R. Co. 38 Mont. 511, 100 Pac. 616; Burger v. Missouri P. R. Co. 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439.

caused by the moving of the car upon which the servant is working. Norfolk & W. R. Co. v. Graham, 96 Va. 430, 31 S. E. 604 (employee went under car forming part of train); Lumpkin v. Southern R. Co. 99 Ga. 111, 24 S. E. 963 (night watchman climbed on car).

But in Bruce v. Michigan C. R. Co. 172 Mich. 441, 138 N. W. 362, where an engine was moved from a cinder pit without ringing the bell before starting, thus injuring an employee in the pit, the company was held liable, the rule requiring foreman and car repairers to display a flag before commencing work under or about a car liable to be moved being held inapplicable to a roundhouse employee, the plaintiff.

So, where it is the duty of a railroad company to set out signals to protect car repairers while at work, a car repairer injured while working under a car as directed is not guilty of contributory negligence as matter of law in not going down the track to inspect or inquire whether the company had done its duty but can rightfully assume that his employer has not been negligent. Russell v. Chicago, R. I. & P. R. Co. — Iowa, —, 141 N. W. 1077. In the above case a car repairer was not charged with the duty of setting out signals, and did not know that none had been provided.

So, where a car repairer went under a car to make repairs without setting out a flag, and was injured by a car being shunted against the one he was under, he was held not guilty of contributory negligence, the rule requiring a warning flag being out of use and not enforced, and the evidence showing that the car would have been switched upon that track even had the flag been set out, and that the accident would have happened just the same, because the car, being defective, could not have been stopped as was expected in time to avoid a collision. Texas & N. O. R. Co. v. Wynne, — Tex. Civ. App. —, 22 S. W. 1064.

A car repairer while at work may rely upon the promise of the yardmaster (Canon v. Chicago, M. & St. P. R. Co. 101 Iowa, 613, 70 N. W. 755, 2 Am. Neg. Rep. 131), or conductor in charge of train (Ritt v. Louisville & N. R. Co. 9 Ky. L. Rep. 307, 46 L.R.A.(N.S.)

4 S. W. 796), or his foreman (Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 588), that the car would not be moved, such persons being vice principals. And this is so notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags (Moore v. Wabash, St. L. & P. R. Co. supra).

But the failure to obey a rule requiring car inspectors or car repairers to display a signal flag while at work is not excused by the presence or consent of another servant of the master who is superior to the servant who agreed to obey such rule, when the superior servant is not authorized to represent the master in the making or changing of rules or contracts, and failure to obey the rule under such circumstances is negligence *per se*. New York, C. & St. L. R. Co. v. Ropp, 76 Ohio St. 449, 11 L.R.A.(N.S.) 413, 81 N. E. 748.

So, the fact that a car repairer who had put out no signal relied upon another employee who was standing outside to give warning and prevent other cars from striking the car on which he was working, will not enable him to recover. Southern P. Co. v. Pool, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; Hulien v. Chicago & N. W. R. Co. 107 Wis. 122, 82 N. W. 710 (engineer went under engine); Whitcomb v. McNulty, 45 C. C. A. 90, 105 Fed. 863 (similar facts); Spencer v. Ohio & M. R. Co. 130 Ind. 181, 29 N. E. 915, 14 Am. Neg. Cas. 513 (employee went under engine without notifying engineer).

So, where an employee was injured by stepping in between a coach and an engine to close the coupler, relying upon the promise of another servant to protect him against the engine backing, he was held guilty of negligence as matter of law, he being familiar with the situation, and having voluntarily and unnecessarily gone into a place which he knew was dangerous; and, although the act of giving notice of the oncoming engine was delegable, the court ruled that the company could not be held liable for injury to a servant which was the result of negligence of a fellow servant. McCauley v. Michigan C. R. Co. 167 Mich. 230, 132 N. W. 510.

The negligence of the deceased was the proximate cause of the injury.

Atchison, T. & S. F. R. Co. v. Todd, 54 Kan. 551, 38 Pac. 804; Handley v. Missouri P. R. Co. 61 Kan. 237, 59 Pac. 271, 7 Am. Neg. Rep. 47; Coy v. Missouri P. R. Co. 74 Kan. 853, 86 Pac. 468, 20 Am. Neg. Rep. 540.

A person who, without necessity, assumes a position of danger upon the tracks of a railway company, cannot recover damages for injuries received by the unexpected movement of a car or train, even though such injuries may have been due to the want of ordinary care on the part of the employees of the railway company.

Atchison, T. & S. F. R. Co. v. Schwindt, 67 Kan. 8, 72 Pac. 573; Zirkle v. Missouri

P. R. Co. 67 Kan. 77, 72 Pac. 539, 14 Am. Neg. Rep. 51; Atchison, T. & S. F. R. Co. v. Withers, 69 Kan. 620, 77 Pac. 542, 16 Am. Neg. Rep. 331; Hoopes v. Atchison, T. & S. F. R. Co. 72 Kan. 422, 83 Pac. 900; St. Louis & S. F. R. Co. v. McMinn, 72 Kan. 681, 84 Pac. 134.

Messrs. Hamer & Harris and C. A. Crowley for appellee.

Mason, J., delivered the opinion of the court:

G. W. Carey was run over by a car of the Chicago, Rock Island & Pacific Railway Company, receiving fatal injuries. His wife recovered a judgment against the company, and it appeals.

Carey was employed by the defendant as

It is ordinarily negligence for an employee to pass between or under cars likely to be moved at any moment. McKee v. Chicago, B. & Q. R. Co. 96 Mo. App. 671, 76 S. W. 922.

Thus, where an employee went between standing cars for an unauthorized purpose (Dillon v. Iowa C. R. Co. 118 Iowa, 645, 92 N. W. 855; Louisville & N. R. Co. v. Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119), or unnecessarily to communicate with another employee (Age v. Louisville & N. R. Co. 148 Ky. 219, 146 S. W. 412), he was held guilty of negligence precluding a recovery for an injury as the result of the cars being jammed together.

So, where an employee went between standing cars with an engine attached, or sufficiently near to make approach probable (McKee v. Chicago, B. & Q. R. Co. supra; Edge v. Atlantic Coast Line R. Co. 153 N. C. 212, 69 S. E. 74; Lord v. Pueblo Smelting & Ref. Co. 12 Colo. 390, 21 Pac. 148; Schwind v. Floriston Pulp & Paper Co. 5 Cal. App. 197, 87 Pac. 1066; Southern R. Co. v. Thomas, 29 Ky. L. Rep. 79, 92 S. W. 578), or went under an engine having a leaky throttle valve, without scotching the wheels or taking other precaution (Atlanta & B. Air Line R. Co. v. Alexander, 161 Ala. 382, 49 So. 792; Vicksburg & M. R. Co. v. Wilkins, 47 Miss. 404), or went in between standing cars to uncouple them knowing that an approaching heavily loaded train was close at hand on the same track (Chesapeake & O. R. Co. v. Lee, 84 Va. 642, 5 S. E. 579), he was held negligent, the danger being of such a character that an ordinarily prudent person would not have taken the chance.

So, a railroad brakeman is guilty of negligence preventing recovery for his death, where he goes between the cars in the nighttime without any warning or signal to the engineer, and at a time when the latter is following the signals of another brakeman. Atchison, T. & S. F. R. Co. v. Alsdurf, 47 Ill. App. 200, later appeal 56 Ill. App. 578.

Or, where he goes between cars at any time without giving any notice to those in charge of the engine and train, if he knows that two unsuccessful attempts have been

made to couple the cars, and that the attempt to couple them has been suspended. Nihill v. New York, N. H. & H. R. Co. 167 Mass. 52, 44 N. E. 1075.

In Casey v. Texarkana & Ft. S. R. Co. — Tex. Civ. App. —, 151 S. W. 856, it was held a question for the jury whether a car inspector who went between the cars after an unsuccessful attempt to couple them had been made assumed the risk of the switching crew repeating the attempt without notice to him.

A workman who, in order to remove ore from a car track, gets under a car standing upon a slight incline, where rakes were provided and he had been instructed to use them for removing the ore, voluntarily subjects himself to unnecessary risk; and he cannot recover from his employer for injuries received where a loaded car in charge of a fellow workman, from which the blocks holding it had in some unknown way been removed, struck the car he was under and moved it upon him. Morgan v. Hudson River Ore & Iron Co. 133 N. Y. 666, 31 N. E. 234. In the above case the court said the failure to adopt rules for the protection of employees is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions.

It is an established rule that an employee who knowingly selects a dangerous way to perform his employment, when a safer way is apparent to him, is guilty of contributory negligence. Thus, a railroad employee was held guilty of contributory negligence where he attempted to go between (Beck v. Southern R. Co. 149 N. C. 168, 62 S. E. 883; Ryan v. Northern P. R. Co. 53 Wash. 279, 101 Pac. 880), or to crawl under, standing cars (Chicago, B. & Q. R. Co. v. Eggman, 59 Ill. App. 680; Beal v. Atchison, T. & S. F. R. Co. 62 Kan. 250, 62 Pac. 321, 8 Ann. Neg. Rep. 395), liable to be moved at any moment, when he could have safely passed around them.

So, where an employee went under cars to remove coal from the track, when he could have safely pulled the coal down the chute

a workman in a stone quarry 2 miles west of Dwight. A spur track 20 rods long ran from the main line in a southwesterly direction to the quarry, curving around an embankment which cut off a view of the main track east of the switch. The spur track was used exclusively for setting in empty cars to be loaded, and shifting loaded cars to the main line. The cars upon it were handled only by one train, an eastbound daily freight, due about 11 o'clock in the morning. Usually the train would stop west of the spur, uncoupling the engine to do the necessary switching. Infrequently it would pass without stopping, in which case it would stop on its eastbound trip on the following morning and do the work. Very infrequently it would go through to Dwight, and after an interval back up from there and take out the loaded cars and set in empty ones. On the day of the accident two crews of workmen were engaged in the quarry. That to which the deceased belonged were stripping or uncovering rock near the switch. Their duties did not require them to be upon the track; they had nothing to do with loading or handling the cars. The other crew were quarrying and loading near the west end of the spur. The freight train referred to was about two hours late. It ran past the switch to Dwight, and later backed up to pick up some cars. Shortly before this a hard rain had set in. Four loaded cars were standing on the spur near the switch, close to, but not touching, each other. All

of the crew to which the deceased belonged, except himself, took refuge in the third car from the switch. He, as found by the jury, took shelter under the fourth. The workmen of the other crew retired to a box car provided by the company, used as a tool house and office, situated near the end of the spur, but off the track. The train backed into the nearest of the cars with such force as to push them together and move the furthest one about a car's length. Carey was thereby run over and fatally injured. A special finding stated that the negligence of the defendant consisted in not giving a proper warning signal. We conclude that the plaintiff cannot recover, because the evidence and findings do not disclose any actionable negligence of the defendant, but, on the other hand, do establish that the accident resulted from the want of ordinary care on the part of the deceased. In the absence of a statute a railway company is not required to give warning of the approach of a train, except where it has reason to anticipate that persons will be upon the track. 33 Cyc. 782. Here the train men owed no such duty to Carey, inasmuch as they did not know of his presence, and had no reason to suppose that any person would be under the cars. Liability for negligence can result only from the violation of a duty owed to the person injured. See *United States Exp. Co. v. Everest*, 72 Kan. 517, 522, 83 Pac. 817, and cases there cited. Shortly after the impact, a brakeman saw one of the work-

under the railway, he was held guilty of contributory negligence precluding recovery for an injury by the car being suddenly moved. *St. Louis Bolt & Iron Co. v. Burke*, 12 Ill. App. 372.

But a track laborer living in a boarding car standing on a side track with brakes set was held, in *Illinois C. R. Co. v. Panebianco*, 227 Ill. 170, 81 N. E. 53, affirming 129 Ill. App. 1, not, as matter of law, guilty of contributory negligence in crawling under the car to get some water, instead of going around the car, when he had reasonable grounds to believe the car would not be disturbed without any warning to him. In this case an engine was run in upon a side track, and violently collided with the car in which plaintiff was living and around which he was working, causing the injury complained of.

Where a motorman was caught and injured between electric cars by one backing as the trolley was adjusted, because the power happened to be turned on, it was held in *Gorman v. Brooklyn, Q. C. & S. R. Co.* 147 App. Div. 21, 131 N. Y. Supp. 686, that he could not be held to have contributed to the accident merely because he was upon the track between the cars in the discharge of his duties.
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In the following cases, whether the person injured was guilty of contributory negligence was held a question for the jury:

Johnson v. St. Louis & S. F. R. Co. 160 Mo. App. 69, 141 S. W. 475 (employee attempting to pass between standing cars); *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722 (brakeman going between cars to adjust coupler); *Pittsburgh & B. Coal Co. v. Hudak*, 106 C. C. A. 89, 183 Fed. 543 (employee going between cars used in mine to adjust a defective coupling).

So, it cannot be said to be negligence as a matter of law for a servant to pass between standing cars which had been separated purposely to leave a passageway between them. *Hickey v. Solid Steel Casting Co.* 212 Pa. 255, 61 Atl. 798, 19 Am. Neg. Rep. 44.

So, whether a brakeman in attempting to make a coupling while hanging on the side of a car, whereby he was crushed between the car he was on and another car on another track, was guilty of contributory negligence, when the coupling could have been made in two other ways with perfect safety, was held a question for the jury in *Parmelee v. New York C. & H. R. R. Co.* — *Mass.* —, 102 N. E. 341.

J. D. C.

men inside a car and heard the voices of others. The conductor also saw some men in the car about the same time. But if there was then time to give warning to these men, and the company was guilty of negligence toward them, its neglect in this regard did not extend to the decedent. In answer to the question whether any of the train crew knew that Carey was under the car, the jury answered that the train men did not know Carey. The reasonable interpretation of the answer, in view of the question, is that it was intended to mean that the train men did not know that Carey was under the car. But in any event the effect must be the same, for there was no evidence that he was seen by any of the train crew.

Assuming, however, that the company may have been negligent, we think the conduct of the deceased was such as to prevent a recovery. The rule is generally, if not universally, accepted that for one unnecessarily to remain upon a railroad track is negligence as a matter of law; none the less so because customary warnings of the approach of a train may have been omitted. In getting under a car which had been loaded, and only awaited the convenience of the company to be hauled away, the deceased was clearly within this rule. The fact that in this instance the train that did the switching first ran onto Dwight and then backed up, instead of doing the work as usual, upon reaching the spur track from the west, does not affect the matter. At the most such a departure from custom could have no greater effect than an omission to perform some positive duty, and would not render the defense of contributory negligence unavailable. *Dyerson v. Union P. R. Co.* 74 Kan. 528, 533, 534, 7 L.R.A.(N.S.) 132, 87 Pac. 680, 11 Ann. Cas. 207.

The contention is made that the evidence was sufficient to justify a finding that the company's employees were guilty of misconduct amounting to wantonness in failing to give a warning of the approach of the train, since two of them knew that men were in or about the cars to be picked up. We do not think the fact that the train men saw a workman in one of the cars, and heard the voices of others, was sufficient to suggest to them the probability of anyone being under the cars or in a similar position.

The judgment is reversed, and the cause remanded, with directions to render judgment for the defendant.

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KENTUCKY COURT OF APPEALS.

R. L. CAMPBELL, Appt.,

v.

MOBILE & OHIO RAILWAY COMPANY.

MRS. JENNIE CAMPBELL, Appt.,

v.

SAME.

(— Ky. —, 157 S. W. 931.)

Railroad — crossing — statutory signals — injury to animals.

A statute requiring signals when a train approaches a road crossing is for the benefit of roaming animals as well as persons, and the railroad company must, to relieve itself from the statutory presumption of negligence which arises from the killing of animals upon its tracks, show that it gave the required signals upon approaching the crossing at which the animals were killed.

(June 20, 1913.)

Note. — Railroads: duty to give crossing signals for protection of animals.

As to duty of railroad employees to keep lookout for live stock on track, see note to *Harris v. Missouri, K. & T. R. Co.* 24 L.R.A.(N.S.) 858.

The great weight of authority is to the effect that statutes requiring the giving of crossing signals are for the protection of animals as well as persons, but in a few jurisdictions a contrary conclusion has been reached. In many cases the question presented in the present note is discussed merely from the view point as to whether or not the failure to give the statutory crossing signals constitutes negligence. In the majority of such cases, such a failure has been held to constitute negligence. In some instances it is characterized as negligence *per se*, in others as *prima facie* evidence, and in others as merely evidence of negligence to be considered by the jury. But in any case, the negligence must be the proximate cause of the injury in order to render the company liable.

Another line of cases which has been included in the present note comprises those decisions which determine whether or not the statutory requirements as to crossing signals are for the protection of animals at places other than a crossing. Upon this point the decisions are in greater conflict, but the weight of authority, perhaps, is to the effect that the requirements are for the protection of animals which might be warned by the giving of the proper crossing signals, even though they are at a place other than a public crossing.

Animals at crossing—duty in general.

As before stated, it is the general rule that it is the duty of the railroad company to give the statutory crossing signals for

APPLEALS by plaintiffs from judgments of the Circuit Court for Hickman County in defendant's favor in actions brought to recover damages for the killing of plaintiff's live stock by the alleged negligent operation of defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. Bennett, Robbins, & Thomas, for appellants:

It was the duty of the engineer who was operating this engine that killed the horses, to signal for the public road crossing, and to keep a lookout as his engine approached this public road crossing.

the protection of animals at a crossing. Nashville, C. & St. L. R. Co. v. Hembree, 85 Ala. 481, 5 So. 173; St. Louis Southwestern R. Co. v. Conger, 84 Ark. 421, 105 S. W. 1177; Barbee v. Southern P. Co. 9 Cal. App. 457, 99 Pac. 541; Charleston & W. C. R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710; Georgia R. Co. v. Cox, 61 Ga. 455; Western & A. R. Co. v. Steadly, 65 Ga. 263; Western & A. R. Co. v. Jones, 65 Ga. 631; Port Royal & W. C. R. Co. v. Phinizy, 83 Ga. 192, 9 S. E. 609; Georgia R. & Bkg. Co. v. Clary, 103 Ga. 639, 30 S. E. 433; Chicago & R. I. R. Co. v. Reid, 24 Ill. 144; Chicago, B. & Q. R. Co. v. Cauffman, 38 Ill. 424; Toledo, P. & W. R. Co. v. Foster, 43 Ill. 415; Illinois C. R. Co. v. Gillis, 68 Ill. 317; Chicago, St. L. & P. R. Co. v. Fenn, 3 Ind. App. 250, 29 N. E. 790; Louisville, N. A. & C. R. Co. v. Ousler, 15 Ind. App. 232, 36 N. E. 290; Cincinnati, W. & M. R. Co. v. Hiltzhauer, 99 Ind. 486; Palmer v. St. Paul & D. R. Co. 38 Minn. 415, 38 N. W. 100; Hohl v. Chicago, M. & St. P. R. Co. 61 Minn. 321, 52 Am. St. Rep. 598, 63 N. W. 742, set out and quoted in CAMPBELL v. MOBILE & O. R. Co.; Young v. Illinois C. R. Co. 88 Miss. 446, 40 So. 870; Southern R. Co. v. Murray, 91 Misc. 546, 44 So. 785; Cathcart v. Hannibal & St. J. R. Co. 19 Mo. App. 113; Smith v. Wabash, St. L. & P. R. Co. 19 Mo. App. 120; Wasson v. McCook, 80 Mo. App. 483; Tate v. Wabash R. Co. 153 Mo. App. 533, 134 S. W. 14; Irving v. Chicago, R. I. & P. R. Co. 156 Mo. App. 667, 137 S. W. 1009; Howenstein v. Pacific R. Co. 55 Mo. 33; Rehman v. Railroad Co. 5 Phila. 450; Texas & P. R. Co. v. Crutcher, — Tex. Civ. App. —, 82 S. W. 341.

In Palmer v. St. Paul & D. R. Co. 38 Minn. 415, 38 N. W. 100, supra, the court said: "Appellant's [the railroad company's] contention is, in substance, that these signals are required and intended solely as a warning to human beings, and not to cattle, which are not supposed to be endowed with reason so as to understand their meaning. It is a matter of common knowledge and observation, and supported by evidence in this case, that the blowing of a whistle does often frighten cattle off a railway track, and is frequently 46 L.R.A. (N.S.)

Illinois C. R. Co. v. Stanley, 29 Ky. L. Rep. 1054, 96 S. W. 846; Mobile & O. R. Co. v. Roper, 22 Ky. L. Rep. 666, 58 S. W. 518.

Mr. E. T. Bullock for appellee.

Turner, J., delivered the opinion of the court:

On the morning of September 16, 1911, about 3:20 A. M., appellee's south-bound fast train running at the rate of 55 miles an hour killed two horses at a grade crossing in Hickman county. One of the horses belonged to appellant R. L. Campbell, and the other to Mrs. Jennie Campbell. The

resorted to by locomotive engineers for that purpose. When the legislature required the giving of these signals, they may be presumed to have intended them for any purpose which they might naturally or reasonably be supposed to subserve, including the driving of cattle from the railway track. Therefore we are of the opinion that evidence of the omission to give those signals was competent, and it was for the justice to say, under all the circumstances of the case, whether the giving of the signals would have prevented, and the omission to do so caused, the accident."

And the rule that crossing signals are for the protection of animals as well as persons has been held to be especially applicable where the statute makes the railroad company liable,

—for "all damages" sustained by reason of such neglect. St. Louis, I. M. & S. R. Co. v. Hendricks, 53 Ark. 201, 13 S. W. 699, followed in Ford v. St. Louis, I. M. & S. R. Co. 66 Ark. 363, 50 S. W. 864; Great Western R. Co. v. Geddis, 33 Ill. 304; Toledo, W. & W. R. Co. v. Furgusson, 42 Ill. 449; Graybill v. Chicago, M. & St. P. R. Co. 112 Iowa, 738, 84 N. W. 946; McGill Bros. v. Minneapolis & St. L. R. Co. 113 Iowa, 358, 85 N. W. 620; Heise v. Chicago G. W. R. Co. — Iowa, —, 114 N. W. 180, affirmed on this point on rehearing in 141 Iowa, 88, 119 N. W. 371; Swisher v. Interurban R. Co. 151 Iowa, 384, 130 N. W. 404; Atchison, T. & S. F. R. Co. v. Morgan, 31 Kan. 77, 1 Pac. 298; Barr v. Hannibal & St. J. R. Co. 30 Mo. App. 248; Stoneman v. Atlantic & P. R. Co. 58 Mo. 503; Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834. (In Graybill v. Chicago, M. & St. P. R. Co. 112 Iowa, 738, 84 N. W. 946, supra, the court reasoned as follows: "There is nothing in the language of the statute tending to show legislative intent to restrict its operation to the human family. It may be said, and indeed it has been held in two or three states, that the sole purpose of such legislation is to advise human beings of the approach of danger. But we think the reasons given for the decisions to which our attention has been called are not sound. They are based on the thought that all animal nature

two actions by agreement were heard together in the lower court, and will be heard together here. The court, after the introduction of all the evidence, gave a peremptory instruction to find for the defendant, and the plaintiffs appeal.

The court placed the burden of proof on the defendant, and it introduced the engineer and fireman in charge of the train, who were the only eyewitnesses to the occurrence. They stated, in substance, that the train was a little late and was running about 55 miles an hour; that the crossing in question is on a curve, and north of the crossing and in this curve is a cut; that

upon the occasion in question the fireman was on the east side of the cab, which was the outside of the curve, and the engineer was on the west side; that in the dirt road just east of the railroad crossing was a depression; and that, by reason of the cut in the curve and the depression in the dirt road stock approaching the crossing from the east on the dirt road could not be seen for a very great distance. The fireman stated that he was looking out, and when from 60 to 100 feet from the crossing, for the first time, he saw several horses rapidly running on the dirt road toward the crossing from the east, and immediately

below man is incapable of intelligent action, and is not endowed with the sense of self-preservation or of fear. The contrary of these propositions we believe to be true. It is a matter of common observation that the attention of dumb animals is quickly attracted by any unusual noise, though at some distance, and that the approach of an unfamiliar object ordinarily holds the attention and arouses the instinct of fear and of self-preservation, which all animal nature possesses. We think the statute must be construed in the light of this common knowledge, and that the legislature, by requiring this notice of the approach of trains, intended to protect as far as possible animals as well as man.");

—or for all damages caused by the company's "locomotives, train, or cars when the provisions of this section [section requiring crossing signals] are not complied with." *Orcutt v. Pacific Coast R. Co.* 85 Cal. 291, 24 Pac. 661, 11 Am. Neg. Cas. 216, holding that proof of failure to comply with the statute establishes a prima facie case, and that it is not necessary for the owner of the stock to prove that the injuries were a result of the failure to signal;

—or for injuries to one "in property or person" where the statute requires signals. *Cincinnati, W. & M. R. Co. v. Hiltzhauer*, 99 Ind. 486; *Neely v. Charlotte, C. & A. R. Co.* 33 S. C. 136, 11 S. E. 636 (provided the stock was at the crossing for the purpose of passing from one side to the other).

And under statutory provisions that a crossing signal must be given, and that a railroad company is liable for all damages done to stock resulting from a failure to comply with statutory requirements, it has been held that a failure to give the crossing signal renders the company liable for injuries to stock resulting from such omission. *East Tennessee, V. & G. R. Co. v. Deaver*, 79 Ala. 216; *Alabama G. S. R. Co. v. McAlpine*, 80 Ala. 73; *Hilliker-Krebs Bldg. & Mfg. Co. v. Birmingham R. & Electric Co.* 100 Ala. 424, 14 So. 200; *Central of Georgia R. Co. v. Wood*, 129 Ala. 483, 29 So. 775; *Western R. Co. v. Moore*, 169 Ala. 284, 53 So. 744. And the same rule applies where the statutes require the giv-

ing of signals while passing through a town or city, and make the railroad company liable for injuries to stock resulting from a failure to give the statutory signals. *Louisville & N. R. Co. v. Christian Moerlein Brewing Co.* 150 Ala. 390, 43 So. 723.

In a few instances it has been held that the statutes relating to the giving of crossing signals do not impose the duty to give such signals for the benefit of animals. Thus, in *Fisher v. Pennsylvania R. Co.* 126 Pa. 293, 17 Atl. 607, in holding such to be the rule, where the alleged negligence was the failure of the employees of the train which struck plaintiff's mule to give the statutory crossing signal, it was said: "If it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule to 'stop, look, and listen.' To apply rules to dumb animals which were intended only for reasonable beings brings us dangerously near to the realm of absurdity." This case (*Fisher v. Pennsylvania R. Co. supra*) was quoted with approval in *Toudy v. Norfolk & W. R. Co.* 38 W. Va. 694, 18 S. E. 896, where, in holding that statutes requiring signals at crossings were not for the benefit of animals, it was said: "The statutory requirement that the whistle shall be blown 60 rods from the crossing which the train is approaching is not intended for the purpose of giving notice to horses and cattle running at large in the public road, but to give warning to travelers upon the highway, to persons who have the faculty of reasoning and understanding the object of the signal." And see *Whelan v. Baltimore & O. R. Co.* 70 W. Va. 442, 74 S. E. 410, wherein it was again said that ringing the bell and blowing the whistle are not means of warning intended for dumb animals, but in the report of which it does not affirmatively appear that the court referred to crossing signals.

So, in *Mills & Le C. Lumber Co. v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 336, 68 N. W. 996, in holding that crossing signals were not for the benefit of animals, it was said that "signals by the whistle and bell are meant exclusively for the protection of persons who are about to cross the railroad at public crossings. . . . They

notified the engineer, but that before anything could be done, and almost simultaneously with such notification, the engine and horses met on the crossing; that, between the time he notified the engineer and the collision, there was no time to give the stock signal. They state they did not give the stock signal or put on the brakes after discovering the stock, because there was no time to do so. The train was equipped with an electric headlight and modern air brakes which were in perfect order. Neither of them stated whether or not the signal for the crossing was given, as required by § 786 of the Kentucky statutes.

The evidence of the plaintiffs was given by witnesses who were not present at the time of the injury, and who were not at the

place of the injury for several hours thereafter; but they undertake to state such facts locating the bodies of the two horses, the places where blood was seen, and other signs indicating the point where the horses were struck, certain tracks which were seen on the west side of the railroad, indicating that some horses had approached from that side, and that no tracks were then discernible approaching the crossing from the east side; and from these circumstances it is argued that the physical facts disclose a state of case which justified a submission to the jury of the question of negligence. The evidence further shows that each of the horses was struck on the rump by the engine and thrown to the west side of the track; this fact, if it shows anything,

are not designed for the protection of brute animals, which could not be expected to either understand or heed the warning."

Where the statute makes it the duty of the engineer to blow the whistle or ring the bell, he need not do both. *East Tennessee, V. & G. R. Co. v. Deaver*, 79 Ala. 216; *Cathcart v. Hannibal & St. J. R. Co.* 19 Mo. App. 113; *Summerville v. Hannibal & St. J. R. Co.* 29 Mo. App. 48; *McCormick v. Kansas City, Ft. S. & M. R. Co.* 50 Mo. App. 109; *Milligan v. Chicago, B. & Q. R. Co.* 79 Mo. App. 393; *Tate v. Wabash R. Co.* 153 Mo. App. 533, 134 S. W. 14; *Van Note v. Hannibal & St. J. R. Co.* 70 Mo. 641; *Turner v. Kansas City, St. J. & C. B. R. Co.* 78 Mo. 578; *Halferty v. Wabash, St. L. & P. R. Co.* 82 Mo. 90.

—negligence in failure to give required signals.

The failure to sound the statutory warning for public crossings seems to have been regarded as negligence *per se*, in some cases at least, among which are the following: *Toledo, P. & W. R. Co. v. Foster*, 43 Ill. 415; *Louisville, N. A. & C. R. Co. v. Ousler*, 15 Ind. App. 232, 36 N. E. 290; *Swisher v. Interurban R. Co.* 151 Iowa, 384, 130 N. W. 404; *Central Branch R. Co. v. Phillips*, 20 Kan. 9; *Atchison, T. & S. F. R. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298; *Missouri P. R. Co. v. Stevens*, 35 Kan. 622, 12 Pac. 25; *Missouri P. R. Co. v. Pierce*, 39 Kan. 391, 18 Pac. 305; *Fritz v. First Div. St. Paul & P. R. Co.* 22 Minn. 404; *Stoneman v. Atlantic & P. R. Co.* 58 Mo. 503; *Rehman v. Railroad Co.* 5 Phila. 450; *Texas & P. R. Co. v. Crutcher*, — Tex. Civ. App. —, 82 S. W. 341.

While in other cases the failure to sound crossing signals as required by statute has been held *prima facie* negligence as to animals killed at the crossing. *St. Louis, J. & C. R. Co. v. Terhune*, 50 Ill. 151, 99 Am. Dec. 504; *Illinois C. R. Co. v. Gillis*, 68 Ill. 317; *Mobile & O. R. Co. v. Roper*, 22 Ky. L. Rep. 666, 58 S. W. 518, set out in *CAMPBELL v. MOBILE & O. R. Co.*; *Young v. Illinois C. R. Co.* 8th Miss. 446, 40 46 L.R.A. (N.S.)

So. 870; *Southern R. Co. v. Murray*, 91 Miss. 546, 44 So. 785; *Cathcart v. Hannibal & St. J. R. Co.* 19 Mo. App. 113; *Barr v. Hannibal & St. J. R. Co.* 30 Mo. App. 248; *Atterberry v. Wabash R. Co.* 110 Mo. App. 608, 85 S. W. 114; *Roberts v. Wabash R. Co.* 113 Mo. App. 6, 87 S. W. 601.

While in still other cases the failure to give statutory crossing signals has been said to be evidence of negligence as to animals injured at a crossing. *Locke v. First Div. St. Paul & P. R. Co.* 15 Minn. 350, Gil. 283; *Palmer v. St. Paul & D. R. Co.* 38 Minn. 415, 38 N. W. 100; *Hohl v. Chicago, M. & St. P. R. Co.* 61 Minn. 321, 52 Am. St. Rep. 598, 63 N. W. 742, set out and quoted in *CAMPBELL v. MOBILE & O. R. Co.*; *Croft v. Chicago G. W. R. Co.* 72 Minn. 47, 74 N. W. 898, 80 N. W. 628; *Goodwin v. Chicago, R. I. & P. R. Co.* 75 Mo. 73; *Schneider v. Missouri P. R. Co.* 75 Mo. 295; *Galveston, H. & S. A. R. Co. v. Huttner*, — Tex. Civ. App. —, 131 S. W. 630.

In the majority of the cases, however, the failure of the railroad company's employees to comply with statutory requirements as to crossing signals has been held to be such negligence as would render the company liable for injuries to animals at a crossing where such injuries were traceable to the negligence, but not liable if the failure to perform the statutory duty did not proximately cause the injuries. The following cases apply this rule: *Georgia & A. R. Co. v. Cook*, 114 Ga. 760, 40 S. E. 718, 11 Am. Neg. Rep. 375; *Terre Haute & I. R. Co. v. Tuterwiler*, 16 Ill. App. 197; *Terre Haute & I. R. Co. v. Jessuine*, 16 Ill. App. 209; *Chicago, B. & Q. R. Co. v. Jones*, 19 Ill. App. 648; *St. Louis, V. & T. H. R. Co. v. Hurst*, 25 Ill. App. 181; *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68; *Rockford, R. I. & St. L. R. Co. v. Linn*, 67 Ill. 109; *Quincy, A. & St. L. R. Co. v. Wellhoener*, 72 Ill. 60; *Lake Shore & M. S. R. Co. v. Van Auker*, 1 Ind. App. 492, 27 N. E. 119; *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790; *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297; *Louisville, N. A. & C. R. Co. v. Ousler*, 15 Ind. App. 232, 36 N.

is an indication that the horses were going from east to west as testified to by the fireman and engineer, and were almost across the track when struck; if they had been struck on the rump while going from west to east, it seems that they would have been knocked off on the east side of the track.

The engineer and fireman are unimpeached; their testimony is clear, explicit, and easily understood; and they fully agree about it. From our understanding of the physical facts and the location of the ground, they furnish no sufficient ground for submission of the question of negligence to the jury in the face of the testimony of the engineer and fireman, if there was no

negligence before the train men discovered the horses.

Section 809 of the Kentucky statutes provides, among other things: "And the killing or injury of cattle by the engine or cars of any company shall be prima facie evidence of negligence and carelessness on the part of the company, its agents, and servants."

Section 786 of the Kentucky statutes is as follows: "Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such bell shall be rung or whistle sounded outside of incorporated cities and towns, at a distance of at least 50 rods from the place where the road crosses upon the same level any highway

E. 290; Cincinnati, W. & M. R. Co. v. Hiltzhauer, 99 Ind. 486; Graybill v. Chicago, M. & St. P. R. Co. 112 Iowa, 738, 84 N. W. 946; Kuehl v. Chicago, M. & St. P. R. Co. 126 Iowa, 638, 102 N. W. 512; Atchison, T. & S. F. R. Co. v. Morgan, 31 Kan. 77, 1 Pac. 298; Southern Kansas R. Co. v. Schmidt, 44 Kan. 374, 24 Pac. 496; Atchison, T. & S. F. R. Co. v. Bell, 52 Kan. 134, 34 Pac. 350; Fritz v. First Div. St. Paul & P. R. Co. 22 Minn. 404; Palmer v. St. Paul & D. R. Co. 38 Minn. 415, 38 N. W. 100; Hohl v. Chicago, M. & St. P. R. Co. 61 Minn. 321, 52 Am. St. Rep. 598, 63 N. W. 742, set out and quoted in CAMPBELL v. MOBILE & O. R. Co.; Smith v. Wabash, St. L. & P. R. Co. 19 Mo. App. 120; Barr v. Hannibal & St. J. R. Co. 30 Mo. App. 248 (statute permits railroad company to show that the injuries were not caused by the negligent failure to comply with the statute requiring crossing signals); McCormick v. Kansas City, Ft. S. & M. R. Co. 50 Mo. App. 109; Wasson v. McCook, 70 Mo. App. 393; Milligan v. Chicago, B. & Q. R. Co. 79 Mo. App. 393; Atterberry v. Wabash R. Co. 110 Mo. App. 608, 85 S. W. 114, holding that the statute referred to in Barr v. Hannibal & St. J. R. Co. 19 Mo. App. 120, required the railroad company, in order to avoid liability, to show that the failure to signal was not the cause of the injury; Roberts v. Wabash R. Co. 113 Mo. App. 6, 87 S. W. 601, holding the same as Atterberry v. Wabash R. Co. 110 Mo. App. 608, 85 S. W. 114; Midlett v. St. Louis & S. F. R. Co. 124 Mo. App. 540, 102 S. W. 56, holding that proof of failure to sound the statutory warnings establishes a prima facie case, which might be rebutted by proof that the negligence was not the cause of the accident; Severn v. St. Louis & S. F. R. Co. 149 Mo. App. 631, 129 S. W. 477; Irving v. Chicago, R. I. & P. R. Co. 156 Mo. App. 667, 137 S. W. 1009; Howenstein v. Pacific R. Co. 55 Mo. 33, holding the same as Midgett v. St. Louis & S. F. R. Co. 124 Mo. App. 540, 102 S. W. 56; Stoneman v. Atlantic & P. R. Co. 58 Mo. 503; Holman v. Chicago, R. I. & P. R. Co. 62 Mo. 562; Moore v. 46 L.R.A. (N.S.)

Chicago, R. I. & P. R. Co. 62 Mo. 584; Van Note v. Hannibal & St. J. R. Co. 70 Mo. 641; Goodwin v. Chicago, R. I. & P. R. Co. 75 Mo. 73; Edwards v. Chicago, R. I. & P. R. Co. 76 Mo. 399; Alexander v. Hannibal & St. J. R. Co. 76 Mo. 494; Braxton v. Hannibal & St. J. R. Co. 77 Mo. 455; Turner v. Kansas City, St. J. & C. B. R. Co. 78 Mo. 578; Kendrick v. Chicago & A. R. Co. 81 Mo. 521; Halferty v. Wabash, St. L. & P. R. Co. 82 Mo. 90; Persinger v. Wabash, St. L. & P. R. Co. 82 Mo. 196; Taylor v. St. Louis, I. M. & S. R. Co. 83 Mo. 386; Grand Island & W. C. R. Co. v. Phipps, 48 Neb. 493, 67 N. W. 441; Dougherty v. Chicago, M. & St. P. R. Co. 20 S. D. 46, 104 N. W. 672; Texas & N. O. R. Co. v. Cunningham, 4 Tex. Civ. App. 262, 23 S. W. 332; Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834; San Antonio & A. P. R. Co. v. Harris, — Tex. Civ. App. —, 79 S. W. 841; Texas & P. R. Co. v. Cratcher, — Tex. Civ. App. —, 82 S. W. 341; Texas & P. R. Co. v. Dean, 55 Tex. Civ. App. 406, 118 S. W. 804. But that, in order to recover, the injury need not in all cases be a result of the failure to give the statutory signals, see Orcutt v. Pacific Coast R. Co. 85 Cal. 291, 24 Pac. 661, 11 Am. Neg. Cas. 216, as set out supra.

Animals not at crossing.

In the following cases it was held that the statutory requirement as to crossing signals has no reference to stock not at a crossing, and that there is consequently no duty to give a crossing signal for the benefit of stock upon the railroad right of way at a place other than a crossing: Nashville, C. & St. L. R. Co. v. Hembree, 85 Ala. 481, 5 So. 173; Illinois C. R. Co. v. Goodwin, 30 Ill. 117, as construed in Great Western R. Co. v. Geddis, 33 Ill. 304; Ravenscraft v. Missouri P. R. Co. 27 Mo. App. 617; Wasson v. McCook, 80 Mo. App. 483; Houston, E. & W. T. R. Co. v. Wilson, 37 Tex. Civ. App. 405, 84 S. W. 274; Gulf, C. & S. F. R. Co. v. Bennett, — Tex. Civ. App. —, 126 S. W. 607; Texas C. R.

or crossing, at which a signboard is required to be maintained, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing."

The question is: Has a railroad company

relieved itself of the negligence imputed to it by § 809, where cattle are killed by its engine or cars at a highway grade crossing, until it has shown that it gave the signals for the crossing as provided in § 786? On this question there has been

Co. v. Mallard, — Tex. Civ. App. —, 127 S. W. 1117. And in Neely v. Charlotte, C. & A. R. Co. 33 S. C. 136, 11 S. E. 636, it was held that statutes requiring the giving of crossing signals, and making the railroad company liable in person or property for injury by collision at a crossing where such signals are not given, applied only to persons and animals at the crossing for the purpose of crossing, and did not apply to animals near by, but not using it to cross from one side to the other. And in Fowles v. Seaboard Air Line R. Co. 73 S. C. 306, 53 S. E. 534, following Neely v. Charlotte, C. & A. R. Co. supra, it was held that there was no duty to give statutory crossing signals for the benefit of a dog hunting near a crossing, but not in an attitude of one intending to cross.

And in the following case it was held that evidence of failure to comply with statutory requirements as to crossing signals was not of itself sufficient to sustain a recovery for the killing of an animal at another point than at a crossing: Missouri, K. & T. R. Co. v. Parker, — Tex. Civ. App. —, 37 S. W. 973, on subsequent appeal 46 S. W. 280.

But it has been held that while the giving of statutory signals is primarily for persons and things at the crossings, a failure to give such signal might be considered by the jury in determining the question of the company's negligence where such failure contributed to the killing of an animal beyond the crossing, but that the failure alone was not negligence *per se* as to such an animal. Western & A. R. Co. v. Jones, 65 Ga. 631, wherein the court said that "signal posts and the sounding of the alarm whistle, it is true, are intended to protect life and property at public crossings. . . . The absence of the signal post, the failure to give the usual warning upon approaching the crossing, as well as the neglect of having his train under control at a point where the law declares it his duty to do so, may well be considered by the jury in determining upon the question of negligence in killing the horse just at the place where he was killed;" Georgia R. & Bkg. Co. v. Clary, 103 Ga. 639, 30 S. E. 433; Miller v. Chicago & N. W. R. Co. 21 S. D. 242, 111 N. W. 553; Houston & T. C. R. Co. v. Kincheloe, 56 Tex. Civ. App. 123, 119 S. W. 905; Texas C. R. Co. v. Mallard, — Tex. Civ. App. —, 127 S. W. 1117. And the same rule has been held to apply where the animal was killed or injured before the crossing was reached. Port Royal & W. C. R. Co. v. Phinzy, 83 Ga. 192, 9 S. E. 609; Willingham v. Macon & B. R. Co. 113 Ga. 46 L.R.A. (N.S.)

374, 38 S. E. 843; Mankey v. Chicago, M. & St. P. R. Co. 14 S. D. 468, 85 N. W. 1013. And in Toledo, W. & W. R. Co. v. Fergusson, 42 Ill. 449, it was said that the animal need not be on the actual intersection of the railway and the highway in order for the owner to claim the benefit of the statute requiring crossing signals.

And in some cases the courts seem to have regarded the failure to sound the statutory signals as negligence *per se*, where the animal was killed or injured at a place where it was the duty of the company's servants to sound crossing signals, as where the injury was inflicted before reaching the crossing, but within the distance therefrom within which it was the duty to sound warnings. Toledo, P. & W. R. Co. v. Foster, 43 Ill. 415, holding also that such failure was not negligence *per se* as to animals injured beyond the crossing.

But it has been held that, in case animals were injured beyond the crossing, the failure to give the statutory signal must have contributed to the injury, in order to hold the company responsible. Georgia R. & Bkg. Co. v. Partee, 107 Ga. 789, 33 S. E. 668; Illinois C. R. Co. v. Phelps, 29 Ill. 447. And see Chicago & A. R. Co. v. Henderson, 63 Ill. 494, wherein the company was held liable for the killing of an animal beyond a crossing for which no statutory signals had been given, and in which the court said that, had the signals been given, the accident probably would not have happened. And see the following cases, wherein it was held that the railroad company was not liable for injuries to animals at a place other than a crossing, for which the statutory signals had not been given, and in which the decision was probably upon the ground that the failure to signal did not contribute to the injury: Georgia R. & Bkg. Co. v. Burke, 93 Ga. 319, 20 S. E. 318; Southern R. Co. v. New, 105 Ga. 481, 30 S. E. 665.

In Newport News & M. Valley Co. v. Curry, 15 Ky. L. Rep. 750, where stock was killed near a crossing, it was held that evidence as to the failure to sound the whistle was competent solely for the purpose of showing that the engineer was not keeping the proper lookout.

It has been held, however, that evidence of the failure to blow the whistle for the crossing is admissible in an action to recover for stock injured at a place other than a public crossing, as part of the *res geste*, although such failure was not the proximate cause of the injury. Southern R. Co. v. Pope, 129 Ga. 842, 60 S. E. 157. G. J. C.

but one opinion by this court, which we have found, and that a very short one which does not give the facts of that case; but it seems to assume that, where the company sought to overcome the *prima facie* case against it, it must show that the signals for the crossing were given as required by the section quoted. *Mobile & O. R. Co. v. Roper*, 22 Ky. L. Rep. 666, 58 S. W. 518.

Whether the signals required by § 786 are alone for the benefit of persons about to cross the tracks on highways, or whether they are also intended to warn or frighten animals unaccompanied by persons, has not, so far as we are aware, been determined by this court, except in the case referred to. *Elliott on Railroads*, vol. 3, § 1206, takes this view of it, to wit: "In nearly all, if not quite all, of the states, statutes are in force requiring railway companies at certain distances from crossings to sound the whistle of the locomotive and to ring the bell. The obvious purpose of such signals is to give notice of the approach of trains. Such signals, it seems, are not required alone for the benefit of persons about to cross the track, but are also required to warn and frighten animals away from the track. Where animals are injured on the track of a railway company, proof of the omission to give statutory signals may be evidence of negligence. The failure to give such signals is not actionable negligence, *per se*, but there are authorities which hold that proof of an injury to the animal and proof of a failure to give statutory signals make a *prima facie* case for the plaintiff."

The case of *Hohl v. Chicago, M. & St. P. R. Co.* 61 Minn. 321, 52 Am. St. Rep. 598, 63 N. W. 742, was where a colt was killed at a highway crossing at night, and the question we are here dealing with arose in that case, and the court said: "It was the duty of the engineer in charge of the locomotive in this case to give the signals at the crossing or cause them to be given. A failure to do so is a misdemeanor. Gen. Stat. 1894, § 6637. It is not the province of the court to ingraft upon this statute any limitations not necessarily implied from the language used, and, inasmuch as the giving of such signals has a tendency in some cases to frighten animals from the railway track, we must presume that this was one of the results intended to be secured by the enactment of the law; hence an omission to comply with the statute in this case was evidence of negligence on the part of the defendant, but whether such omission was the cause of the accident or not was a question for the jury. *Palmer v. St. Paul & D. R. Co.* 38 Minn. 415, 38 N. W. 100."

In Missouri they have a statute very 46 L.R.A. (N.S.)

similar to our own, requiring the giving of signals upon the approach of trains to highway crossings, and in the case of *Owens v. Hannibal & St. J. R. Co.* 58 Mo. 386, it was held that that statute was intended for the protection of stock as well as for persons.

There is nothing in the language of § 786 from which it might be inferred that its requirements were intended only for the protection of human beings; it is sufficiently broad to hold the company negligent for a failure to observe its provisions whether men or stock may be killed or injured at a grade crossing if its provisions are violated.

The burden being on the company to overcome the presumption of negligence, and it having failed to show a compliance with the provisions of § 786, that presumption was not overcome.

The judgment is reversed for a new trial and for further proceedings consistent herewith.

MARYLAND COURT OF APPEALS.

CONTINENTAL TRUST COMPANY et al.,
Appts.,
v.

BALTIMORE REFRIGERATING & HEATING COMPANY et al.

(120 Md. 450, 87 Atl. 947.)

Judicial sale — defaulted bid — right to charge undisclosed principal.

1. A trustee to make a judicial sale of property, whose acceptance of a bidder has been confirmed by the court, cannot, after he has defaulted and the property has been resold at his risk, maintain a petition to declare the bidder a mere representative of an undisclosed principal, and charge the latter with the deficiency in the resale.

Note. — Liability of undisclosed principal of bidder at judicial sale for purchase price, or for deficiency upon resale of property.

The decision in the case of *CONTINENTAL TRUST Co. v. BALTIMORE REFRIGERATING & HEATING Co.*, based upon the ground of executed contract, of acceptance of the agent as the purchaser, and resale at his risk, and recognition of the agent as the owner of the property, appears to be supported by the little authority there is on the subject.

A distinction should be made between the case of *CONTINENTAL TRUST Co. v. BALTIMORE REFRIGERATING & HEATING Co.*, where the undisclosed principal was sued for the deficiency upon a resale of the property, and cases where the undisclosed principal received the property and was sued for the

Appeal — sustaining demurrers — absence of grounds — effect.

2. An order sustaining demurrers will not be reversed because they did not state the special grounds for demurrer, as required by statute, if no exception was taken to them and another demurrer stated the ground, which challenged petitioner's right to relief.

Same — refusal of leave to amend — discretion.

3. An order refusing leave to amend a petition is not subject to review on appeal.

(April 11, 1913.)

APPEAL by petitioner and the Terminal Freezing & Heating Company from orders of the Circuit Court No. 2 of Baltimore City, sustaining demurrers to a petition filed to declare the bidder at a judicial sale required not only a lien upon the property cipeal, and charge the latter with a deficiency in a resale of the property, and refusing leave to amend the original petition. First order affirmed. Appeal from second order dismissed.

The facts are stated in the opinion.

purchase price. In the latter instance, the rule is well established in ordinary sales that the undisclosed principal is liable, and there seems no sound reason for a distinction in this respect between ordinary sales and those made by the court. As is said in 31 Cyc. 1574: "Although the third person extended credit to the agent in ignorance of the fact that the latter was acting in a representative capacity, he may elect to hold the undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal is bound by executory simple contracts made by the agent, and acts done by the agent in relation thereto, within the scope of his authority and in the course of his employment."

And in *Carney v. Dennison*, 15 Vt. 400, a case of judicial sale, the court said that, "in reference to an ordinary sale, it has long been settled that, unless the seller is apprised, at the time of the sale, that the ostensible purchaser is acting as the agent of another, he has an election, upon learning that fact, to resort for payment either to the principal or the agent. Nor is he deprived of such election by a mere notice that the buyer is purchasing for another, if the notice does not disclose the principal's name and place of business. . . . And I am aware of no recognized distinction, in this respect, between a sale at auction, whether under public or private authority, and ordinary sales."

In *Carney v. Dennison*, supra, it was held that an undisclosed principal who had received property sold at judicial sale was liable for the purchase price; and it was held also that the fact that the return of the officers stated that the sale was made to the agent did not preclude him from 46 L.R.A.(N.S.)

Messrs. J. Southgate Lemmon, Edward Duffy, and J. Wallace Bryan, with Lemmon & Clotworthy, and Bond, Robinson, & Duffy, for appellant Continental Trust Company:

The securities company became bound to pay the price called for by its bid, whether it acted for itself or for others.

Richardson v. Jones, 3 Gill. & J. 184, 22 Am. Dec. 293.

Upon default, however, the vendor acquired not only a lien upon the property enforceable by resale, but the right to recover the deficiency either from the nominal purchaser, or, at his election, from the principal of the purchaser, if he should find one of the larger means than the agent.

York County Bank v. Stein, 24 Md. 447; *E. J. Codd Co. v. Parker*, 97 Md. 325, 55 Atl. 623; *Mayhew v. Graham*, 4 Gill, 363; *Spedden v. Baltimore Refrigerating & Heating Co.* 117 Md. 443, 84 Atl. 150; *Richardson v. Jones*, 3 Gill & J. 184, 22 Am. Dec. 293; *Boyle v. Schindel*, 52 Md. 1; *Miller, Eq.* §§ 271, 524, p. 618; *Sloan v. Safe Deposit & T. Co.* 73 Md. 239, 20 Atl. 922.

afterward recovering from the undisclosed principal, where the fact of the agency was not discovered until after the return was made, the evidence of the agency being introduced not for the purpose of contradicting the return, but to obviate an inference from it,—not to disprove ostensibly a sale of the property to the agent, but to show the capacity in which he acted as regards the principal.

The decision in *CONTINENTAL TRUST CO. v. BALTIMORE REFRIGERATING & HEATING CO.* is supported by the language of the court in the case of *Aukam v. Zantlinger*, 94 Md. 421, 51 Atl. 93, from which the court quotes in the former case, although it appears that the undisclosed principal did not appeal from that part of the decision against him. But, as indicated in the quoted part of the opinion, the action of the lower court in refusing to set aside the resale of the property at the instance of the undisclosed principal was approved upon appeal, on the ground that such principal had no interest in the property, the sale having been made exclusively to the agent, to whom alone the seller looked for the purchase price, and who alone was liable for the deficiency upon resale.

In *Ranger v. Thalmann*, 84 App. Div. 341, 82 N. Y. Supp. 846, affirmed in 178 N. Y. 574, 70 N. E. 1108, action was brought by bondholders of property sold at judicial sale, against the undisclosed principal for the balance remaining unpaid upon the agent's bid, there being a deficiency upon a resale of the property, and it was held that the plaintiff could not recover. The decision supports the conclusion reached in *CONTINENTAL TRUST CO. v. BALTIMORE REFRIGERATING & HEATING CO.*, in that it is based upon the ground of executed contract;

The court cannot be concluded by name assumed by the real purchaser.

Kampman v. Nicewaner, 60 Neb. 208, 82 N. W. 623.

Mr. Clarence K. Bowie, for appellant Terminal Freezing & Heating Company:

The demurrers specify no ground of demurrer, and should have been overruled.

Williams v. Harlan, 88 Md. 7, 71 Am. St. Rep. 394, 41 Atl. 51.

The undisclosed principal was a party to the original offer to buy, and by the order of ratification became a party to the original contract, and the order of resale did not release him from his liability for the deficiency.

York County Bank v. Stein, 24 Md. 447; *E. J. Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623; *Baltimore Coal Tar & Mfg. Co. v. Fletcher*, 61 Md. 295; *Moore v. Taylor*, 81 Md. 644, 32 Atl. 320, 33 Atl. 886; *Vickers v. Tracey*, 22 Md. 196; 31 Cyc. 1574; *Mealey v. Page*, 41 Md. 172; *Early v. Dorsett*, 45 Md. 462; *Brundige v. Morrison*, 56 Md. 407; *State v. Second Nat. Bank*, 84 Md. 325, 35 Atl. 889.

but there was the further circumstance that the agent had given his note in payment of the balance of the purchase price. The court said: "Assuming that Godfrey made the purchase as agent of the defendants, although the fact of such agency was not disclosed to the master in chancery who made the sale, or to the bondholders whose right he was enforcing, when the master in chancery accepted Godfrey as the purchaser, and accepted his note in part payment of the purchase price, and conveyed the property to him individually, the conditions had been complied with, Godfrey had become the owner of the property, and the original contract of purchase had been executed. . . . Assuming this to be the defendants' contract, they had complied with it, had paid the \$2,000. and had given Godfrey's individual notes for the remainder of the purchase money. That had been accepted by the master of chancery as a completion of the contract for the purchase of the property, and that contract for the purchase of the property was thus completely executed." And upon the principle that the "rule that, where a simple contract is made by a duly authorized agent without disclosing his principal, and the other contracting party afterwards discovers that the person with whom he dealt is not the principal, he may abandon his right to look to the agent personally, and resort to the principal," does not apply to a note or bill of exchange, it was held that the undisclosed principal was not liable upon the individual notes of the agent given for the balance of the purchase price.

In an earlier decision, in *Ranger v. Thalmann*, 65 App. Div. 5, 72 N. Y. Supp. 451, before the objections had been cured by an amendment to the complaint, it was held 46 L.R.A. (N.S.)

Messrs. Whitelock, Deming, & Kemp and Keech, Wright, & Lord, for appellees:

The effect of ratifying a judicial sale of real estate is to vest the full equitable title to the property in the purchaser.

17 Am. & Eng. Enc. Law, 993.

And until such final ratification, no resale can be directed.

17 Am. & Eng. Enc. Law, 1028; *Schaefer v. O'Brien*, 49 Md. 253; *Berry v. Foley*, 92 Md. 322, 48 Atl. 146; *Mealey v. Page*, 41 Md. 172.

A decree once enrolled cannot be opened except by bill of review, or by original bill for fraud.

Miller, Eq. Proc. pp. 357, 358.

The exceptions to this rule are (a) cases not heard upon the merits; or (b) cases wherein it is alleged that the decree has been entered by mistake or surprise; or (c) where the entry of the decree was under circumstances satisfying the court, in the exercise of a sound discretion, that the enrolment should be discharged.

Hollingsworth v. McDonald, 2 Harr. & J.

that the complaint against the undisclosed principal did not state a cause of action, in that it did not sufficiently connect the principal with the transaction, it not appearing that he had paid the consideration or was entitled to the property as against the agent, and in that it did not allege that the fact of agency was unknown when the action was brought against the agent for the purchase price, an election thereby arising to hold the agent, and not the principal, liable upon the obligation.

In *State Bank v. Wilchinsky*, 128 App. Div. 485, 112 N. Y. Supp. 1002, it was held that, assuming that a bid was made by the son of appellant, who was present and signed the memorandum of sale and furnished the checks to make the required immediate payment, he was the purchaser and liable in damages for failure to carry out the contract.

No case has been found as to the right of an undisclosed principal to a surplus arising upon resale of the property.

Attention is called to the fact that in a number of cases not within the scope of this note it has been held that the agent of an undisclosed principal is personally liable for the purchase price or deficiency arising upon resale of the property by the court. Among possibly other cases of this class are the following: *Gray v. Case*, 51 Mo. 463 (holding agent liable for deficiency upon resale, on the ground that the contract of sale and purchase was complete when the bids were accepted and entered on the sale books in the agent's name); *Adams v. Aycock*, 11 Ga. App. 793, 76 S. E. 161 (same); *Ogilvie v. Richardson*, 14 Wis. 158 (holding agent liable for amount of bid); *Chappell v. Dann*, 21 Barb. 17 (same).

R. E. H.

230, note (d), 3 Am. Dec. 545; *Herbert v. Rowles*, 30 Md. 271; *Rice v. Donald*, 97 Md. 401, 55 Atl. 620.

If a plaintiff suffers his bill to be finally dismissed, the court cannot do otherwise than refuse leave to amend, for there is in fact nothing left to amend.

Miller, Eq. Proc. 230, note 2; *Hitch v. Davis*, 3 Md. Ch. 266.

The action of the court below was the exercise of a discretion which cannot be reviewed on appeal.

Thomas v. Doub, 1 Md. 324; *Warren v. Twilley*, 10 Md. 46; *Calvert v. Carter*, 18 Md. 74; *Snook v. Munday*, 96 Md. 514, 54 Atl. 77.

Thomas, J., delivered the opinion of the court:

The question presented by this appeal is a narrow one, and in order to get a clear apprehension of it, it will be necessary to refer to the circumstances under which it arises. In 1902 the Baltimore Refrigerating & Heating Company of Baltimore city executed to the Continental Trust Company, as trustee, a mortgage to secure an issue of 2,000 bonds of the par value of \$1,000 each. The refrigerating company became insolvent, and in 1908 receivers were appointed and authorized to continue the business of the company until the further order of the court. After the appointment of receivers, two committees of the bondholders of the refrigerating company were formed, one called the Homer-Betts committee, which represented a large majority of the bondholders, and the other called the Middendorf-Heyward committee, representing a minority of the bonds. In December, 1909, some of the bondholders filed a bill against the refrigerating company and the Continental Trust Company, alleging, among other things, that the trust company had wrongfully certified and issued a number of bonds of the refrigerating company, and asking that the trust company be removed as trustee for the bondholders. The trust company answered, denying the averments of the bill, but the controversy resulted in the trust company being restrained until the final hearing, from proceeding to foreclose the mortgage under the power contained therein. While that order was in force the Middendorf-Heyward committee and Robert Spedden, a bondholder, on the 3d of November, 1910, filed a bill against the refrigerating company, the trust company, and the Homer-Betts committee, for a sale of the property of the refrigerating company. A few days later, on the 12th of November, the same plaintiffs filed a petition for a sale of the property before final decree, and after a hearing the circuit court

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No. 2 of Baltimore city, on the 7th of December, 1910, passed an order or decree directing the sale of the property, and appointing the Continental Trust Company trustee to make the sale. On February 3, 1911, the trust company, trustee, reported a sale of the property to the Central Securities Company for \$503,000, which sale was finally ratified and confirmed by the court. The Central Securities Company, as purchaser, paid the trustee \$25,000 on account of the purchase money, but failed to pay the balance, and on March 27, 1911, the court ordered a resale of the property at the cost and risk of the purchaser. On appeal that order was affirmed by this court on December 6, 1911. 117 Md. 17, 82 Atl. 1047. The property was accordingly resold by the trustee to Francis T. Homer and others, constituting a committee of the bondholders of the refrigerating company, for \$261,000. That sale was finally ratified July 20, 1911, and the order confirming it was affirmed by this court in February, 1912. 117 Md. 443, 84 Atl. 150. On the 19th of March, 1912, the Continental Trust Company, trustee, filed a petition in the court below, in which, after reciting that the property had been sold to the Central Securities Company for \$503,000, that said company had paid \$25,000, but failed to make any further payment, and that the property had been resold at its cost and risk for \$261,000, it alleged that the Central Securities Company was a corporation organized under the laws of the state of Maryland, and that it acted in purchasing the property of the refrigerating company merely as the agent of other persons, among whom were "holders or representatives of the bonds of the Baltimore Refrigerating & Heating Company; that no part of the difference" between the said sum of \$503,000 and the sum of \$261,000 had been paid to the petitioner, except the sum of \$25,000; that the persons for whom the Central Securities Company acted were liable for said difference; that "a deficiency decree should be made against them;" and "that none of the bondholders represented by said Central Securities Company should be permitted to receive any part of the funds held by this trustee, as a dividend on any bond held by them." The petition further alleged: "That, while your petitioner has no reason to believe that any of the bonds of the Baltimore Refrigerating & Heating Company were improperly certified, issued, or negotiated, nevertheless the plaintiffs in this case, on or about July 21, 1911, filed a petition in these proceedings, in which petition they allege that certain of the 600 bonds, numbered 701 to 1,300, both inclusive, of the Baltimore Refrigerating & Heating

Company, were improperly issued, and that no portion of the proceeds of sale of the property mentioned in these proceedings should be distributed to the holders of bonds numbered as aforesaid until this court shall, by proper proceedings, have determined which, if any, of such bonds have been improperly certified, issued, and negotiated. That before a distribution account can be passed in this case it is therefore necessary to determine: (1) For whom and for which of the holders of the bonds of the Baltimore Refrigerating & Heating Company the aforesaid Central Securities Company was acting as agent; (2) which of the bonds of the Baltimore Refrigerating & Heating Company numbered respectively 701 to 1,300, both inclusive, were improperly certified, issued, and negotiated. Wherefore your petitioner prays that these proceedings may be set down for a hearing on the above questions, and that testimony may be taken orally in open court." No one was named as defendant in the petition, but the court passed an order setting it down for a hearing on the 4th day of April, 1912, provided a copy of the petition and order be served on the two committees of the bondholders, the executors of Robert M. Spedden, the Central Securities Company, William R. Pohler, Julia M. Brauer, and William H. Brauer, or their respective counsel, on or before March 25th. Julia M. and William H. Brauer answered the petition, alleging that they became possessed of the bonds held by them as the distributees of the estate of their father; that, as holders of said bonds, they had filed their claims in the case for the purpose of sharing in the distribution to be made under the direction of the court; that they were in no way represented by the Central Securities Company; that they "concurred in the objects sought by the petition," and submitted their rights to the determination of the court. The Middendorf-Heyward committee, the executors of Robert M. Spedden, and the Central Securities Company filed separate demurrers to the petition. Nothing further was done under said petition until the 15th of October, 1912, when the Middendorf-Heyward committee filed an "additional demurrer." In the meantime, however, the Continental Trust Company, trustee, filed its report to the court, showing that the terms of the sale to Francis T. Homer and others had been complied with; that all exceptions to the sale and all appeals that could be taken had been finally disposed of, and alleging that there was no reason why a distribution among the creditors of the refrigerating company should be further postponed. Upon this report the court passed an order referring the case to the

auditor to state an expense account and an account making final distribution of the funds in the hands of the trustee; and account "B" of the auditor, distributing the balance of the fund after deducting costs, fees, etc., among the bondholders, was finally ratified August 19, 1912.

The fourth and fifth grounds of the "additional demurrer" filed by the Middendorf-Heyward committee are as follows:

"Fourth. The petition is founded upon the alleged necessity of certain action by the court prior to the distribution of the funds derived from the sale by the trustee of the property mentioned in the petition, and it appears from the proceedings in the cause had since the filing of the petition, that the funds have been distributed by an auditor's account, finally ratified by this court on August 19, 1912, and the court has therefore no longer any jurisdiction or control over said funds.

"Fifth. The petition shows on its face that the property referred to was sold by the trustee to the Central Securities Company, and upon its sole credit, and that the sale to it was finally ratified by this court; and the order of final ratification thereof is unreversed, and remains in full force and effect, and consequently no other person can now be substituted by the court as purchaser of said property in lieu of the Central Securities Company, or held liable by decree of this court for the default of said company in payment of the purchase money of said property."

After a hearing the court below, by its order of November 18, 1912, sustained the demurrers, and dismissed the petition. Thereupon the Continental Trust Company, trustee, on the 17th of December, 1912, filed a petition for leave to file an amended petition so "as to eliminate the matter of distribution suggested in the demurrer, and to present the question of substance," and in the petition filed as the proposed "amended petition," the relief sought was "a deficiency decree against the principals for whom the Central Securities Company acted." The court below on the same day refused to grant leave to the trustee to file the amended petition, and dismissed its petition of that date, and in its order stated that the demurrers had been sustained on the ground that the sale to the Central Securities Company having been ratified, and the property resold at its risk, it was too late to institute an inquiry at the instance of the trustee as to whether any other persons than the company had purchased the property, and that the proposed amendment did not remove the ground of objection. From these orders of November 18th and December 17th the trustee

and the Terminal Freezing & Heating Company have appealed.

Distribution of the proceeds of the sale of all the property of the Baltimore Refrigerating & Heating Company, after deducting costs, fees, etc., having been made among the bondholders of the company, and the account having been finally ratified without objection, the only important question in this case relates to the right of the trustee, under the circumstances stated above, to hold any other person or persons liable as purchasers for the sum the Central Securities Company agreed to pay for the property, and we think that question was correctly determined by the learned court below.

The trustee having accepted the Central Securities Company as the purchaser of the property, and having reported the sale as made to said company, and the sale having been ratified by the court, the Central Securities Company thereby became the equitable owner of the property. The contract of sale was not set aside, but the resale of the property was a summary proceeding for the enforcement of that contract, and the property was resold as the property of the purchaser, and at its cost and risk. If at the second sale the property had sold for more than the Central Securities Company contracted to pay for it, it would have been entitled to the surplus, after deducting the contract price and interest, and all proper costs, expenses, commissions, etc. The property having sold for less than the amount of the original sale, the securities company is liable for the balance remaining unpaid. This is the rule stated in *Mealey v. Page*, 41 Md. 172, and followed in the more recent cases. In the case of *Schaefer v. O'Brien*, 49 Md. 253, the lower court, after the sale had been reported, on the application of the trustee, and without notice to the purchaser, ordered a resale of the property at his risk, and this court held that, as the sale had been reported by the trustee, no order affecting the rights of the purchaser should have been passed without affording him an opportunity to be heard, and that there could be no resale of the property at the risk of the purchaser until the first sale was ratified. In that case Judge Alvey said: "The party must be accepted as the purchaser, and the sale ratified, before he can be proceeded against for the enforcement of the contract of purchase. The summary proceeding against a defaulting purchaser, to obtain an order of resale at his risk, is grounded upon the equitable lien held and controlled by the court as vendor of the property, for the benefit of those interested in the proceeds of sale. Such lien is but the incident of

the sale, and does not come into existence, to form the ground of proceeding, until the contract of purchase is consummated." In the case of *Berry v. Foley*, 92 Md. 311, 48 Atl. 146, it was said by Judge Page: "It would seem to be clear, the order of final ratification having been passed by a court having jurisdiction, that its effect was to invest the purchaser with the equitable ownership of the property from the period of sale, and to entitle him to a deed on payment of the purchase money." In *Mealey's Case*, where the property brought more at the second sale than it sold for at the first sale, and the original purchaser's claim to the surplus was resisted, Judge Alvey said: "It is even contended that the appellant never in fact intended to pay for the property, and that his conduct in regard to the sale was in truth but a fraudulent device whereby to enable him to speculate on the chances of resale. But, be this as it may, it cannot affect the present claim of the appellant. The ground alleged against the appellant's claim may have formed very sufficient reasons for rejecting or refusing to ratify the sale made to him; but, as that sale was allowed to be finally ratified by the court, the appellant is entitled to occupy the position of a purchaser of the property. Trustees and executors can easily, and should, protect themselves and the estates they represent, from such impositions and practices as the appellee alleges here, by observing with strictness the powers under which they act. They can, and should, in all cases where there are doubts of the good faith or solvency of the purchaser, require security for the compliance with the terms of sale, and that before the sale is ratified. By observing this precaution all danger of imposition, such as is here complained of, is at once effectually avoided." And in *Schaefer's Case* this court said: "If, however, a sale be reported, as was done in this case, and the purchaser refuse to comply with the terms of sale, upon representation by the trustee or other party in interest, the court may order that cause be shown why the terms of sale are not complied with; and, upon the failure of the party reported as the purchaser to show sufficient cause for his refusal or failure to comply, the court may then, considering all the circumstances of the case, if there be no other sufficient cause to the contrary, either ratify the sale or set it aside, as will best subserve the interest of the parties concerned. In such case, if the sale be set aside, the court may properly, as terms of releasing the party from the purchase, and as the consequence of his own act, impose upon him all the costs and expenses attending the sale thus set

aside because of his default. But if the sale be ratified, and the party still fail to comply, the court may then proceed, in a summary way, by order nisi and final order, to direct a resale of the property at the risk of the purchaser."

In the case at bar the trustee accepted the Central Securities Company as the purchaser of the property, and that company, in compliance with the terms of sale, paid the trustee \$25,000, which was no doubt deemed a sufficient protection for the persons interested, from the consequences of a failure to further comply with the terms of sale. The sale was reported to and finally ratified by the court, and the subsequent proceedings for the resale of the property were based upon the theory that the contract of sale had been consummated by the order of court, and that the property belonged to said company. Whether that company purchased the property for itself or for other persons is a matter not now open for inquiry in this case. The company was accepted as the purchaser, and in any proceeding for the enforcement of that contract of sale, it alone can be held responsible as the purchaser. This we think was directly decided in the case of *Aukam v. Zantzinger*, 94 Md. 421, 51 Atl. 93, where the property of F. G. Aukam, the mortgagor, was sold under the mortgage, and, the purchaser, his son, having failed to comply with the terms of sale, it was resold at his risk, and the mortgagor filed objections to the ratifications of the second sale. In that case the present chief judge of this court said: "It would seem to be clear from what we have said that F. G. Aukam had no interest in this property when it was resold, and he therefore had no standing to object to the sale. The fact that the appellant bought it to protect or for the benefit of his father could make no difference. The purchaser accepted by the attorney making the sale was George C. Aukam, and to him alone could he look for the purchase money, under this proceeding. Whatever arrangement he and his father made was merely between them, and could in no way affect the right of the attorney making the sale to hold him responsible for the purchase money, and he alone is liable for any deficiency, and entitled to any surplus, that there may be as the result of the resale. The court had no power to set aside the sale at the instance of F. G. Aukam, as it rightly determined." *Aukam v. Zantzinger*, 98 Md. 380, 56 Atl. 820.

The first three demurrers did not state the grounds of the demurrers, and it is urged on behalf of the appellants that the order of the court below, of November 18, 1912, should to that extent be reversed. 46 L.R.A. (N.S.)

Section 158 of art. 16 of the Code of 1912 (rule 18), in the form there provided, does require the special grounds of a demurrer to be stated. But there were no exceptions to the demurrers referred to in the court below; and, as the "additional demurrer" filed by the Middendorf-Heyward committee October 15, 1912, does state the grounds of the demurrer, and as that demurrer challenges the right of the petitioner to the relief prayed, we will not, because of the defect indicated in the other or original demurrers, reverse the order of November 18, 1912, which, for the reasons we have stated, must be affirmed.

The appellees have filed a motion to dismiss the appeal from the order of December 17, 1912, refusing the petitioner's prayer for leave to amend, and dismissing its petition of that date. That petition was addressed to the discretion of the court, and, according to the settled rule, its action cannot be reviewed on appeal. *Calvert v. Carter*, 18 Md. 73; *Snook v. Munday*, 96 Md. 514, 54 Atl. 77. We might add, however, that as the proposed amendment did not remove the objection relied on in the demurrer, and upon which the court below based its decision, it very properly refused to permit the amendment to be made.

Order of November 18, 1912, affirmed with costs, and the appeal from the order of December 17, 1912, dismissed with costs.

NEW YORK COURT OF APPEALS.

CITY OF NEW YORK, Appt.,
v.

SICILIAN ASPHALT PAVING COMPANY, Impleaded, etc., Respnt.

(208 N. Y. 45, 101 N. E. 696.)

Indemnity — paving contract — judgment against municipality — liability of contractor.

A provision in a paving contract obligating the contractor to maintain, repair, and replace the pavement for a period of years upon notice, and during the performance

Note. — There are two different ways in which the question in the above case as to the liability of a paving contractor to indemnify the municipality for an injury resulting from the breach of his contract to keep the street in repair might arise: namely, where the contractor's contract contains a stipulation for indemnity, and where it does not. In the first instance the question would be, as in *NEW YORK v. SICILIAN ASPHALT PAVING CO.*, whether the provision for indemnity was sufficient to cover the municipality's liability for personal injuries resulting from the breach

of the work to indemnify the city for any injury resulting from negligence in such performance, does not render the contractor liable to indemnify the city for a recovery by a traveler against the city because of its failure promptly to make repairs when notified to do so.

(April 1, 1913.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in defendants' favor in an action brought to recover from defendants the amount which plaintiff had been compelled to pay for injuries sustained through a defect in one of its streets which defendants were alleged to be under obligation to keep in repair. Affirmed.

The facts are stated in the opinion.

Mr. Terence Farley, with Mr. Archibald R. Watson, for appellant:

The contractor obligates himself to maintain the pavement duty on behalf of the public, in the place and stead of the municipality, and, having assumed that burden, he is not only liable, on his agreement, at the suit of a third person who may have been injured through his neglect, but he is also responsible to the municipality for any damages which naturally and proximately fall upon it in consequence of a breach of that duty.

Weet v. Brockport, 16 N. Y. 161, note; Jenree v. Metropolitan Street R. Co. 86 Kan. 479, 39 L.R.A.(N.S.) 1112, 121 Pac. 610, Ann. Cas. 1913 C. 214; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 328, 40 L. ed. 712, 719, 16 Sup. Ct. Rep. 564; Booth, Street Railways, § 256; 2 Dill. Mun.

of the general contract; and in the second instance the question would be merely whether the general rule relating to indemnity could be invoked to render the contractor liable in such circumstances. No additional cases have been found which involve either aspect mentioned above. Discussing the question in the first aspect, the writer, in 22 Cyc. 86, says: "A class of indemnity contracts on which damages have been frequently recovered are those containing a covenant to indemnify and save harmless from injuries to the person or property growing out of the performance of contracts for the construction of buildings or other improvements and other similar contracts. But to justify a recovery it must be shown that the damage or injury alleged is such as fairly falls within the terms of the contract." The cases in which municipalities have sought indemnity upon the ground of the contractor's tort are discussed in other notes in this series. 46 L.R.A.(N.S.)

Corp. 4th. ed. § 721; 2 Elliott, Roads & Streets, 3d. ed. §§ 1056, 1170; Jones, Neg. Mun. Corp. § 171; Shearm. & Redf. Neg. 5th ed. § 301; 2 Smith, Mun. Corp. §§ 1305, 1533; 1 Sutherland, Damages, 3d ed. §§ 83, 86; Thomp. Neg. §§ 1169, 1356, 1367, 6359; McMahon v. Second Ave. R. Co. 75 N. Y. 231; Sullivan v. Staten Island Electric R. Co. 50 App. Div. 558, 64 N. Y. Supp. 91; Schiverea v. Brooklyn Heights R. Co. 89 App. Div. 340, 85 N. Y. Supp. 902; Little v. Banks, 85 N. Y. 258; Rochester v. Campbell, 123 N. Y. 405, 10 L.R.A. 393, 20 Am. St. Rep. 760, 25 N. E. 937; Smyth v. New York, 203 N. Y. 106, 96 N. E. 409; St. Paul Water Co. v. Ware, 16 Wall. 566, 21 L. ed. 485; Ober v. Crescent City R. Co. 44 La. Ann. 1059, 32 Am. St. Rep. 366, 11 So. 818, 3 Am. Neg. Cas. 573; Phinney v. Boston Elev. R. Co. 201 Mass. 286, 131 Am. St. Rep. 400, 87 N. E. 490; Cox v. Fidelity & Deposit Co. 157 Mich. 59, 121 N. W. 494; Lexington v. Aetna Indemnity Co. 155 N. C. 219, 71 S. E. 214; Gates v. Pennsylvania R. Co. 150 Pa. 50, 16 L.R.A. 554, 24 Atl. 638; Farmers & M. Nat. Bank v. Hanks, — Tex. Civ. App. —, 128 S. W. 147; Cook v. Dean, 11 App. Div. 123, 42 N. Y. Supp. 1040, affirmed in 160 N. Y. 660, 55 N. E. 1094; Weber v. Buffalo R. Co. 20 App. Div. 292, 47 N. Y. Supp. 7; Prescott v. Le Conte, 83 App. Div. 482, 82 N. Y. Supp. 411, affirmed in 178 N. Y. 585, 70 N. E. 1108; Wurster v. New York, 136 App. Div. 408, 120 N. Y. Supp. 1029, affirmed in 199 N. Y. 534, 92 N. E. 1108; Wilson v. Watertown, 3 Hun, 508; Seneca Falls v. Zalinski, 8 Hun, 576; McMahon v. Second Ave. R. Co. 11 Hun, 347; Port Jarvis v. First Nat. Bank, 31 Hun, 107, affirmed in 96 N. Y. 550; Conroy v. Gale, 5 Lana. 344, affirmed in 47 N. Y. 665; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Fulton F.

Thus, reference may be had to Robertson v. Paducah, 40 L.R.A.(N.S.) 1153, to which is appended a note dealing with the right of an employer who has been held liable for the tort of his contractor to recover over from the actual wrongdoer. Generally as to the right of a municipality to recover indemnity or contribution from one for whose tort it has been held liable, see the note to Grand Forks v. Paulsness, 40 L.R.A.(N.S.) 1165. For a discussion more generally of the right of one constructively liable for a tort, to contribution or indemnity from one actually responsible for its commission, see the note to Scott v. Curtis, 40 L.R.A.(N.S.) 1147.

As to whether a breach of contract with a municipality to keep a street or highway in repair will sustain an action by a person injured directly against the contractor, see the note to Jenree v. Metropolitan Street R. Co. 39 L.R.A.(N.S.) 1112.

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Ins. Co. v. Baldwin, 37 N. Y. 648; *Hicks v. Dorn*, 42 N. Y. 47; *Johnson v. Belden*, 47 N. Y. 130; *French v. Donaldson*, 57 N. Y. 496; *Huntley v. Empire Engineering Corp.* 189 Fed. 516.

The paving company expressly agreed to indemnify the city for damages sustained by it "on account of any act or omission of the contractor or his agents."

New York v. Brady, 151 N. Y. 611, 45 N. E. 1122; *Fulton County Gas & Electric Co. v. Hudson River Teleph. Co.* 200 N. Y. 287, 93 N. E. 1052; *Mack Paving Co. v. New York*, 142 App. Div. 702, 127 N. Y. Supp. 728.

Mr. Walter Lester Glenney, with Mr. Bertrand L. Pettigrew, for respondent:

The appellant cannot recover from the respondent the damages sued for herein, no affirmative negligence on the part of respondent being alleged.

Mack Paving Co. v. New York, supra; *McMahon v. Second Ave. R. Co.* 75 N. Y. 231; *Schick v. Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Cuilhe v. Ackerman*, 58 Misc. 538, 109 N. Y. Supp. 714; *Levy v. Roosevelt*, 131 App. Div. 8, 115 N. Y. Supp. 475; *New York v. American R. Traffic Co.* 66 Misc. 166, 121 N. Y. Supp. 221; *Rochester v. Campbell*, 123 N. Y. 405, 10 L.R.A. 303, 20 Am. St. Rep. 760, 25 N. E. 937; *Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411; *New York v. Brady*, 151 N. Y. 611, 45 N. E. 1122; *Manhattan R. Co. v. Cornell*, 54 Hun, 292, 7 N. Y. Supp. 557, affirmed in 130 N. Y. 637, 29 N. E. 151.

The appellant's own negligence caused the damages claimed, and it cannot, therefore, recover such damages from this respondent.

Brooklyn v. Brooklyn City R. Co. 47 N. Y. 486, 7 Am. Rep. 469; *Prescott v. Le Conte*, 83 App. Div. 482, 70 N. E. 1108, affirmed in 178 N. Y. 585, 70 N. E. 1108; *Manhattan R. Co. v. Cornell*, 54 Hun, 292, 7 N. Y. Supp. 557, affirmed in 130 N. Y. 637, 29 N. E. 151.

The control of the street remained in the appellant, the city of New York, and no other duty than a contract obligation was imposed upon the respondent.

People ex rel. Consolidated Teleg. & Electrical Subway Co. v. Monroe, 85 App. Div. 542, 83 N. Y. Supp. 382; *Geneva v. Brush Electric Co.* 50 Hun, 581, 3 N. Y. Supp. 595, affirmed in 130 N. Y. 670, 29 N. E. 1034.

The damages sought to be recovered by appellant were not contemplated by the respondent and appellant, as within the terms of their agreement as set forth in the complaint herein.

New York v. American R. Traffic Co. 66 46 L.R.A. (N.S.)

Misc. 166, 121 N. Y. Supp. 221; *Geneva v. Brush Electric Co.* 50 Hun, 581, 3 N. Y. Supp. 595, affirmed in 130 N. Y. 670, 29 N. E. 1034; *Schick v. Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Cuilhe v. Ackerman*, 58 Misc. 538, 109 N. Y. Supp. 714; *Levy v. Roosevelt*, 131 App. Div. 8, 115 N. Y. Supp. 475; *New York v. American R. Traffic Co.* 66 Misc. 166, 121 N. Y. Supp. 221.

Gray, J., delivered the opinion of the court:

This action was brought by the city of New York to recover from the defendants the amount which had been paid in satisfaction of a judgment theretofore recovered against the former, at the suit of a person injured upon one of its streets. The complaint was demurred to by one of the defendants for insufficiency of the facts alleged to constitute a cause of action. The demurrer has been sustained in the courts below, and the present appeal is from a final judgment, entered upon the plaintiff's failure to serve an amended complaint. The justices of the appellate division were sharply divided in opinion, and the question of law presented upon this appeal turns upon the construction to be given to certain provisions of a contract made by the city for the grading and paving of one of its streets. This contract, which is made part of the complaint, was with the defendant the Sicilian Asphalt Paving Company, respondent here. By a clause of the contract the contractor was to furnish all the labor and materials necessary, in accordance with specifications attached, to regulate, grade, pave, or repave with asphalt pavement a portion of Forty-fifth street, and was to "maintain said pavement in good condition to the satisfaction of the president (of the borough) for the period of five years from the final completion and acceptance thereof." By another clause, the contractor agreed that, "during the performance of the work herein set forth he will place proper guards upon and around the same for the prevention of accidents.

... will indemnify and save harmless party of the first part against and from all suits and actions, of every name and description, brought against them, and all costs and damages to which it may be put on account, or by reason, of any injury or alleged injury to the person or property of another, resulting from negligence or carelessness in the performance of the work, or in guarding the same, or from any improper materials used in its prosecution." By another clause the contractor agreed "to repair and make good, to the satisfaction of the engineer, any disintegration,

cracks, bunches, levees, or settlement, or any depression in the pavement that shall measure more than three eighths ($\frac{3}{8}$) of an inch from the under side of a straight edge four (4) feet long, which shall occur at any time during the period of five years from the date of the acceptance of the whole work under the contract, when notified so to do by the president by a written notice to be served on him. . . . During the period of maintenance, the contractor shall, within five (5) days after the receipt of notice so to do, restore the pavement over all openings made by corporations or plumbers for making new service connections, or repairing, renewing, or removing the same, and over all trenches made for carrying sewers, water or gas pipes or any other subsurface pipes or conduits, for the building or laying of which permits may be issued by the president." After the completion and acceptance of the work called for by the contract, and within five years, permission was granted by the president of the borough to the defendant the Consolidated Telegraph & Electrical Subway Company to open the pavement at Nos. 537 to 547 West Forty-fifth street. This permission was granted with the condition that that company should indemnify the city against all damages which might result from the company's negligence, and with the consent of the defendant the Sicilian Asphalt Company, and upon the express understanding that the latter would restore the pavement at the expense of the Consolidated Telegraph & Electrical Company. The asphalt company was duly notified to restore the pavement over the openings made, but failed to do so prior to the happening of an accident, which was caused by the opening in the street. The injured party thereafter recovered a judgment against the city for the damages caused to him.

The judgment below, which sustained the demurrer interposed by the asphalt company to the complaint, was correct; for the reason that its contract with the city only made it answerable over for such damages as might be recovered against the city by reason of accidents happening through the contractor's negligence during the performance of the work of construction or of subsequent repairing. The contractor was not responsible generally for what personal injuries might be occasioned by reason of defective conditions in the street; but only became responsible therefor as its agreements in the contract might devolve responsibility upon it. When the work was performed, which the contract required, then no other continuing liability was provided for, except by the agreement to main-

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tain the pavement in good condition for the period of five years. That simply imposed upon the contractor a duty to see to it that the pavement, which it had laid, should be properly serviceable for street purposes during the period stipulated. There was a distinct and separate agreement on its part that, when notified to that effect by the president of the borough, it would repair and make good certain defects specified, which might be found in the pavement, with the right reserved to the president of the borough, upon its failure to do so, to cause the repairs to be done at the contractor's expense. Another provision, which bound the contractor during the period of maintenance, required it, within five days after the receipt of notice so to do, to "restore the pavement over all openings made by corporations or plumbers," for which permits might be issued by the president of the borough. This provision is an amplification of the contractor's agreement to make repairs during the five years constituting the period of maintenance. It contemplated a condition quite likely to arise in the use of the streets. It was a further consideration for the contract, and the city thereby relieved itself of the expense of that class of street repairs. But the primary liability of the city for the safe condition of its streets could not, and never did, shift to the contractor, and the latter never undertook to keep the street in repair. It could neither make repairs, nor be held for failure in that respect, until the notice had been given. *O'Keeffe v. New York*, 173 N. Y. 474, 66 N. E. 194. Its agreements to repair and to restore the pavement, in no reasonable view of the contract, comprehended a liability over for personal injuries occasioned by defective street conditions; they subjected it to a liability to make good to the city such expense as the latter might incur in doing the work which the contractor had agreed to do. The argument of the appellant is based upon the erroneous premise that the contractor, by force of its agreements, had obligated itself to perform on behalf of the public the duty which rested upon the municipality. The contract imported no such obligation, and the city could not evade, suspend, or cast upon others the duty, as to the public, of maintaining the streets in a safe condition. *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344. The city had not given over the street to the contractor, in which respect the case differed from one where a railroad company, in consideration of the license from a municipal corporation to use the streets, has agreed

to keep the portion of the streets used in repair. In such a case the railroad company, as it was said in *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, at page 485, 7 Am. Rep. 469, "contracts to perform that duty to the public in the place and stead of the municipality, and the way is given over to him for that purpose." The railroad company in that case would be liable independently for an injury caused by a defect in its reserved portion of the street by reason of its failure to perform its agreement to keep it in repair.

This contract neither contains, nor imports, any agreement on the part of the contractor, after completion of the work contracted for and during the period of maintenance, to do anything more than to maintain the pavement, as it had been accepted, and to make such repairs, or to do such relaying of the pavement, as are stipulated for and which may be indicated in the notice to be served.

It does not appear that the contractor was at fault here in any respect, except as it had failed to comply with the notice from the city to restore the pavement over the openings made by the Consolidated Telegraph & Electrical Company. Liability for that failure would be measured by the expense to which the city would be put in causing the work to be done. Enough has been said in connection with the discussion at the appellate division to indicate the grounds upon which we place our affirmance of the judgment appealed from.

Cullen, Ch. J., and Werner, Hiscock, Collin, Cuddeback, and Miller, JJ., concur.

OREGON SUPREME COURT.

SARA B. WRENN et al., Respts.,
v.

UNIVERSITY LAND COMPANY, Appt.

(— Or. —, 133 Pac. 627.)

Penalty — provision of remission of interest on prompt payment.

The provision in a contract for the payment of the purchase price of real estate

Note. — Effect of provision for remission of part of the principal or interest if payment is made at maturity.

The usual question in contracts similar to that under consideration in *WRENN v. UNIVERSITY LAND CO.* is whether the difference between the larger and smaller sums is a penalty or liquidated damages. (While this note does not consider the question of usury, the reader will remember that contracts of this kind are in general not usury.) 46 L.R.A. (N.S.)

in instalments, with interest, that in case all instalments are paid on or before maturity interest will be remitted, does not render the provision for interest a penalty, and therefore the purchaser is not entitled to a conveyance upon paying the principal without interest, if he has not paid the instalments according to the contract, although the delays were only slight and of little importance.

(June 24, 1913.)

A PPEAL by defendant from a decree of the Circuit Court for Multnomah County in plaintiffs' favor in a suit to compel specific performance of a contract to sell real estate. Reversed.

Statement by Ramsey, J.:

This suit was brought by the respondents against the appellant, asking for the specific performance of a contract to convey lots 38, 39, and 40, as described on the plat of University Park as it appears on record in the public records of deeds of Multnomah county, Oregon. The contract is dated February 15, 1907. The respondents claim that they have fully performed said contract on their part, and are entitled to a deed of conveyance of said lots. The appellant claims that the respondents are not entitled to a conveyance of said lots, because they failed to pay the interest amounting to \$74.18, which the appellant asserts has accumulated and become due on the purchase price of said lots. The purchase price of the lots was \$600, and it was fully paid, but no interest thereon was paid. Whether or not the respondents were entitled to a deed of conveyance depends upon whether any interest accrued on said contract. The facts in the case were agreed upon by stipulation of the parties. The defendant appealed.

Mr. P. L. Willis, for appellant:

The contract could and did draw interest.

Rumsey v. Matthews, 1 Bibb, 242; *Daggett v. Pratt*, 15 Mass. 177; *Satterwhite v. McKie*, Harp. L. 397; *M'Nairy v. Bell*, 1 Yerg. 502, 24 Am. Dec. 454; *Alexander v. Troutman*, 1 Ga. 469; *Lalande v. Breaux*, 5 La. Ann. 505; *Rogers v. Sample*, 33 Miss.

rious unless made with intent to evade the usury law, as the matter is under the control of the borrower. 39 Cyc. 953. Thus, in *Roberts v. Tremayne*, Cro. Jac. 507, *Doderidge, J.*, said: "If I lend to one a hundred pounds for two years, to pay for the loan thereof thirty pounds, and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself.")

311, 69 Am. Dec. 349; Hackenberry v. Shaw, 11 Ind. 392; Fisher v. Anderson, 25 Iowa, 29, 95 Am. Dec. 761; Flanders v. Chamberlain, 24 Mich. 316; Reeves v. Stipp, 91 Ill. 610; Pom. Eq. Jur. 1st ed. § 436; Finger v. McCaughey, 114 Cal. 64, 45 Pac. 1004; McKay v. Belknap Sav. Bank, 27 Colo. 50, 59 Pac. 747; Close v. Riddle, 40 Or. 596, 91 Am. St. Rep. 580, 67 Pac. 932; Sedgw. Damages, 6th ed. 514.

Messrs. Platt & Platt, Palmer L. Fales, and J. O. Bailey, for respondents:

Wherever the payment of a smaller sum is secured by a larger, the larger sum thus contracted for can never be treated as liquidated damages, but must always be treated as a penalty.

Pom. Eq. Jur. 3d ed. 435, 436, 441; 13

Cyc. 101; Foley v. McKeegan, 4 Iowa, 1, 66 Am. Dec. 107; Lampman v. Cochran, 16 N. Y. 275; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; Gay Mfg. Co. v. Camp, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 799.

Whether an agreement provides for the performance or nonperformance of one single act or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed and of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when the failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages.

Cases are excluded where the obligation of a third party is brought in on agreeing to reduce a debt if paid promptly. See Rose v. Rose, Ambl. 331; Carroll v. O'Connor, 11 Ir. Eq. Rep. 200; Watson v. Mason, 22 Grant, Ch. (U. C.) 574 (reversing 22 Grant, Ch. [U. C.] 180).

Where there is an agreement by a creditor to remit part of his debt if paid by a certain day, on a default the whole debt may be recovered, and equity will grant no relief. Sewell v. Musson, 1 Vern. 210, 1 Eq. Cas. Abr. 28, Pl. 3; Ex parte Bennett 2 Atk. 527; Ford v. Chesterfield, 19 Beav. 428, 2 Week. Rep. 640; Eargle v. Lorick, 55 S. C. 431, 33 S. E. 490.

This rule is recognized in United States Mortg. Co. v. Sperry, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 321.

Where a creditor agrees to take less than his debt if paid by such a day a tender a day or two later will not avoid an action for the whole sum. Sewell v. Musson, 1 Vern. 210.

(But a technical default in payment was relieved against where an attempt to pay in time was made in good faith. Mookerjee v. Masseyk, 9 Week. Rep. 4.)

In some of the cases, as in WRENN v. UNIVERSITY LAND CO., the deduction was to be of the interest or a part of it.

Thus, where a mortgagee lends money at a certain per cent, but agrees in the deed that if the money be paid within three months after it becomes due, that he will accept a lower per cent, after such time he is entitled to the higher rate (Jory v. Cox, Prec. in Ch. 160), for chancery can give him no relief (in Re Powis, 3 Atk. 519).

Where a note made in Alabama was payable in New York for a certain sum, with lawful interest from date till paid, "but if the principal sum shall be punctually paid when due, then, in that case and not otherwise, the interest is to be deducted," it was held that there could be no abatement of interest unless the note was promptly paid; the court laying stress on the fact that in view of the high rate of exchange, prompt payment in New York might be equivalent

in advantage to the amount of interest. Ely v. Witherspoon, 2 Ala. 131.

In Ex parte Bennet, 2 Atk. 527, Lord Hardwicke, said: "The general rule of equity with respect to compositions of debts has been rightly laid down, that the court will not dispense with the point of time in compositions; for where a creditor agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails of payment, he cannot be relieved (Sewell's Case, 1 Eq. Cas. Abr. 28, Pl. 3)," and he considered that the same should be true where the debtor became a bankrupt.

In Thompson v. Hudson, L. R. 4 H. L. 1, 38 L. J. Ch. N. S. 431 (reversing L. R. 2 Ch. 255, 36 L. J. Ch. N. S. 388, 15 Week Rep. 697), it was held that where, in consideration of payment by a certain time, a creditor agrees to remit part of his debt, stipulating that default shall revive the entire debt, upon default the entire debt can be recovered.

The question of form.

There was a clear distinction in chancery between an agreement to pay a certain sum which would be satisfied by the payment of a smaller sum if paid by a certain time, and an agreement to pay a certain sum with a proviso that if not paid by a certain time then a larger sum would be due.

Thus, in Re Powis, supra, Lord Hardwicke said that if a "mortgage had been made, with a reservation of 4 per cent interest, with a proviso that upon nonpayment thereof within a certain time after it is due the mortgagor shall pay 5 per cent, such proviso would not be good, and has been determined several times; because, where the interest is to be increased if not paid at the day, that is but as a *nomine pœna*, and relievable in equity." See also a similar statement by the same judge in Walmsley v. Booth, Barnard Ch. 475, 2 Atk. 25.

And in Bonafous v. Rybot, 3 Burr. 1374, Lord Mansfield said: "There is a distinction in the court of chancery, 'that if 5

Pom. Eq. Jur. 3d ed. p. 743; Wilhelm v. Eaves, 21 Or. 194, 14 L.R.A. 297, 27 Pac. 1053; Lee v. Overstreet, 44 Ga. 507; Shreve v. Brereton, 51 Pa. 175; Hamaker v. Schroers, 49 Mo. 406; Longworth v. Askren, 15 Ohio St. 370; Goodyear Shoe Machinery Co. v. Selz, S. & Co. 157 Ill. 186, 41 N. E. 625; Taylor v. The Marcella, 1 Woods, 302, Fed. Cas. No. 13,797; Curry v. Larer, 7 Pa. 470, 49 Am. Dec. 486.

Where the construction of a contract is doubtful, the tendency of the court is in favor of the interpretation which makes the sum a penalty.

Wilhelm v. Eaves, 21 Or. 199, 14 L.R.A. 297, 27 Pac. 1053; Cushing v. Drew, 97 Mass. 445; 13 Cyc. 95; Foley v. McKeegan,

per cent be reserved for interest on a mortgage, with a condition to accept 4 if punctually paid; this condition must be strictly performed; and the debtor shall not have relief in equity after the day of payment is elapsed (because the 1 per cent was to be abated upon a condition which is not performed), but if 4 per cent be reserved, with an agreement that if the 4 be not punctually paid at the day, the mortgagee shall pay 5, that shall be considered as a penalty added; and the court of equity will, in such case, relieve against it."

Lord Eldon, however, confuses the two forms in his remarks in Seton v. Slade, 7 Ves. Jr. 205, where he is reported to have said: "Time is not regarded here as at law. So, in the instance of a mortgage with interest at 5 per cent, and a condition to take 4 if regularly paid; or at 4 per cent, with a condition for 5, if not regularly paid. At law you might in that case recover the 5 per cent, for it is the legal interest. But this court regards the 5 per cent as a penalty for securing the 4; and time is no farther the essence than that if it is not paid at the time, the party may be relieved from paying the 5 per cent by paying the 4 per cent, and putting the other party in the same condition as if the 4 per cent had been paid; that is, by paying him interest on the 4 per cent as if it had been received at the time."

In some of the American cases it has been held that there is no distinction between the two forms of contract. This has been done for the purpose of sustaining the terms of an agreement to pay a larger sum on default in paying a smaller one, the decision being that such an agreement was the same thing as a promise to pay the larger sum, with the privilege of satisfying the contract by prompt payment of a smaller sum. Reeves v. Stipp, 91 Ill. 610; Rogers v. Sample, 33 Miss. 312, 69 Am. Dec. 349; Satterwhite v. McKie, Harp. L. 397; in all of which cases the contract provided for interest if the principal was not promptly paid.

And it has been held that an agreement 46 L.R.A. (N.S.)

4 Iowa, 1, 66 Am. Dec. 107; Tayloe v. Sandiford, 7 Wheat, 13, 5 L. ed. 384.

Equity will relieve against penalties and forfeitures.

16 Cyc. 75; Pom. Eq. Jur. 3d ed. § 450, p. 75; Sherburne v. Hirst, 121 Fed. 1003; Manhattan L. Ins. Co. v. Wright, 61 C. C. A. 138, 126 Fed. 82.

Ramsey, J., delivered the opinion of the court:

This suit for specific performance is based on a written contract of which the following is a copy, in part, to wit: "This contract, made and entered into this 15th day of February, 1907, by and between University Land Company, a corporation of Multnomah county, Oregon, as first party

to discharge a larger sum by the prompt payment of a smaller sum would be a contract for a penalty if such would be the effect of a contract increasing the sum due on a default. Longworth v. Askren, 15 Ohio St. 370, where the court said: "Nor, in our view, does the order in which the sums are stated change their character, or the legal effect of the instrument; for, whether the amount to be paid is to be reduced upon compliance which the sums are stated change their creased on a default, is only a different mode of expressing the same thing." See also to similar effect Goodyear Shoe Machinery Co. v. Selz, S. & Co. 157 Ill. 186, 41 N. E. 625, *infra*.

The question of actual debt.

It has been asserted that to insure the the enforcement of the contract according to its terms, it is necessary that the larger sum should be the real debt.

Thus, where a promissory note payable in instalments, with interest, in ten years (the contract price of a lot), provided that if every payment was made respectively within ten days after due, "as an inducement to punctuality," one-fifth part of the principal sum would be released, and the balance, with interest on such balance, accepted in full payment, it was held that the four fifths was evidently the amount of the debt and the other one fifth a penalty. Longworth v. Askren, *supra*.

And in Waggoner v. Cox, 40 Ohio St. 539, where there was given for a dower right a promise to pay \$800 on a certain day a few months later, provided that if the promisor should pay the promisee \$40 a year for life it should be a discharge of the debt, the court, in holding that upon all the facts \$800 was the price of the dower right and became due upon default in instalments, distinguished the Longworth Case and said: "To this state of facts another principle applies and is decisive. When the larger sum is the actual debt, and a smaller sum has been agreed upon as a release if paid under stated conditions, the

hereto, and Sara B. Wrenn, Ada A. Schlott, Susie M. Wrenn, as second party hereto, witnesseth: That the said first party, in consideration of the covenants, and agreements, herein contained and the payments herein mentioned, agrees to sell unto the second party, all the land situated in the county of Multnomah and state of Oregon, and described as follows, to wit: Lots thirty-eight (38), thirty-nine (39), and forty (40), block 182, as shown and designated on the plat of University Park as the same appears on record in the public records of deeds of said Multnomah county, and delivers the possession thereof to said second party, all for the sum or purchase price of six hundred dollars (\$600), to be paid by the second party to the first party

at its office in Portland, Oregon, at the following named times, to wit: Thirty dollars (\$30) in cash, the receipt whereof is hereby acknowledged and the remainder in monthly instalments, as follows: Fifteen dollars (\$15) thereof on or before the 15th day of March, 1907, and fifteen (\$15) additional dollars thereof on or before the 15th day of each calendar month thereafter until the whole of said purchase price shall be paid. All of which payments said second party hereby agrees to make at the times and place above provided therefor, with interest at the rate of 8 per cent per annum, payable in like instalments immediately after the last instalment of principal shall fall due. All interest shall be remitted if each instalment of principal

neglect to comply with the easier terms gives the creditor the right to compel the payment of the larger sum. 1 Sutherland, Damages, 499."

On the other hand, other cases look to the contract. Thus, where a bond was to be void if interest on a certain sum was annually paid during the life of the obligee, but upon default such sum should be due and payable, this was held to be liquidated damages, although at the time of the default the obligee's life interest was worth less than such sum. Berrinkott v. Trap-hagen, 39 Wis. 219 (where the point of the case was that the contract was not unreasonable).

So, in Russell v. Wright, 23 S. D. 338, 121 N. W. 842, where two notes secured by mortgage were executed to pay certain commissions, one of them stating that if the payments on the other were promptly made and certain other payments affecting the mortgage security were made, that then the second note should be void, it was held that the holder of the second note in enforcing a breach was not enforcing a forfeiture but the contract of the parties.

In Jordan v. Lewis, 2 Stew. (Ala.) 426, it was held that a promissory note containing a stipulation that, if paid by a certain day before maturity a certain less sum "is to satisfy this note," does not involve a penalty, and the larger sum may be collected at maturity. This case was followed in Carter v. Corley, 23 Ala. 612 (where there seems to be a misprint in the maturity of the note as copied in the court's opinion).

It will be observed that in these Alabama cases it does not appear which sum was the actual debt. In the Carter Case, the court said, referring to the Jordan Case: "We have heretofore decided that in a note made after this form, where a greater sum may be discharged by the payment of a less sum at an earlier day, the greater sum will not be considered in the nature of a penalty, but the debt actually due, and is recoverable if the less sum be not paid according to the terms of the note."

See also cases infra, "Discounts." 46 L.R.A. (N.S.)

Discounts.

Where a contract to use the plaintiff's electric lighting service provided that, in consideration of defendant's using it for a year and paying bills by the 10th of the month, certain large discounts would be allowed, it was held on the defendant's ceasing within the year to use such service that the discounts already allowed on bills paid were collectable by the plaintiff, as the real ground of the discounts was the provision to use the service for a year. Missouri Edison Electric Co. v. M. J. Steinberg Hat & Fur Co. 94 Mo. App. 543, 68 S. W. 383.

So, where the defendant failed to keep a similar contract to use the plaintiff's light service exclusively for a certain number of years the discounts of 20 per cent allowed him by the contract were recoverable from him. Missouri Electric Light & P. Co. v. Carmody, 72 Mo. App. 534; Missouri Edison Electric Co. v. Bry, 88 Mo. App. 135.

But, in Goodyear Shoe Machinery Co. v. Selz, S. & Co. 157 Ill. 186, 41 N. E. 625, where a lease of machines for monthly rents and royalties provided that if paid by the middle of the month there should be a discount of 50 per cent, it was held that this 50 per cent was too unreasonable to be considered a discount, and must be considered a penalty, and not recoverable. (The contract is somewhat contradictory as to whether the payment to obtain a discount should be in advance or within fifteen days after due.)

But the opposite was held upon a somewhat similar contract in United Shoe Machinery Co. v. Abbott, 86 C. C. A. 118, 158 Fed. 762, where the court, while not entirely approving the Goodyear Case, distinguished it on the ground that in its opinion the contract in the Goodyear Case was for discounts if payment was made within fifteen days after the same was due, and so there was a penalty for more than fifteen days' delay, while the discount in the Shoe Company Case was to be obtained if the payment was in advance.

B. B. B.

shall be paid at or before maturity." It will be perceived that the agreed purchase price of the three lots was \$600. Thirty dollars of the purchase price was paid at the time the contract was executed, leaving \$570 to be paid in 38 monthly instalments on or before the 15th day of each month until the whole \$570 should be paid.

The question to be decided arises upon the following clause of the contract: "All of which payments said second party hereby agrees to make at the times and place above provided for, with interest at the rate of 8 per cent per annum, payable in like instalments immediately after the last instalment of principal shall fall due. All interest shall be remitted if each instalment of principal shall be paid at or before maturity." The respondents failed to pay the instalments of principal on or before the 15th day of ten of the months in which said instalments became due, but the 15th days of three of those months fell on Sundays. In two instances the payments were made on the 17th day of the month, and in the other eight instances the payments were made on the 16th days of the months. The defaults were only for one or two days in each instance.

The respondents claim that the provision in the contract for the payment of interest was a penalty, and that no interest became due or payable. This presents the only question for decision on this appeal. While the defaults were only for a day or two in each instance, they were sufficient to preclude the respondents' having the benefit of the clause in the contract "remitting the payment of interest," unless the clause providing for the payment of interest created a penalty. The contract does not use the word "penalty" or the phrase "liquidated damages." It will be observed that by this contract the respondents agreed to make all the payments of principal imposed by the contract at the times and place provided for by the contract, "with interest at the rate of 8 per cent per annum, payable in like instalments immediately after the last instalment of principal shall fall due," and then provided that all interest shall be remitted, if each instalment of principal shall be paid on or before maturity. The agreement to pay interest is absolute. The clause providing for the remission of interest is an independent sentence, to be construed, however, in connection with the sentence preceding it. The provision for remission of the interest was to be operative only on condition that the respondents should pay each instalment of principal on or before its maturity. The interest was to be 8 per cent 46 L.R.A. (N.S.)

per annum, and, according to the terms of the contract, it was to be paid as interest.

Black, in his Law Dictionary, 2d ed. p. 887, defines "penalty" thus: "A penalty is an agreement to pay a greater sum to secure the payment of a less sum. It is conditional, and can be avoided by the payment of the less sum before the contingency agreed upon shall happen." Professor Pomeroy, in § 436, vol. 1, of his work on Equity Jurisprudence, 3d ed., states the rule thus as to penalties: "It may be regarded as a rule of universal application that if a party for any reason is liable to pay, or binds himself to pay, a certain sum of money, and adds a stipulation to the effect that, in case such sum shall not be paid at the time agreed upon, he shall then be liable to pay, or be bound to pay, a larger sum of money, the stipulation to pay the larger sum is invariably and necessarily a penalty. Of course, in this proposition, it is understood that the 'larger sum' is not simply the lawful interest accruing upon the principal actually due." According to Professor Pomeroy, lawful interest to be paid upon money actually due cannot constitute the "larger sum" to be paid, which is necessary to create a penalty. This is a material point in this case, because the "larger sum" to be paid in this case is the 8 per cent interest per annum on the principal sum agreed to be paid for the three lots.

This court held in *Close v. Riddle*, 40 Or. 596, 91 Am. St. Rep. 580, 67 Pac. 933, that where a promissory note bore interest from its date until maturity at 6 per cent per annum, and contained a clause to the effect that, if it should not be paid at maturity, it should bear interest from the day of its maturity at the rate of 8 per cent per annum, the clause increasing the rate of interest from 6 to 8 per cent per annum was valid, and did not create a penalty. Moore, J., delivering the opinion of the court in that case said *inter alia*: "While the decisions upon this subject are not uniform, we think the great preponderance of authority supports the rule that, where a higher rate of interest is expressly reserved to be paid after maturity, the rate so stipulated is recoverable if not usurious." That case seems to settle the law in this state upon that question. The point was directly made in that case that the clause increasing the rate of interest from 6 to 8 per cent per annum after maturity of the debt created a penalty, and that equity would not enforce it, but the court held that it was valid and enforced it. In *Rumsey v. Matthews*, 1 Bibb, 242, the court says: "It has been always admitted that if the contract be for the payment of principal and

interest by a given day, with a proviso that if the principal be punctually paid on that day the interest should be remitted, both principal and interest shall be recovered if the principal be not punctually paid. In good sense there can exist no difference between that case and this. In both no interest is demandable if the debt be punctually paid; in both the obligor may discharge himself by paying the principal without interest on the day; and in both the obligee may, if he chooses, demand payment on the day, but without interest. In both cases the contract is equally fair, and the object is the same in both, to wit, the securing punctuality in the payment of the principal. . . . It is just that interest shall be paid for the use of money. In the present case the parties have stipulated as to the time the interest shall begin to run in the way most favorable to the obligor by allowing him to discharge himself on the day without interest. The parties were competent to make this agreement; it is prohibited by no statute; there is no turpitude in it, and there is no principle of sound policy militating against it."

Referring to a contract analogous to the one in question, the court in *Rogers v. Sample*, 33 Miss. 312, 69 Am. Dec. 349, says: "There is nothing illegal or unconscientious in such a contract; for the debtor can readily avoid the payment of interest by doing that which law and good faith require him to do, *viz.*, paying the principal at maturity. He is therefore subjected to no loss, except what he has occasioned by his own wrong." Chief Justice Christancy in *Flanders v. Chamberlain*, 24 Mich. 316, says: "As this note shows upon its face that it was to draw no interest before maturity, if then paid, it is claimed that this is in the nature of a penalty; and in an ordinary case, when a note is given for a precedent debt, I am strongly inclined to think such a provision for interest from date at 10 per cent, if not paid when due, ought to be treated as a penalty rather than stipulated damages for nonpayment at the day. But it is shown that this note was given for property sold on these specific terms, such being the condition of the sale, and undoubtedly a vendor has a right to refuse to sell except upon this or any other condition; and, such being the condition of the sale in pursuance of which the note was given, I think it must draw interest from date at the rate mentioned." In *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761, the court held that where a promissory note stipulated that, if it be not paid when

due, it shall draw interest at 10 per cent per annum from date, it is not usurious, and that, if it was not paid at maturity, the principal and 10 per cent interest from date could be recovered, and rejected the contention that it was a penalty. In the case of *Reeves v. Stipp*, 91 Ill. 610, 611, the court says: "The defense insisted upon is that the interest reserved in the note from the date thereof unless paid at maturity is a penalty, and, as the maker died before the note matured, it is contended the estate, equitably, ought not to be held for it. The fallacy of the position taken lies in the assumption that the rate of interest reserved from the date of the note, which was evidently intended to secure prompt payment, is penalty, and not liquidated damages. Whether the sum named in an agreement to secure performance will be treated as liquidated damages or as penalty is often a question of much difficulty. . . . It is very clear the parties in this case intended the interest reserved should be the measure of damages in case the note was not paid when due. The parties call it neither penalty nor liquidated damages, but that is a matter of no consequence. It is simply a rate of interest which is lawful by contract under our statute from the date of the note, inserted with a view to secure prompt payment. It is a contract the maker could lawfully make, and, if living, it could be enforced against him as valid and binding in law," etc. In *Thompson v. Gorner*, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900, the court held where a promissory note, after providing for the payment of interest at the rate of 8 per cent per annum, provided also that, if the principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent per month, such a contract is not to be treated as a penalty, but as a contract to pay 1 per cent per month interest upon a contingency. In *McKay v. Belknap Sav. Bank*, 27 Colo. 54, 59 Pac. 747, the court says: "On the other hand, counsel for appellee contend that the agreement to pay an increased rate of interest in case of such default (nonpayment of principal at maturity) is a contract to pay a higher rate of interest on a contingency, or a contract for liquidated damages; and that such an agreement, not being in contravention of any statute, or affected by actual fraud, or such circumstances as warrant the inference of undue advantage, is enforceable both at law and in equity. We think the latter view is correct." 16 Am. & Eng. Enc. Law, 2d ed. 1049, dis-

cussing this question, says: "By the weight of authority a stipulation for a higher rate of interest after maturity is valid and enforceable, provided the increased rate which it is sought to recover does not exceed the highest rate allowed by law, and in the absence of a statute limiting the rate which may be contracted for, or where the rate provided for after maturity is not unlawful, a stipulation for a higher rate after maturity will generally be considered as liquidation of the damages, rather than as a penalty for a breach."

We have examined all the authorities referred to in the briefs of counsel and some others, but we deem it unnecessary to refer to any additional cases. While there is some conflict in the decision, we think that both reason and a strong preponderance of the authorities are to the effect that the agreement of the respondents in this case to pay interest is not a penalty, and that it is an agreement to pay interest on \$570 at 8 per cent per annum, with a condition that, if each instalment of principal should be paid at or before maturity thereof, the payment of interest should be remitted. We deem such a contract valid and enforceable both at law and in equity. It was in the power of the respondents to avoid the paying of the interest by paying each instalment of principal on or before its maturity as they agreed to do. Their failure to make the payments promptly when due fastens on them the liability to pay the interest stipulated to be paid. The rate of interest to be paid is only 8 per cent per annum.

It is usual for debtors to pay interest on deferred payments, and there is nothing unreasonable in an agreement in a case like this to pay interest at 8 per cent per annum on the principal if the instalments of principal should not be paid promptly when due. The agreement to pay interest in this case is not repugnant to any statute or contrary to public policy, and fraud is not charged. The respondents are not entitled to a decree for specific performance on the contract, because they have not paid the interest provided for by the contract.

The decree of the court below is reversed, and the case is remanded to the court below, with instructions to enter in its journal the decree of this court, and to dismiss the suit without prejudice to the rights of the respondents to institute another suit for specific performance after paying said interest.

McBride, Ch. J., and Moore and Burnett, JJ., concur.
46 L.R.A. (N.S.)

TEXAS COURT OF CRIMINAL APPEALS.

C. B. SPENCER, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 153 S. W. 858.)

New Trial — cumulative evidence.

Newly discovered evidence of a witness to a homicide, that accused did not fire the fatal shot, but that his brother did, is ground for new trial after conviction, if the circumstances were not such as to make accused responsible for the brother's act, although the brother testified at the trial that the shot was fired by him.

(February 12, 1913.)

Note. — Cumulative evidence as ground for new trial in criminal cases.

I. In general, 903.

II. Circumstances under which cumulative evidence has or has not been held to render a different outcome probable, 911.

On the question of cumulative evidence as ground for new trial in general, see note to *State v. Stowe*, 14 L.R.A. 609.

I. In general.

Newly discovered evidence, in order to be ground for new trial, must satisfy several elementary requirements. The courts are not wholly in accord concerning all these requirements, but, without exception, they agree upon the following:

1. That the newly discovered evidence be such as could not, with reasonable diligence, have been discovered and produced at the trial.

2. That it be not merely cumulative.

3. That it be such as to render a different result probable on the retrial of the case.

The second of these requirements, applied to criminal cases, is the subject of this note. In order to understand the application of this requirement, however, it is necessary to keep the others in mind, especially the third one.

While the rule stated in a majority of the cases is that a new trial will not be granted for newly discovered evidence which is "merely cumulative," or "simply cumulative," other cases append the qualification, "unless under some peculiar circumstances," or, putting the qualification in more definite form, hold that a new trial will be granted in doubtful cases where it is probable that the newly discovered evidence will produce a different result, notwithstanding it is cumulative in character.

It is probable that in many of the cases which state the rule without qualification, this has been done merely because the case presented no facts which would call for the application of the exception, rather, than

APPEAL by defendant from a judgment of the District Court for Falls County convicting him of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. Williams & Williams and Nat Llewellyn for appellant.

Messrs. Frank Oltorf and C. E. Lane, Assistant Attorney General, for the State.

Defendant is not entitled to a new trial.

Gulf, C. & S. F. R. Co. v. Blanchard, 96 Tex. 616, 75 S. W. 6; Templeton v. State, 5 Tex. App. 419; Gulf, C. & S. F. R. Co. v. Reagan, — Tex. Civ. App. —, 34 S. W. 798; Pelly v. Denison & S. R. Co. — Tex. Civ. App. —, 78 S. W. 542; Burns v. State, 12 Tex. App. 278; Porter v. State, — Tex. Crim. Rep. —, 32 S. W. 695; Ash v. State, — Tex. Crim. Rep. —, 63 S. W. 882; Dun-

can v. State, — Tex. Crim. Rep. —, 77 S. W. 13; Evans v. State, 55 Tex. Crim. Rep. 649, 117 S. W. 821; Henry v. State, — Tex. Crim. Rep. —, 30 S. W. 804; McVey v. State, 23 Tex. App. 659, 5 S. W. 175; Gulf, C. & S. F. R. Co. v. Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860; Ringo v. State, 54 Tex. Crim. Rep. 561, 114 S. W. 121; Parham v. Shockler, — Tex. Civ. App. —, 73 S. W. 839; Upson v. Campbell, — Tex. Civ. App. —, 99 S. W. 1129; Gass v. State, — Tex. Crim. Rep. —, 56 S. W. 73; Burns v. State, 12 Tex. App. 269.

Harper, J., delivered the opinion of the court:

Appellant, when tried, was convicted of manslaughter, and his punishment assessed

because of an intention to negative the existence of any possible exception. This is demonstrated by the fact that many of these cases were decided by courts which on other occasions have been recognized the existence of the exception stated. Furthermore, although certain civil cases (of which Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. 721, may be mentioned as an instance) have denied that a new trial may ever be had for newly discovered evidence which is cumulative, however decisive such evidence may be, no criminal case has been found which denies a new trial on the ground that newly discovered evidence is cumulative, while admitting at the same time that, if produced on the trial, it would have been likely to bring about a different result. It would therefore appear that the rule that a new trial will not be granted to permit the introduction of cumulative evidence has more sound than meaning; the real test being that applied to all newly discovered evidence, whether cumulative or not, namely, the probability of a different verdict; and that the only significance of the cumulative character of evidence lies in the improbability that evidence of the same character as that which a jury has by its verdict already rejected would lead to a different result.

In this connection the language of the court in *State v. Albert*, 109 La. 201, 33 So. 196, is interesting. It is as follows: "When a court refuses a new trial on the ground that the newly discovered evidence is merely cumulative, it is tantamount to saying that, were it offered in a new trial, the result of the second trial would not, in its opinion, be different from that on the first."

And in *Mitchell v. State*, 6 Ga. App. 554, 65 S. E. 326, it is said that the main question is not whether the newly discovered evidence is cumulative, but whether, cumulative or not, it would probably produce a different result on a second trial.

On the other hand, in some of the earlier decisions, it seems very probable that the court found two grounds for refusing a new trial in the failure of the newly discovered evidence to satisfy, first, the requirement against cumulative evidence, and, second, 46 L.R.A. (N.S.)

that against evidence which would not render a different result probable. In some cases this is too clear to be open to doubt. *State v. Alvarez*, 7 La. Ann. 283, the earliest decision in that jurisdiction on this point, is such a case. After stating the principle requiring the evidence to be such as ought to produce a different result, the court continues: "At all events, we would not interfere with the discretion of the district court in refusing a new trial, because testimony merely cumulative might be produced."

In *State v. Lamothe*, 37 La. Ann. 43, the court assigns as its reason for denying a new trial that "the evidence was, at most, only cumulative and corroborative in its character, and that it was not such as ought to produce, on another trial, an opposite result on its merits." From this language it is not clear whether the court means to assign a failure to satisfy two requirements, or merely to imply that the cumulative requirement is qualified by the probability of a different result. The court discusses the point no further, but cites Wharton, Crim. Pl. & Pr. § 854, from which it is evident that two requirements have failed of satisfaction. In this same case the syllabus is as follows: "New trial on the ground of newly discovered evidence will not be enforced . . . when the evidence is merely cumulative and corroborative, and not calculated, in the opinion of the judge, to produce a different result on another trial."

Similar instances are to be found in the early decisions of other jurisdictions, which, like Louisiana, now hold the qualified rule to be the law.

The rule that a new trial will not be granted in a criminal prosecution for newly discovered evidence which is merely cumulative is stated in or supported by the following decisions:

Ariz.—*High v. Territory*, 12 Ariz. 146, 100 Pac. 448; *Williams v. Territory*, 13 Ariz. 306, 114 Pac. 556.

Ark.—*Douglass v. State*, 91 Ark. 492, 121 S. W. 923; *Cravens v. State*, 95 Ark. 321, 128 S. W. 1037; *Osborne v. State*, 96 Ark. 400, 132 S. W. 210; *Russell v. State*, 97 Ark. 92, 133 S. W. 188; *Young v. State*, 99 Ark. 407, 138 S. W. 475; *Adams v. State*, 100.

at three years' confinement in the penitentiary. The state's evidence would support the verdict, and we do not deem it necessary to state it in detail, but only such of it as will explain the opinion of the court.

On the trial it was proven that deceased and appellant had been friends, but on the morning of the difficulty deceased went into the store of appellant to transact some business; that a dispute arose, and deceased called appellant a son of a bitch. It is not clear which one committed the first overt act in the actual difficulty that occurred; but it is apparent that they "clinched," and a scuffle ensued. A state's witness says that during the difficulty appellant pulled a pistol and shot deceased, and there are circumstances in the case which support this

theory. Appellant testified, admitting the difficulty, but says he had no pistol, and did not do the shooting, and did not know who did do it; that deceased had an arm around his neck, and he was so situated he could not and did not see the shooting; that, when the pistol fired, deceased fell and dragged him down with him.

John Spencer, a brother of appellant, who was a clerk in the store, tells of the difficulty, and says that deceased had his brother (appellant) around the neck with his left arm, and run his right hand in his pocket, saying at the time, "I will cut your God damn guts out," and he (John Spencer) then fired the shot that killed the deceased. If John Spencer in fact shot the deceased, there is no evidence that appel-

Ark. 203, 139 S. W. 1116; *Ary v. State*, 104 Ark. 212, 148 S. W. 1032.

Cal.—*People v. McDonell*, 47 Cal. 134; *People v. Anthony*, 56 Cal. 397; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295; *People v. Cesena*, 90 Cal. 381, 27 Pac. 300; *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096; *People v. Mesa*, 93 Cal. 580, 29 Pac. 116; *People v. Kloss*, 115 Cal. 567, 47 Pac. 459; *People v. Von Perhacs*, — Cal. App. —, 127 Pac. 1048; *People v. Cowan*, 1 Cal. App. 411, 82 Pac. 339; *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808.

Colo.—*Liggett v. People*, 26 Colo. 364, 58 Pac. 144; *Mitchell v. People*, 53 Colo. 479, 128 Pac. 61.

Fla.—*Long v. State*, 42 Fla. 612, 28 So. 855.

Ga.—*Roberts v. State*, 3 Ga. 310; *Giles v. State*, 6 Ga. 276; *John v. State*, 33 Ga. 257; *O'Shields v. State*, 55 Ga. 606; *Flanagan v. State*, 64 Ga. 52; *Puryear v. State*, 66 Ga. 753; *Hutchins v. State*, 70 Ga. 727; *Smith v. State*, 72 Ga. 114; *Carter v. State*, 75 Ga. 747; *Callahan v. State*, 75 Ga. 887; *Cobb v. State*, 78 Ga. 801, 3 S. E. 628; *Artemus v. State*, 79 Ga. 512, 4 S. E. 385; *Neill v. State*, 79 Ga. 779, 4 S. E. 871; *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782; *Smith v. State*, 81 Ga. 479, 8 S. E. 187; *Harrison v. State*, 83 Ga. 129, 9 S. E. 542; *Johnson v. State*, 83 Ga. 553, 10 S. E. 207; *Greer v. State*, 87 Ga. 559, 13 S. E. 552; *Edwards v. State*, 90 Ga. 143, 15 S. E. 744; *Sweat v. State*, 90 Ga. 315, 17 S. E. 273; *Tripp v. State*, 95 Ga. 502, 20 S. E. 248; *Walker v. State*, 97 Ga. 197, 22 S. E. 401; *Reid v. State*, 103 Ga. 572, 30 S. E. 248; *Wallace v. State*, 110 Ga. 284, 34 S. E. 852; *Tyre v. State*, 112 Ga. 225, 37 S. E. 374; *Fordham v. State*, 112 Ga. 228, 37 S. E. 391; *Isham v. State*, 112 Ga. 406, 37 S. E. 735; *Graham v. State*, 113 Ga. 724, 39 S. E. 293; *Davis v. State*, 116 Ga. 87, 42 S. E. 382; *Sturkey v. State*, 116 Ga. 526, 42 S. E. 747; *Somers v. State*, 116 Ga. 535, 42 S. E. 779; *Clark v. State*, 117 Ga. 254, 43 S. E. 853; *Watson v. State*, 118 Ga. 83, 44 S. E. 824; *Clay-46 L.R.A. (N.S.)*

ton v. State, 118 Ga. 760, 45 S. E. 597; *Rountree v. State*, 118 Ga. 785, 45 S. E. 623; *Teal v. State*, 119 Ga. 102, 45 S. E. 964; *Tipton v. State*, 119 Ga. 304, 46 S. E. 436, 15 Am. Crim. Rep. 209; *McDuffie v. State*, 121 Ga. 580, 49 S. E. 708; *Washington v. State*, 124 Ga. 423, 52 S. E. 910; *Watkins v. State*, 125 Ga. 143, 53 S. E. 1024; *Slade v. State*, 125 Ga. 788, 54 S. E. 750; *Rawlins v. State*, 126 Ga. 96, 54 S. E. 924; *Park v. State*, 126 Ga. 575, 55 S. E. 489; *Walker v. State*, 126 Ga. 588, 55 S. E. 483; *Brown v. State*, 127 Ga. 285, 56 S. E. 417; *Crawford v. State*, 128 Ga. 30, 57 S. E. 94; *Thomas v. State*, 129 Ga. 419, 59 S. E. 246; *Rogers v. State*, 129 Ga. 589, 59 S. E. 288; *Young v. State*, 131 Ga. 498, 62 S. E. 707; *Shelton v. State*, 132 Ga. 413, 64 S. E. 262; *Lewis v. State*, 134 Ga. 531, 68 S. E. 101; *Bowers v. State*, 135 Ga. 310, 69 S. E. 536; *Reeves v. State*, 135 Ga. 311, 69 S. E. 536; *Jefferson v. State*, 137 Ga. 382, 73 S. E. 499; *Johnson v. State*, 138 Ga. 265, 75 S. E. 135; *Moody v. State*, 1 Ga. App. 772, 58 S. E. 262; *Carter v. State*, 2 Ga. App. 254, 58 S. E. 532; *Clark v. State*, 5 Ga. App. 605, 63 S. E. 606; *Corbitt v. State*, 7 Ga. App. 13, 66 S. E. 152; *Rucker v. State*, 7 Ga. App. 47, 65 S. E. 1068; *Oliver v. State*, 7 Ga. App. 695, 67 S. E. 886; *Hopkins v. State*, 8 Ga. App. 124, 68 S. E. 623; *Holton v. State*, 9 Ga. App. 414, 71 S. E. 599; *Strickland v. State*, 9 Ga. App. 552, 71 S. E. 919; *Duncan v. State*, 9 Ga. App. 873, 72 S. E. 431; *Sewell v. State*, 10 Ga. App. 451, 73 S. E. 607; *Potter v. State*, — Ga. App. —, 77 S. E. 186.

Idaho.—*People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *State v. Davis*, 6 Idaho, 169, 53 Pac. 678.

Ill.—*Higgins v. People*, 98 Ill. 519; *Kinney v. People*, 108 Ill. 519; *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80; *Gilmore v. People*, 124 Ill. 380, 15 N. E. 758; *Bean v. People*, 124 Ill. 570, 16 N. E. 656; *Burns v. People*, 126 Ill. 282, 18 N. E. 550; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *People v. Probst*, 237 Ill. 390, 86 N. E. 588; *People v. Hager*, 249 Ill. 603, 94 N. E. 979.

Ind.—*Porter v. State*, 2 Ind. 435; *Sloan v. State*, 8 Ind. 312; *O'Brian v. State*, 14

lant, C. B. Spencer, had any knowledge of such intention on John Spencer's part.

The jury find that C. B. Spencer, appellant, fired the shot, and not John Spencer, and, as we said before, the evidence had on the trial would support their so finding. The amended motion for a new trial, together with the affidavits attached and evidence heard on the motion for new trial, shows that, after the trial, the foreman of the jury met a friend who informed him that they had convicted the wrong man, and in the conversation disclosed his reasons for so believing, stating his source of information. The foreman of the jury went promptly to appellant's counsel and told him what he had heard. Upon investigation, it was discovered that there was a

man who claimed he had seen the difficulty, and who would testify that John Spencer, and not appellant, was the person who fired the shot. This witness left Marlin shortly after the difficulty, and is now residing in Missouri. Appellant's counsel went to Missouri, and saw this witness, Mr. Floyd P. Smith, and attaches the affidavit of Mr. Smith, which reads as follows:

In the spring of 1908 I went to Marlin, Texas, to live, for my health, and remained there until July, 1909. During all of that time I was in the employ of Curtis & Company at their store in Marlin. I was working there at the time a man named Thomas was shot and killed in the store of C. B. Spencer, just across the street from the

Ind. 469; *Winsett v. State*, 57 Ind. 26; *Batterson v. State*, 63 Ind. 531; *Clare v. State*, 68 Ind. 17; *Harper v. State*, 110 Ind. 109; *Stalcup v. State*, 129 Ind. 519, 28 N. E. 1116; *Meurer v. State*, 129 Ind. 587, 29 N. E. 392; *Malone v. State*, 176 Ind. 338, 96 N. E. 1; *Ludwig v. State*, 170 Ind. 648, 85 N. E. 345.

Iowa.—*State v. Gleason*, 68 Iowa, 618, 27 N. W. 785; *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177; *State v. Phillips*, — Iowa, —, 89 N. W. 1092; *State v. Blain*, 118 Iowa, 466, 92 N. W. 650, 14 Am. Crim. 535; *State v. Stanley*, — Iowa, —, 104 N. W. 284.

Kan.—*State v. Kearley*, 26 Kan. 77; *State v. Rohrer*, 34 Kan. 427, 8 Pac. 718; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; *State v. Nelson*, 59 Kan. 776, 52 Pac. 868; *State v. Nimerick*, 74 Kan. 658, 87 Pac. 722; *State v. Miller*, — Kan. —, 132 Pac. 878.

Ky.—*Lewis v. Com.* 93 Ky. 238, 19 S. W. 664; *Cox v. Com.* — Ky. —, 118 S. W. 282; *Hays v. Com.* 140 Ky. 184, 130 S. W. 987; *Wilson v. Com.* 141 Ky. 341, 132 S. W. 557; *Parks v. Com.* 145 Ky. 364, 140 S. W. 544; *Calico v. Com.* 145 Ky. 641, 140 S. W. 1036; *Ellis v. Com.* 146 Ky. 715, 143 S. W. 425; *Lawson v. Com.* 152 Ky. 113, 153 S. W. 56; *Williams v. Com.* 13 Ky. L. Rep. 753, 18 S. W. 364; *Curry v. Com.* 25 Ky. L. Rep. 281, 74 S. W. 1077; *Todd v. Com.* 29 Ky. L. Rep. 473, 93 S. W. 631; *Hamilton v. Com.* 29 Ky. L. Rep. 1039, 96 S. W. 833; *Norman v. Com.* 31 Ky. L. Rep. 1283, 104 S. W. 1024.

La.—*State v. Fahey*, 35 La. Ann. 9; *State v. Hyland*, 36 La. Ann. 709; *State v. Hanks*, 39 La. Ann. 234, 1 So. 458; *State v. Travis*, 39 La. Ann. 356, 1 So. 817; *State v. Harris*, 39 La. Ann. 1105, 3 So. 344; *State v. Hendrix*, 45 La. Ann. 500, 12 So. 621; *State v. Jones*, 46 La. Ann. 545, 15 So. 402; *State v. Green*, 49 La. Ann. 60, 21 So. 124; *State v. Hollier*, 49 La. Ann. 371, 21 So. 633; *State v. Bailey*, 50 La. Ann. 533, 23 So. 603; *State v. Lajeune*, 52 La. Ann. 463, 26 So. 992; *State v. Maxey*, 107 La. 799, 32 So. 206; *State v. Callian*, 109 La. 346, 33 So. 363; *State v. Sparks*, 112 La. 418, 36 So. 479; *State v. Wilson*, 114 La. 398, 38 So. 397; *State v. Turner*, 122 La. 371, 47 46 L.R.A.(N.S.)

So. 685; *State v. Mitchell*, 127 La. 380, 53 So. 657.

Mich.—*People v. Quimby*, 134 Mich. 625, 96 N. W. 1061.

Minn.—*State v. Dumphrey*, 4 Minn. 438, Gil. 340; *State v. Barrett*, 40 Minn. 65, 41 N. W. 459; *State v. Schreiber*, 111 Minn. 138, 126 N. W. 536.

Miss.—*Newcomb v. State*, 37 Miss. 383; *Cousins v. State*, — Miss. —, 34 So. 323.

Mo.—*State v. Stumbo*, 26 Mo. 306; *State v. Ray*, 53 Mo. 345; *State v. Sayers*, 58 Mo. 585; *State v. Butler*, 67 Mo. 59; *State v. Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *State v. Willoughby*, 76 Mo. 215; *State v. Emory*, 79 Mo. 461; *State v. Griffin*, 87 Mo. 608; *State v. Woodward*, 95 Mo. 129, 8 S. W. 220; *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Campbell*, 115 Mo. 391, 22 S. W. 367; *State v. Myers*, 115 Mo. 394, 22 S. W. 382; *State v. Beard*, 126 Mo. 548, 29 S. W. 592; *State v. Johnson*, 139 Mo. 197, 40 S. W. 767; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Allen*, 171 Mo. 562, 71 S. W. 1000; *State v. Bates*, 182 Mo. 70, 81 S. W. 408; *State v. King*, 194 Mo. 474, 92 S. W. 670; *State v. Redemeier*, 8 Mo. App. 1; *State v. Keith*, 53 Mo. App. 383; *State v. Thurman*, 121 Mo. App. 374, 98 S. W. 819.

Mont.—*Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293; *Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038; *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006.

Neb.—*St. Louis v. State*, 8 Neb. 405, 1 N. W. 371; *Turley v. State*, 74 Neb. 471, 104 N. W. 934; *Hamblin v. State*, 81 Neb. 148, 115 N. W. 850, 16 Ann. Cas. 569.

N. M.—*Territory v. Yarberry*, 2 N. M. 391.

N. Y.—*Williams v. People*, 45 Barb. 201; *People v. Hovey*, 30 Hun, 354.

N. C.—*State v. Starnes*, 97 N. C. 423, 2 S. E. 447; *State v. Lilliston*, 141 N. C. 857, 115 Am. St. Rep. 705, 54 S. E. 427.

N. D.—*State v. Brandner*, 21 N. D. 310, 130 N. W. 941.

Ohio.—*Loeffner v. State*, 10 Ohio St. 598.

Okla.—*Douthitt v. Territory*, 7 Okla. 55, 54 Pac. 312; *Harvey v. Territory*, 11 Okla. 150, 65 Pac. 837.

store I worked in. I saw John Spencer shoot Mr. Thomas. C. B. Spencer did not shoot Mr. Thomas. There was only one shot fired, and I saw John Spencer fire that. The circumstances were as follows, so far as I saw: It was about the noon hour, and I had started out the north front door of Curtis & Company to go get a sack of tobacco, and just as I got on the sidewalk (being on Commerce street) I heard a scuffling in the front part of Spencer's store across the street. I looked over there and saw Mr. Thomas scuffling with someone. This party Mr. Thomas was scuffling with was backing before Mr. Thomas caught hold of him, and, just as Mr. Thomas caught him, he backed behind the edge of the door facing from me so that I could only see

Mr. Thomas, and could not see the person he had hold of. As they backed against the wall, I heard a trace chain fall, or something that sounded like it, and just at this time, while these two men were scuffling there by the door facing, I saw John Spencer come up the south aisle of the Spencer store and shoot Mr. Thomas in the side or back with a pistol, and just then I saw C. B. Spencer come out from behind the door facing so that I then knew, and now state as a fact, that it was C. B. Spencer that Mr. Thomas was scuffling with. Mr. C. B. Spencer came instantly into my view after the shot was fired, and he did not then have any pistol in either hand, nor did I see him with one at any time. John Spencer was standing directly in front

Or.—State v. Hill, 39 Or. 90, 65 Pac. 518.
Pa.—Com. v. Hine, 213 Pa. 97, 62 Atl. 369; Com. v. Brown, 7 Kulp, 103; Com. v. Kane, 12 Phila. 630.

S. C.—State v. Jones, 49 S. C. 330, 26 S. E. 652; State v. Anderson, 85 S. C. 229, 137 Am. St. Rep. 887, 67 S. E. 237.

S. D.—State v. Raice, 24 S. D. 111, 123 N. W. 708.

Tenn.—King v. State, 91 Tenn. 617, 20 S. W. 169.

Tex.—Shaw v. State, 27 Tex. 750; Kemp v. State, 38 Tex. 110; Henderson v. State, 1 Tex. App. 432; Terry v. State, 3 Tex. App. 236; Duval v. State, 8 Tex. App. 370; Garner v. State, 34 Tex. Crim. Rep. 356, 30 S. W. 782; Granger v. State, — Tex. Crim. Rep. —, 31 S. W. 671; Washington v. State, 35 Tex. Crim. Rep. 154, 32 S. W. 693; Porter v. State, — Tex. Crim. Rep. —, 32 S. W. 605; Scruggs v. State, 35 Tex. Crim. Rep. 622, 34 S. W. 951; Little v. State, — Tex. Crim. Rep. —, 35 S. W. 659; Price v. State, 36 Tex. Crim. Rep. 403, 37 S. W. 743; Turner v. State, 37 Tex. Crim. Rep. 461, 36 S. W. 87, 40 S. W. 980; Simmacher v. State, — Tex. Crim. Rep. —, 43 S. W. 512; Adler v. State, — Tex. Crim. Rep. —, 50 S. W. 358; Gass v. State, — Tex. Crim. Rep. —, 56 S. W. 73; Johnson v. State, — Tex. Crim. Rep. —, 58 S. W. 105; Thompson v. State, 45 Tex. Crim. Rep. 244, 76 S. W. 561; Duncan v. State, — Tex. Crim. Rep. —, 77 S. W. 13; Mathews v. State, — Tex. Crim. Rep. —, 77 S. W. 218; Hanna v. State, 48 Tex. Crim. Rep. 269, 87 S. W. 702; Taylor v. State, — Tex. Crim. Rep. —, 87 S. W. 1039; Owens v. State, — Tex. Crim. Rep. —, 89 S. W. 837; Goen v. State, — Tex. Crim. Rep. —, 101 S. W. 232; Coffman v. State, 51 Tex. Crim. Rep. 478, 103 S. W. 1128; Harrolson v. State, 54 Tex. Crim. Rep. 452, 113 S. W. 544; Roberts v. State, 57 Tex. Crim. Rep. 199, 122 S. W. 388; Reagan v. State, 57 Tex. Crim. Rep. 642, 124 S. W. 685; Garza v. State, — Tex. Crim. Rep. —, 145 S. W. 590; Hogan v. State, — Tex. Crim. Rep. —, 147 S. W. 871.

Utah.—United States v. Eldredge, 5 Utah, 161, 13 Pac. 673; People v. Peacock, 5 Utah, 237, 14 Pac. 332; State v. Molitz, — Utah, 46 L.R.A. (N.S.)

—, 122 Pac. 86; State v. Moore, — Utah, —, 126 Pac. 322.

Vt.—May v. State, 77 Vt. 330, 60 Atl. 1.

Va.—Baccigalupo v. Com. 33 Grat. 807, 36 Am. Rep. 795; Allen v. Com. — Va. —, 77 S. E. 66.

Wash.—State v. Hunter, 18 Wash. 670, 52 Pac. 247; State v. Underwood, 35 Wash. 558, 77 Pac. 863; State v. Bridgham, 51 Wash. 18, 97 Pac. 1096; State v. Beeman, 51 Wash. 557, 99 Pac. 756.

W. Va.—Bales v. State, 3 W. Va. 685.

Wyo.—Paseo v. State, 19 Wyo. 344, 117 Pac. 862.

Fed.—Daniels v. United States, 116 C. C. A. 233, 196 Fed. 459.

Can.—Reg. v. Mellroy, 15 U. C. C. P. 116.

If the newly discovered evidence is cumulative of testimony offered at the trial, on the question of new trial it seems to be immaterial whether such testimony was that of a witness on behalf of the prosecution, or of the defense. People v. Brewer, 19 Cal. App. 742, 127 Pac. 808; State v. Larrimore, 20 Mo. 425; State v. Ray, 53 Mo. 345; State v. Montgomery, 37 Utah, 515, 109 Pac. 315.

The rule that newly discovered evidence which is merely cumulative will not constitute a good cause for a new trial is applicable to a case where the evidence on the trial was exclusively the evidence of a party to the suit. Winsett v. State, 57 Ind. 26.

A case where the evidence given upon the trial has been elicited from the party accused as a witness in his own behalf forms no exception to the statutory rule that a new trial cannot be granted for newly discovered evidence which is cumulative. People v. Leighton, 1 N. Y. Crim. Rep. 468.

And the discovery of evidence which is simply cumulative of that of the existence of which defendant knew when the case was tried, and which he might then have introduced, is not ground for a new trial. Jinks v. State, 117 Ga. 714, 44 S. E. 814.

The rule in its qualified form is stated in or supported by the following decisions:

Ark.—White v. State, 17 Ark. 404.

Cal.—People v. Burdick, — Cal. —, 29 Pac. 245; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Benc, 130 Cal. 159,

of the door, and about 4 or 5 feet back from it, at the corner of the show case by the south aisle, when he shot Mr. Thomas. When the shot was fired Thomas dropped to his knees or entirely to the floor,—he fell. But I cannot definitely say whether it was just to his knees, his all fours, or entirely down, as I turned abruptly and went immediately back in the Curtis & Company store. As I went in I met Gilbert O. Burgess coming to the front door, and he turned and went back with me. We then looked through the glass door, and I saw Mr. Thomas. He was then standing up again, and he seemed to be leaning on C. B. Spencer, or Mr. C. B. Spencer was trying to hold him up, but he gradually sank to the floor. I knew both of the Spencers well by

sight, and came in daily contact with them. I cannot be mistaken when I say it was John Spencer, and not C. B. Spencer, that shot Mr. Thomas. John Spencer was standing in front of the door back only a few feet from it, and in plain view of me, when he fired the shot. He was about 70 feet from me. I have never told anyone what I saw or knew about this matter, except Mr. Gilbert Burgess and Mr. D. W. Stallworth, of Marlin; nor have I told or intimated to anyone else that I knew anything at all about the killing of Mr. Thomas. I have never told Mr. C. B. Spencer, or any of his attorneys or family or anyone else, about my knowing anything of this matter, and he had no reason for suspecting that I knew of it that I know or can think of

62 Pac. 404; *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *People v. Lapique*, 136 Cal. 503, 69 Pac. 226, 15 Am. Crim. Rep. 512; *People v. Singh*, 11 Cal. App. 427, 105 Pac. 423; *People v. Maruyama*, 19 Cal. App. 290, 125 Pac. 924.

Conn.—*Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 660.

Fla.—*Howard v. State*, 36 Fla. 21, 17 So. 84.

Ga.—*McAfee v. State*, 31 Ga. 411; *Thompson v. State*, 60 Ga. 619; *Hill v. State*, 64 Ga. 453; *Dale v. State*, 98 Ga. 552, 15 S. E. 287; *Cooper v. State*, 91 Ga. 362, 18 S. E. 303; *Milam v. State*, 108 Ga. 29, 33 S. E. 818; *Windom v. State*, 114 Ga. 36, 39 S. E. 949; *Bickers v. State*, 120 Ga. 172, 47 S. E. 515; *Drane v. State*, 130 Ga. 349, 60 S. E. 863; *Speer v. State*, 136 Ga. 67, 70 S. E. 797; *Walker v. State*, 137 Ga. 398, 75 S. E. 368; *Mitchell v. State*, 138 Ga. 21, 74 S. E. 690; *Johnson v. State*, 138 Ga. 265, 75 S. E. 135; *Daniel v. State*, 6 Ga. App. 164, 64 S. E. 574; *Mitchell v. State*, 6 Ga. App. 554, 65 S. E. 326; *Green v. State*, 6 Ga. App. 784, 65 S. E. 802; *Dougherty v. State*, 7 Ga. App. 91, 66 S. E. 276; *Clark v. State*, 7 Ga. App. 609, 67 S. E. 697; *Hunt v. State*, 8 Ga. App. 374, 69 S. E. 42; *Prator v. State*, 8 Ga. App. 436, 60 S. E. 496; *Benton v. State*, 9 Ga. App. 291, 71 S. E. 8; *Kirk v. State*, 9 Ga. App. 829, 72 S. E. 282, on rehearing 10 Ga. App. 450, 73 S. E. 623; *Moore v. State*, 11 Ga. App. 259, 74 S. E. 1102.

Ill.—*Adams v. People*, 47 Ill. 376; *Bowers v. People*, 74 Ill. 418; *Dyer v. People*, 84 Ill. 624; *Bulliner v. State*, 95 Ill. 394; *Sahlinger v. People*, 102 Ill. 241; *Collins v. People*, 103 Ill. 21; *Leigh v. People*, 113 Ill. 372; *Klein v. People*, 113 Ill. 596; *Spahn v. People*, 137 Ill. 538, 27 N. E. 638; *Lilly v. People*, 148 Ill. 467, 36 N. E. 95; *Williams v. People*, 164 Ill. 481, 45 N. E. 937; *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385; *Henry v. People*, 198 Ill. 162, 65 N. E. 120; *Harter v. People*, 204 Ill. 153, 68 N. E. 447; *Graff v. People*, 208 Ill. 312, 70 N. E. 299, affirming 108 Ill. App. 168; *Martinatis v. People*, 223 Ill. 117, 79 N. E. 55; *People v. White*, 251 Ill. 67, 95 N. E. 1036; *Scharf v. People*, 34 Ill. App. 400, appeal dis-
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missed without considering this point in 134 Ill. 240, 24 N. E. 761; *People v. Barton*, 147 Ill. App. 185.

Ind.—*Sutherland v. State*, 108 Ind. 389, 9 N. E. 208; *Barnett v. State*, 141 Ind. 149, 40 N. E. 666; *Smith v. State*, 143 Ind. 685, 42 N. E. 913; *Williams v. State*, 170 Ind. 630, 85 N. E. 113; *Straub v. State*, — Ind. —, 100 N. E. 754; *Eddingfield v. State*, 12 Ind. App. 312, 39 N. E. 1057.

Iowa.—*State v. Nadal*, 69 Iowa, 478, 29 N. W. 451; *State v. Lowell*, 123 Iowa, 427, 99 N. W. 125.

Kan.—*State v. McCool*, 34 Kan. 613, 9 Pac. 618, 745; *State v. Tyson*, 56 Kan. 686, 44 Pac. 609.

Ky.—*Harp v. Com.* — Ky. —, 119 S. W. 1191; *Fittrell v. Com.* 141 Ky. 310, 132 S. W. 555; *Carnes v. Com.* 146 Ky. 425, 142 S. W. 723; *Traynor v. Com.* 149 Ky. 462, 149 S. W. 904; *May v. Com.* 153 Ky. 141, 154 S. W. 1074.

La.—*State v. Alvarez*, 7 La. Ann. 283; *State v. Lamothe*, 37 La. Ann. 43; *State v. Albert*, 109 La. 201, 33 So. 196; *State v. Ferguson*, 114 La. 70, 38 So. 23; *State v. Sims*, 117 La. 1036, 42 So. 494.

Mich.—*People v. Vanderpool*, 1 Mich. N. P. 157.

Minn.—*State v. Nelson*, 91 Minn. 143, 97 N. W. 652.

Mo.—*State v. Larimore*, 20 Mo. 425; *State v. Bybee*, 149 Mo. 632, 51 S. W. 470; *State v. Carpenter*, 182 Mo. 53, 81 S. W. 410; *State v. Church*, 199 Mo. 605, 98 S. W. 16; *State v. Estes*, 209 Mo. 288, 107 S. W. 1059; *State v. Keener*, 225 Mo. 488, 125 S. W. 747; *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555.

Mont.—*State v. Hardee*, 28 Mont. 18, 72 Pac. 39; *State v. Matkins*, 45 Mont. 58, 121 Pac. 881.

Neb.—*Casey v. State*, 20 Neb. 138, 29 N. W. 264.

N. D.—*State v. Reilly*, — N. D. —, 141 N. W. 720.

Ohio.—*Searles v. State*, 6 Ohio C. C. 331, 3 Ohio C. D. 478.

Okla.—*Smiley v. Territory*, 15 Okla. 314, 81 Pac. 433; *Hurst v. Territory*, 16 Okla. 600, 86 Pac. 280; *Martin v. Territory*, 19 Okla. 370, 90 Pac. 13; *Byers v. Territory*, 1

My reason for not wanting anyone to know that I knew the facts I have stated above, and on the opposite side of this sheet of paper, is the condition of my health at that time. I had gone to Texas and to Marlin for lung trouble, and my doctor, Dr. Allen, of Marlin, had told me that I had a cavity in each lung, and had advised me against any excitement whatever, and I very much feared any excitement whatever. What did happen and my seeing it put me to bed for several hours. I regarded my condition there at that time as serious. Later I went to Dr. Torbett, of Marlin, and in July of that year he advised me to go to San Marcos, Texas, on account of my lung trouble. I left Marlin in July, 1909, and have never been back

since. I went from there to San Marcos, Texas, where I remained eleven months, and then came direct to my old home at Laddonia, Missouri, where I now live. My health is now much improved, and I believe I have almost, if not entirely, recovered from my lung trouble, but otherwise my health is not very good at this particular time. If this case is ever tried again in the trial court, it is my intention to be present and give my testimony in this case, and I would have given both sides the benefit of what I know before this, but for the reasons above stated. I am thirty-three years old, have been married fourteen years, and have three children. I have no special interest in this matter, and only a speaking acquaintance with C. B. Spencer. I have

Okl. Crim. Rep. 677, 100 Pac. 261, rehearing denied without discussing the point in 1 Okla. Crim. Rep. 698, 103 Pac. 532.

Pa.—Com. v. Moss, 6 Kulp, 31; Com. v. Yot Sing, 7 Kulp, 349.

R. I.—State v. Buchanan, 32 R. I. 490, 79 Atl. 1114.

S. C.—State v. Bradford, 87 S. C. 546, 70 S. E. 308.

S. D.—State v. Coleman, 17 S. D. 594, 98 N. W. 175; State v. Laper, 26 S. D. 151, 128 N. W. 476.

Tex.—Johnson v. State, 2 Tex. App. 456; White v. State, 10 Tex. App. 167; Tyler v. State, 13 Tex. App. 205; Langham v. State, 26 Tex. App. 533, 10 S. W. 113; Rodgers v. State, — Tex. Crim. Rep. —, 20 S. W. 709; Screws v. State, — Tex. Crim. Rep. —, 23 S. W. 796; Hickman v. State, — Tex. Crim. Rep. —, 25 S. W. 126; Sebastian v. State, — Tex. Crim. Rep. —, 39 S. W. 680; Austin v. State, — Tex. Crim. Rep. —, 47 S. W. 371; Whitfield v. State, 40 Tex. Crim. Rep. 14, 48 S. W. 173; Dansby v. State, — Tex. Crim. Rep. —, 53 S. W. 105; Johnson v. State, — Tex. Crim. Rep. —, 58 S. W. 105; Castillo v. State, — Tex. Crim. Rep. —, 69 S. W. 517; Walters v. State, — Tex. Crim. Rep. —, 79 S. W. 539; Anderson v. State, — Tex. Crim. Rep. —, 100 S. W. 153; O'Hara v. State, 57 Tex. Crim. Rep. 577, 124 S. W. 95.

Utah.—State v. Haworth, 26 Utah, 310, 13 Pac. 413; State v. Montgomery, 37 Utah, 515, 109 Pac. 815.

Va.—Thompson v. Com. 8 Gratt. 637; Read v. Com. 22 Gratt. 924; Bond v. Com. 83 Va. 581, 3 S. E. 149.

Wash.—State v. Stowe, 3 Wash. 206, 14 L.R.A. 609, 28 Pac. 337; State v. Townsend, 7 Wash. 462, 35 Pac. 367.

In some cases the qualification of the rule takes the form of the statement that a court will not refuse to grant a new trial for newly discovered evidence for the reason that it is cumulative merely, if it is sufficient to render clear that which was before a doubtful case. See Adams v. State, 55 Fla. 1, 46 So. 152; Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669; People v. Vanderpool, 1 Mich. N. P. 157; Casey v. State, 46 L.R.A. (N.S.)

20 Neb. 138, 29 N. W. 264; State v. Reilly, — N. D. —, 141 N. W. 720.

Though it be the rule that a new trial will not be granted in order to permit the introduction of evidence merely cumulative, the rule is not inflexible. The cumulative evidence, however, should be such as to impress the trial judge that, if added to the other evidence of the case, it would be likely to turn the scales in favor of the accused. State v. Albert, 109 La. 201, 33 So. 196; State v. Ferguson, 114 La. 70, 38 So. 23.

In Dougherty v. State, 7 Ga. App. 91, 66 S. E. 276, the court said: "As a general rule, a new trial will not be granted on account of the discovery of facts and circumstances merely cumulative in their character; but, of course, this rule must be taken in its proper sense, and is not to be understood as precluding a new trial in every case where newly discovered testimony relates to a point contested on a former trial. Where the testimony on the trial was purely circumstantial, and the newly discovered testimony is of a direct and positive kind, from a creditable witness, proving the essential fact in controversy, it would seem that the rule should not be strictly applied. There is a tendency to discredit circumstantial evidence, or at least to attach much less weight to that character of evidence than to positive and direct testimony; and it must be conceded that almost universally evidence of the latter character is given much more weight than evidence of the former character. Evidence, therefore, which is positive and direct as to the existence of a material fact, is not in a strict sense cumulative of circumstantial evidence tending to show the existence of the same fact; for cumulative evidence is additional evidence to support the same point, and must be of the same quality or description as the evidence already produced. Evidence which merely tends to corroborate or strengthen evidence already introduced is cumulative, but evidence which removes all doubt upon a material point which was before doubtful is not in

never been convicted of or charged with a felony or any other offense, and no fact exists that would render me incompetent as a witness. I am well known by the business people of Marlin, Texas. I am a member of the Christian church. I have never seen anyone from Marlin since I left there except Mr. Gilbert Burgess. As I recollect it, this shooting occurred in February, 1909. Signed and sworn to this June 19th, 1912.

Floyd P. Smith.

Signed and sworn to before me by Floyd P. Smith, who is personally known to me, this June 19th, 1912.

W. H. Logan, Notary Public,
[Seal.] Audrain County, Missouri.
My commission expires June 24, 1914.

a legal sense cumulative, and such evidence will warrant the grant of another trial, as it shows that injustice has apparently been done, and that on another trial a different result will probably follow. Even merely cumulative evidence, if it has the effect to render clear and positive that which was before equivocal and uncertain, might justify a new trial."

In *Holton v. State*, 9 Ga. App. 414, 71 S. E. 599, it was said: "The rule is well established—indeed, it is the language of the statute of this state—that new trials should not be granted for evidence merely cumulative in character. The adverb 'merely' in the statute and in the decisions, as qualifying the character of the evidence, is significant. We apprehend that, if the newly discovered testimony as to some facts was that of a witness who was entitled to credit as against the testimony to the same point given by witnesses on the trial who were not entitled to credit, or who have been impeached, the testimony would not be merely cumulative, for the additional fact of the character of the newly discovered witness would take it out of that category, at least to some extent; and it is easy to imagine cases in which a fact, although testified to by many witnesses on the previous trial, while not believed because of the character of the witnesses who testified to its existence, yet might be believed without hesitation, if, on a second trial, it was testified to by only one witness of unquestioned and unimpeached veracity."

The doctrine of the preceding cases is exemplified by *State v. Townsend*, 7 Wash. 462, 35 Pac. 367. At the trial the defendant had been unable to secure any witnesses except Indians, but since the trial he had discovered evidence in the shape of testimony of a reputable white man. On account of the probability that a jury would give more credit to the white man than to the Indians, and so bring about a change in the verdict, a new trial was granted.

The case of *People v. Lapique*, 136 Cal. 503, 69 Pac. 226, 15 Am. Crim. Rep. 512, is very similar. The only witness for the defense, besides the defendant, was not able to testify positively, but the newly dis-

covered evidence was to the same point and positive, leaving no room for doubt, and so making it probable that a different verdict would result, should an opportunity be given to submit it to a jury. The court reversed its former decision reported in 67 Pac. 14, in which it had upheld the action of the lower court in overruling the motion for a new trial.

By the testimony of a number of witnesses, Mr. Smith is shown to be a credible man, whose general reputation is good for truth and veracity. Appellant testifies as to the diligence used to discover all persons who knew anything about the difficulty at the time and before the trial of his case, and we think it such that any ordinary person would use, and he cannot be held not to have used proper diligence in discovering sooner that Mr. Smith was a witness in his case. However, the state contends that, even if appellant is not lacking in diligence, the testimony is but cumulative of that of John Spencer, and for this reason the court did not err in refusing to grant a new trial. This is the general rule of law, as has frequently been announced by

covered evidence was to the same point and positive, leaving no room for doubt, and so making it probable that a different verdict would result, should an opportunity be given to submit it to a jury. The court reversed its former decision reported in 67 Pac. 14, in which it had upheld the action of the lower court in overruling the motion for a new trial.

In *Cooper v. State*, 91 Ga. 362, 18 S. E. 303, it was held that, while authorities to the contrary are numerous, newly discovered evidence relating to specific facts touching which there was no evidence at the trial, but which has no value except as tending to prove and establish the same identical defense which the accused set up at the trial, and touching which he not only adduced some evidence, but enough to clear him if the jury had given it credit, should not be treated as merely cumulative, within the meaning of the rule that a new trial will not be granted for newly discovered evidence which is merely cumulative.

It cannot be objected to granting a motion for a new trial on the ground of newly discovered evidence, that such evidence is cumulative, if it is of a different kind or character from that adduced on the trial. *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80.

Newly discovered cumulative evidence will not be a ground for new trial, where it is of such a nature that its truth may be conceded without justifying acquittal in the face of other evidence. *People v. Maruyama*, 10 Cal. App. 290, 125 Pac. 924; *Hill v. State*, 64 Ga. 453; *Dyer v. People*, 84 Ill. 624; *People v. White*, 251 Ill. 67, 95 N. E. 1036; *Reg. v. McIlroy*, 15 U. C. C. P. 116.

In New York, Georgia, and doubtless in other states, the requirements which newly discovered evidence must meet in order to be ground for a new trial are prescribed by statute, the requirement that it be not cumulative being one of the number. Under such a statute, the courts have no power to grant new trials for cumulative evidence. *People v. Shea*, 16 Misc. Rep. 111, 38 N. Y. Supp. 821; *People v. O'Connor*, 37 Misc. 754, 16 N. Y. Crim. Rep. 445, 76 N. Y. Supp. 511, subsequent appeal in which the

this court. The appellant contends that it is not "cumulative only," and enters into a lengthy discussion of what is "only cumulative testimony." The distinction he attempts, and the decisions he cites, we do not deem it necessary to notice under the disposition we make of this case.

There can be no question, under the evidence in this case, that, if John Spencer in fact fired the shot, appellant is not guilty of the homicide, either as a principal, accomplice, or accessory. In other words, if the shot was fired by John Spencer, an innocent man has been sentenced to the penitentiary. The evidence, without the testimony of Floyd P. Smith, renders it extremely doubtful as to which one, appellant or John Spencer did the shooting; and while the

testimony would justify the jury in finding as they did on this contested issue, it would also have supported a finding that John Spencer did the shooting. The record being in this condition, can any man say what would have been their finding if Mr. Smith, a reputable citizen, had supported the testimony of John Spencer by testifying that he saw John Spencer fire the shot? We all know how prone human nature, men who compose the juries of the country, as well as the balance of mankind, is to fail to give to the evidence of a brother of one on trial charged with a penitentiary offense, that credence that would be given to his testimony under different circumstances. The testimony of a relative of one on trial is seldom given that weight that is given

question here presented was not considered, 82 App. Div. 55, 81 N. Y. Supp. 555; *People v. Bonifacio*, 119 App. Div. 719, 104 N. Y. Supp. 181, affirmed, but without mention of the point under consideration; in 100 N. Y. 150, 32 N. E. 1098; *People v. Way*, 54 Misc. 488, 106 N. Y. Supp. 52; *People v. Jones*, 115 N. Y. Supp. 800; *People v. Leighton*, 1 N. Y. Crim. Rep. 468.

In *People v. O'Connor*, 37 Misc. 754, 16 N. Y. Crim. Rep. 445, 76 N. Y. Supp. 511, it was held that, although in civil cases it is a settled rule that newly discovered evidence which is cumulative does not necessarily afford ground for denying the motion for a new trial, the existence of a statute stating the grounds upon which a new trial may be granted in criminal cases, which provides that a new trial may be granted where it is made to appear by affidavit that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict, if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence,—precludes the court from granting a new trial for newly discovered evidence which is cumulative.

Where no statute authorizes the granting of new trials in criminal cases on account of newly discovered evidence, the rule against newly discovered cumulative evidence is unnecessary. *State v. Bourman*, 45 Iowa, 418; *State v. Whitmer*, 77 Iowa, 557, 42 N. W. 442; *State v. Watson*, 81 Iowa, 380, 46 N. W. 808. *State v. Potts*, 83 Iowa, 317, 49 N. W. 845.

Cumulative evidence defined.

For a complete collection of definitions of cumulative evidence, resort must be had to civil as well as to the criminal cases. Those which follow have been gleaned from the decisions falling within the scope of this note.

Cumulative evidence is additional evidence of the same kind to the same point. *May v. State*, 77 Vt. 330, 60 Atl. 1.

Cumulative evidence is of the same im-

port, of the same kind, and to the same point, as that produced on the trial. *State v. Ray*, 53 Mo. 345.

Evidence is cumulative which only multiplies witnesses as to one or more facts already investigated, or only adds other circumstances of the same general character. *Harrolson v. State*, 54 Tex. Crim. Rep. 452, 113 S. W. 544.

Cumulative evidence is additional evidence offered to establish a fact to which witnesses have already testified. It does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact. *Dale v. State*, 88 Ga. 552, 15 S. E. 287.

Evidence is cumulative when it is of the same nature as that previously produced to establish the same fact or facts. *People v. Leighton*, 1 N. Y. Crim. Rep. 468.

Evidence of a different fact with the same logical bearing cannot be considered as cumulative. *People v. Vanderpool*, 1 Mich. N. P. 157.

Though newly discovered evidence may tend to establish the truth of a material contention in direct support of which testimony was introduced at the trial, such evidence is not merely cumulative when it relates to a particular fact concerning which no witness has already testified. *Fellows v. State*, 114 Ga. 233, 39 S. E. 885.

II. Circumstances under which cumulative evidence has or has not been held to render a different outcome probable.

In view of the qualification of the general rule above noted, the question under what circumstances cumulative evidence has been regarded as rendering a different result probable is one of considerable interest. The attempt has therefore been made, where the facts of the cases have been reported with sufficient fulness to enable this to be done, to group the decisions, both those denying and those granting new trials, under headings which will suggest the character of the evidence, or of the issue to which it relates. In many of the cases above cited, the nature of the cumulative evidence

to one wholly disinterested, even though they may be men of equal standing and reputation in the community. We all feel and believe that the ties of blood, of brotherhood, will have its weight with a witness; and the law recognizes this by admitting evidence of that fact to show interest, bias, etc. As said in some of the opinions, the reason for the rule forbidding a new trial for the purpose of admitting cumulative testimony is that public policy, looking to the finality of trials, requires that a defendant be held to diligence in preparing their cases for trial; but this policy, which seeks to limit continued litigation, should never be applied where the newly discovered testimony may be of that cogency and force where it might probably show that an inno-

cent man may probably be caused to suffer for a crime he did not commit. Courts are organized, and the object of the law is, that the true facts may be arrived at and justice administered; and where the evidence is about upon an equipoise as to whether a man committed an offense or not, if there is really newly discovered testimony coming from a credible source, this rule will be held in subordination to the great end to be obtained,—that is, meting out justice to each individual citizen. As illustrative of this rule, two men may be charged with crime, and, under such circumstances, neither can be a witness for the other; but if one is first tried and convicted, and then the other tried and acquitted, our courts have always held that a

is either not stated at all, or is mentioned so briefly as to render the case of no particular interest save for its relation to the general rule.

Evidence contradicting or impeaching witness for prosecution.

In *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80, the defendant testified to facts which tended to show that he shot in self-defense. This testimony was contradicted by the only eyewitness which the prosecution had; but after the trial the defense discovered his affidavit which he had made in expectation of death, in which his statements corroborated those of the defendant. While conceding this to be cumulative, the court was of the opinion that it was a proper case to make an exception and grant a new trial.

As the result of a conflict of the testimony of the prosecuting witness and the defendant, the issue arose as to the authority of the latter to sign the name of the former, in *People v. Lapique*, 136 Cal. 503, 69 Pac. 226, 15 Am. Crim. Rep. 512. The only other witness for the defense testified to a prior inconsistent statement of the prosecuting witness on this point, but was not able to do so positively. The newly discovered evidence was positive as to such a statement, and for that reason a new trial was granted, although the evidence was conceded to be cumulative.

In *Com. v. Yot Sing*, 7 Kulp, 349, it was held that evidence of an admission by the prosecuting witness made since the trial, that the watch of which he claimed to have been robbed was in the possession of his brother, was not merely cumulative, since, in view of the strong evidence of an alibi produced by the defendant, it would probably produce a different result on a new trial.

Newly discovered evidence has been held merely cumulative and insufficient ground for new trial,

—where the reputation of a witness for the prosecution has been attacked on trial, and the newly discovered evidence is introduced for the same purpose. *May v. Com.* 153 Ky. 141, 154 S. W. 1074; *State v. Fahey*, 46 L.R.A. (N.S.)

35 La. Ann. 9; *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555;

—where both it and the testimony on the trial tended to prove a prior statement of a witness for the prosecution, which was inconsistent with his testimony. *Long v. State*, 42 Fla. 612, 28 So. 855; *Sweat v. State*, 90 Ga. 315, 17 S. E. 273; *Walker v. State*, 97 Ga. 197, 22 S. E. 401; *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385; *Harper v. State*, 101 Ind. 109; *State v. Dumphrey*, 4 Minn. 438, Gil. 340; *State v. Starnes*, 97 N. C. 423, 2 S. E. 447 (this was motion for new trial after appeal in 94 N. C. 973, was refused); *Rodgers v. State*, — Tex. Crim. Rep. —, 20 S. W. 709; *Granger v. State*, — Tex. Crim. Rep. —, 31 S. W. 671; *Daniels v. United States*, 116 C. C. A. 233, 196 Fed. 459;

—where a prior statement of a witness for the prosecution inconsistent with his testimony had been in evidence, and the newly discovered evidence consisted of a similar statement made by the same witness after trial. *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096; *State v. Potter*, 108 Mo. 424, 22 S. W. 89;

—where it consisted of the affidavit of a witness for the prosecution that his testimony was incorrect, and his corrected statement was similar to testimony offered by the defense at the trial. *Osborne v. State*, 96 Ark. 400, 132 S. W. 210; *State v. Wilson*, 114 La. 398, 38 So. 397; *Harter v. People*, 204 Ill. 158, 68 N. E. 447;

—where it consisted of the affidavit of a witness for the defense, that he became confused and gave incorrect testimony which was damaging to the defendant, if his corrected statement was similar to testimony offered by the defense at the trial. *People v. Von Perhacs*, — Cal. App. —, 127 Pac. 1048;

—where it was offered for the purpose of contradicting the testimony of certain witnesses for the prosecution on a point on which evidence of the same nature was introduced at the trial. *Adams v. State*, 100 Ark. 203, 139 S. W. 1116; *People v. Louis Tung*, 90 Cal. 377, 27 Pac. 295; *Porter v. State*, 2 Ind. 435; *Sutherland v. State*, 108 Ind. 389, 9 N. E. 298; *Meurer v. State*, 129

new trial will be granted if, in a motion for new trial, he swears that the testimony of this witness is material to his defense, and the witness attaches his affidavit, swearing to facts that are material to the defense, even though it should be held to be in some sense cumulative; the reason being that no amount of diligence could sooner have obtained this testimony.

And in this case it is disclosed that the witness wilfully withheld from the knowledge of this defendant the facts he would testify to, until discovered by accident by the foreman of the jury who had convicted him. While the testimony of Mr. Smith, as shown by the affidavit, may be said to be cumulative of the testimony of John Spencer, yet in it are stated some other

facts and circumstances not testified to by John Spencer, but corroborative of the theory of the appellant in this case that he was attacked by deceased and retreated. Looking at the relative size and strength of the parties, as shown by the record, Thomas, deceased, being a powerful man, weighing from 190 to 200 pounds, much heavier and stronger than appellant, as the court submitted the issue of self-defense as to appellant, this testimony might have great weight. Viewing the record as a whole, we do not think this alleged newly discovered testimony can be said to be only cumulative in the legal sense of those words; but, if it should be so held, then this case presents one of those rare instances where the evidence adduced on the

Ind. 587, 29 N. E. 392; Todd v. Com. 29 Ky. L. Rep. 473, 93 S. W. 631; State v. Mitchell, 127 La. 380, 53 So. 657; State v. Barretti, 40 Minn. 65, 41 N. W. 459; State v. King, 194 Mo. 474, 92 S. W. 670; State v. Estes, 209 Mo. 288, 107 S. W. 1059; Austin v. State, — Tex. Crim. Rep. —, 47 S. W. 371; Roberts v. State, 57 Tex. Crim. Rep. 199, 122 S. W. 388;

—where it was as to the impossibility of a person's hand being introduced through a certain space, as was testified by the prosecuting witness. Cuellar v. State, — Tex. Crim. Rep. —, 154 S. W. 228;

—where a witness for the prosecution had testified to the presence of a particular person at the commission of the alleged crime, and the new evidence consisted of the denial by that person of his presence there, although the only impeachment of such testimony on the trial was the denial by the defendant of committing the crime. Winsett v. State, 57 Ind. 26; State v. Rohrer, 34 Kan. 427, 8 Pac. 718;

—where the new evidence was of a person in whose presence a witness had testified that an offer to bribe was made, that he was not acquainted with the witness and that the conversation testified to never took place. State v. Myers, 115 Mo. 394, 22 S. W. 382;

—in general, where it was impeaching, and added nothing to the evidence offered by the defense on trial. Flanagan v. State, 64 Ga. 52; Callahan v. State, 75 Ga. 887; Isham v. State, 112 Ga. 406, 37 S. E. 735; State v. Johnson, 139 Mo. 197, 40 S. W. 767; Paseo v. State, 19 Wyo. 344, 117 Pac. 862.

Where a witness for the state, upon the trial of one accused of having poisoned his wife, testified that on the afternoon of the day preceding her death the wife requested the accused to give her some medicine, whereupon he stepped to a sewing machine standing in an adjoining room, picked up a glass of water and a spoon, and gave his wife a powder, at the same time giving witness to understand that it was magnesia, and in his testimony the accused, while admitting the giving of the powder, declared that he did not get it from the sewing machine, but

from a paper of magnesia standing on the shelf in the kitchen, it was held that the evidence of a witness that, at the time in question, she was at work in the kitchen and that the accused went to the kitchen cupboard and filled a spoon from a paper of magnesia which she had noticed standing on the shelf for several days, was cumulative only, and that its production could not possibly change the result. St. Louis v. State, 8 Neb. 405, 1 N. W. 371.

Eyewitness.

In Adams v. State, 55 Fla. 1, 46 So. 152, the defendant was indicted for murder. He was the only eyewitness to the transaction who testified at the trial, his testimony being to the effect that upon stepping out of a house he found the deceased pointing a gun at him, that he called to him, and then shot. The newly discovered evidence was the testimony of another eyewitness, and, although it merely set out the same facts testified to by the defendant, and was therefore cumulative, a new trial was granted.

In Holton v. State, 9 Ga. App. 414, 71 S. E. 599, the homicide in question took place under the following circumstances: Deceased and the accused had had a dispute over a game, which proceeded to a point where weapons were produced, after which the accused withdrew, and was absent about thirty-five or forty minutes. On returning, he immediately referred to the quarrel and intimated to the deceased that he would not repeat outside of the shop what he had said, and invited him to go outside in the rear of the shop. The deceased accepted the invitation. The accused held the back door open for him to pass out, and they both went outside, where their voices were again heard in dispute, followed by shots. The deceased, upon being shot, turned and endeavored to retrace his steps, and fell dead; and the accused ran away. Upon the trial the theory accepted by the jury was that the parties had engaged in mutual combat; but, according to the statement of the accused, corroborated by two negro witnesses, one of whom was his servant, deceased was advancing on him with a knife, when he shot

trial renders it questionable as to whether appellant is guilty of any wrongdoing; and, while we would not feel authorized to disturb the verdict on account of this conflict in the testimony, yet a new trial should be granted to enable appellant to place before a jury of his countrymen this additional testimony, coming, as it does, from a credible source, before being branded as a felon. While the interests of society require that those who violate the law shall be punished and restrained, yet the state desires no innocent man to suffer, and a greater crime is committed against society when a person guilty of no offense is wrongfully made to wear prison stripes than when one guilty is permitted to escape. Our law is that, so long as there is a reasonable doubt of one's guilt, he is entitled to that doubt; and this evidence of Mr. Smith can but create a doubt in the mind of one that,

in self-defense. It was held that newly discovered testimony of two credible white witnesses that, shortly before the homicide, they went to deceased's shop, where they found him standing in the door with a pistol in his hand; that they asked him what he was doing with the pistol, and he replied that he was near killing defendant, and was sorry that he had not done it, and that if defendant ever said anything else to him about it, he would cut his throat; and testimony of one who witnessed the affray from a store near by, his account corresponding with that of the defendant, although in a sense cumulative, would under the circumstances require the granting of a new trial.

In *Green v. State*, 6 Ga. App. 784, 65 S. E. 802, where the fact testified to by the newly discovered witness had been insisted upon at the trial by the defendant in his statement, but he had had no witness to the fact, it was held that the character of the new witness having been duly substantiated, and there being no contrary showing, a new trial should be granted.

And see also *State v. Townsend*, 7 Wash. 463, 35 Pac. 367, where a new trial was granted for newly discovered testimony of a white eyewitness of an affray, the witnesses testifying at the trial all being Indians.

But in other cases, where the new evidence consisted of the testimony of eyewitnesses, merely cumulative to the testimony of other eyewitnesses at the trial, it has been held not sufficient ground for a new trial. *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114; *State v. Jones*, 49 S. C. 330, 26 S. E. 652; *Hogan v. State*, — Tex. Crim. Rep. —, 147 S. W. 871; *State v. Molitz*, — Utah, —, 122 Pac. 86.

Alibi.

Even the courts which have enunciated the modified rule have hesitated to grant 46 L.R.A. (N.S.)

if it had been before the jury in this case, a different result might have been obtained.

There are other questions presented in the record, but we deem it unnecessary to discuss them, except to add that, as there was no evidence that appellant and John Spencer were acting together, carrying out a common purpose in accordance with a previous understanding, the court should not have burdened that part of his charge presenting the theory as to whether or not John Spencer killed deceased, with the requirement that the jury must find that "he acted upon an independent impulse of his own." On another trial, if the evidence is the same, those words should be omitted from that paragraph of the charge.

While, under the evidence, this perhaps would not present reversible error, but, on account of the matters above pointed out, the judgment is reversed, and the cause is remanded.

new trials under it except in very forceful cases. Consequently the number of cases in that class is limited. One court, at least, has established a rule requiring the granting of new trials for the admission of cumulative evidence in all cases of a certain class. In this instance the court seems to base its rule on the ground that newly discovered evidence, although cumulative, will probably affect the verdict in cases of that kind.

Such instance is where the newly discovered evidence would tend to establish an alibi, which has been relied upon at the trial. In *State v. Stowe*, 3 Wash. 206, 14 L.R.A. 609, 28 Pac. 337, a new trial was granted to permit the introduction of testimony tending to prove an alibi. The decision was not placed on the particular facts of the case, but on the general ground that the newly discovered evidence tended to establish the alibi which the defendant had attempted to prove on trial. The court said: "But this rule governing cumulative evidence must be received with some modification, and given a common-sense construction, and, whatever may be its application to other character of testimony, we do not think it applies where the object of the evidence is to prove an alibi."

On the other hand, *Harrison v. State*, 83 Ga. 129, 9 S. E. 542, has made alibi the object of more rigid application of the rule against new trials for cumulative evidence. The court says: "The policy of the law is adverse to granting new trials on account of merely cumulative evidence, more especially where the point to which the evidence relates is the defense of alibi."

In *Fellows v. State*, 114 Ga. 233, 39 S. E. 885, where the defense was an alibi, and the accused introduced witnesses who testified that on the day of the commission of the crime they saw the accused in a county other than that in which it was perpetrated, he being on that day, according to the testimony of some of them, at one place in the

county to which their testimony related, and, according to the testimony of others of them, in other places therein, and, according to the testimony of all, too far from the scene of the offense to have been present at the time of its perpetration, newly discovered testimony of still another witness which placed the accused in the county where the other witnesses located him on the day in question, at a different hour and place from any testified to by them, to that extent was a separate and distinct alibi, though harmonizing entirely with all the evidence produced in behalf of the accused, and is not merely cumulative, though it, of course, tends, like the other testimony, to establish the alibi.

Tyler v. State, 13 Tex. App. 205, turns on the peculiar circumstances therein presented. There an application for a continuance was made to permit the introduction of further evidence to establish an alibi. This application was held properly to have been overruled because of a failure to show proper diligence; but it was further held that it was proper to take the matters therein stated into consideration in determining the motion for a new trial based upon the ground of newly discovered evidence tending to establish the alibi. The court accordingly held that although it would not say that on the ground of the newly discovered evidence only the new trial should be granted, yet taking into consideration the meagerness of the evidence upon which the conviction rested, and the absent testimony set out in defendant's application for a continuance, and the additional testimony disclosed by his application for a new trial, a new trial should have been granted.

But where the identity of the accused as the guilty party is clearly and strongly shown by both positive and circumstantial evidence of the most credible and convincing character, a new trial will not be granted on the ground of newly discovered testimony tending to establish an alibi, contained in the affidavit of a witness of doubtful character, whose statement does not exclude the possibility of the presence of the defendant at the time when and place where the crime was committed. Mitchell v. State, 6 Ga. App. 564, 65 S. E. 326.

In Teal v. State, 119 Ga. 102, 45 S. E. 964, it was held that a new trial would not be granted for newly discovered evidence of a witness that he had met accused and another on the road at a certain time and place, where such evidence was merely cumulative to the testimony of such other and the statement of the accused, and the time and place were about the same as the time when and place where the state contended the theft was committed.

Where, on the trial for an assault with intent to murder, the prosecution showed that the defendant was riding a gray horse, while the defense testified that he was riding a dark colored or dark bay horse, there was no error in refusing to grant a new trial because of newly discovered evidence that a person saw defendant riding a dark 46 L.R.A. (N.S.)

colored horse at a point 8 or 10 miles from where the shooting occurred, as such testimony was only cumulative, and not likely to produce a different result on another trial, in view of the fact that the defendant was positively identified as the man who did the shooting. Austin v. State, — Tex. Crim. Rep. —, 47 S. W. 371.

In Johnson v. State, 128 Ga. 102, 57 S. E. 353, where the newly discovered evidence tended to establish a wholly different alibi from that relied on in the trial, and was not such as to exclude the possibility of the defendant's presence at the scene of the crime at the time of its commission, it was held that the newly discovered evidence was not ground for a new trial.

Where the newly discovered witnesses in support of the defense of alibi were unable to say that they recognized the defendant as one of the occupants of a buggy met by them, although they thought that he was, but it appeared that their only reason was the fact that they thought they recognized the rig as defendant's, their evidence is not ground for a new trial. Clements v. State, 80 Neb. 313, 114 N. W. 271.

Where several witnesses had testified in support of defendant's alibi, newly discovered evidence that defendant was seen at the place where they testified having seen him, talking to a witness who had denied seeing him there, is not ground for a new trial. Whitfield v. State, 40 Tex. Crim. Rep. 14, 48 S. W. 173.

In several other cases new trials have been refused in accordance with the rule against cumulative evidence, without any distinction being made on account of the tendency of the evidence to prove an alibi. Artemus v. State, 79 Ga. 512, 4 S. E. 385; Tipton v. State, 119 Ga. 304, 46 S. E. 436, 15 Am. Crim. Rep. 209; State v. Davis, 6 Idaho, 159, 53 Pac. 678; Burns v. People, 126 Ill. 282, 18 N. E. 550; Spahn v. People, 137 Ill. 538, 27 N. E. 688; People v. Probst, 237 Ill. 390, 86 N. E. 588; State v. Nelson, 59 Kan. 776, 52 Pac. 868; State v. Travis, 39 La. Ann. 356, 1 So. 817; State v. Turner, 122 La. 371, 47 So. 685; Bean v. People, 124 Ill. 576, 16 N. E. 656; State v. Cushenberry, 157 Mo. 168, 56 S. W. 737; State v. Bates, 182 Mo. 70, 81 S. W. 408; State v. Moore, — Utah, —, 126 Pac. 322; Reg. v. McIlroy, 15 U. C. C. P. 116.

A statute prohibiting the granting of new trials in criminal cases for newly discovered evidence which is cumulative is applicable where the purpose of such evidence is to prove an alibi. People v. Way, 54 Misc. 488, 106 N. Y. Supp. 52.

Evidence that accused is not the guilty party.

In Sebastian v. State, — Tex. Crim. Rep. —, 39 S. W. 680, it was held that a defendant convicted of murder on conflicting evidence was entitled to a new trial on the ground of newly discovered evidence that witness saw the shooting, which occurred in the evening, and that it was done by an-

other than defendant, although evidence to that effect had been given at the trial.

In *Castillo v. State*, — Tex. Crim. Rep. —, 69 S. W. 517, where testimony had been given on a murder trial that a certain person was at the dance where the murder was committed, and disappeared that night, newly discovered evidence of one who stated that he was at the dance and near where the shooting occurred, that he saw such person shoot deceased and run off, and that he had never seen him since, was held to require the granting of a new trial, where of all the attendants at the dance only one witness for the state had given testimony to connect accused with the crime, and he admitted his enmity to accused, and other witnesses had testified that when the shooting occurred accused was in a drunken sleep some distance from the shooting, and was carried home that night in a drunken stupor.

In *Casey v. State*, 20 Neb. 138, 29 N. W. 264, newly discovered evidence that the killing was done by a third person was held sufficient to require the granting of a new trial, although testimony to that effect had been given at the trial.

Where, upon the trial of a bastardy proceeding, the state's witnesses testified that prosecutrix went to the defendant's house to work at a certain date, and defendant's testimony tended to show that the girl came to his place and left it at an earlier date, his purpose being to show that, according to the ordinary period of gestation, he could not have been the father of the child, and the newly discovered evidence clearly showed that the prosecutrix went to the defendant's house on the earlier date, which was finally admitted by her after hearing the testimony of the witness whose evidence was newly discovered, it was held that, though the effect of the new testimony was to fix the time when the alleged intercourse occurred, it was not of the same kind as that introduced on the original trial, and so not cumulative in character. *State v. Lowell*, 123 Iowa, 427, 99 N. W. 125.

But in *State v. Montgomery*, 37 Utah, 515, 109 Pac. 815, the court held that newly discovered evidence of a physician that a child was an eight-months child was nearly enough in accord with the testimony of the prosecutrix to the effect that conception had taken place on a date seven and one-half months prior to the birth, to make the new evidence cumulative, and to destroy its efficacy as ground for a new trial.

In *State v. Reilly*, — N. D. —, 141 N. W. 720, where, on the trial of a physician for causing the death of a woman by a criminal operation, there was evidence of declarations by the woman that she had performed the operation on herself, it was held that newly discovered evidence of another witness that the woman had made similar declarations to her, and that she had said that she had not told defendant what she had done, would not in any way have influenced the conclusion of the jury, and so was not ground for a new trial.
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In *Lawson v. Com.* 152 Ky. 113, 153 S. W. 56, two witnesses testified that the deceased had made a written statement that a certain person, not the accused, had stabbed him. The new evidence consisted of this written statement itself. It was held merely cumulative, and not sufficient ground for new trial.

In *Rawlins v. State*, 126 Ga. 96, 54 S. E. 924, it was held that where a father, his three sons, and another were indicted for murder and convicted, though all claimed to be innocent, and the judgments were affirmed on appeal, the fact that the father afterward confessed that he was guilty of sending another to murder the father of the children who were killed, but claimed that he did not authorize the killing of the children, and that his sons were not connected with the crime, but were innocent, would not require the granting of a new trial.

Where, on the trial, a witness for the defendant testified that deceased was killed by a third person, and his testimony was corroborated by others, his subsequent confession that he himself was the guilty party is cumulative, and, in view of the fact that the jury did not believe his corroborated statement on the trial, it is not probable that his uncorroborated confession would produce a different result. *People v. Shea*, 16 Misc. 111, 38 N. Y. Supp. 821.

In *State v. Thurman*, 121 Mo. App. 374, 98 S. W. 819, the new evidence was similar to testimony at the trial to the effect that the defendant did not occupy the premises where he was alleged to have sold liquor illegally. The new trial was refused, because the newly discovered evidence was cumulative only.

And in the following cases where new evidence was directed toward the defense that another than the accused committed the alleged crime, it was held to add nothing to the evidence given at the trial: *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Giles v. State*, 6 Ga. 276; *John v. State*, 33 Ga. 257; *O'Shields v. State*, 55 Ga. 696; *Sahlinger v. People*, 102 Ill. 241; *State v. Nimerick*, 74 Kan. 658, 87 Pac. 722; *Williams v. People*, 45 Barb. 201; *State v. Lilliston*, 141 N. C. 857, 115 Am. St. Rep. 705, 54 S. E. 427; *Hurst v. Territory*, 16 Okla. 600, 86 Pac. 280; *Hanna v. State*, 48 Tex. Crim. Rep. 269, 87 S. W. 702.

Time of commission of crime.

Where it is conceded that the crime, if committed by the defendant, occurred before a certain definite time, new evidence tending to prove that the crime had not been committed at that time, although cumulative of evidence at the trial, will be ground for a new trial.

In *Young v. State*, 30 Tex. App. 308, 17 S. W. 413, it was conceded that the defendant, if guilty of stealing a horse as charged, must have done so before Monday. The owner testified that he had fed the horse on Monday, and the new evidence was the testimony of two others who were pres-

ent at the time of the feeding. The court, in reversing the trial court's action in overruling the motion, made no mention of the rule against granting new trials for cumulative evidence.

In *People v. Vanderpool*, 1 Mich. N. P. 157, a new trial was granted on account of newly discovered evidence of a similar nature. The defendant was charged with committing murder between 11 and 12 o'clock in the morning. At the trial, witnesses testified to having seen the deceased about town in the afternoon of the same day. The new evidence was the testimony of others who had also seen him about town on the same afternoon, but in different places from those testified to at the trial. The court, after conceding the new evidence to be cumulative, continues: "But under this definition the rule that a new trial will not be granted on merely cumulative evidence is not of universal application. Such evidence will not be refused if it will make a doubtful case clear."

Self-defense.

In *Thompson v. State*, 60 Ga. 619, it was held that a new trial would be granted to one who had been convicted of voluntary manslaughter, where newly discovered evidence of a witness to the difficulty between accused and the deceased was to the effect that the deceased was the aggressor, and such evidence, in view of the evidence had on the former trial, might produce a different result.

See also *Holton v. State*, 9 Ga. App. 414, 71 S. E. 599, under heading "Eyewitness," supra.

In the following cases, the new evidence was held insufficient to warrant a new trial, being cumulative of evidence introduced at the trial to establish the defense of self-defense:

People v. O'Brien, 78 Cal. 41, 20 Pac. 359 (deceased attacked defendant with knife); *Howard v. State*, 36 Fla. 21, 17 S. E. 84 (assaulted party fired first); *McAfee v. State*, 31 Ga. 411 (conspiracy against defendant); *Smith v. State*, 81 Ga. 479, 8 S. E. 187 (opponent struck first); *Jefferson v. State*, 137 Ga. 382, 73 S. E. 499; *Prator v. State*, 8 Ga. App. 436, 89 S. E. 496 (assaulted party was advancing on defendant with ax); *Harp v. Com.* — Ky. —, 119 S. W. 1191 (deceased was about to strike defendant with rock, defendant having testified to that effect); *Parks v. Com.* 145 Ky. 364, 140 S. W. 544 (the newly discovered evidence that defendant did not cut when deceased made the first assault was cumulative of evidence that defendant did not cut until the second assault); *Traynor v. Com.* 149 Ky. 462, 149 S. W. 904 (evidence supporting defendant's statement that deceased knocked defendant to his knees before he shot, contradicted by witnesses for state); *Cousins v. State*, — Miss. —, 34 So. 323 (deceased was advancing with fence rail); *State v. Bybee*, 149 Mo. 632, 51 S. W. 470 (assaulted party had rock in hand); *People v. Leighton*, 1 N. Y. Crim. Rep. 468 46 L.R.A. (N.S.)

(deceased struck defendant first); *State v. Raice*, 24 S. D. 111, 123 N. W. 708 (deceased was in the act of assaulting defendant); *Hickman v. State*, — Tex. Crim. Rep. —, 25 S. W. 126 (deceased pursued defendant with knife as he retreated); *Turner v. State*, 37 Tex. Crim. Rep. 451, 36 S. W. 87, 40 S. W. 980 (that other party to affray was the aggressor); *State v. Molitz*, — Utah, —, 122 Pac. 86 (assaulted reached toward his pocket for his gun before defendant shot).

In the above cases the cumulative evidence corresponded almost exactly to the evidence on the trial. In the following cases, the newly discovered evidence is cumulative, not because the *factum probans* of the evidence on the trial and that of the affidavits are the same, but because the purpose of each is to prove the same *factum probandum*:

Evidence tending to show the animus of the deceased toward the defendant was introduced on the trial in *Park v. State*, 126 Ga. 575, 55 S. E. 489, and *People v. Demasters*, 109 Cal. 607, 42 Pac. 236. A new trial was refused for newly discovered evidence of another statement of the same nature by the deceased.

In *Leigh v. People*, 113 Ill. 372, the new evidence was a statement of the deceased that he wanted to borrow a pistol to use in coming trouble with the defendant's family. This was held to be cumulative of other talk and threats on the part of the deceased, evidence of which was before the jury.

In order to prove that he shot in self-defense, the defendant asked for a new trial that he might adduce evidence that he was standing in the open road when the shot was fired, and was not concealed from the deceased. The court overruled his motion on the ground that it was merely cumulative of his own testimony at the trial that he shot in self-defense, and, in view of the fact that he was convicted of manslaughter only, would not be likely to change the result. *Reagan v. State*, 57 Tex. Crim. Rep. 642, 124 S. W. 685.

Where, upon the trial, there was testimony that the deceased advanced upon the defendant with a knife, which was sufficiently described for all the purposes of the defense, the finding of the knife under the house of the deceased, where it had apparently been concealed, is no cause for a new trial. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

Where the newly discovered evidence was that the morning after a fight between defendant and prosecuting witness, affiant visited the scene and found and picked up two pocket knives there, one of which he believed belonged to the prosecuting witness, and upon the trial five persons testified for defendant, none of whom stated that the prosecuting witness had a knife in his hand at the time of the difficulty, though they were all close by the combatants during the fight and there was nothing to prevent them seeing all that occurred, there is no possibility that the newly discovered

evidence, if introduced at the trial, could produce a different result. *State v. Keener*, 225 Mo. 488, 125 S. W. 747.

And in the following cases, a new trial was refused for newly discovered evidence.

—as to whether deceased had a knife on the day of the affray. *Garner v. State*, 34 Tex. Crim. Rep. 356, 30 S. W. 782;

—where the new evidence was that a wound upon defendant's hand, which defendant claimed was inflicted by deceased in jerking from him the stick with which it was alleged he tried to strike him, was seen by witness immediately after the homicide was committed, or on the same day, and the existence of the wound had been established upon the trial by the testimony of defendant and perhaps that of another. *Wilson v. Com.* 141 Ky. 341, 132 S. W. 557;

—where the new evidence was that a razor found upon the premises where the killing occurred belonged to the deceased, and there was testimony on the trial that deceased had a weapon when he was killed. *Lewis v. Com.* 93 Ky. 238, 19 S. W. 664;

—where there was evidence that the other party had a weapon, and the new evidence consisted of the finding of such weapon on the scene of the crime (*Edwards v. State*, 90 Ga. 143, 15 S. E. 744; *Henry v. People*, 198 Ill. 162, 65 N. E. 120; *State v. Griffin*, 87 Mo. 608, or on the person of the other party (*Carter v. State*, 2 Ga. App. 254, 58 S. E. 532);

—on an indictment for murder, where there was testimony on trial that deceased was armed, and the new evidence set out the finding of cartridges upon his person after his death. *Territory v. Yarberry*, 2 N. M. 391.

Threats.

Newly discovered evidence has been held cumulative, and not sufficient ground for a new trial, where it consisted of threats which were in evidence, or which were similar to those in evidence. *Williams v. Territory*, 13 Ariz. 306, 114 Pac. 556; *Milam v. State*, 108 Ga. 29, 33 S. E. 818; *Adams v. People*, 47 Ill. 376; *Williams v. State*, 170 Ind. 630, 85 N. E. 113; *Malone v. State*, — Ind. —, 96 N. E. 1; *State v. Kearley*, 26 Kan. 77; *Williams v. Com.* 13 Ky. L. Rep. 753, 18 S. W. 364; *Wilson v. Com.* 141 Ky. 341, 132 S. W. 557; *State v. Carpenter*, 182 Mo. 53, 81 S. W. 410; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293.

Intoxication.

Newly discovered evidence has been held cumulative, and not sufficient ground for a new trial, where it consisted of evidence of intoxication, and evidence of the same was before the jury. *Williams v. State*, 170 Ind. 630, 85 N. E. 113 (intoxication of deceased in murder case); *Straub v. State*, — Ind. —, 100 N. E. 754 (intoxication of prosecuting witness at time of crime); *Futrell v. Com.* 141 Ky. 310, 132 S. W. 555 (intoxication of deceased in murder case); *People v. Hovey*, 30 Hun, 354 (intoxication of defendant); *Anderson v. State*, — Tex. 46 L.R.A.(N.S.)

Crim. Rep. —, 100 S. W. 153 (intoxication of prosecuting witness at commission of crime).

Insanity.

According to the theory of *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669, "a large number of acts indicating insanity will generally produce a greater effect upon the mind of the trier than a smaller number." For that reason a new trial was granted in order that the accused might have the opportunity of putting before the jury the evidence of additional acts which would tend to show his insanity. The decision in this case, however, seems to be limited to capital offenses.

In all other cases where a new trial has been requested on the same ground, it has been refused. *People v. McDonell*, 47 Cal. 134 (evidence as to delusions to which accused was subject); *People v. Kloss*, 115 Cal. 567, 47 Pac. 459 (evidence was as to the pathological effect of a blow received by accused, cumulative of evidence of the same fact on trial); *Roberts v. State*, 3 Ga. 310 (evidence of irrational conduct); *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782 (evidence cumulative as to accused having epilepsy, a disease resulting in insanity); *Lilly v. People*, 148 Ill. 467, 36 N. E. 95 (evidence that defendant was eccentric, excitable and nervous); *People v. Quimby*, 134 Mich. 625, 96 N. W. 1061 (evidence at trial of insanity of father and brother of accused; after the trial a sister had been adjudged insane); *Newcomb v. State*, 37 Miss. 383; *State v. Church*, 199 Mo. 605, 98 S. W. 16 (newly discovered evidence of accused's early history, and past and present condition of his mother and her other children. Evidence at trial did not extend to these); *State v. Redemeier*, 8 Mo. App. 1; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038; *State v. Hardee*, 28 Mont. 18, 72 Pac. 39; *Hamblin v. State*, 81 Neb. 148, 115 N. W. 850, 16 Ann. Cas. 569 (evidence consisted of incidents in earlier life of accused); *People v. Gambacorta*, 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425 (where evidence tending to establish defendant's insanity was given at the trial, and the newly discovered evidence was of insanity in the family, and of his being an epileptic); *People v. Jones*, 131 App. Div. 921, 115 N. Y. Supp. 800; *Com. v. Hine*, 213 Pa. 97, 62 Atl. 369; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Mathews v. State*, — Tex. Crim. Rep. —, 77 S. W. 218; *Baccigalupo v. Com.* 33 Gratt. 807, 36 Am. Rep. 795; *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096.

And in *State v. Schreiber*, 111 Minn. 138, 126 N. W. 536, a prosecution for murder, newly discovered evidence of the appearance and conduct of the deceased, to support the theory that he had committed suicide, was held cumulative, and insufficient to warrant a new trial.

Marks.

Where the evidence raises an issue as to the existence of certain marks at a definite

time, new evidence to support the defendant's contention is merely cumulative, and not ground for a new trial. *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *Martin v. Territory*, 18 Okla. 370, 90 Pac. 13.

And where the prosecution attempted to establish the identity of the defendant by a bite on his finger alleged to have been received while perpetrating the crime, and the defendant testified that a horse had bitten him, newly discovered evidence of one who saw the horse bite him was merely cumulative. *State v. Bradford*, 97 S. C. 546, 70 S. E. 308.

Measurements.

Cumulative evidence has been held not to require a new trial where it consisted of measurements which were in evidence at the trial. *Russell v. State*, 97 Ark. 92, 133 S. W. 188; *Coffman v. State*, 51 Tex. Crim. Rep. 478, 103 S. W. 1128.

Speed.

In *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114, it was held that where, upon a trial for operating an automobile at an unlawful speed, evidence had been given as to the speed indicated by the speedometer, newly discovered evidence consisting of the opinion of a civil engineer who was in a trolley car at the time, and who noticed the automobile, as to the rate at which it was going, would not be likely to change the result.

Mode of death.

Where, upon a trial for the murder of a child found dead on a tide flat, inside a sack weighted with a stone, the witnesses for the prosecution testified that the child had been drowned, while the defendant claimed that the child had died from an overdose of chloroform inadvertently given, and was afterward concealed by him, and it was one of the main contentions of the defendant that closed eyes and open hands were symptoms of death by chloroform, and opposed to death by drowning, and much of the evidence in the trial was devoted to this question, newly discovered evidence consisting of a photograph of the dead child, taken before the post mortem examination, which showed the open hands and closed eyes, and of the testimony of the undertaker to the fact that when he took the child out of the sack the eyes were closed and its hands were open, does not require the granting of a new trial. *State v. Underwood*, 35 Wash. 558, 77 Pac. 863.

Identity of person or thing.

In *Dale v. State*, 88 Ga. 552, 15 S. E. 287, where the identity of the accused in a prosecution for bigamy with one who had theretofore been married to another woman was in issue, it was held that newly discovered testimony bearing upon the question of identity, but relating to special marks and peculiarities of person which were present in the other person, but not 46 L.R.A.(N.S.)

present in the defendant, such as a broken tooth, a scar, etc., as to which no testimony had been introduced upon the trial, was not merely cumulative, and that, the case as presented to the jury being a very close one, and it being probable that if this testimony had been before them the verdict would have been different, a new trial should be granted.

In *State v. Tyson*, 56 Kan. 686, 44 Pac. 609, where the identity of a man and woman seen together in a spring wagon by two occupants of a buggy and a man driving a carriage was in question, and both the occupants of the buggy testified that the persons were defendant and his daughter, but the daughter testified to the contrary, it was held that newly discovered testimony of the occupant of the carriage that the persons in the wagon were not the defendant and his daughter is not merely cumulative, as it would probably have produced a different result at the trial.

But in *Oliver v. State*, 7 Ga. App. 695, 67 S. E. 886; and *May v. State*, 77 Vt. 330, 60 Atl. 1, where the issue of the identity of the defendant was raised on the trial, and the new evidence went to the same point and tended to support the defendant's contention, a new trial was refused.

In *State v. Hunter*, 18 Wash. 670, 52 Pac. 247, where, at the trial, the state introduced in evidence a shirt which it claimed was worn by the defendant at the time of his arrest, and the defendant produced three witnesses who testified that the shirt was not the property of the defendant, but belonged to a fellow prisoner, newly discovered evidence of the mother and sister of the fellow prisoner, that the garment in question was made by the mother, was held to be insufficient ground for awarding a new trial.

Chastity.

Although it set forth facts material to the defense, newly discovered evidence has been held cumulative, and not sufficient ground for a new trial,

—where it consisted of evidence of the lack of chastity of the prosecuting witness, and evidence had been introduced at the trial to establish the same fact. *Hunt v. State*, 8 Ga. App. 374, 69 S. E. 42; *Potter v. State*, 12 Ga. App. 315, 77 S. E. 186; *State v. Hollier*, 49 La. Ann. 371, 21 So. 633;

—where, on the issue whether the defendant was the only one who had had sexual intercourse with a certain female, evidence that a second had had such intercourse with her was offered on the trial, and the new evidence consisted of testimony of a third who had had intercourse with her. *Eddingfield v. State*, 12 Ind. App. 312, 39 N. E. 1057; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

But in *Dougherty v. State*, 7 Ga. App. 91, 66 S. E. 276, a prosecution for seduction, where, on the trial, evidence was introduced wholly of a circumstantial nature, against the character of the female, but this evidence, when most strongly considered against her, was entirely consistent with

her innocence of any immoral act, and there was newly discovered evidence of a credible witness that, previously to the time of the alleged seduction by the defendant, he had had intercourse with the girl, and the guilt of the defendant rested solely on the uncorroborated testimony of the girl, it was held that a new trial should be granted.

Age of prosecutrix.

In *Walters v. State*, — Tex. Crim. Rep. —, 79 S. W. 539, it was held that where, upon the trial, evidence was conflicting as to whether prosecuting witness was over the age of consent and her reputation for chastity, truth, and veracity was shown to be bad, newly discovered evidence tending to prove that she was over the age to which she had testified warranted a new trial.

Lawful acquisition of personal property.

Where the issue was the lawful acquisition of personal property by the defendant, who claims to have received it in a lawful transaction with its owner, newly discovered evidence of the owner or his agent to establish such transaction has been held cumulative, and not ground for a new trial. *State v. Hill*, 39 Or. 90, 65 Pac. 518; *State v. Beeman*, 51 Wash. 557, 99 Pac. 756.

So, also, where the new evidence is that of one who has knowledge of the transaction by which the defendant got possession, although not a party to it. *Gass v. State*, — Tex. Crim. Rep. —, 56 S. W. 73; *Bales v. State*, 3 W. Va. 685; *Thompson v. State*, 45 Tex. Crim. Rep. 244, 76 S. W. 561.

And where the new evidence merely states circumstances making such a transaction possible, there is still more reason to refuse a new trial. Even in jurisdictions where it is freely conceded that cumulative evidence will be ground for a new trial if it makes a different verdict possible, it could scarcely be claimed that such evidence would have that effect. *Cravens v. State*, 95 Ark. 321, 128 S. W. 1037; *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *Douthitt v. Territory*, 7 Okla. 55, 54 Pac. 312.

In *Dansby v. State*, — Tex. Crim. Rep. —, 53 S. W. 105, where the new evidence was as to statements made by a codefendant in a prosecution for stealing certain hogs, on the morning of the day of the alleged theft, that he was going after two hogs that he had bought, and a subsequent declaration that he had brought home the hogs, a new trial was denied.

But in *Langham v. State*, 26 Tex. App. 533, 10 S. W. 113, where, upon the trial of a defendant for the theft of a colt, the ownership of which was laid in the indictment as unknown, evidence was given by one who testified that he owned the colt, that it got away, and that he told a certain person to hunt and get it up for him, and the third person testified that he told defendant to take the colt and keep it until witness could come and get it to carry it home, it was held that newly discovered evidence of other witnesses that they heard the owner tell the third person about losing the colt, 46 L.R.A. (N.S.)

and ask him to look out for it, and of another person to prove the ownership of the colt, warranted the granting of a new trial, defendant having proved a good character for honesty.

Title to personal property.

On an issue of title to personalty, newly discovered evidence of witnesses who have knowledge of defendant's ownership is cumulative of his testimony of title, and is not sufficient ground for a new trial. *State v. Matkins*, 45 Mont. 58, 121 Pac. 881; *Shaw v. State*, 27 Tex. 750; *Harrolson v. State*, 54 Tex. Crim. Rep. 452, 113 S. W. 544; *State v. McCool*, 34 Kan. 613, 9 Pac. 618, 745.

In *Simmacher v. State*, — Tex. Crim. Rep. —, 43 S. W. 512, the issue was the ownership of cotton. Pecan leaves were discovered in it, and evidence of this, together with the fact that pecan trees grew in defendant's field, and not in that of the prosecuting witness, was the ground for the motion for a new trial. It was, however, overruled, because such evidence was cumulative of defendant's testimony of title.

And where a defendant charged with larceny of a steer branded "Bar P Bar" claimed the steer she was driving was her own, and branded "I Bar X," newly discovered evidence to the effect that the brand was "I Bar X" was merely cumulative, and a new trial was refused. *Mitchell v. People*, 53 Colo. 479, 128 Pac. 61.

In *Jones v. State*, — Tex. Crim. Rep. —, 105 S. W. 349, where the prosecution averred that the pistol with which the shooting was done belonged to the person shot at, and the defendant testified that he was the owner of the pistol, it was held that evidence of the man from whom it was purchased would be simply cumulative.

But where, on a trial for receiving stolen property, defendant sought to establish that he had been the owner of the mare in question since it was foaled, newly discovered evidence of different witnesses that they had seen the identical mare alleged to have been received as stolen property by the defendant, in the possession of and used by the defendant prior to the time it was alleged to have been stolen, and other witnesses had testified to the same fact at the trial, the new evidence relating to different times and places than those testified to by any of the witnesses on the trial, is not cumulative, though directed to the establishment of the same ultimate fact. *State v. Laper*, 26 S. D. 151, 128 N. W. 476.

Value in larceny cases.

In *State v. Blain*, 118 Iowa, 466, 92 N. W. 650, 14 Am. Crim. Rep. 535, the defendant had been found guilty of larceny of a saddle the value of which was assessed at \$25 by the jury. A new trial was asked to admit new testimony estimating the value at below \$20. This was considered merely cumulative of testimony offered by the defense estimating the value at from \$10 to \$18, and new trial was denied.

VERMONT SUPREME COURT.

TOWN OF NEW HAVEN

v.

E. S. WESTON et al., Appts.

(— Vt. —, 86 Atl. 996.)

Estoppel — town orders — assignment to bank — right to collect.

1. A bank which by arrangement with the town treasurer cashes his check given in payment of town orders, and receives from him as collateral the assigned orders so paid, may enforce them against the town, although the treasurer had no authority to make the agreement; since, having received the benefit of the agreement, the town will not be permitted to repudiate it so far as its obligations have been liquidated by money furnished by the bank.

Note. — Liability of municipality or other public corporation on implied contract.

Earlier notes on this subject may be found in 41 L.R.A.(N.S.) 473; 39 L.R.A.(N.S.) 72, and 27 L.R.A.(N.S.) 1117. This note is supplemental to the foregoing.

As to the liability of a municipality or other public corporation on an implied contract for labor or services rendered, see notes in 39 L.R.A.(N.S.) 43, and 27 L.R.A.(N.S.) 1125.

It has been asserted that a contract by an officer or agent of a municipality with himself, although prohibited by law, may be ratified to the extent of rendering it liable as upon implied contract for the reasonable value of the services or property received under it. *Minneapolis v. Canterbury*, — Minn. —, 142 N. W. 812.

And it has been said to be well settled that municipal corporations cannot be made liable on implied contracts which would be *ultra vires* if attempted to be made in express terms, or which they are forbidden by statute to enter into except in a particular manner. On the other hand, there is no reason, in the absence of statutory objection, why the general obligation to do justice should not bind a town so as to make it liable for the reasonable worth of a permanent improvement constructed under an imperfectly executed contract, and retained by the town as a part of a highway. *Vito v. Simsbury*, — Conn. —, 87 Atl. 722.

Notwithstanding the rule that a binding contract with the officers of a school district can be made only when they are in session, a district may be required to pay the value of material received by it when it has knowingly permitted it to be furnished and has received and used the same and enjoyed the benefits thereof, although the material was not furnished or received under a contract binding upon the district. *Watkins v. School Dist.* 85 Kan. 760, 118 Pac. 1069.

So, where a municipality has authority to operate a waterworks system, the value 46 L.R.A.(N.S.)

Injunction — against enforcement of town orders — assignment to bank.

2. Injunction will not lie at the suit of the town to prevent the use by a bank of town orders which it has taken as collateral from the town treasurer, to whom it agreed to advance money to pay the orders upon his agreement to assign the orders to it as collateral; since the town, having received the benefit of the agreement, is estopped to deny the bank's right of reimbursement.

Town — power of treasurer to borrow money.

3. A town treasurer has no authority, by virtue of his office, to borrow money for the use of the town.

Same — power of selectmen.

4. The selectmen of a town are authorized to borrow money on its behalf, from time to time, as the necessities of the town require.

of coal ordered by it in operating same may be recovered, and there is an implied promise to pay from a fund which the municipality is authorized to devote to waterworks purposes. *Martin-Strelau Co. v. Dubuque*, 149 Iowa, 1, 127 N. W. 1013.

Although there is no lawful preliminary action on the part of a town through its financial town meeting or its town council whereby a valid and enforceable contract for the construction of a state road, or for the hire of road-making machinery, may lawfully be made, yet where the contract made has been fully executed, the road built, the road-making machinery used, and the contract price paid to and received by the town, it is liable for the reasonable value of the benefit received under the contract, it having the power to make such a contract under certain formalities. *Pocasaset Ice Co. v. Burton*, — R. I. —, 85 Atl. 277 (quoting from the note in 27 L.R.A.(N.S.) 1117).

Although the forms of law are not complied with in effecting a loan to a municipality, and the contract is invalid for that reason, yet if the lender acts in good faith, and the money is paid into the municipal treasury, and subsequently expended for a purpose authorized by law, the municipality is liable therefor. The foundation of this liability is the fact that the municipality has received money or property for a legitimate municipal purpose for which equity and good conscience require payment. *First Nat. Bank v. Goodhue*, 120 Minn. 362, 43 L.R.A.(N.S.) 84, 139 N. W. 599, citing note in 27 L.R.A.(N.S.) 1117 (in this case the contract for the original loan was invalid also because the lender was trustee of the municipality).

But where a city treasurer is without authority to borrow money for a city, the latter cannot be held upon an implied contract for money loaned by a bank to the city at the request of the treasurer, although the money was placed to his credit as treasurer, where, however, at the time he was in default. *First Nat. Bank v. Newcastle*, 224 Pa. 285, 132 Am. St. Rep.

Same — ratification of loan.

5. The selectmen of a town may recognize and validate receipts given by the town treasurer without authority for money advanced to him by strangers to meet current expenses.

Trusts — orders in possession of treasurer — right of bank.

6. Orders paid by a town treasurer and laid aside by him before his death to be delivered to a bank as security for money advanced upon his check to pay the orders, in accordance with an agreement that it shall have the orders as collateral security, belong to the bank after the death of the treasurer, as against the claims of the town.

Assumpsit — money advanced — possession of collateral.

7. Possession of the orders is not necessary to enable a bank which, by agreement with a town treasurer, has honored his check drawn in payment of them in consideration that they be turned over to it as collateral security for the advances, to recover the amount of the advances from the town.

(May 20, 1913.)

APPEAL by defendants from a decree of the Addison County Chancery Court in complainant's favor in a suit to enjoin the payment or collection of certain outstanding town orders and to compel their surrender for cancellation. Reversed.

The facts are stated in the opinion.

Messrs. Charles J. Button and Marvella C. Webber, for appellants:

The orders were not void when they came into the hands of the bank, but they were then valid and subsisting obligations of

the town, and the defendant bank should not surrender them, but may enforce their collection against the town.

Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251, 524; *Morrow v. Surber*, 97 Mo. 155, 11 S. W. 48; *Elser v. Ft. Worth*, — Tex. Civ. App. —, 27 S. W. 739; *Jones, Corporate Bonds & Mortgages*, § 325; 18 Am. & Eng. Enc. Law, 150; *Cushing v. Wyman*, 44 Me. 121; *Bloodworth v. Jacobs*, 2 La. Ann. 24; 2 Dan. Neg. Inst. 4th ed. § 1221; *New York Secur. & T. Co. v. Tacoma*, 21 Wash. 303, 57 Pac. 810; *Manitou v. First Nat. Bank*, 37 Colo. 344, 86 Pac. 75; *DuBois v. Stoner*, 11 Ill. App. 403; *Bowman v. St. Louis Times*, 87 Mo. 191; *Swope v. Ross*, 40 Pa. 186, 80 Am. Dec. 567; *Sawyer v. Springfield*, 40 Vt. 309.

The town auditors audited the books of the treasurer annually, finding and allowing each year the item charged by the treasurer for interest paid on orders deposited, and this report was published and acted upon by the town, and accepted by vote, and ordered to be placed on file and recorded. This amounted to a ratification by the town.

Benoit v. Conway, 10 Allen, 528; *Com. v. Patterson*, 206 Pa. 522, 56 Atl. 27; *Re Brown*, 9 Ohio S. & C. P. Dec. 810; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524.

The findings in regard to apparent shortage in Roscoe's accounts are immaterial. The defendants are in no way responsible, and the validity of the orders that came into the bank's hands are in no way affected by any such shortage.

Shackford v. Newton, 46 N. H. 415;

779, 73 Atl. 331, compare with *NEW HAVEN v. WESTON*.

If a city's occupation of premises results in some pecuniary gain, benefit, or advantage to it, or is the performance of some public duty enjoined by statute, it may be held liable for a reasonable rental thereof upon an implied contract, but not where the premises were not required for any general or special municipal use, and where not provided for or occupied by any of the various departments of the city. *Commercial Wharf Corp. v. Boston*, 208 Mass. 482, 94 N. E. 805.

Where a contract between a public corporation (the state) and any member of the legislature is expressly prohibited, no recovery can be had thereon, on the theory of an implied contract, although there is no personal moral turpitude or dishonesty of any kind involved, and the state may have made an advantageous contract and suffered no loss by reason thereof; since no right can arise out of an illegal transaction, even on the theory of constructive contracts, and the law leaves the parties to illegal contracts where it finds them, 46 L.R.A. (N.S.)

and gives them no assistance in extricating themselves. *Norbeck & N. Co. v. State*, — S. D. —, 142 N. W. 847. And see also upon the question of the obligation of a municipality to pay for property purchased from an officer or a member of a board of trustees charged with the duty of making purchases, note in 9 L.R.A. (N.S.) 1014, which is cited with approval in the preceding case.

So, when the mode of contracting for a public work or improvement is limited and provided for by statute, if these formalities are not complied with, an implied contract cannot be raised from the performance of the illegal express contract. *Niland v. Bowron*, 193 N. Y. 180, 85 N. E. 1012.

Where a statute expressly prevents any claim from accruing in favor of a contractor who, in performing a public contract, works his men over eight hours a day, he is also barred from any recovery, upon the theory of an implied contract, for benefits received by the municipality. *Medina v. Dingledine*, 152 App. Div. 307, 136 N. Y. Supp. 786.

A. G. S.

Boyce v. Auditor General, 90 Mich. 314, 52 N. W. 754.

The orders paid by Treasurer Weston since Roscoe's death cannot be recovered. Where a party pays money which he is under no legal obligation to pay, with full knowledge of the facts, he cannot recover it back.

Taggart v. Rice, 37 Vt. 51; **Stevens v. Head**, 9 Vt. 174, 31 Am. Dec. 617; **Strong v. McConnell**, 10 Vt. 231; **Winn v. Southgate**, 17 Vt. 355; **Gilson v. Bingham**, 43 Vt. 410; 28 Cyc. 1755; **Advertiser & Tribune Co. v. Detroit**, 43 Mich. 116, 5 N. W. 72; **Randall v. Lyon County**, 20 Nev. 35, 14 Pac. 583; **Onondaga v. Briggs**, 2 Denio, 26; **Macon County v. Jackson County**, 75 N. C. 240; **Ottawa County v. Auditor**, 7 Ohio N. P. 400, 5 Ohio S. & C. P. Dec. 597; **Eau Claire v. Payson**, 46 C. C. A. 466, 107 Fed. 552; **American Waterworks & Guarantee Co. v. Home Water Co.** 115 Fed. 171; 11 Pom. Eq. Jur. §§ 869, 871.

Town and school orders are negotiable.

Glastenbury v. McDonald, 44 Vt. 450; **Dalrymple v. Whitingham**, 26 Vt. 345; **Blaisdell v. School Dist. No. 2**, 72 Vt. 63, 47 Atl. 173; **Davenport v. Johnson**, 49 Vt. 403; **Gifford v. White Plains**, 25 Hun, 606; **Kelley v. Cowing**, 4 Hill, 265; **Hyde v. Franklin County**, 27 Vt. 186; 1 Dana, Neg. Inst. § 1 a; **Norton, Bills & Notes**, 6, 7.

The selectmen's audit settled the account.

Thayer v. Lyman, 35 Vt. 647; **Dix v. Dummerston**, 19 Vt. 262; **West v. Errol**, 58 N. H. 233; **Barnard v. Argyle**, 20 Me. 296; **People ex rel. Bevier v. Ulster County**, 32 Hun, 607; **Elizabeth Twp. v. White**, 48 Ohio St. 577, 29 N. E. 47; **Outagamie Co. v. Greenville**, 77 Wis. 165, 45 N. W. 1090.

It will not be presumed that the borrowing was without authority or not ratified.

Brock v. Bruce, 59 Vt. 313, 10 Atl. 93; **Sargeant v. Sunderland**, 21 Vt. 284.

Messrs. G. E. Lawrence, E. G. Hunt, and Leroy C. Russell, for orator:

Any representations on Roscoe's part to McIntyre that he had authority to borrow money for the town were false, and would not bind the town.

Railroad Nat. Bank v. Lowell, 109 Mass. 214; **Agawan Nat. Bank v. South Hadley**, 128 Mass. 503.

The treasurer had no authority whatever to borrow money for the use of the town, or to pledge its credit in any way.

Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; **Otis v. Stockton**, 76 Me. 506; **Agawam Nat. Bank v. South Hadley**, 128 Mass. 503; **Musgrove v. Kennell**, 23 N. J. Eq. 75; **Pierce v. Greenfield**, 96 Me. 350, 52 Atl. 765; **East Hartford v. American Nat. Bank**, 49 Conn. 539.

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The selectmen of New Haven had no authority to draw these orders in settlement of McIntyre's receipts.

People ex rel. Smith v. Flagg, 17 N. Y. 584; **Brady v. New York**, 20 N. Y. 312; **Highway Comrs. v. Van Dusan**, 40 Mich. 429; **Nash v. St. Paul**, 11 Minn. 174, Gil. 110; **Hague v. Philadelphia**, 48 Pa. 528; **Lovejoy v. Foxcroft**, 91 Me. 370, 40 Atl. 141; **Sheldon v. Bennington**, 67 Vt. 580, 32 Atl. 497; **Gregg v. Weathersfield**, 55 Vt. 385; **Taft v. Pittsford**, 28 Vt. 286; **Perry v. Ames**, 26 Cal. 372; 11 Cyc. 536.

The mere issuing of a town warrant or order does not estop the town from defending against the same.

Boom v. Utica, 2 Barb. 104; **De Kalb County v. Auburn Foundry & Mach. Works**, 14 Ind. App. 214, 42 N. E. 689; **Shirk v. Pulaski**, 4 Dill. 209, Fed. Cas. No. 12,794; **Bogart v. Lamotte Twp.** 79 Mich. 294, 44 N. W. 612; **Clark v. Des Moines**, 19 Iowa, 199, 87 Am. Dec. 423; **Cheaney v. Brookfield**, 60 Mo. 53; **Halstead v. New York**, 3 N. Y. 430; 1 Dill. Mun. Corp. 4th ed. § 504, note 1; **Claiborne County v. Brooks**, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; **Benoit v. Conway**, 10 Allen, 528; **Dickinson v. Conway**, 12 Allen, 487; **Otis v. Stockton**, 76 Me. 506; **Brown v. Winterport**, 79 Me. 305, 9 Atl. 844.

No innocent holder for value can claim protection if the paper is transferred to him when overdue.

Nashville v. Ray, 19 Wall. 468, 22 L. ed. 164; **Smith v. Cheshire**, 13 Gray, 318; **Paige v. Stone**, 10 Met. 168, 43 Am. Dec. 420; **Taber v. Cannon**, 8 Met. 456.

A city warrant is not a negotiable instrument in such sense as to protect a bona fide holder against defenses.

Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784; **Sturtevant v. Liberty**, 46 Me. 457; **Emery v. Mariaville**, 56 Me. 315; **Bank of Santa Cruz County v. Bartlett**, 78 Cal. 301, 20 Pac. 682; **Furgerson v. Staples**, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; **First Nat. Bank v. Osborne**, 18 Ind. App. 442, 48 N. E. 256; **Goodwin v. East Hartford**, 70 Conn. 18, 38 Atl. 876; **Wall v. Monroe County**, 103 U. S. 74, 26 L. ed. 430.

The town itself has no power, without legislative authority expressed or clearly implied, to borrow money.

Nashville v. Ray, 19 Wall. 468, 477, 22 L. ed. 164, 169; **Simpson v. Lauderdale County**, 56 Ala. 64; **Wetumpka v. Wetumpka Wharf Co.** 63 Ala. 611; 1 Dill. Mun. Corp. 4th ed. § 487, p. 480; **Claiborne County v. Brooks**, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; **Watson v. Huron**, 38 C. C. A. 264, 97 Fed. 449; **Wall v. Monroe County**, 103 U. S. 74, 26 L. ed. 430.

When the orders subsequently delivered to the bank were redeemed they ceased to have a legal existence.

Mitchell v. Albion, 81 Me. 482, 17 Atl. 546; *Ballard v. Greenbush*, 24 Me. 336; *Pray v. Maine*, 7 Cush. 253; *Davis v. Stevens*, 10 N. H. 188; *Chapman v. Collins*, 12 Cush. 163; *Burr v. Smith*, 21 Barb. 262; *Hopkins v. Farwell*, 32 N. H. 425; *Bartlett v. Wade*, 66 Vt. 629, 30 Atl. 4; *Collins v. Adams*, 53 Vt. 433; *Wells v. Tucker*, 57 Vt. 223; *Eastman v. Plumer*, 32 N. H. 238; *Allen v. McCreary*, 101 Ala. 514, 14 So. 320.

If a treasurer borrows money in a manner unauthorized by statute, the lender cannot recover it back, although the money is used by the treasurer in the payment of the debts of the town.

Benoit v. Conway, 10 Allen, 528; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214; *Kelley v. Lindsey*, 7 Gray, 287; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109; *Smith v. Epping*, 69 N. H. 558, 45 Atl. 415; *East Hartford v. American Nat. Bank*, 49 Conn. 539; *Steinback v. State*, 38 Ind. 483; *Lovejoy v. Foxcroft*, 91 Me. 367, 40 Atl. 141; *Musgrove v. Kennell*, 23 N. J. Eq. 75; *Pierce v. Greenfield*, 96 Me. 350, 52 Atl. 765; *Otis v. Stockton*, 70 Me. 506; *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844; *Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865.

The various reports made at town meeting, etc., and the acceptance thereof by the town, do not work any ratification of Roscoe's irregularities in his accounts as presented and audited.

Otis v. Stockton, 76 Me. 506; *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844; *Hurd v. St. Albans*, 81 Me. 343, 17 Atl. 108; *Dickinson v. Conway*, 12 Allen, 487; *Brown v. Melrose*, 155 Mass. 587, 30 N. E. 87; *Marsh v. Fulton County*, 10 Wall. 684, 19 L. ed. 1040; 1 Dill. Mun. Corp. § 465; *Allen v. McCreary*, 101 Ala. 514, 14 So. 320.

Powers, J., delivered the opinion of the court:

For more than fifteen years prior to his death on May 19, 1909, Alfred P. Roscoe was treasurer of the town of New Haven. During all or a part of this time he was town clerk, postmaster, trustee of public money, treasurer of a local church society, treasurer of the county agricultural society, and handled and invested some of the funds of Beeman Academy. He carried on a fire insurance business and acted as a banker for his neighbors, issuing and cashing checks for their convenience. He kept an

account at the Middlebury National Bank in his own name, and to the credit of this account he deposited money coming to his hands from these various sources, except such as he received as postmaster and as treasurer of the agricultural society. Against this account he drew his personal checks in payment of such bills as he was called upon to pay, including personal obligations and debts against the town. He issued accommodation checks against this account in exchange for cash, and either deposited the cash so received to the credit of the account, used it to pay his own bills, or to redeem town orders, as occasion required. When town orders were presented to him in the regular course of town business, after requiring the holder to write his name across the backs of them, he would either give the holder the amount called for in cash or his personal check drawn against this account in the bank. Later on he would take the orders, or a part of them, write the word "accepted" on the backs of them, sign his name as treasurer thereunder, and from time to time send them to the bank to be credited to his said account as outstanding obligations of the town. These acceptances were dated as of the day they were forwarded to the bank, but the orders generally came to his hands some time before. Sometimes orders were presented directly to the bank; these were cashed by the bank, charged to Roscoe's account, and sent to him for acceptance. When received by Roscoe he would indorse his acceptance thereon and return them to the bank, and they were then credited to Roscoe's account like the others. At the time of his death, the amount of orders held by the bank was \$2,201.29, and his account was overdrawn \$344.55. About the time that Roscoe became treasurer of the town, the selectmen made arrangements with the bank to provide the money for the payment of the town's state taxes at a special rate of 5 per cent interest, and in consideration thereof the bank was to have the town's business. It was the practice of the selectmen to issue town orders for the amount of the state highway and school taxes. These were drawn to Roscoe, and he put them in the bank and thereby raised the money for the payment of these taxes. None of these orders were in the bank at the time of Roscoe's death. While the bank held town orders, it charged interest thereon until the condition of Roscoe's account was such that they or some of them could be taken care of, when they would be charged up and retired.

The foregoing method of handling the town business was according to an arrangement entered into between Roscoe and the

cashier of the bank, and had existed for at least ten years prior to the former's death.

During his last sickness, Roscoe directed a member of his family to forward some of these orders to the bank for deposit, but on one occasion at least the orders were not sent as directed. After his death, orders amounting to \$329.19 were found among his papers, and checks drawn and paid during this illness correspond with these orders, indicating that he had taken up the orders with checks and laid them aside to be forwarded and deposited according to the usual course. Except as stated, no arrangement was made between the selectmen and Roscoe, or between the selectmen and the bank, as to how the business should be conducted; nor was there any evidence that the selectmen knew the method or details of any of the transactions between Roscoe and the bank. They had, however, for a good many years, drawn orders to themselves for the amount of their salaries, some of which were paid by Roscoe's personal checks. No vote of the town was ever passed regarding borrowing money for the use of the town.

The accounts of the treasurer and other town officers were audited annually, and a report was published and distributed purporting to show the standing of the town finances, and the contents of these reports were known to the selectmen. From the time of the March meeting until the taxes were paid in the fall, the selectmen drew orders for the current expenses of the town. Taxes were payable to the treasurer, and the selectmen knew that they were not paid in large amounts until about the 1st of September, and that orders were drawn by them between March and September in excess of the money in the treasury. They also knew that Roscoe took care of such orders in some way. The reports of the auditors, published as aforesaid, were annually accepted by vote of the town and ordered to be filed and recorded; and, while Roscoe had been behind in his accounts for ten years, the auditors did not discover it, but reported his accounts to be correct.

No town orders remained in the bank on October 7, 1908. All had been previously paid, and Roscoe's account then showed a credit balance of \$330.99. Between that date and the date of Roscoe's death, May 19, 1909, he deposited orders amounting to \$2,001.29, and during the same time the bank cashed his checks drawn for the payment of valid obligations to the town to the amount of \$3,882.48. And during the time specified no other town funds went into his account. So, treating all of the money left in his account on October 7th as belonging to the town, the town has, since that date

actually been benefited by this method of doing business, \$1,350.10.

An examination of Roscoe's books discloses certain irregularities and errors covering his entire term of office. Some of these, the master says, are clearly clerical errors; others, he says, are difficult to understand. Some are in his favor; some are against him. The net result, however, is a shortage, but the amount is disputed, and we find no occasion for determining it.

After the defendant Weston was appointed town treasurer, the selectmen discovered that the treasury was empty; and, in order that the new treasurer might have money in hand, they drew an order for \$500, which was cashed by the bank. Weston then began paying orders when presented, and paid orders held by the bank at the time of Roscoe's death to the amount (including interest) of \$1,039.77, leaving orders amounting to \$1,171.52 in the bank. The legal agent of the town, Mr. Hunt, advised Weston that these orders were invalid, and protested against their payment; but Weston maintained that it was his duty, as treasurer, to pay orders so far as he had funds, and informed Hunt that he should continue to do so.

The town brings this bill in chancery to restrain the collection or payment of the outstanding orders hereinbefore and hereinafter specified, and to compel the holders to surrender the same, and to require the bank to pay back the \$1,029.77 received from Weston. The bank, by way of cross bill, seeks to compel the town to deliver to it the orders amounting to \$329.19 set apart by Roscoe as stated.

Three groups of town orders are involved: (1) Those deposited by Roscoe; (2) those issued to retire the McIntyre receipts, as hereinafter stated; (3) those amounting to \$329.19 found among Roscoe's papers after his death. A fourth class might have been made of those presented directly to the bank, but there is no way of identifying them, and so they cannot be separately considered.

1. In the argument before us regarding the validity of the orders deposited by Roscoe, counsel have made the character and legal effect of the transactions between Roscoe and the holders of the orders the test of the town's liability to the bank. The claim of the town is that these transactions were, in law, payments, and that the well-established rule "once paid, always paid," applies to them, and therefore they cannot be enforced. The bank's claim is that, in view of its arrangement with Roscoe, the transactions amounted to purchases of the orders by Roscoe for the bank. In our view this question is not controlling. Let us

assume that the orders were, in law, paid when Roscoe took them up. Roscoe undertook to make an agreement for the town whereby he was to procure money for the town's use by depositing these orders as he did. As between Roscoe and the bank, Roscoe, in effect, either bought the orders for the bank, or, in effect, he borrowed money for the use of the town. Whatever the character of the arrangement was, the bank has fully carried it out. The town has had the benefit of it. It proposes to retain this benefit, which as we have seen amounts to at least \$1,350, so far as the dealings are here concerned. In other words, the town now repudiates Roscoe's authority to make an agreement, under which it has, in effect, received and retains over \$1,300 of the bank's money. The injustice of such a result must be apparent to everybody.

It should be remembered that we are not dealing with a contract which a town is forbidden by law to make, nor yet with one which a town is unauthorized to make for itself, nor are we dealing with a contract wholly executory. We have here a contract fully executed on the part of the bank, the benefits of which are retained by the town—a contract which is (we will assume) unenforceable, but only because made with an officer who had no authority to make it. In short, a loan under a contract with an unauthorized agent, the avails of which have gone to pay the valid debts of the principal. Between individuals, on plainest principles, the law would require repayment of this money. It remains to consider whether a municipal corporation can avoid this result.

We approach the discussion of the law of this subject with these general principles established: Towns are mere creatures of the legislature, constituted for governmental purposes (*Burlington v. Central Vermont R. Co.* 82 Vt. 5, 71 Atl. 826; *Sargent v. Clark*, 83 Vt. 523, 77 Atl. 337), and possess only such powers as are expressly granted, or are implied because necessary to carry into effect such as are expressly granted. *Swanton v. Highgate*, 81 Vt. 152, 16 L.R.A. (N.S.) 867, 69 Atl. 667. Like all corporations, both public and private, they necessarily act through agents; but municipal officers derive their authority, largely, if not wholly, from the law, and not from the municipality, and all persons dealing with them are bound to know the extent and limitations thereof. *Taft v. Pittsford*, 28 Vt. 286; *Barre v. Perry*, 82 Vt. 301, 73 Atl. 574. There is a marked tendency, however, on the part of the courts to treat these public corporations, in their ordinary business affairs, more nearly as

private corporations and individuals are treated than was formerly done. And while there are some who hold that the contract of an unauthorized municipal officer is void, and cannot be enforced, and gives rise to no available equities, no matter how unjust the result, there is plenty of authority for the more reasonable and just rule that where the infirmity in the contract lies merely in the lack of authority of the one who assumes to make it for the municipality, and the latter has received and retains the benefit of the contract, the law will not refuse relief to the other party, at least to the extent of the benefit conferred. This last clause is added for the reason that, as will be seen from the cases following, courts which arrive at practically the same result differ in this one respect. Some say that the municipality is estopped to deny the validity of the contract; others say that the contract as made is invalid, but one who has carried it out may recover, not on the contract, but *quantum meruit* or *quantum valebant*. In other words, some, in effect, make the contract binding; others, in effect, make it binding to the extent of benefits received and retained by the municipality.

Argenti v. San Francisco, 16 Cal. 255, is a leading case on the subject under discussion. Two opinions appear in the report of the case. Cope, J., expressed the view that while an executory contract, made without authority, cannot be enforced in the case of a contract which has been executed, the benefit of which the municipality has received, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. Field, Ch. J., took this view: "If the city obtain the money of another by mistake or without authority by law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial,"—though he says the rule does not apply where money or property was received in disregard of a positive prohibition.

East St. Louis v. East St. Louis Gaslight & Coke Co. 98 Ill. 415, 38 Am. Rep. 97, involved the validity of a long-term contract for lighting the streets of the city. The city had authority to contract for service of this character, but it was claimed that a thirty-year term was beyond its authority, and that the contract, as made, would result in exceeding the debt limit fixed by the charter. The court left the question regarding the term undecided, but applied the rule governing private corporations, and held that, at least so far as executed, the contract was binding; that, the light having

been furnished and enjoyed by the city, it ought to be paid for.

In *Des Moines v. Welsbach Street Lighting Co.* 110 C. C. A. 540, 188 Fed. 906, it is said: "The complaint made of the contract in question is not that it was one beyond the scope and power of the city to enter into, but that it was not entered into in the manner prescribed by law. A business contract, which is within the scope of the powers of the city to make, but illegal because entered into in an irregular manner, when fully executed by one party, and the city has received and accepted the full benefit of the contract and cannot restore what it has received, is enforceable; the city being estopped to assert the irregular execution when the ends of justice would thereby be defeated."

In *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996, 95 N. W. 94, the rule is thus stated: "The result is that no one can successfully plead ignorance to save himself from loss in dealing with a municipality as to matters expressly prohibited, nor as to any matter beyond the scope of corporate authority, except in case his money or property has actually been used for legitimate corporate purposes. In that event, on equitable grounds, the court will afford a remedy to the extent of the corporate benefit, but no further."

It is held in Alabama that, where a city's contract is illegal because it is prohibited, it is utterly void, and the city is not in any wise bound, though it has used the money received thereunder. But where the contract is merely unauthorized, and the money or property has been received by the city and applied to its authorized objects, it is liable to an action of implied assumpsit. That, while no suit can be maintained on the contract, "persons who have in any way advanced money to a corporation, which money has been devoted to the necessities of the corporation, are considered in chancery (and at law in the equitable action for money had and received) as creditors of the corporation to the extent to which the loan has been so expended." *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87; *Allen v. La Fayette*, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30; *Ensley v. Hollingsworth & Co.* 170 Ala. 398, 54 So. 95, Ann. Cas. 1912 D, 652. The same distinction is made in Pennsylvania, and it is held that municipalities must account for money or other property applied by their officers to authorized uses, although it was received under an agreement that is wholly unenforceable. *Aspinwall-Delafield Co. v. Aspinwall*, 229 Pa. 1, 77 Atl. 1098; *Rainburg v. Fyan*, 127 Pa. 74, 4 L.R.A. 336, 17

Atl. 678; *Long v. Lemoyne*, 222 Pa. 311, 21 L.R.A. (N.S.) 474; 71 Atl. 211.

Valley Falls Co. v. Taft, 27 R. I. 136, 61 Atl. 41, involved the validity of a contract to construct a highway on payment of certain advances which were made. It was argued on behalf of the town that the council had no power to bind the town as they assumed to do. "If this is so," said the court, "the money was paid without consideration, and may be recovered back."

In *Eden v. Stevens*, — Iowa, —, 138 N. W. 927, a town treasurer had deposited the public funds in a private bank. The bank failed, and the funds were tied up. In this situation of affairs, the treasurer voluntarily paid certain warrants with his own money, expecting to be reimbursed when the public funds should become available. The court held that he was entitled to a recovery, saying: "It would be a reproach to the law if there were no remedy available to the defendant under such circumstances. We can think of no fair reason, either legal, equitable, or moral, why he should not be reimbursed." See also *Bell v. Kirkland*, 102 Minn. 213, 13 L.R.A. (N.S.) 793, 120 Am. St. Rep. 621, 113 N. W. 271; *First Nat. Bank v. Goodhue*, 120 Minn. 362, 43 L.R.A. (N.S.) 84, 139 N. W. 599; *Nebraska Bitulithic Co. v. Omaha*, 84 Neb. 375, 121 N. W. 443; *Ft. Scott v. Eads Brokerage Co.* 54 C. C. A. 437, 117 Fed. 51; 1 Beach, Pub. Corp. § 226; 2 Herman, Estoppel, § 1222; 1 Abbott, Mun. Corp. 579-581.

In *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659, a contract for street work payable in bonds was under discussion. The right of the city to make such a contract was denied. But it was held that the validity of the provision regarding payment was not controlling. "If," said the court, "payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law." And in *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62, not only was this proposition affirmed, but the following language from *Pimental v. San Francisco*, 21 Cal. 362, was approved: "The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor from the like obligation." (*Argenti v. San Francisco*, 16

Cal. 282.) The legal liability springs from the moral duty to make restitution."

And it is this very doctrine, we think, which underlies our own cases. *Burnham v. Strafford*, 53 Vt. 610, and *Brock v. Bruce*, 59 Vt. 313, 10 Atl. 93. In the former, the plaintiff being one of the selectmen, borrowed a sum of money of a certain person and gave therefor a town order, to which he signed his own name and the names of the other selectmen. He claimed that he paid the money over to the town treasurer. The town denied his right to sign the names of the other selectmen, and denied that the treasurer ever received the money; and refused to pay the order. Thereupon the plaintiff went to the holder of the order and took it up, and brought suit against the town, declaring in general assumpsit. It was held that he could not recover on the order, as it was not negotiable in form, nor could he recover on the ground that it was paid at the request of the town, since he knew when he took it up that the town had repudiated it; but that, in the circumstances, if he could prove that he turned the money over to the town treasurer and it was received for the town, he could recover, for it would be "a loan directly from the plaintiff to the town—money had and received of him by the town to its use—for the payment of which the law would imply a promise."

In the *Brock Case* the prudential committee of a school district borrowed a sum of money on the credit of the district, and used it for the purposes of the district, and assessed a tax large enough to cover it. It was claimed that the committee had no authority to borrow this sum. But it was said that the money was needed and used for paying the expenses of the school, and, "if the committee had no authority to borrow it on the credit of the district, it may be treated as if they borrowed it of themselves; and, it being to supply a temporary need in respect of expenses for which a tax might legally be assessed under the vote, it was properly a part of those expenses and ought to be so regarded." See also *State v. St. Johnsbury*, 59 Vt. 332, 10 Atl. 531.

It is especially appropriate that the rule of restitution should be applied when a municipality, while holding benefits which it does not offer to surrender, applies for relief, against the enforcement of alleged illegal warrants or orders, to the court of chancery, wherein the maxim is, "He who seeks equity must do equity." To permit this town to deny the bank the right to compensation for actual value received would be manifestly inequitable and unjust, and would amount to an utter disregard of

the maxim. *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. 483; *Natchez v. Mallery*, 54 Miss. 499; *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242. So we need not assert the legality or illegality of the orders deposited by Roscoe. If they are valid, of course their collection will not be enjoined. If they are invalid, they correctly represent the amount advanced by the bank, and can be used as evidence. There is no danger to the town in their remaining in the hands of the bank, and an injunction is unnecessary and should not be granted. *Allen v. La Fayette*, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30.

2. Roscoe had another method of procuring money. He borrowed various sums from different persons in the community, giving as evidence thereof a writing, signed by himself as treasurer, reciting that he had received a certain sum of the person named, "for the use of the town, payable on demand, with interest annually." When he had money of the town, Roscoe would call in these receipts and pay the holder the amount specified, with interest. This practice he had followed for a number of years. These transactions did not appear in the reports, but he charged in his account each year a considerable sum as interest in excess of that paid to the bank. Soon after Roscoe's death, the defendant McIntyre presented to the selectmen receipts of the kind described, issued between December 1, 1908, and February 1, 1909, to the amount (including interest) of \$1,642.24, and asked for orders in exchange therefor. He asked for two orders,—one for \$1,500, and one for \$142.24. After some discussion these were issued to him by the selectmen, and he surrendered the receipts. The larger of these orders McIntyre deposited in the defendant bank in his check account, and soon after checked out most of it. The other he holds. These receipts did not appear on the books as an outstanding liability, and it did not appear before the master that the town ever received the money on them. McIntyre was one of the auditors and assisted in the audit of the town books in February, 1909, and at that time the books showed a substantial balance on hand in all departments. He said nothing about his receipts, though it is not found that he intentionally concealed the fact that he had them. He had let Roscoe have money for his own use, taking his personal note therefor, and held one such note when Roscoe died. The selectmen knew nothing about this method of raising funds.

It is apparent that these orders differ from those hereinbefore discussed in a vital particular: They do not represent money which it is found went to the town's use.

So, if these are to be held valid when issued, it must be on the ground that a town treasurer has *ex officio* authority to borrow money for the town, in which case it would make no difference whether the town actually received the money or not; or on the ground that the action of the selectmen in issuing orders to take up the receipts bound the town by way of ratification.

That a town treasurer has no authority by virtue of his office merely to borrow money for the use of the town seems clear enough. His duty is to receive and keep the money of the town (*Middlebury v. Rood*, 7 Vt. 125) and pay it out on proper orders, or otherwise account for the same. Certain special duties are put upon him by statute, but his fiscal duties are limited as stated. The selectmen, however, are officers of more general authority. They are commonly spoken of as the "fathers of the town," and by express enactment have general supervision of the affairs of the town, and are to cause duties required of the town, not committed to any particular officer, to be duly performed and executed. Pub. Stat. 3467. See *Middlebury v. Rood*, supra. They are especially the financial agents of the town. *Thayer v. Lyman*, 35 Vt. 646; *Burnham v. Strafford*, 53 Vt. 610. They are to audit and in their discretion allow claims against the town for money paid or services performed, and draw orders therefor. Pub. Stat. 3471. They may submit disputed claims to arbitration, and the award will bind the town. *Dix v. Dummerston*, 19 Vt. 262; *Hollister v. Pawlet*, 43 Vt. 425. They may, in certain cases, employ counsel (*Burton v. Norwich*, 34 Vt. 345), settle cases in which the town is interested (*Cabot v. Britt*, 36 Vt. 349), and control by contract an invalid tax bill (*Miles v. Albany*, 59 Vt. 79, 7 Atl. 601). Their authority approximates that of general agents.

It was said by Chief Judge Poland, in *Cabot v. Britt*, that "selectmen cannot be said to be, in a strict legal sense, general agents of towns, because specific subjects and duties, committed by law to other officers, do not belong to them. Nor are we prepared to say that in other respects they are general agents of towns to such an extent as to be authorized to exercise all the corporate authority of the town, and by their action bind the town in all cases where the town itself could by a corporate vote. But, in all matters pertaining to the ordinary and usual corporate interest, we think it was intended by the statute to clothe selectmen with authority to act without calling a town meeting to act upon it." It follows, we think, that the selectmen are authorized by law to borrow money, from time to time, as the necessities of the town

require. No one denies that they have authority to continue to draw orders for the payment of town debts, and thereby make the town liable on such orders, though to their knowledge the treasury is empty. Such orders, on due presentment, would bear interest at the legal rate. It would be a misfortune if they should be held to be unauthorized to borrow money to pay current bills and issue the order to the lender, instead of the creditor, and thereby secure to the town the lower rate of interest which can always be obtained. It is a matter of common knowledge that towns are usually out of funds between spring and fall. During this time the usual bills for roads, schools, and the poor must be met. It is altogether reasonable and quite consistent for this court to hold that the selectmen may pledge the credit of the town for money borrowed to meet its current bills, without a vote of the town on the subject.

If they could borrow money for the town, the selectmen could authorize the treasurer to do so in their stead, or ratify his acts in that behalf. For the rule is that ratification may be by the principal or his authorized agent. 1 Dill. Mun. Corp. 2d ed. § 387; *Clarke v. Lyon County*, 8 Nev. 188; *People v. Swift*, 31 Cal. 28. This is shown by our own cases. In *Langdon v. Castleton*, 30 Vt. 285, the plaintiff continued to serve the defendant as attorney after his office of town agent expired, without an express contract with the town or the new agent. It was held that he could recover for his services, for the agent must have known about the matter and it was taken that he assented.

Topsham v. Rogers, 42 Vt. 189, arose under a statute which made it unlawful for liquor agents to purchase liquors for their agencies, and imposed that duty upon the selectmen. Not regarding this provision, and in spite of a contract to like effect, the defendant bought liquors for his agency, used the town funds to pay for them, sold them in violation of law, and refused to account for the proceeds. It was held that these acts were unwarranted, and that the town might repudiate them, but that the selectmen might have made the defendant their special agent to buy the liquors for the town, and had an undoubted right to adopt and ratify the transaction after the acts were done. See also *Mt. Holly v. Buswell*, 45 Vt. 354; *Hett v. Portsmouth*, 73 N. H. 334, 61 Atl. 596.

These receipts might or might not have been valid against the town. There was no fraud perpetrated on the selectmen, and they chose to treat them as valid. Exercising that discretion which the statute vests in them, they allowed the claims made by McIntyre for the money represented by

the receipts. "If the right surrendered," said this court in *Gregg v. Weathersfield*, 55 Vt. 385, "is of doubtful validity, or indeed of no validity at all, its surrender may be a valuable consideration for a promise." What the result would be had the McIntyre receipts been of acknowledged invalidity and his claim wholly invalid, we need not say. It did not appear before the master that the money went to the use of the town; but it does not appear, nor can we assume, that it did not appear to the satisfaction of the selectmen that the town had the benefit of the loans. In the circumstances, the claim was within their jurisdiction to allow or disallow.

3. In equity the orders which Roscoe had laid aside to be sent to the bank belong to the bank. Equity regards that as done which ought to be done, and so what is agreed to be done. *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193. When Roscoe drew his checks for these orders and laid them aside to be forwarded to the bank pursuant to the arrangement, he held them as a quasi trustee for the bank, and, when the bank paid the checks, it became entitled to the orders. But it does not here appear that these orders ever passed into the control of the town. Roscoe's representative is not a party here, and it only appears that these orders were found among his papers. They are not necessary to a recovery of the amount paid by the bank; and, it not appearing that the town is in a position to make delivery of them, no decree regarding them should be made. *Angus v. Robinson*, 62 Vt. 60, 19 Atl. 993.

Decree reversed, and cause remanded, with directions to dismiss the bill, with costs.

CONNECTICUT SUPREME COURT OF ERRORS.

CHRISTIAN KLING, Admr., etc., of David Kling, Deceased, Appt.,
v.
RAFFAELE TORELLO.

(— Conn. —, 87 Atl. 987.)

Abatement — amendment of cause of action for injury to one for death — effect.

1. Where, by statute, a right of action for

Note. — Right to recover for intentional killing of person.

As to justifiable killing as a defense in an action for death intentionally inflicted, see note to *Suell v. Derricott*, 23 L.R.A. (N.S.) 996.

As to judgment in criminal action as bar to civil action, see note in 31 L.R.A. (N.S.) 671.
46 L.R.A. (N.S.)

personal injuries survives the death of the person injured, and the right of action for death is not an independent one in favor of survivors, but is a survival of a right belonging to the deceased, an amendment by an administrator after the death of the person injured, of an action brought by him before his death, claiming additional damages for the death, does not constitute an abandonment of the original cause of action for one not originating until after the action was begun, so as to preclude a recovery in such action.

Death — intentional injury — right of recovery.

2. Under an amendment of a statute permitting recovery for death caused by negligence by omitting the reference to negligence, and permitting a recovery in all actions surviving to an administrator for injuries resulting in death, a recovery can be had for death resulting from injuries intentionally inflicted, although the statute provides that the action must be brought within one year "from the neglect complained of."

(July 25, 1913.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in defendant's favor in an action brought to recover damages for the alleged wilful killing of plaintiff's intestate. Reversed.

Statement by Prentice, Ch. J.:

David Kling, the present plaintiff's intestate, brought this action in his lifetime, claiming damages for an alleged malicious and wilful assault, resulting in severe injuries and a fractured skull, endangering life. Following his death, which occurred two days later, the present plaintiff, as the administrator upon his estate, entered to prosecute the action, and thereafter filed a substituted complaint. This complaint repeated the same allegation of an assault upon the original plaintiff, causing a fracture of his skull, and added that as a consequence thereof he died. Upon the trial evidence was offered by the plaintiff tending to show the commission of a wilful assault as alleged, and the death of the plaintiff's intestate three days later as its proximate result. Upon the defendant's motion a verdict was directed in his favor.

At common law, in conformance with the maxim, *Actio personalis moritur cum persona*, no action would lie for damages caused by the death of a human being by the wrongful or negligent act of another. This view was general except in a few jurisdictions where the exception was made that where the death of a wife or child, caused by a wrongful act, was not instan-

Messrs. Charles J. Martin and William T. Minor, for appellant:

The statute indirectly creates a cause of action for death.

Murphy v. New York & N. H. R. Co. 29 Conn. 496, 30 Conn. 184; Goodsell v. Hartford & N. H. R. Co. 33 Conn. 451; Broughel v. Southern New England Teleph. Co. 72 Conn. 617, 49 L.R.A. 404, 45 Atl. 435; Budd v. Meriden Electric R. Co. 69 Conn. 283, 37 Atl. 683, 3 Am. Neg. Rep. 335.

The statute has been construed to be remedial.

Lamphear v. Buckingham, 33 Conn. 247; Broughel v. Southern New England Teleph. Co. 72 Conn. 617, 49 L.R.A. 404, 45 Atl. 435.

Judgment may be rendered for the relief demanded upon any right of action which

the facts alleged in the complaint are sufficient in law to support.

Cole v. Jerman, 77 Conn. 375, 59 Atl. 425; Morehouse v. Throckmorton, 72 Conn. 449, 44 Atl. 747.

The filing of a substituted complaint, by the administrator of David Kling, deceased, did not change the nature of the case.

Craft Refrigerating Mach. Co. v. Quinncipiac Brewing Co. 63 Conn. 551, 25 L.R.A. 856, 29 Atl. 76; Broughel v. Southern New England Teleph. Co., supra.

The gist of the action is that the statute of our state, instead of in terms creating a new right of action, provides that the right of action of the party injured shall survive, and thus indirectly accomplishes the same result as do those statutes which

taneous, the husband or father could recover for the loss of services and for medical and other expenses up to the time of death without the aid of any statute (see 13 Cyc. 310). This general denial of a right of action at common law led to the enactment of statutes giving a right of recovery in such cases in practically every jurisdiction. The first of these statutes (9 and 10 Vict. chap. 93) was enacted in 1846, and is commonly known as Lord Campbell's act, and with various minor variations is now embodied in the law of practically all the states of the union. These statutes are of two kinds; namely, those generally known as survival statutes, and in which the right of action was that which the deceased would have had had he lived, and those creating a new cause of action independent of any right of action which the deceased might have had. In some jurisdictions, however, the statutes embrace both of these classes. (See generally, 8 Am. & Eng. Enc. Law, 858 *et seq.*)

But few decisions seem to have passed directly upon the question whether or not such statutes give a right of action for an intentional killing, but most of the statutes are undoubtedly sufficiently broad to embrace such cases.

Thus, under statutes giving a right of action for death caused by wrongful act or negligence, etc., of such character as would, if death had not ensued, have entitled the party injured to maintain an action, it has been held that recovery for death intentionally inflicted may be had provided the killing was not justifiable. Morgan v. Barnhill, 55 C. A. 1, 118 Fed. 24; Howard v. Hunter, 126 Ky. 685, 104 S. W. 723; Randolph v. Snyder, 139 Ky. 159, 129 S. W. 562 (dictum); Tucker v. State, 89 Md. 471, 46 L.R.A. 181, 43 Atl. 778, 44 Atl. 1004; White v. Maxcy, 64 Mo. 552; Nichols v. Winfrey, 79 Mo. 544, on subsequent appeal, 90 Mo. 403, 2 S. W. 305; Vawter v. Hultz, 112 Mo. 633, 20 S. W. 689; Besenecker v. Sale, 8 Mo. App. 212; Kain v. Larkin, 56 Hun, 79, 9 N. Y. Supp. 89; Darling v. Williams, 35 Ohio St. 58; Wilson 46 L.R.A. (N.S.)

v. Brown, — Tex. Civ. App. —, 154 S. W. 322. In Howard v. Hunter, 126 Ky. 685, 104 S. W. 723, supra, the court, in discussing the scope to be given the term "wrongful act," said: "The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person. . . . As the word 'negligence' has a limited meaning, the words 'wrongful act' were used to embrace every injury that might be committed against the person, whether negligently done or not. A wrongful act may or may not be negligent, depending on how it is committed and the relation between the parties. Many wrongful acts are committed in which there is no element of negligence,—no breach of duty is committed. A wrongful act may be criminal, wilful, wanton, or reckless. In short, every injury inflicted upon the person without legal right or excuse is a wrongful act without reference to the relation existing between the perpetrator and his victim. Clearly the death of a person caused by the careless, wanton, or malicious use of firearms is a wrongful act. . . . Any act that is wanton or malicious is necessarily wrongful, and whenever death is caused by a wrongful act, however it may be committed, or whatever the means or instrument used in its commission may be, a cause of action survives to the personal representative. Any other interpretation would seriously impair, if not destroy, the meaning of the words 'wrongful act,' found in the Constitution, and inserted for the purpose of allowing a cause of action for the death of any person, caused by such act."

And a right of action for the intentional, unjustifiable killing of a person existed in Texas under the act of February 2, 1860, which gave a right of action for compensatory damages in case of death caused by wrongful act, etc., for the benefit of the surviving husband, wife, child, or parent of the person killed, and the cumulative provision of the Constitution of 1869 (§ 30) to the effect that every person or corporation that may commit a homicide

in express terms create a new cause of action.

Tiffany, *Death by Wrongful Act*, 2d ed. p. 32, § 25; *Broughel v. Southern New England Teleph. Co.* supra; *Boston, C. & M. R. Co. v. State*, 32 N. H. 215; *Soule v. New York & N. H. R. Co.* 24 Conn. 575; *Budd v. Meriden Electric R. Co.* 69 Conn. 272, 37 Atl. 683, 3 Am. Neg. Rep. 335; *Goodsell v.*

Hartford & N. H. R. Co. 33 Conn. 51; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Connors v. Burlington, C. R. & N. R. Co.* 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465.

The death does not form an essential part of the cause of action, but is only an element in ascertaining the damages arising therefrom.

through wilful act or omission shall be responsible in exemplary damages, etc. *March v. Walker*, 48 Tex. 372.

And a statute providing that an action for actual damages on account of injuries causing the death of any person may be brought where the death was caused by the "wrongful act," etc., of another, although the killing might have amounted to a felony, and without regard to any criminal proceedings, was held, in *Croft v. Smith*, — Tex. Civ. App. —, 51 S. W. 1089, to give a right of action for damages resulting from the intentional and unjustifiable killing of a person, against the person doing the killing.

So, under a statute providing for reparation for killing by "careless or wanton or malicious use of firearms or other deadly weapons, not in self-defense," recovery may be had for an intentional killing done with firearms, and not in self-defense. *Becker v. Crow*, 7 Bush, 198; *Spring v. Glenn*, 12 Bush, 172. And see *Young v. Young*, 141 Ky. 76, 132 S. W. 155.

And in *McClurg v. Igleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80, it was held that a statute allowing recovery for a killing done "wantonly and maliciously" embraced every wrongful and intentional killing.

And in the following cases it was held, without indicating the nature of the statute under which the action was brought, that recovery could be had for an intentional unjustifiable killing: *Weekes v. Cottingham*, 58 Ga. 559; *McKinney v. Carmack*, 119 Ga. 467, 46 S. E. 719; *Forbes v. Snyder*, 94 Ill. 374; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Brinkmann v. Gottenstroeter*, 160 Mo. App. 596, 140 S. W. 1194, adopting opinion as reported in 153 Mo. App. 351, 134 S. W. 584; *Marks v. Borum*, 1 Baxt. 87, 25 Am. Rep. 764; *Wallace v. Stevens*, 74 Tex. 559, 12 S. W. 283, on subsequent appeal 10 Tex. Civ. App. 44, 30 S. W. 1099; *Gray v. Phillips*, 54 Tex. Civ. App. 148, 117 S. W. 870.

And in the following cases it seems to have been assumed that an action may be maintained under a statute giving a right of action for death by wilful or wrongful act where the intestate could have maintained an action for the act causing death if death had not ensued, for having intentionally killed a person, provided the killing was not justifiable: *Lawrence v. Seay*, — Ala. —, 60 So. 937; *Suell v. Derricott*, 161 Ala. 259, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636; *Richards v. Burgin*, 159 Ala. 282, 49 So. 294, 17 Ann. Cas. 898; *Gobb v. Owen*, 150 Ala. 410, 43 So. 826; 46 L.R.A.(N.S.)

Rutherford v. Foster, 60 C. C. A. 129, 125 Fed. 187, construing an Arkansas statute: *Baker v. Bailey*, 16 Barb. 54. And in the following cases wherein the statutes under consideration were not disclosed in the reports of the respective cases, the courts seemingly have proceeded upon a similar assumption: *Brooks v. Haslam*, 65 Cal. 421, 4 Pac. 399; *Foster v. Shepherd*, 258 Ill. 164, 45 L.R.A.(N.S.) 167, 101 N. E. 411; *Cleveland, C. C. & St. L. R. Co. v. Starks*, 174 Ind. 345, 92 N. E. 54; *Pierce v. Myrick*, 12 N. C. (1 Dev. L.) 345; *Garcia v. Sanders*, 90 Tex. 103, 37 S. W. 314.

But under a statute allowing recovery for death of one, caused by "wilful neglect" of another, no recovery can be had where the killing was intentional. *Spring v. Glenn*, 12 Bush, 172; *Morgan v. Thompson*, 82 Ky. 383. In *Spring v. Glenn*, supra, the court said: "While wilful negligence may be quasi criminal, and such a high degree of neglect as is equivalent to an intentional wrong, still it can scarcely be said that when one commits a wrong intentionally, and to accomplish a certain purpose, he is guilty of wilful neglect; nor can it be supposed that the legislature had this class of wrongs in view when enacting the statute authorizing the personal representative to sue when his intestate's death was the result of the wilful negligence of another. The element of negligence must enter into the act of killing in order to create a cause of action under the statute."

Under statutes which are broad enough to allow recovery for an intentional killing, the action must be brought by a party designated in the statute as one for whose benefit recovery is allowed. *Morgan v. Thompson*, supra, holding that an action for intentional killing could not be maintained by the administrator of the deceased where the statute gives the right of action to the widow and minor children of the person killed.

And under those statutes which give a right of action in cases where the wrongful act was such as would, if death had not ensued, have entitled the party injured to maintain an action, an action cannot be maintained unless decedent could have maintained an action for damages for his injury had he survived. *Wilson v. Brown*, — Tex. Civ. App. —, 154 S. W. 322, holding that no action could be maintained under the statute, where the deceased could not have sued had she survived, because she was the wife of the defendant.

G. J. C.

Jackson v. Watson [1909] 2 K. B. 193, 16 Ann. Cas. 492; *Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. 608, 74 L. J. K. N. S. 386, 21 Times L. R. 300, 53 Week. Rep. 354, 92 L. T. N. S. 527; *Cregin v. Brooklyn Crosstown R. Co.* 75 N. Y. 192, 31 Am. Rep. 459.

Mr. Philip Pond, for appellee:

If there is such right of action, it is the creature of statute.

Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co. 25 Conn. 265, 65 Am. Dec. 571; *Gregory v. Brooks*, 35 Conn. 446, 95 Am. Dec. 278; *Broughel v. Southern New England Teleph. Co.* 72 Conn. 620, 49 L.R.A. 404, 45 Atl. 435; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 756, 24 L. ed. 582; *Tiffany, Death by Wrongful Act*, 2d ed. §§1, 11; *Thornton, Federal Employers' Liability*, 2d ed. §99, p. 165.

Ordinary meaning of the word "neglect" is an omission from carelessness to do something that can be done and that ought to be done.

Watson v. Hall, 46 Conn. 207.

Prentice, Ch. J., delivered the opinion of the court:

The record does not disclose the reasons assigned by the court for its direction of a defendant's verdict. Examination of the transcript of testimony clearly indicates that the reason was not found in the insufficiency of the proof of the alleged assault, and of the intestate's death as a consequence thereof. Presumably the reason was that which defendant's counsel insists was sufficient; to wit, that as the proof was of injuries resulting in death, intentionally inflicted, there could be no recovery under the substituted complaint. Possibly it was for the reason that the substituted complaint set up an independent cause of action, founded upon the death of the intestate, which was unrelated to that contained in the original complaint, and which therefore did not accrue until death had occurred, which death, the evidence showed, was subsequent to the commencement of the action.

The first of these reasons, to be adequate, involves the maintenance of two propositions, to wit: (1) That under the substituted complaint there could be no recovery except for the death of the intestate; and (2) that there can be no recovery in this state for death intentionally caused.

The maintenance of the first of these propositions is an essential preliminary to the second. Upon the assumption that the alleged assault was made as claimed, and that David Kling survived it for three days before death intervened, he, while living, had a right of action for substantial damages. That right of action, by force of the 46 L.R.A.(N.S.)

statute, survived to the plaintiff administrator. Pub. Act 1903, chap. 193, p. 149. Before his death, suit to enforce this right of recovery in him, being the present action, was begun. The plaintiff was entitled to enter, as he did, to prosecute it to a judgment, which should be compensatory for all that the intestate, while living, suffered as the consequence of the injuries inflicted. *Soule v. New York & N. H. R. Co.* 24 Conn. 575, 577; *Goodsell v. Hartford & N. H. R. Co.* 38 Conn. 51, 55. Unless the amendment of the complaint operated to withdraw this right of action from the consideration of the jury, and to preclude recovery for the consequences of the assault, which antedated the death which ensued, the direction of a verdict for the defendant was manifestly unwarranted.

The original and amended complaints differ from each other in only one particular of possible significance. That arises from the added allegation that death had resulted from the injuries inflicted by the defendant. The former averred that these injuries were so severe that the plaintiff was in danger of death therefrom; the latter, that death had resulted. What did this change in allegation signify in the matter of the plaintiff's right of recovery upon the complaint as it finally stood?

Under Lord Campbell's act, 9 and 10 Victoria, and those statutes in this country which have followed its general lines, a right of action is given where death results from injuries, which is entirely independent of and unrelated to any which the deceased might have had in life. It is not a continuation of or incidental to any right of action existing in favor of anybody prior to the death, and attaches itself to no such right. It is a new thing, which springs into existence upon the death. It is independent of every other right of action, and different in its theory, quality, and object from every other. It does not rest upon the basis of an injury suffered by the deceased's estate; its foundation is the loss sustained by certain persons designated as beneficiaries of the recovery. *American R. Co. v. Didricksen*, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 70, 57 L. ed. 417, 421, 33 Sup. Ct. Rep. 192; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 175, 57 L. ed. 785, 786, 33 Sup. Ct. Rep. 426. "A totally new action is given against the persons who would have been responsible to the deceased if the deceased had lived; an action which . . . is new in its species, new in its quality, new in its principle, in every way new." *Seward v. Vera Cruz*, L. R. 10 App. Cas. 59; *Blake v. Midland R. Co.* 18 Q. B. 93, 109. In *Michigan C. R. Co. v. Vreeland*, 227

U. S. 59, 68, 57 L. ed. 417, 420, 33 Sup. Ct. Rep. 192, the court, speaking of the Federal employer's liability act of 1908 (act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322), similar in its provisions upon the subject now under discussion to those of Lord Campbell's act, said that the right of action which it created was independent of any which the decedent had, proceeded on altogether different principles, and permitted the inclusion in the judgment of no damages which the decedent might have recovered, if he had survived. In the jurisdictions where these statutes exist it would necessarily follow that the substitution of a complaint counting upon the death for one averring sufferings during life only would be the desertion of one cause of action for a radically different one, and the presentation of a right of action which in no way could be made to comprehend, as a basis of recovery, consequences to the deceased during his lifetime.

The situation is very different in this state. The right of recovery for the death which our statute gives is not one which is independent of or unrelated to the right of action which was in the deceased at his death. Our statute is framed upon an entirely different theory, and effectuates quite a different policy. *Goodsell v. Hartford & N. H. R. Co. supra*. The right of action which the executor or administrator is permitted to pursue is not one which springs from the death. It is one which comes to the representative by survival. The right of recovery for the death is as for one of the consequences of the wrong inflicted upon the decedent. The amount of recovery is determined from the standpoint of the deceased, and not from that of the statutory beneficiaries. Its measure, within the statutory limitation, is the value of life to him whose life has been cut off. *Broughel v. Southern New England Teleph. Co. 73 Conn. 614, 620, 84 Am. St. Rep. 176, 48 Atl. 751*. When one, as the result of injuries inflicted, suffers during life, and death later results, there are not two independent rights of action. There is but one liability, and that is for all the consequences of the wrongful act, including the death. *Broughel v. Southern New England Teleph. Co. 73 Conn. 614, 617, 84 Am. St. Rep. 176, 48 Atl. 751*. There cannot be two recoveries. *Goodsell v. Hartford & N. H. R. Co., supra*; *McElligott v. Randolph, 61 Conn. 157, 159, 29 Am. St. Rep. 181, 22 Atl. 1094*. If the injured man survives to recover, he recovers once for all; if he dies before recovery, his executor or administrator stands in his place. The survival statute operates to transfer to the representative the right of

action which the deceased had for his sufferings and disability during life, while the death enlarges his right of recovery by permitting an award of additional damages for the death itself as one of the harmful results of the wrongful act. The court is, by the statute, as it was not by the common law, authorized to take that event into consideration, as it might any other physical development consequent upon the injuries, whether occurring before or after action brought. The new event is not regarded as one which creates a cause of action, but one which has a bearing upon the award of damages. Instantaneous death may of itself bring into existence a right of action which is confined, in the matter of recovery, to the event of death. *Murphy v. New York & N. H. R. Co. 30 Conn. 184, 188*. But if the death is not instantaneous, the right of action is not so confined. It reaches back to the antecedent harmful results, and the death is, by force of the statute, made one of the incidents, in the story of results, which is material in a determination of the amount of recovery to which the representative is entitled. *Broughel v. Southern New England Teleph. Co. supra*.

Our long-continued practice has conformed to this view. Repeatedly have judgments been rendered where there was a single recovery for the death and antecedent sufferings. The utterances of this court from early days have uniformly sanctioned this procedure. *Soule v. New York & N. H. R. Co. supra*; *Murphy v. New York & N. H. R. Co. 29 Conn. 496, 499*. The language of our statute comports with this view, and would not be in harmony with any other. *Pub. Acts of 1903, chap. 193, p. 49*.

A complaint which avers both suffering during the life of the decedent and his resulting death does not therefore embody inharmonious or inconsistent allegations of damage. It specifies damages which flow from a common source, and which our law regards as having such source. In a given case the field of damages recoverable may include both sorts of damage, or only one. A complaint which avers both cannot therefore be regarded as presenting for consideration only the damages flowing from the death, and recovery is not precluded for the damages suffered during life. In such case recovery may properly be had for both or either cause, as the proof may justify. Accordingly in the present case it was competent for the plaintiff to recover for the intestate's pain, suffering, and disability during his period of life following the assault, even if he failed to recover for the death. This was distinctly recognized in

the earliest of our cases: *Soule v. New York & N. H. R. Co.* supra; *Murphy v. New York & N. H. R. Co.* 29 Conn. 496, 499.

We have next to consider whether or not he was entitled to recover for the intestate's death; it having been caused, as the evidence showed, intentionally. It is unnecessary to trace the development of our statutes imposing a civil liability for injuries to the person, resulting in death. A partial outline of their history is given in *Broughel v. Southern New England Teleph. Co.* supra. Prior to the enactment of chap. 193 of the Public Acts of 1903, that liability was, and always had been, confined to injuries occasioned by negligence. The statute then in force provided that the executor or administrator of any person whose death was caused by negligence might recover of the party legally in fault just damages, not exceeding \$5,000. Gen. Stat. 1902, § 1094. Chapter 193 of the Public Acts of 1903, which is the statute now in force, except as the maximum of recovery was changed in 1911, omits the limiting words "caused by negligence," and provides that in all actions surviving to and brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally in fault for such injuries just damages, not exceeding \$5,000. We must believe that this omission of the pre-existing limitation to injuries caused by negligence, and the substitution of general comprehensive language, was intentional, and with the purpose of extending the right of recovery to all cases where death was the result of injuries wrongfully inflicted. Otherwise it is difficult to conceive of a sufficient reason for the enactment of this chapter of the Public Acts of 1903. Possibly there was a desire to bring together into close relation the provisions touching the survival of actions and those concerning the right of recovery in cases of death, which had been separated in the Revision of 1902, after having been grouped in successive sections in that of 1888,—§§ 1007-1009. But that desire would scarcely be sufficient to prompt the enactment of the legislation of 1903, and if so, certainly not sufficient of explain the radical change in language which was made in dealing with the subject of recovery for injuries resulting in death. Evidently a change of policy was intended and one which should complete the gradual development of our law upon that subject from its small beginning, in cases of death from defective conditions in highway and bridges through negligence in certain other relations, to the point already reached, 46 L.R.A. (N.S.)

where recovery was permitted in all cases where the death arose from negligent conduct, by including all cases of death, however wrongfully caused. Quite likely the not unnatural notion prevailed that there was something unseemly in excepting from liability one who had caused a death intentionally, when one whose offense grew out of want of care was subjected to liability, and that it was time that the existing discrimination in favor of intentional wrongdoers should be removed.

The language of the act would leave no ground for question that the intent was as indicated, were it not that it is provided in the latter part of the section in question that the action must be brought "within one year from the neglect complained of." The act of 1903 unfortunately is not well drafted. Its shortcomings appear in other of its provisions, and the presence in it of this phrase is apparently the result of a careless appropriation of the language of former statutes, without an appreciation of its inappropriateness to the new conditions created. Judging from the similarity of language, the draftsman had before him the act of 1877, chap. 78, and borrowed from its phraseology, including the precise language used by him, prescribing the time within which action must be brought. Identically the same language appears in § 1009 of the Revision of 1888; and the thoughtless transfer may have been from that source. However that may be, the phraseology of the time limitation provision cannot be fairly regarded as of such consequence as to wrest the comprehensive language of the main provision, defining the right of action, from its plain meaning, and to control its construction. We are satisfied that the statute authorizes recovery for injuries intentionally inflicted, resulting in death.

Our discussion, already had, of the theory upon which our law proceeds in authorizing the recovery for death where it results from personal injuries received, and the nature of that recovery in its relation to the original wrongful act, and to the consequences of such act to the injured person during life, renders it unnecessary to further consider the second reason, which we have suggested as having, by possibility, induced the court to direct the verdict. The right of action which was being pursued under the substituted complaint had accrued when the action was begun, and there was no prosecution of a right of action which did not accrue until death ensued.

There is error, and a new trial is ordered.

The other judges concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

EUGENE M. STOCKTON, Plff. in Err.,
v.

UNITED STATES OF AMERICA.

(— C. C. A. —, 205 Fed. 402.)

Postoffice — scheme to defraud — loaded dice.

Sending through the mails offers to sell loaded dice and marked playing cards does not render one subject to punishment under a statute subjecting to a penalty whoever, having devised or intending to devise any scheme or artifice to defraud, shall, for the purpose of executing such scheme or artifice, place in the mail any letter, circular, advertisement, etc.

(April 15, 1913.)

ERROR to the District Court of the United States for the Eastern Division of the Northern District of Illinois to review a judgment convicting defendant of using the postoffice in furtherance of a scheme to defraud. Reversed.

Statement by Gelger, District Judge:

The plaintiff in error seeks review of a judgment of conviction and sentence herein

Note. — Communications offering the means or paraphernalia by which frauds may be perpetrated as an offense against the postal laws.

But few reported cases have been found where, as in *STOCKTON v. UNITED STATES*, the use of the mails was for the purpose not of defrauding the one communicated with, but of offering him the means by which he might defraud others; but, few as they are, they present a contrariety of opinion as to whether the sending of such a communication constitutes an offense within the meaning of the statute.

Prior to 1889, the statute under which the indictments in these cases were brought read as follows: "If any person having devised or intending to devise any scheme or artifice to defraud or be effected by either opening or intending to open correspondence or communication . . . etc." (U. S. Rev. Stat. § 5480.)

In 1889 the statute was amended so as to read: "If any person having devised or intending to devise any scheme or artifice to defraud or to sell, . . . any counterfeit or spurious coin . . . to be effected by either opening or intending to open correspondence or communication . . . etc." (25 Stat. at L. 873, chap. 393, U. S. Comp. Stat. 1901, p. 3696.)

So that cases considering an indictment under the amendment, charging the offense to sell counterfeit money, while within the scope of this note, are not authority 46 L.R.A. (N.S.)

upon an indictment charging violation of § 215 of the Penal Code.

The first count of the indictment charges the defendant with having "devised a scheme and artifice to defraud a class of persons," i. e., "persons . . . whom the said Eugene M. Stockton intended would engage in playing games of chance for money and other valuable consideration, in the manner and by the means hereinafter in this count of the indictment set forth, with one Ike Nichols of Kingsville in the state of Texas," which scheme and artifice to defraud was and is as follows:

"That said Eugene M. Stockton planned, devised, and intended that the said Ike Nichols would purchase from him, said Eugene M. Stockton, and planned, devised, and intended that he, the said Eugene M. Stockton, would sell and deliver to the said Ike Nichols for the purpose hereinafter mentioned, certain gambling devices; to wit, loaded dice and marked playing cards hereinafter more particularly described, for money to be paid therefor by the said Ike Nichols to the said Eugene M. Stockton, and the said Eugene M. Stockton planned, devised, and intended that the said Ike Nichols would engage the said persons intended to be defrauded in playing games of chance for money and other valuable

where the indictment was under the first clause, charging an intent to defraud.

Such a case is *Streep v. United States*, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244, decided after the amendment, holding that as the indictment charged a scheme not to defraud, but a scheme to sell counterfeit obligations of the United States, by means of communications through the mails, no proof of a scheme to defraud was necessary to support it.

The earliest reported case found is that of *United States v. Jones*, 20 Blatchf. 235, 10 Fed. 469, involving an indictment charging the devising of a scheme to put counterfeit money in circulation by sending through the mail a letter calculated to produce the purchase of counterfeit money at a low price for the purpose of putting it off as good, and based on the statute prior to the amendment of 1889. The court, in holding that the offense was within the scope of the statute, said: "The scheme to defraud, described in the information, may be a scheme to defraud any person upon whom the bad money might be passed, and it is within the scope of the statute, although no particular person had been selected as the subject of its operation. Any scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning . . . [of the statute] and a scheme to put counterfeit money in circulation is such a scheme." This decision, which seems to be directly opposed to *STOCKTON v. UNITED STATES*, is not mentioned in that decision.

consideration to be wagered thereon in the manner commonly known as gambling; and the said Eugene M. Stockton planned, devised, and intended that the said dice so to be sold as aforesaid, would be constructed in such manner as to enable the said Ike Nichols to cause said dice in the playing of such games of chance with the said persons intended to be defrauded, as aforesaid, to fall on certain six sides of the said dice, to be determined in advance, as he, the said Eugene M. Stockton, then well knew, without intending that the said persons intended to be defrauded should have any knowledge that the said dice were so constructed as aforesaid; but, on the contrary, he, the said Eugene M. Stockton, by and through the said Ike Nichols, intended to cause the said persons intended to be defrauded, to believe that the said dice were constructed in the same manner as ordinary dice are commonly constructed, to wit: without any mechanical or other device by which it could be determined in advance on which of the six sides the said dice should fall in the playing of the said games of chance."

The indictment further described the marked playing cards, and contained similar averments respecting the plaintiff in error's intention that said Nichols would, in the use of such cards, have an unfair advantage

over the persons intended to be defrauded; that the defendant "so having devised the said scheme and artifice, in and for executing the said scheme and artifice, in and for attempting to do so, and in and for defrauding by and through the said scheme and artifice the said persons intended to be defrauded, unlawfully, wilfully, fraudulently, and feloniously, did place in the post-office of the United States, at Chicago, and cause to be placed in the postoffice of the United States, to be sent and delivered by the said postoffice establishment of the said United States, to said Ike Nichols at Kingsville, in the state of Texas, aforesaid, a certain printed catalogue" (not set forth in the indictment, but identified).

The second count is similar except in respect of the alleged gambling device contemplated to be sold and the person to whom the catalogue was mailed; also setting forth a letter alleged to have been written by the defendant, accompanying the catalogue, amplifying some of its contents, and containing discussion of the use of gambling devices.

The facts in the case are that the plaintiff in error, Eugene M. Stockton, in December, 1910, at the time of his indictment, was engaged in the business of manufacturing and selling magical goods, cards, dice, and

In *Milby v. United States*, 48 C. C. A. 574, 109 Fed. 638, where the indictment was for using the mails in attempting to sell counterfeit money, the court held that the indictment was insufficient because the scheme was to sell counterfeit money, and there was no allegation or proof that the seller did not in fact intend to send counterfeit money, and so it did not disclose an intent to defraud. The court, as pointed out in *Stockton v. United States*, entirely overlooked the amendment of 1889, which provided for just such offenses as in the case at bar. A new indictment was found in that case, and upon appeal from a conviction thereunder the court (opinion by Day, J., 57 C. C. A. 21, 120 Fed. 1), held that the indictment in any event sufficiently charged an offense under the clause added by the amendment of 1889, but also expressed the opinion that an intent that a fraud should be perpetrated on other and unknown persons by the person to whom the communication offering to sell counterfeit money was sent was sufficient to sustain a prosecution under the other clause to which a fraudulent intent is essential. The court observed that the defect in the former indictment was that there was no allegation of intent to defraud the persons directly dealt with or others who might obtain the counterfeit money. The court said: "It is further argued that the first count, which charges an intention to defraud persons unknown by subsequent circulation of the counterfeit money after its receipt by the persons to whom it was

originally sent, is insufficient. It is urged that, as the person ordering counterfeit money would know what he was to get, he could not be defrauded. We think, however, that the allegation of the indictment as to defrauding others by the subsequent circulation of the counterfeit money brings it within the statute. It must always be borne in mind that the use of the mails in aid of schemes of spoliation is the thing sought to be prevented and punished. The allegation of the indictment was distinct that there was an intention to defraud those whom it was intended should obtain the counterfeit money from the postmasters to whom it was sent."

This decision, it will be seen, is in harmony with *United States v. Jones*, supra, and though criticized in *Stockton v. United States*, would seem to be based on sound reasoning.

It will thus be seen that *Stockton v. United States*, in holding that the offense was not within the statute where the scheme is to defraud persons other than the purchaser, is opposed to the majority of the prior decisions in that court. The court in the principal case said that until by appropriate amendment the scope of the statute is further expanded, it did not and cannot comprehend the situation as disclosed in the proofs of that case; and this would seem to be true, especially where the courts entirely overlook earlier decisions of the same court, and criticize other decisions which take a sound and sane view in the construction of the statute.

J. H. B.

kindred articles, including those specified in the indictment. Catalogues, describing the goods and giving prices of the articles manufactured and offered to be sold, were issued and sent through the United States mail to customers, and persons, firms, and individuals to whom such merchandise might be sold.

It is undisputed that catalogues were sent to the two persons named in the indictment; that they contained detailed descriptions of loaded dice, marked playing cards, and other gambling equipment referred to in the indictment.

Argued before Baker and Kohlsaat, Circuit Judges, and Geiger, District Judge.

Messrs. Edward Maher and Bernhardt Frank, with C. S. O'Meara, for plaintiff in error:

Defendant manufactured and sold the devices, and was not a party to any intent to defraud others by the employment thereof.

The indictment expressly shows that both Moore and Nichols knew the nature of the articles advertised. There was, therefore, no fraudulent representation by the defendant.

There is no proof that the mails were used in the execution of a fraudulent scheme.

Federal Penal Code of 1910, § 215; United States v. McCrory, 175 Fed. 804; United States v. Clark, 121 Fed. 191; United States v. Ryan, 123 Fed. 636.

The devices are not within the statute, and the maxim of *ejusdem generis* does not embrace them.

United States v. Beach, 71 Fed. 161.

Messrs. Henry W. Freeman and Walter P. Steffen, with Mr. James H. Wilkerson, for the United States.

Geiger, District Judge, delivered the opinion of the court:

Section 215 of the Penal Code, so far as pertinent to the question presented, is as follows: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining . . . shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States," etc. [35 Stat. at L. 1130, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1653.]

It will be observed that the ingredients which go to make up the offense under this section are:

(1) A scheme or artifice to defraud which the accused has devised, or is intending to devise.

(2) The use of the mails for the purpose of executing such scheme or artifice, or attempting to do so.

Assuming that marked cards and loaded dice may be—or are, almost exclusively—used to cheat or defraud in gambling, has the plaintiff in error, in selling or offering to sell to one knowingly desiring to purchase these articles at an agreed price, devised or intended to devise a scheme or artifice to defraud? Does he, by mailing a catalogue accurately descriptive of these articles and their prices, execute or attempt to execute such scheme or artifice? Without attempting comprehensively to define the language of the act, it is apparent that each of the words "devise," "scheme," and "artifice" embodies elements found in the other two. As understood in the law of crimes or torts, to "devise" conveys the idea of being devious, contriving, disingenuous; a "scheme," machination, intrigue, or plan whose appearance differs from the reality; an "artifice;" a trick, false pretense, or token. But the degree to which this conception of the language of the statute is satisfied is never material, nor does the first essential ingredient of the offense exist, unless the scheme or artifice devised or intended to be devised is one to defraud.

We start, as we must, with the concession that, although marked cards and loaded dice may be used, as stated, they are none the less lawful subjects of commerce. They may be manufactured, sold, and purchased. If, therefore, upon purchase and sale, the parties thereto understand precisely the subject-matter, and the seller proposes to and does give to the purchaser just what the latter wants,—even though it be gambling apparatus,—the transaction is an ordinary contract. The seller has neither devised nor executed a scheme or artifice. But the government, to sustain the indictment and conviction in the present case, seeks to impute or ascribe to the plaintiff in error the fraudulent intent of the purchaser or possessor of the gambling devices, and thereby charge a fraudulent scheme. Its claim is thus stated in the brief: "That Stockton, the defendant below, intended that the persons to be defrauded would engage in playing games of chance for money and other valuable consideration, with the persons to whom the catalogue described in the indictment was mailed, and that he planned, devised, and intended that these addressees should purchase from him (Stockton), and that he would sell them certain gambling devices, namely, loaded dice, marked playing cards, electro magnets, etc., by means of which the persons intended to be defrauded, while playing at games of chance with the possessors thereof, were to

be defrauded of their money by being deprived of a fair and equal chance of winning in playing such games."

In other words, plaintiff in error by mailing the catalogue intended to induce Moore and Nichols to purchase gambling apparatus from him; if they purchased, he intended that they would engage persons at play and defraud them. Therefore he devised a scheme to defraud, because he intended to supply the instrumentality, i. e., marked cards, etc. Now, if plaintiff in error had, through personal solicitation, sold or offered to sell this apparatus to Moore and Nichols; or if they had called at his place of business and entered into and concluded negotiations with him, there would in each case be present every element disclosed in the indictment. The mailing of the catalogue is not an element of the scheme; the arbitrary allegation of the intention of plaintiff in error that Moore and Nichols would engage persons in play, etc., is in effect an allegation of knowledge on his part that such purchasers would put the apparatus to a use for which it was obviously intended; and it adds and can add nothing unless and until by appropriate averment of facts it appears that he was to be in some relation of confederacy or participation, beneficial or otherwise, in such use. The real scheme or artifice to defraud, if any, is that devised and perpetrated by the possessors of the apparatus when they use it. The actual intent of the plaintiff in error was coextensive only with his transaction in selling or offering to sell; and in case he sold—the subject-matter being disclosed and known—his whole intention and expectation would have been fully realized. His relation to the matter would have been at an end; and granting that Nichols and Moore would or might defraud persons as alleged in the indictment, they would not do so upon the prompting nor in obedience to any act or intention of the plaintiff in error. So, too, the defrauded victims could point to no act of, or circumstance affecting, plaintiff in error, in justifiable reliance whereon they could claim to have entered into a situation wherein he defrauded them. Therefore, to uphold the indictment by imputing to him the fraudulent design or acts of subsequent possessors of the gambling apparatus, without averment or proof of participation therein, would by construction enlarge the statute. The statute (except in the particulars to be noted) neither defines nor denounces, but aims only to punish using the mails in effectuating, what, without it, would still be schemes or artifices to defraud.

This application of the statute is quite conclusively demonstrated by the course of its amendment and construction respecting

counterfeit money and transactions specifically enumerated. Prior to the amendment by act of March 2, 1889, chap 393, 25 Stat. at L. 873, U. S. Comp. Stat. 1901, p. 3696, the section under consideration was limited to forbidding the use of the mails to effectuate schemes or artifices to defraud; but by such amendment there was added, in the disjunctive, the particular specification, now found, denouncing schemes or artifices to sell or deal in counterfeit money, "paper goods," the "sawdust swindle," and the like. The Supreme Court, in passing upon the amended section, said: "The statute, in very words as well as in manifest intent, applies to any person who devises either a scheme to defraud, or a scheme to sell counterfeit money or counterfeit obligations of the United States, provided the scheme is intended to be effected, and is effected, by communications through the postoffice. This indictment charged, not a scheme to defraud, but a scheme to sell counterfeit obligations of the United States; and therefore no proof of a scheme to defraud was necessary to support it." Per Gray, Justice, *Streep v. United States*, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244.

The distinction between cases now, but not formerly, comprehended by the statute, is thus stated by Judge Adams in *Lemon v. United States*, 90 C. C. A. 617, 164 Fed. 953: "There is an obvious difference between schemes to defraud and those to sell or deal in counterfeit money. The one necessarily involves a scheme to defraud some person or persons, while the other may or may not involve such scheme. It may be only a scheme to do an unlawful act in which all concerned knowingly participate. . . .

"The amendment of 1889, instead of limiting, expanded the operation of the statute. It brought within its comprehension, in addition to what was there before, the subject of dealing in counterfeit and spurious money and other articles there specified."

Prior to the amendment it therefore was possible for one person to communicate to another an undisguised offer to sell counterfeit money. It was not a scheme to defraud within the meaning of the act, although counterfeit money could be dealt in only in violation of law, and was universally recognized as a means to defraud. How much more clearly is this true of gambling devices which may be lawfully bought and sold. Were it not true, we would have the anomalous situation of permitting the sending of gambling devices themselves through the mail, but forbidding communications respecting them. The plaintiff in error, without objection on the part of the government, could have sent the loaded dice

or marked cards through the mail to Nichols and Moore, but could not have sent a letter soliciting the purchase.

Counsel for the government urge the authority of *Milby v. United States*, 57 C. C. A. 21, 120 Fed. 1, in support of the indictment and conviction. The case will be examined in the light of an earlier determination (48 C. C. A. 574, 109 Fed. 643) by the same court, involving the same defendant. The facts were these: Milby was originally indicted for using the mails in attempting to sell counterfeit money. Demurrers were overruled, and motions in arrest of judgment denied. He was convicted. Upon appeal (48 C. C. A. 579, 109 Fed. 643), the indictment was held insufficient because the scheme was—"plainly a direct, undisguised proposition to sell counterfeit money.

. . . It is plainly evident," said the court, "from the course pursued in relation to the letter by the postmaster at Albany, Oregon, that he was left in no doubt or difficulty whatever as to the meaning and object of the proposition contained in the defendant's letter. If there was any misrepresentation, direct or indirect, or other facts and circumstances, which would constitute a scheme devised by the defendant to defraud Stites, the particulars in this respect are not given in this indictment. There is no averment to the effect that the defendant was not engaged in making counterfeit money, and in every way prepared to comply with his proposition if accepted. In what method and by what scheme was Stites to be deceived or defrauded, looking alone to the facts disclosed in this indictment? . . . Or, again, putting the transaction in a past aspect, if Stites had concluded to accept the proposition, and use the spurious money offered, and had sent money to the defendant, and received counterfeit money in return therefor at the agreed rate of exchange, in what respect would Stites have been defrauded or misled? In this last aspect of the case both the defendant and Stites would have committed an offense, but Stites would not have been defrauded or deceived. The proposition contained in the letter was entirely devoid of artfulness, and could not have been misunderstood in the ordinary case; and, as we have said, no exceptional circumstance or fact is alleged in the indictment."

It is to be noted that, although the case was decided many years after passage of the amendment of March 2, 1889, no reference is made to such amendment, nor to the case of *Streep v. United States*, supra, which definitely construed it as expanding the statute to comprehend situations not therefore within its terms, and comprehending precisely the accusation against Milby.

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A new indictment, charging in several counts the subject-matter of the first prosecution, was then returned. After trial and conviction, the case was appealed, being reported as *Milby v. United States*, 57 C. C. A. 21, 120 Fed. 1, and now relied upon. It was urged that the first count, which charged an intention to defraud persons through subsequent circulation of the money, was insufficient. The court said: "It is further argued that the first count, which charges an intention to defraud persons unknown by subsequent circulation of the counterfeit money after its receipt by the persons to whom it was originally sent, is insufficient. It is urged that, as the person ordering counterfeit money would know what he was to get, he could not be defrauded. We think, however, that the allegation of the indictment as to defrauding others by the subsequent circulation of the counterfeit money brings it within the statute. It must always be borne in mind that the use of the mails in aid of schemes of spoilation is the thing sought to be prevented and punished."

But the court further held that, even if defendant's contentions were sound, the count was sufficient as charging an offense within the amendment, and the conviction was sustained because other sufficient counts of the indictment were covered by the proofs and a verdict of guilty. However, the infirmity of the position taken in the language quoted is this: It is always possible to impute to a seller knowledge, and (in an inaccurate sense) an intention, that an article sold may be put to uses for which it is obviously intended. Hence, if the wrongful intent or scheme of the purchaser of counterfeit money could be ascribed to the seller as his scheme, there would have been no necessity for amending the statute. The sale, or offer to sell, would be a devising, and the scheme or artifice could always be charged and found, solely upon the inherent character of counterfeit money.

The views which we have expressed respecting the scope of the statute and its application to the indictment render unnecessary extended discussion of the facts established by the testimony. The plaintiff in error mailed the catalogues which were descriptive of the articles in his possession and described in the indictment. He sustained no relations toward Moore and Nichols, the addressees, other than such as arose through a desire to sell to them articles described in the catalogue. Until, by appropriate amendment, the scope of the statute is further expanded, it does not and cannot comprehend the situation thus disclosed in the proofs; and neither the indictment nor such proof shows either a scheme

or artifice to defraud devised by the plaintiff in error, nor an execution or attempted execution thereof by him, through the use of the mails.

The judgment is reversed, with directions to sustain the demurrer to the indictment, and to discharge the defendant.

SOUTH DAKOTA SUPREME COURT.

F. A. STRAUB, Respt.,

v.

LYMAN LAND & INVESTMENT COMPANY, Appt.

(— S. D. —, 138 N. W. 957.)

Writ — service on corporation — leaving with officer in other state.

1. A provision for service of process on a domestic corporation by delivering it to an officer of the corporation while he is in another state where he resides does not deprive the corporation of due process of law. **Statute — construction — legislative declaration — effect.**

2. Legislative declaration as to the construction to be given to a previous statute is not conclusive on the courts.

(December 3, 1912.)

A PPEAL by defendant from an order of the Circuit Court for Lyman County refusing to vacate a judgment in plaintiff's favor in an action brought to recover damages for breach of contract to sell and convey real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Davis, Lyon, & Gates, for appellant:

Jurisdiction of the court to render a personal judgment against the defendant was dependent upon a personal service of the summons or a voluntary appearance in the action by the defendant.

1 Bailey, Jurisdiction, § 30; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Process cannot go beyond the state and compel a person to return and make a defense.

De la Montanya v. De la Montanya, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 165, 44 Pac. 345.

Both parties claimed under execution

sales against the North Carolina estate (limited).

Bernhardt v. Brown, 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 527, 715; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 50 L.R.A. 577, 80 Am. St. Rep. 41, 82 N. W. 308; Grigsby v. Wopschall, 25 S. D. 564, 37 L.R.A. (N.S.) 206, 127 N. W. 605.

On petition for rehearing.

The laws of the state have no extraterritorial force, and process served outside of the state will not give the court jurisdiction.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Story, Conf. L. 7th ed. § 539; Cooley, Const. Lim. 7th ed. 579, 584; Raher v. Raher, 150 Iowa, 511, 35 L.R.A. (N.S.) 292, 129 N. W. 494; Ann. Cas. 1912 D, 680; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 50 L.R.A. 577, 80 Am. St. Rep. 41, 82 N. W. 308; De la Montanya v. De la Montanya, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 165, 44 Pac. 345; Aikmann v. Sanderson, 122 La. 265, 47 So. 600; Bernhardt v. Brown, 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 527, 715.

Mr. James Brown, for respondent:

In the very nature of the case, there can only be constructive or substituted service of process on a corporation.

Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co. 51 Fla. 176, 4 L.R.A. (N.S.) 117, 120 Am. St. Rep. 153, 40 So. 436.

The legislature may provide whatever means it deems best adapted to bring the attention of the corporation to the fact that proceedings have been commenced against it.

Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835.

Smith, J., delivered the opinion of the court:

Appeal from an order of the circuit court of Lyman county denying defendant's motion to vacate a judgment against appellant. The complaint in the action alleges the breach of an agreement by defendant to sell and convey to plaintiff certain farm lands situated in Lyman county, and demands damages in the sum of \$300, with interest. The defendant is a domestic corporation organized and existing under the laws of this state. The summons and complaint were

Note.—Generally as to whether constructive or substituted service, including personal service out of the state, upon a resident in an action *in personam* constitutes due process of law, see notes to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 585, and Raher v. Raher, 35 L.R.A. (N.S.) 292. Specifically as to validity of 46 L.R.A. (N.S.)

statutes authorizing constructive or substituted service on domestic corporations, see note to Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co. 4 L.R.A. (N.S.) 117; and later cases, Nelson v. Chicago, B. & Q. R. Co. 8 L.R.A. (N.S.) 1186, and Ward Lumber Co. v. Henderson-White Mfg. Co. 17 L.R.A. (N.S.) 324.

served by one Phillips, a deputy sheriff of Lyon county, Iowa, by delivering to and leaving the same with one Charles Shade, the treasurer of said corporation, a resident of Lyon county, Iowa, on the 7th day of February, 1908, in Lyon county, Iowa. No appearance or answer was made in the action, and the summons, complaint, and return of service, as stated, were filed in the office of the clerk of the circuit court of Lyman county, February 26, 1910, and on March 15, 1910, judgment was entered against the defendant corporation in the sum of \$403.95, damages and costs. Thereafter, on the 21st day of August, 1911, defendant appearing specially moved the court, upon affidavit and the files and records of the court, to set aside and vacate the alleged pretended judgment, upon the ground that the court was without jurisdiction to enter the same. The affidavit accompanying the motion discloses the mode of service as indicated; that there was no affidavit or order for publication of summons; and that no other service was made or attempted than as above stated, and no appearance made in the action by defendant, or by anyone in its behalf. In resistance of the motion plaintiff's counsel filed an affidavit of M. A. Brown, stating that summons was issued in said cause on January 8, 1908, and an attempt made to serve the same upon officers of said corporation, residents of this state; whereupon it was disclosed that all the resident officers of said corporation had resigned, and that Charles Shade, the treasurer, was a resident of and in Lyon county, Iowa; whereupon service was made upon him, as stated. Upon the hearing an order was entered, denying defendant's motion to vacate the judgment, to which ruling defendant excepted, and has brought the action to this court for review, alleging error in the denial of the motion to vacate the judgment.

It is appellant's contention that service of the summons upon an officer designated by statute as one of the officers upon whom service of process may be had, but who resides and is served outside of the state, does not constitute due process of law in an action against a domestic corporation, so as to authorize a judgment for damages against such corporation.

It is respondent's contention, on the other hand, that § 110 of the Code of Civil Procedure authorizes such service in an action against a domestic corporation, and that such service constitutes due process of law. Section 110 provides: "The summons shall be served by delivering a copy thereof as follows: 1. If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier,

treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property in this state, or the cause of action arose therein, or when such service shall be made within this state personally upon the president, treasurer, secretary, or duly authorized agent thereof. . . . Service made in any of the modes provided in this section shall be taken and held to be personal service. . . ."

None of the other provisions of the section affect the question involved in this appeal. It seems plain to us that the clauses of the section above quoted are intended to distinguish broadly between domestic and foreign corporations as to the mode of service of summons. It will be observed that as to domestic corporations service may be made upon "the president or other head of the corporation, the secretary, cashier, treasurer, a director or managing agent thereof;" while as to foreign corporations such service can only be made upon "the president, treasurer, secretary, or duly authorized agent thereof." The section also expressly provides that as to foreign corporations such service shall be made within this state, personally, upon the officers named; while as to domestic corporations the statute does not say that service shall be made within the state. It is almost universally held that service of process within the state upon officers of a foreign corporation, pursuant to statutory enactments, is sufficient to bring the foreign corporation within the jurisdiction of the state court, and to authorize the entry of judgment against such corporation in any case; and such statutes are upheld by an overwhelming weight of authority.

If service upon an officer of a foreign corporation within this state may be deemed due process of law, we see no reason why service of process upon an officer of a domestic corporation residing in a foreign state may not likewise be deemed due process as well. A domestic corporation is necessarily resident within the state, and cannot remove itself therefrom, either permanently or temporarily. Such corporation is at all times to be deemed an inhabitant of the state, and never beyond the territorial jurisdiction of its courts. A natural person may voluntarily remove from the state, either temporarily or permanently. Where the removal is temporary, the statute prescribes a mode in which process may be served and jurisdiction of the absent defendant obtained by leaving a copy of the summons at the usual dwelling place, with a member of the family over fourteen years of age,—a mode of substituted service. Such service is upheld by the courts, upon the theory that it is reason-

ably designed to give the defendant notice of the proceeding in court and an opportunity to be heard in defense of the action. A corporation is an artificial person, and can be served with process only through its agents. The statute does not say that service of the summons upon a domestic corporation shall be made within the state; and upon principle we see no reason for adding such limitation by construction. Such a corporation is at all times within the territorial jurisdiction of the state courts, and service upon its agents or officers designated by the statute, without the state, is as reasonably certain to convey notice of the pendency of the action as would like service upon the same officer within the state. The theory of such statutes is that any of the officers designated, when so served, will take proper and necessary steps to protect the interests of the corporation in the pending proceeding. It appears to have been held at common law that jurisdiction of a corporation could not be acquired by service of process on its officers outside of the state which gave it existence. *M'Queen v. Middleton Mfg. Co.* 16 Johns. 6; *Barnett v. Chicago & L. H. R. Co.* 4 Hun, 114; *Peckham v. Haverhill*, 16 Pick. 286. In almost all if not in every state of the Union, statutes have been enacted which provide that if a foreign corporation engages in business in the state it will be suable there in regard to such business; and service within the state on its officers designated by statute is sufficient to bring the corporation within the jurisdiction of the state courts. *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 234; *Bawknight v. Liverpool, L. & G. Ins. Co.* 55 Ga. 195; *National Bank v. Huntington*, 129 Mass. 444; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Hagerman v. Empire State Co.* 97 Pa. 534; *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457. The latter case also holds that such service may become the basis of a judgment *in personam*. *Hinckley v. Kettle River R. Co.* 70 Minn. 105, 72 N. W. 835; *Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co.* 51 Fla. 176, 4 L.R.A.(N.S.) 117, 120 Am. St. Rep. 153, 40 So. 436. In the latter cases it is held that if the mode of service provided in the statute is, under the circumstances, reasonable and appropriate to the case, it is "due process of law," and, as to a resident of the state, will give jurisdiction of the person and support a personal judgment. It is also held that due process of law does not require that there be actual personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an op-

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portunity is offered him to defend. 3 Words & Phrases, 2251, citing *Happy v. Mosher*, 48 N. Y. 313; *Re Union Elev. R. Co.* 112 N. Y. 61, 2 L.R.A. 359, 19 N. E. 664; *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100; *Gilechrist v. Schmidling*, 12 Kan. 263; *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513.

The purpose of such a statute is not to bring the nonresident officer of the corporation within the jurisdiction of the court, but to bring the domestic corporation within its jurisdiction. It does not seek to have the process of the court affect the personal or property rights of a person or corporation resident in another state; and therefore is not an attempt to extend the process of the court beyond the territorial limits of the state within which it is established. It follows that the only question really involved is whether or not such service constitutes due process of law within the state. The fundamental principle involved in "due process of law" is that it shall give sufficient notice of the pendency of the action or proceeding, and a reasonable opportunity to a defendant to appear and assert his rights before a tribunal legally constituted to adjudicate such rights. And whenever a statutory mode of service is reasonably designed to accomplish that end service in accordance therewith constitutes due process of law, and confers jurisdiction on the state court.

Counsel for appellant note the fact that chap. 226, Laws of 1911, being an amendment to § 110, Code Civ. Proc. provides that service on a domestic corporation may be made by delivering a copy to a designated officer of the corporation, "either within or without the state," and urge that this enactment is a legislative recognition of the insufficiency of the existing statute to authorize such service. A legislative declaration as to the construction to be given a previous statute is not conclusive or binding on the courts. The amendment, however, may be regarded as an express legislative adoption of the principle announced in this decision as to what constitutes due process of law. No question of discretion is involved in the ruling of the trial court. It is not alleged that the defendant corporation did not receive notice of the pendency of the action, nor that it has a good defense thereto. We are clearly of opinion respondent is right in his contention, and that the principle underlying the decisions in *Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co.* and *Hinckley v. Kettle River Co.* supra, and the cases there cited, is controlling in this case.

The order and judgment of the trial court are therefore affirmed.

A petition for rehearing having been

granted, Smith, J., on May 24, 1913, handed down the following additional opinion (— S. D. —, 141 N. W. 979):

This cause is before us on rehearing, which was granted and a reargument permitted because of the importance and novelty of the main question involved. The original opinion is reported, in — S. D. —, ante, 941, 138 N. W. 959. We are not disposed to change the views there expressed as to the interpretation of the provisions of § 110, Code Civ. Proc. This statute by necessary implication divides corporations into two general classes,—domestic and foreign. It also distinguishes certain classes of cases in which service may be made on foreign corporations. As to this class of corporations, service can be made only: (1) When the corporation has property in the state; (2) when the cause of action arose in the state; or (3) when such service shall be made in this state personally, upon some one of four of its officers named in the statute. It would seem also, under the first clause of the statute, it was intended that when a foreign corporation has property in this state, or the cause of action arose therein, service may be made upon any one of the six officers named in the statute, either within or without the state; but that question is not before us, and we do not decide it. Necessarily, all corporations not embraced within the limitations applying to foreign corporations are domestic corporations. The provisions of the statute as to property within the state, that the cause of action arose in the state, or that service must be made within the state, have no application to domestic corporations. We think, as to domestic corporations, the statute was intended to authorize service, either within or without the state, upon any one of the six officers or agents named in the statute.

The important and crucial question is, as stated in appellant's brief on rehearing, whether the service thus authorized, constitutes "due process of law." In a discussion of this question, it must be borne in mind that a domestic corporation is always, not only a resident of the state, but is at all times within the state, and cannot be absent therefrom even temporarily. The real question, then, is whether the mode of service provided by this statute upon a corporation, resident of and at all times within the state, constitutes "due process of law." The case before us, we think, is distinguishable from a case where a natural person, either resident or nonresident, is attempted to be served with process without the boundaries of the state. It seems to us

that appellant's counsel has failed to distinguish between "process" as a writ, and "due process of law." The question is not whether "process" may be served upon a person outside the boundaries and jurisdiction of the state, but whether service upon a domestic corporation, a resident of and within the state, by delivery of a summons to one of its officers named in the statute, outside the state, constitutes "due process of law." Appellant, in its brief on rehearing, says: "We concede to the fullest extent the doctrine of the (former) opinion in this case, that a state has the right to prescribe the method of service upon its own citizens, and that the method of service adopted by the legislature, whatever it may be, if personally (properly) designed to give notice to the defendant, is sufficient to support a personal judgment."

The statement of counsel makes it unnecessary to refer to the authorities which discuss generally and establish this doctrine. But counsel in their brief further say: "The power of the state to designate the method of service of process is, however, subject to a very well-defined restriction. The power must be exercised within the territorial limits of the state."

Counsel found this supposed restriction upon the universally recognized doctrine that a state cannot send its process over a state line and thus make its laws operative in another jurisdiction. A moment's reflection, we think, will make it clear that this statement of an alleged exception or restriction is inaccurate. As an approximately correct statement, it may be said that the power to proceed under a state statute, prescribing a particular mode of service as to citizens of the state, can only be constitutionally exercised when the citizen is within the territorial limits of the state. Thus stated, we think the rule is sustained by practically all the authorities. But statutes may be found under which it has been contended, by reason of the general rule as stated by appellant's counsel, that a state may authorize service of process upon its own citizens outside its territorial jurisdiction. This view could only be sustained, if at all, upon the theory that a citizen of the state is always constructively within its boundaries and subject to its laws. A statute seemingly enacting this principle is discussed by Justice McLain, in *Raher v. Raher*, 150 Iowa, 511, 35 L.R.A.(N.S.) 292, 129 N. W. 494, Ann. Cas. 1912 D, 694. In that case, service was made in South Dakota, on the defendant Raher, who was at the time a resident and citizen of Iowa. It was contended that service outside the state of Iowa was valid, because authorized by the laws of that state and because Raher was a citi-

man or resident of that state. Justice McLean said: "The precise question involved in this case is absolutely without precedent in this or any other state in the Union." He reaches the conclusion that the statute authorizing such service is unconstitutional, both under the state and Federal Constitutions.

We have no criticism to offer, either as to the reasoning or the final conclusion in that case; but we think it has no application to the case before us, because not only was the service made outside the state, but the defendant himself was outside the state at the time of service. In the *Raher* Case, it was held that such service did not constitute "due process of law," and therefore the statute authorizing it was unconstitutional. But what constitutes due process of law, as to a citizen within the state, is a different question, and we think is settled by the authorities. It may be conceded that no person, resident or nonresident of the state, can be required by service of process or notice in a foreign state to appear and defend in the courts of the state from which such notice or process issues, except in those cases in which the impending action is intended to affect property or status of such person already within the jurisdiction of the state or its courts. The exception is founded upon the theory that, while the process or writ of the state court cannot reach a person outside the state, it can reach his property which is within the state. But even in this class of cases, the procedure is unconstitutional unless it is such as to constitute "due process of law." It is essential to due process of law in such cases that some method of service of notice be provided, reasonably designed to reach the defendant, and that an opportunity be offered him to appear and defend. It is not the fact alone that property of the absent defendant is within the state, or is seized under a writ of process of the state court, that constitutes due process of law. It is the notice, and opportunity to appear and defend provided by the statute, which constitutes such process.

In *Carter v. Frahm*, — S. D. —, 141 N. W. 373, this court quoted with approval the language in *Freeman on Judgments*, § 611, where it is said: "The mere seizure of property does not confer jurisdiction upon the court to proceed to judgment. To this end, some notification of the proceedings, beyond that arising from seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually made by publication in some form. *The manner of notification is immaterial, but the notification itself is indispensable.*" (The italics are ours.)

No argument or citation of authorities is 46 L.R.A.(N.S.)

necessary to sustain the proposition that such notice as is required to constitute "due process of law" when a person or a foreign corporation has property within the state may be served outside the state. The notice thus required is not, in itself, due process of law; it is merely one of its essential parts. The fact that the notice in this class of cases may be served outside the state is alone sufficient, we think, to demonstrate the fallacy of appellant's contention,—that the notice essential to due process of law as against our own citizens within the state cannot be served or given outside the state boundaries. It is apparent that the cases cited by appellant, which hold that a judgment *in personam* cannot be entered upon service outside the state upon either residents or nonresidents, of either notice or process, have no application to the case before us. In this case, we are dealing with a resident of the state which never was and never can be outside its boundary lines. The constitutional limitation as to persons without the state does not apply to persons actually within its boundaries. As to persons within the state, the only constitutional restriction is that they shall not be deprived of life, liberty, or property without due process of law. As to this limitation, no distinction exists between actions *in rem* and actions *in personam*. The only question is whether the procedure provided by the statute is such as to constitute due process of law. If service of summons outside the state, upon a non-resident who has property in the state, is sufficient notice to afford an opportunity to appear and defend against the taking of its property, we see no reason for holding that, as to a domestic corporation, a like service upon its agent or officer, outside the state, is not likewise sufficient to constitute due process of law. We think the rule is that, when a citizen of the state is within its territorial jurisdiction, the state may authorize any mode of service reasonably designed and calculated to give him notice of the judicial proceeding impending, and to afford him a reasonable opportunity to defend in its courts, and any statutory mode of service which fulfils these requirements affords "due process of law."

In some cases, the courts, while recognizing the authority of the legislature to prescribe the mode of service as to citizens within the state, have held that the service prescribed by a particular statute was not due process of law, because not reasonably calculated to bring notice of the commencement of the action home to the defendant. *Pinney v. Providence Loan & Invest. Co.* 106 Wis. 396, 50 L.R.A. 577, 80 Am. St. Rep. 41, 82 N. W. 308.

Nelson v. Chicago, B. & Q. R. Co. 225 Ill.

197, 8 L.R.A. (N.S.) 1186, 116 Am. St. Rep. 133, 80 N. E. 109, a case not before referred to, was an action on the case against a domestic corporation of the state of Illinois. The statute of that state in substance provides that, when the sheriff makes return upon the summons that the defendant company has no officer or agent upon whom summons can be served in the county, service may be made by publication and mailing. This statute was attacked as unconstitutional. The court said: "In this case actual service could not be had upon the defendant, although the suit was properly brought in the court from which the process was issued and the defendant was a resident of and was in the state, and the question here is narrowed to this: Can the legislature provide a constructive or substituted service of process by publication and mail, in lieu of actual service of process, in a case where the process cannot be actually served upon the defendant in the county where the statute expressly authorizes the suit to be commenced, although the defendant resides and is in the state? . . . While the authorities are not in entire harmony upon the subject, the Illinois cases and the greater weight of authority clearly establish, we think, the proposition that a personal judgment in an action at law may be rendered against a defendant residing in and who is in the state where the suit or proceeding is pending, who has been notified of the pendency of the suit by constructive service of process, where it appears actual service of process could not be had upon the defendant, if the constructive service provided for was required to be had in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action or proceeding before judgment or decree was rendered against him." The statute was held constitutional.

A similar statute was sustained in the case of Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co. 51 Fla. 176, 4 L.R.A. (N.S.) 117, 120 Am. St. Rep. 153, 40 So. 436, in an action *in personam*. In that case the appeal was from the denial of a motion to vacate a personal judgment against a domestic corporation upon default. It was admitted that service was in accordance with the statute. The court said: "The fundamental object of all laws relating to service of process is to give that notice which will, in the nature of things, most likely bring the attention of the corporation to commencement of the proceedings against it, and, when the legislature carries out this clear design, it should not be stricken down by the courts."

A statute of Minnesota provided, in substance, that, when a domestic corporation

had no officer in the state upon whom service of process could be made, an action might be commenced in any county where the cause of action arose, by depositing a copy of the summons, writ, or other process or citation in the office of the secretary of state, which should be deemed and treated as personal service on such corporation. The statute was assailed as unconstitutional, because such service was not due process of law. The court says: "If the mode of service provided for is, under the circumstances, reasonable and appropriate to the case, it is 'due process of law,' and, as to citizens and residents of the state, will give jurisdiction of the person, and support a personal judgment against them, although they were not served in person. Freeman, Judgm. § 127. There is no class of cases where there is greater necessity . . . for service in person than where domestic corporations have no officers who can be found in the state upon whom to make service of process; and we can conceive of no other form of service which would in such cases be more appropriate and more likely to communicate notice of the commencement of the action to the corporation, than the one provided in this statute." *Hinckley v. Kettle River R. Co.* 70 Minn. 110, 72 N. W. 836.

In their brief on rehearing, appellant's counsel attempt to distinguish the Florida and Minnesota cases, upon the ground that in neither case did the statute declare that the notice might be given or any act done outside the boundaries of the state. No authority is cited to sustain this contention, and, as suggested in our former opinion, we see no reason for holding that service, sufficient in itself to comply with the requirement of notice as one of the elements of due process of law, when made outside the state upon the proper officer or agent of a domestic corporation, is not due process of law. The essential thing is that the notice required be given or served in such manner as to afford a reasonable probability that it will reach the defendant who is within the state. That a notice personally served upon an agent of a domestic corporation outside the state would be less likely to reach the corporation within the state than would a notice filed with the secretary of state or published in some newspaper in the state would seem unreasonable.

We are of opinion that the statute, as we have construed it, should be held to provide due process of law as to a domestic corporation, and that the order appealed from should be affirmed.

Gates, J., took no part in this decision.

IOWA SUPREME COURT.

J. E. RAY, Guardian of John H. Ray,
v.
ELMER YOUNG, Appt.

(— Iowa, —, 142 N. W. 393.)

Fixtures — repair shop — right to remove.

1. A frame building covering 30 by 50 feet of space, erected by a tenant on the

Note. — Termination of estate of uncertain duration as affecting right of sublessee to remove trade fixtures.

Under the general rule that where the lessee's term is for an indefinite period, as at the will of the landlord, the former has a reasonable time after its expiration in which to remove his fixtures (19 Cyc. 1068), it would seem reasonably to follow that he should have the same privilege where the uncertainty of duration characterizes his lessor's estate, rather than his own.

This is the rule laid down in RAY v. YOUNG, where it was held that the right of the lessee of a life tenant to remove trade fixtures from the leased premises does not terminate immediately by virtue of the death of his lessor, but that he is entitled to a reasonable time thereafter in which to remove such fixtures.

So, where the owner of premises went abroad for an indefinite period, and left an agent in charge "while he was gone" to make the premises pay the best way he could, and the agent leased the premises for a term of years, it was held that the return of the owner terminated the agency, and that his demand of the premises terminated the tenancy, but that the lessee had a reasonable time thereafter in which to remove his fixtures. *Antoni v. Belknap*, 102 Mass. 193.

And in *Oakley v. Monck*, L. R. 1 Exch. 159, 4 Hurlst. & C. 251, 35 L. J. Exch. N. S. 87, 12 Jur. N. S. 213, 14 L. T. N. S. 20, 14 Week. Rep. 406, it was said that where a tenant for life leases premises to another with the stipulation that all fruit trees and shrubs planted by such sublessee during his term and remaining on the premises at the expiration of the lease shall be taken by the landlord at a valuation, if the landlord dies the tenant may either call on his executors to take the trees at a valuation, or he may exercise the ordinary right of a tenant holding an uncertain interest to remove within a reasonable time such fixtures as in the trade of a nurseryman are in the nature of trade fixtures. In that case, the tenant took neither course, but remained in possession, paying rent to the next succeeding proprietor, and it was held that such proprietor was not thereby bound by the special stipulation in the original lease not known to him.

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leased property, which is placed on a cement foundation and is connected by a shed with the building on the lot when the lease was taken, and which is used as a garage and repair shop, may be removed at the end of the term as a trade fixture if it can be done without injury to the premises.

Life tenant — lessee — right to remove trade fixtures.

2. The right of a lessee of a life tenant to remove his trade fixtures from a leasehold does not terminate instantly upon the death of the life tenant, but he has a rea-

But it has been held that a tenant for life cannot, by contract with his tenant, bind the remainderman so as to authorize the subtenant after the termination of the life estate to remove structures which, but for such contract, would in law constitute a permanent accession to the estate. *White v. Arndt*, 1 Whart. 91 (stable); *Haflick v. Stober*, 11 Ohio St. 482 (barn).

In *Haflick v. Stober*, supra, it was said that the right of a sublessee of a tenant who holds for an uncertain period to remove fixtures after the expiration of such tenancy must be confined to such fixtures as the sublessee would be entitled to remove as a matter of legal right without reference to any contract on the subject.

Again, on the falling in of the particular estate, the remainderman is entitled to all the improvements which the law denominates fixtures, without regard to the manner in which they are constructed, the persons who may have erected them, or whether they may contribute to enhance the value of the property or not. It is not competent for the life tenant and the subtenant to make an agreement which affects the inheritance, without the assent of the remainderman. And without such assent, fixtures or permanent improvements cannot be removed after the termination of the life estate. *White v. Arndt*, supra; *Jones v. Shufflin*, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975.

And the termination of the life estate also terminates the interest of the lessee of the life tenant, and thereupon the remainderman becomes entitled to the property with all improvements thereon, and a frame building erected by such lessee cannot thereafter be removed by him, especially where the remainderman expressly refuses to join in the lease and where the building was erected against his will. *Jones v. Shufflin*, supra.

And *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387, is authority for the proposition that one who holds land under conveyance from a life tenant must be presumed to know the nature and duration of his estate, and that upon the termination of the life estate the land must go to the remainderman, with all permanent improvements erected thereon by the subgrantee, and that in such case the latter is not entitled to compensation there-

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sonable time to effect the removal after that event.

Fixtures — delay in removal — pending negotiations for renewal of lease.

3. Delay of a tenant to remove the fixtures after termination of the lease does not become unreasonable while negotiations for the renewal of the lease are pending.

Landlord and tenant — renewal of lease — failure to reserve right to fixtures — effect.

4. Failure to reserve right to remove fixtures when renewing a lease does not work an abandonment of them to the landlord.

(July 2, 1913.)

APPPEAL by defendant from a decree of the District Court for Linn County in plaintiff's favor in an action brought to enjoin defendant from removing a building which had been erected by him on premises which he occupied as tenant. Reversed.

Statement by Evans, J.:

Suit in equity on behalf of the owner of real estate to enjoin a tenant from removing a building therefrom which had been erected by the tenant thereon during his tenancy. The defendant tenant was the lessee of Mrs. L. E. Ray, who subsequently died and who owned a life estate only in the premises, although this latter fact was not known to the defendant at the time of his lease. The defendant entered upon the premises in November, 1909, under a written lease which permitted him to erect a building thereon with the right of removal thereof. He erected his building and continued in possession until after the death of his lessor. He thereupon proceeded to remove the building. The plaintiff, as remainderman, brought this action by his guardian to restrain such removal. There was a decree for the plaintiff, and the defendant appeals.

Mr. J. H. Preston, for appellant:

When the building in controversy was erected by appellant, it, by express agreement between landlord and tenant, was personal property.

Mickle v. Douglas, 75 Iowa, 78, 39 N. W. 198, 17 Mor. Min. Rep. 137; McCarthy v. Trumacher, 108 Iowa, 284, 79 N. W. 1104; Union Terminal Co. v. Wilmar & S. F. R. Co. 116 Iowa, 392, 90 N. W. 92; Daly v. Simonson, 126 Iowa, 720, 102 N. W. 780.

When the improvements are placed on the land by the tenant under a lease authorizing him to remove the same, he does not lose his right thereto by taking a lease from a subsequent purchaser while in possession, which failed to reserve the same.

Daly v. Simonson, 126 Iowa, 719, 102 N. W. 780; 25 Cyc. 1103.
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Messrs. Deacon, Good, Sargent, & Spangler, for appellee:

At the expiration of a life tenancy the remainderman is entitled to the property with all the improvements thereon.

Stewart v. Matheny, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387; Jones v. Shufflin, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975; Booth v. Booth, 114 Iowa, 79, 86 N. W. 51.

Any agreement made by a life tenant with his lessee in reference to removing buildings placed on the land by said lessee does not bind the remainderman or the person holding the reversionary interest.

Haffick v. Stober, 11 Ohio St. 484; White v. Arndt, 1 Whart. 91.

Buildings placed on land by a tenant, under an agreement with a life tenant that the same can be removed, must be removed, if at all, during the life of the life tenant, and not afterward.

Jones v. Shufflin, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975; Haffick v. Stover, 11 Ohio St. 484; White v. Arndt, 1 Whart. 91; Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301.

A tenant must take notice of his landlord's title, and if he erects improvements on a life estate he does so at his own risk, as he cannot charge the remainderman therefor or remove them.

Stewart v. Matheny, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387; Jones v. Shufflin, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975.

Evans, J., delivered the opinion of the court:

The plaintiff is the great grandson of the former husband of Mrs. L. E. Ray. Some years before the lease in question Mrs. Ray and her husband had conveyed the real estate involved herein to the plaintiff, subject to a life estate therein in favor of Mrs. Ray, and such conveyance appeared of record. The property so conveyed consisted of a lot in the town of Palo, Linn county, and a small and old building thereon 16 by 24 in dimensions. The negotiations between the parties to the lease began with the following letter dated October 17, 1909, from Mrs. Ray to the defendant Young.

Mr. Young,

Kind Friend:

I received a letter from Ed Sisley to-day in regard to renting of the shop on the corner and the lot. I will say do you not think 3 dollars is a small sum per month. I think that I ought to get 4 dollars per month out of it, by paying the tax out of it. If you wish to have it at that price you can have it as long as you want it with the

privilege of removing the part you put on when the lease expires. I will see my brother Ed he lives at Walkerton to write up a lease to that effect as soon as I can, if everything is all right with you. I hope this will be satisfactory to you. Mr. Young my address is 820 East Washington street. Hoping to hear from you soon.

Your friend, L. E. Ray. (Over.)

If you want it at that price you can commence it to-morrow and take possession at once and I shall see that the lease is coming all right.

Later a written lease was executed under date of November 1, 1909, by which the premises were leased to the defendant for the term of one year, with the privilege of five, for the sum of \$48 per year in advance. Such lease contained the following provision: "Mr. Elmer Young having the privilege of adding to this building and removing the same at the expiration of the lease." Young went into possession and built a building on the premises "30x50" and connected the same with the old building, as will be indicated later. The purpose of the building was for use as garage and repair shop, and it was so used during the entire tenancy of the defendant. The defendant continued in possession of the premises under the lease until the death of Mrs. Ray, which occurred June 8, 1911. He had previously paid the rent in advance to January, 1912. He continued in possession of the premises throughout the year 1911 with the knowledge and acquiescence of the plaintiff and his guardian. There is some dispute at this point between the parties, which will be considered later, as to what the understanding between them was during this continued occupancy after the death of Mrs. Ray. But it is undisputed that such occupancy did continue with the consent of the plaintiff. There were in the meantime negotiations between the parties, looking to a new lease; the plaintiff, however, demanding a larger rental. On January 3, 1912, the defendant, while preparing to remove his building, was served with a temporary writ of injunction issued herein. The injunction was made perpetual upon final decree. The effect thereof is to wholly deprive the defendant of all right of property in his building.

The equity of good conscience is not with the plaintiff in this case. If he is entitled to the decree awarded below, it must be upon the ground of absolute legal right unaffected by equitable considerations. The argument on behalf of the plaintiff is that he is not bound by the terms of the contract between the defendant and his lessor; that the rights of the defendant under his

contract terminated with the death of such lessor; that the death of such lessor terminated not only the defendant's right of occupancy, but his right of removal of the building; that the right of removal provided for by the terms of the lease could only be exercised during the term of the tenancy; and that at the death of the lessor the building passed to the remainderman as a part of the real estate. It is also contended that after the death of the lessor the defendant entered into a new oral lease with the plaintiff, and that he became thereby estopped from claiming ownership of the building. We will consider these contentions in the order stated.

It must be conceded that the terms of the contract between the defendant and his lessor are not binding as such upon the plaintiff as remainderman. *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387; *Jones v. Shufflin*, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975. This contract can be considered only as bearing upon the rights of the defendant as they were up to the time of the death of his lessor. It is the contention of the plaintiff that such contract cannot be considered for any purpose. In view of such contention, we may as well inquire first whether, independent of the provision of the contract for the right of removal, the defendant had a right as between him and his lessor to remove the building erected by him. And this depends upon the further question whether or not the building should be classified as a trade fixture.

The following testimony of the witness Hall is the only consistent and intelligible description of the property which we find in the record:

I live in Palo and am a carpenter by occupation; I assisted in building the building for Mr. Young on the lot in controversy; he employed me to do so. I am familiar with the whole of the building as it now stands. The old building was one story, 16x24, facing south; it was moved back about 60 feet, turned around so it faces the side street to the west. There was a shed addition on the east end to make it come out even with the new building. There is 12 feet of space between the old building and the new one; the new building was built 30x50 and then gabled up with a kind of quarter pitch roof, then this was shedded down to the old one in between the full width of the building. There was cement floors over the whole thing, the old ones and the new. It was used as a garage and blacksmith shop; before the old building was moved it was down to the ground and had no foundation under it; then it was moved back with a cement foundation under

it; after it was moved back I helped to tear the floor out; the joists were all pretty near gone; wasn't any good at all. The sills were old; the pine floor held it together; that floor was taken out and a cement one put in.

Cross-examination:

The new part of the building was frame 2x6 2 feet apart and 10 feet high, rafters 2 feet apart covered with shiplap or drop-siding. It wasn't plastered inside; the roof was a common, ordinary roof, rubberoid. It ran back about 50 feet from the front to the rear, and then the roof sloped off for the last 12 feet and shedded down to the old building. It had a cement floor, which extended from the back end of the old part to the front end of the new part. The sills to the new building ran back 62 feet; the shed was connected round the rear end of the old building the same as one of those barns you have in the country with the cowshed built on the side.

By the Court:

Q. Was that 12 feet cut off from the 50 feet by partition and doors?

A. Yes, you see it was a building 30x50, and then that was sided up just like a barn, and just left two big doors, and then a shed built on that, and it left in there another room; all that there was between there was two big double doors. There was nothing between the 12-foot room and the old building. The 12-foot room is as long as the old room east and west. The shed points down to the eaves of the old building and carries the water off to the eastward. There was no new roof on the old building put on at the time this addition was built; it had a shingle roof. The foundation of the new building is cement. The floor stands on top of the cement. I saw them putting in some filling in the old building, —dirt taken from the northerly end of the lot, except some sand they hauled from the river. There used to be an old barn on the north of the lot, and what they call a rivulet comes down there; it always fills in there with water; it was always lower down there. It is about 30 feet from the north side of the old building to the north end of the lot.

Defendant rests.

Without dispute the building was built and used for garage and repair-shop purposes. The following excerpts from the authorities is a sufficient indication of the general rules concerning the definition of trade fixtures. "The question as to what particular articles erected by a tenant on the demised premises in relation to his trade come within the protection of the law as being trade fixtures, and hence removable by the tenant at the expiration of his term, 46 L.R.A. (N.S.)

gives rise to a great variety of considerations as to the nature of the article, its use, the degree of annexation, etc. Such annexations may consist of articles of machinery, utensils, etc., of a perfect chattel nature before annexation was made, and capable of detachment and use elsewhere in connection with other realty; or the articles annexed may consist of buildings, etc., of a more or less substantial and permanent nature, more or less capable of removal and reconstruction, and which having been constructed upon the land, have hitherto had no existence as integral chattels, except in connection with the land whereon they stand." Ewell, *Fixtures*, 2d ed. p. 139.

"Since the strict application of the rule that things annexed to the land, although at the time of annexation belonging to a person other than the owner of the land, become a part of the land, would operate to give to the landlord all articles annexed by the tenant for the better enjoyment of the premises, and so tend to prevent the making of improvements by him and the most beneficial utilization of the premises, the rule has been subjected to considerable relaxations in the tenant's favor, and certain classes of articles, although of such character and so affixed that, as between persons in other relations, they would be treated as permanent annexations, are ordinarily removable by him.

"There are occasional statements to be found to the effect that all annexations made by the tenant for the better enjoyment of the premises are removable by him, but these are not in accord with the weight of authority, which is substantially that the tenant's rights of removal are restricted to: (1) Trade fixtures; (2) domestic and ornamental fixtures; and by some decisions (3) agricultural fixtures. These various classes of fixtures and the tenant's rights in reference thereto will be considered in the above order.

"The exceptional right of the tenant to remove fixtures annexed for the purpose of trade was, in a quite early case, stated to exist 'in favor of trade and to encourage industry,' and that seems the logical ground on which to base it. Occasionally it is said to be based on the presumption of an intention on the part of the tenant subsequently to remove the article, but there appears no more reason for such a presumption when the annexation is for purposes of trade than when it is for any other purpose.

"As before remarked, it is a reasonable presumption that in every case of an annexation by a tenant having an estate of limited duration, he intends, if possible to remove the article annexed upon the termination of his interest; but such an intention

should not, it seems, affect the rights of the remainderman or reversioner. Occasionally, moreover, the court seems to have regarded the question whether a particular article is a trade fixture, for the purposes of the rule, as dependent upon whether the tenant intended it to be a trade fixture. But whether an article is a trade fixture is, it is conceived, in no way a question whether it was intended so to be, there usually, indeed, being no intention in this regard; but it is rather a question whether, so far as appears from the nature of the article and the mode in which the premises were utilized, it was annexed for the purpose of aiding in the conduct of a trade.

"The determination of the question whether a particular article or structure comes within the rule, as being evidently annexed by the tenant to aid in the carrying on of his trade or business, seems to involve but little difficulty. There have, however, been numerous adjudications upon the subject, and engines and boilers, industrial machinery, and apparatus of various kinds, appliances annexed by the proprietor of a place of public entertainment or amusement, buildings, or parts of a building, and even plants grown by a nurseryman, have all been regarded as trade fixtures in particular cases and as therefore removable. Generally, it seems, an article so annexed as to be part of the realty is a trade fixture if the purpose of the annexation was to aid in the conduct of a calling exercised for the purpose of pecuniary profit, provided this calling is not exclusively agricultural in its nature; and the fact that the article has also the qualities of a domestic or agricultural fixture is immaterial in this respect." 2 Tiffany, Land. & T. pp. 1570-1574.

Beyond question the building under consideration in this case was built by the defendant and used by him strictly for trade purposes within the meaning of the law on that subject. Regardless, therefore, of the particular provision in the defendant's contract with his lessor, he had a right to remove his building as between him and his lessor as a "trade fixture," provided, of course, that he could do so without substantial injury to the premises.

Taking such right as it then was immediately preceding the death of the lessor, the question is then projected whether his right of removal of his own property from the leased premises terminated *instantly* by the death of his lessor, or whether he was entitled to a reasonable time to remove his property from the premises. There are cases which hold to the strict rule of forfeiture against the tenant in such a case. *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538, 5 So. 387; *Jones v. Shufflin*, 45 46 L.R.A. (N.S.)

W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975. We have never followed such a rule of forfeiture in this state; neither have we had occasion to pass upon the exact question now before us. The principle or theory upon which such rule is said to be based is that the fixtures erected by a tenant become a part of the realty as soon as erected, and that there is no right of property therein to the tenant, his right being in the nature of a privilege or license to sever the same from the realty and repossess himself thereof, and that a failure to exercise such right or privilege during the term of the tenancy is in legal effect a complete abandonment or "dereliction" to the landlord. This theory of the nature of the right of the tenant to fixtures erected by him has been repudiated in many jurisdictions, including our own, as will be hereinafter noted. The previous holdings of this court in that respect have been that the tenant has a right of property in the fixtures so erected by him, although he may lose his right of property on the theory of abandonment by the failure to make timely removal thereof. While such right remains, the property is deemed as the personal property of the tenant as between him and the landlord.

We think the weight of authority and reason is that the right of removal is not necessarily lost by the mere expiration of the term. An active duty devolves upon the tenant to exercise his right promptly, in view of all the circumstances of the case, and ordinarily he is required to exercise it before an actual surrender of the possession of the premises. But, as long as he continues in possession with the acquiescence of the owner, his right of removal continues accordingly. *Garland v. Hickman*, 56 W. Va. 75, 67 L.R.A. 694, 49 S. E. 14; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95, 18 Mor. Min. Rep. 260; *Berger v. Hoerner*, 36 Ill. App. 360; *Preston v. Briggs*, 16 Vt. 124; *Burk v. Hollis*, 98 Mass. 55; *Beckwith v. Boyce*, 9 Mo. 560; *Weeton v. Woodcock*, 7 Mees. & W. 14, 10 L. J. Exch. N. S. 183; *Merritt v. Judd*, 14 Cal. 59, 6 Mor. Min. Rep. 62; *Morey v. Hoyt*, 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127; *Youngblood v. Eubank*, 68 Ga. 630; *Erickson v. Jones*, 37 Minn. 459, 35 N. W. 267; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Alexander v. Touhy*, 13 Kan. 64; *Leader v. Homewood*, 5 C. B. N. S. 546, 27 L. J. C. P. N. S. 316, 4 Jur. N. S. 1062; *Barff v. Probyn*, 73 L. T. N. S. 118, 64 L. J. Q. B. N. S. 557; *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907; *Allen v. Kennedy*, 40 Ind. 142; *Hedderich v. Smith*, 103 Ind. 203, 53 Am. Rep. 509, 2 N. E. 315.

The following from *Tiffany on Landlord and Tenant*, vol. 2, pp. 1585 et seq., is a

sufficient *résumé* of the authorities on this question:

"A question has frequently arisen as to the time at which the right to remove trade, ornamental, or agricultural fixtures must be exercised; and it is difficult to extract a uniform rule from the decisions in this regard. In some decisions it is stated that the removal must be made during the term, in some that the right expires with the tenancy, and in some that it may be exercised a 'reasonable time' after the expiration of the term. It has occasionally been stated that the tenant's right of removal continues 'during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant,' or during what may, for this purpose, 'be considered as an excrescence on the term,' or 'during his rightful continuance in possession.' What is the exact meaning of some of these statements it is difficult to say, but a number of cases recognize the right of the tenant to remove the fixtures even after the term, provided he does so before he relinquishes possession of the land; it being said in some that he may make the removal before such relinquishment of possession, and in others that he must do so. The decisions or *dicta* to the effect that a tenant holding over has the right of removal, and that he loses the right by giving up possession of the premises, are usually in terms based on the theory that by yielding possession he indicates an intention to abandon the fixtures, and that no presumption of such an intention arises so long as he continues his possession. But, as has been well remarked, if his right as to fixtures on the premises are to be determined by the presumption of his intention to abandon *vel non*, the same rule should apply to chattels on the land not so annexed as to become fixtures, and he would lose all right to them by relinquishing possession of the land, which he certainly does not do. This theory of a presumption of abandonment, however, seems the only possible one on which, in any jurisdiction in which removable fixtures are regarded as personalty, to support the view that the right of removal is lost by the tenant's relinquishment of possession of the land. On the other hand, regarding the fixtures as constituting a part of the land, with a mere right of removal in the tenant, it is perhaps difficult to see why a tenant should be enabled, by wrongfully holding over, to extend the period for the removal of the fixtures, thus profiting by his own wrong. Such a case, it might seem, would be governed by a rule different from that which governs when he holds over rightfully; that is, by permission. In the

latter case, it has been decided, the right of removal continues.

"(b) Tenancy of uncertain duration. If the tenancy is of uncertain duration, such as a tenancy at will, or if it is subject to termination on a certain contingency, the tenant has a 'reasonable time' after its termination within which to remove the fixtures, provided at least the termination is not the result of his own voluntary act, and provided further, it seems, he has not relinquished possession. It has been questioned whether this principle would apply to a tenancy at will, when by statute the tenant is entitled to a reasonable notice to terminate, and there are cases somewhat adverse to its application in favor of a tenant under a lease made by a life tenant, when the leasehold is terminated by the death of the lessor."

We quote from Ewell on Fixtures, p. 293, the following:

"As has been already stated in a prior chapter, the general rule that the right of removal of fixtures must be exercised before the expiration of the tenancy is necessarily subject to exception in those cases where the tenancy is of uncertain duration and liable to be determined by the happening of some contingent or uncertain event on which it depends, as in the case of a tenancy at will. And in analogy to the case of tenancy at will, it seems that, to say the least, the right of personal representatives of a deceased tenant for life or in tail to remove the fixtures to which they are entitled is not terminated until after the expiration of a reasonable time after the death of the person whom they represent. Whether the right of removal shall be considered to extend further than this, the authorities do not declare."

In the light of the foregoing we are disposed to follow the more equitable rule which allows the lessee of a tenant for life a reasonable time after the death of his lessor to surrender his possession and remove his property. This is not only equitable as between all the parties, but the contrary rules tends greatly to the unnecessary depreciation of the rental value of a life estate by the constant menace of forfeiture.

2. Was the defendant guilty of undue delay in the removal of his property in this case? This is largely a question of fact under the evidence in this record. No objection was ever made to his continued possession. On the contrary, in August negotiations were entered into between the defendant and the plaintiff's guardian, looking to a continuance of the tenancy. It is the testimony of the plaintiff's guardian that they did agree orally to a one-year lease at \$75 rental. As will be seen later, a part of

the plaintiff's case is based upon this alleged new lease. The defendant denies that they ever reached an agreement for a new lease, but admits that negotiations were pending between them. Manifestly an immediate removal of the building pending the negotiations for a continuance of the tenancy would of itself tend to render such negotiations futile. The negotiations of themselves manifestly contemplated the maintenance of the *status quo* while they were pending. Whether, therefore, an agreement was actually reached, as contended by appellant, or whether the negotiations were simply pending, in either case the delay of removal was in harmony therewith and was therefore necessarily reasonable. On this branch of the case, therefore, we must find that the defendant acted with reasonable promptness in the proposed removal of his building.

3. The next contention of the plaintiff is that the defendant accepted from him a new oral lease of the premises in August, 1911, and that he made no reservation therein of his right to the building, and that he thereby abandoned the same to the plaintiff as a part of the real estate. If the defendant abandoned his building to the plaintiff, he did so by force of legal construction, and not by actual word or intent. There are cases which hold with grim severity that by the acceptance of a new lease by a tenant from his landlord, which omits a reservation to him of his previous property in fixtures, he thereby, as a matter of law, surrenders such property to his landlord and loses all rights therein except those of a tenant under the new lease. *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301. The cases supporting this view will be found collected in the opinion of the Maryland court in the cited case.

The rule here announced, however, was expressly changed by legislation in Maryland since the decision referred to. In this state we have heretofore, by our previous decisions, repudiated such rule, although it was then sustained perhaps by the numerical weight of authority. *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104; *Daly v. Simonson*, 126 Iowa, 719, 102 N. W. 780. This question is therefore quite settled for this jurisdiction. To the same effect see *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Radey v. McCurdy*, 209 Pa. 306, 67 L.R.A. 359, 103 Am. St. Rep. 1009, 58 Atl. 558; *Wittenmeyer v. Board of Education*, 10 Ohio C. C. 119, 6 Ohio C. D. 258; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907; *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514.
46 L.R.A.(N.S.)

The question is discussed in *Tiffany on Landlord & Tenant* as follows (vol. 2, pp. 1593-1597):

"Acceptance of new lease by tenant. The weight of authority is to the effect that by the acceptance from the landlord of a new lease, containing no mention of fixtures annexed during the tenancy under the former lease, the tenant loses his right to remove such fixtures; the theory being that, the fixtures being a part of the land, the tenant, by an acceptance of the new lease, takes such an interest in the fixtures only as he does in the land (that is, a merely temporary interest). Occasionally a decision to this effect lays some stress upon the fact that the new lease contains a covenant by the lessee to yield up the premises at the end of the term in as good condition as at the time of the lease; but it does not seem that this can be material, since, even in its absence, a tenant has no right to remove improvements covered by the lease to him.

"This doctrine has been held to apply as against one to whom the right to remove the fixtures has been transferred by the tenant who annexed them, upon the taking of a new lease by such transferee; and it has also been decided that such a transferee loses his right of removal if his transferor, while still in possession of the premises, takes a new lease. The rule has even been applied as against a sublessee who, after making annexations, took a new lease from the original lessor.

"Since this doctrine is based upon the theory that the new lease includes the fixtures, as constituting a part of the realty, it necessarily follows that it has no application to articles not so annexed, or not of such character as to constitute fixtures. Furthermore, it would seem to be inapplicable in any jurisdiction where removable fixtures are regarded as personal property, since, if personal property, they would not ordinarily be covered by a second lease, which is in terms of the land only.

"There seems to be some inconsistency between this rule, as asserted, that a renewal lease puts an end to the right of removal, and the decisions before referred to that a tenant holding over by permission does not lose his right of removal, since such permission is in effect a new lease, though only for a brief or indefinite space of time. The cases, however, undertake to distinguish in this regard between a holding under an extension of the original lease and under a new lease, without, it may be said, asserting any satisfactory ground

of distinction. In one case the question of the applicability of the rule is regarded as dependent on whether the right of continued possession is given orally or in writing, while in others it is regarded as dependent on whether the continued possession is on the same terms as before; it being in such case regarded as under a mere extension of the old lease, while it is under a new lease if the terms are different.

"In two or three jurisdictions the doctrine that the acceptance of a new lease, not referring to the fixtures, involves a loss of the right of removal, has been repudiated. As before suggested, in so far as in either of these jurisdictions removable fixtures may be regarded as personalty, this view seems the only possible one, and the judicial statements to the effect that the right of removal is not lost by the new lease seem in fact to be based on the theory that the fixtures are the personal effects of the tenant, without, however, any apparent recognition of the fact that the doctrine criticized involves the view that the tenant does not own the fixtures; but has a mere right of removal. In one case it was decided that the doctrine did not apply in view of evidence that the language of the new lease was not intended to cover the fixtures, supported by a presumption from the relation of the parties that this was not intended. It seems that, when the description in such lease is general in terms, evidence would always be admissible to show that it was not intended by the parties that the fixtures should be covered thereby."

The following from *Daly v. Simonson*, supra, will be a sufficient discussion at this point: "True this last lease did not contain any reservations or exceptions, but it did not cover anything aside from the land and its proper fixtures. It surely did not deprive defendant of his property. Of course a tenant must ordinarily remove fixtures and improvements within a reasonable time after the expiration of his lease. *Mickle v. Douglas*, 75 Iowa, 78, 39 N. W. 198, 17 Mor. Min. Rep. 137. There are some cases which seem to hold that if a tenant takes a renewal lease, which contains no reservations, he by that act surrenders his right to removal of the fixtures placed by him upon the land during the term created by the prior lease. But we have not followed that rule. *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104; *Union Terminal Co. v. Wilmar & S. F. R. Co.* 116 Iowa, 392, 90 N. W. 92. When the improvements were erected in this case, they by

express agreement between the landlord and tenant were personal property; and by taking the lease from plaintiff, defendant did not surrender his claim thereto. See *McCarthy Case*, supra, and the following: *Kerr v. Kingsbury*, 39 Mich. 152, 23 Am. Rep. 362; *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514; *Fischer v. Johnson*, 106 Iowa, 182, 76 N. W. 658; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907. So that, even if the lease from plaintiff and Butler to defendant be not reformed, we do not think defendant lost his title to the personal property."

In the case before us there is no claim of any special provision in the alleged new lease which of itself negatived the right of removal of the building. Reliance is placed solely upon the fact that an alleged new oral lease was made. Taking the plaintiff's own testimony for it, it does not appear that any terms were agreed upon, except the rate of rent and the period of the lease.

We may as well say, further, that in our opinion the evidence would not warrant a finding that a new oral lease was consummated by agreement between the parties. It appears from plaintiff's own evidence that they contemplated a written lease and that they never got together to make it. What terms were to be included in such written lease, apart from the period thereof and the rate of rent, does not appear. The conduct of the parties and all the circumstances corroborate the defendant in the claim that their negotiations never reached the final word. Of course this conclusion does not forbid the recovery of rent by plaintiff for the period of defendant's occupancy. It is our conclusion that the defendant was within his rights in the attempted removal of his building.

We hardly need to say that in so removing it he was bound to do so without substantial injury to the premises, and that he was bound to leave the property in as good condition as when he found it. This he offered to do, and his offer was full and complete. We are quite satisfied from the evidence that it was not impracticable for him to so put the property.

It follows that the decree below must be reversed and the writ of injunction dismissed. The defendant will be awarded a reasonable time after the final disposition of this case to remove his building and to put the property of the plaintiff in proper condition.

Reversed.

MISSOURI SUPREME COURT.

(In Banc.)

STATE OF MISSOURI EX REL. JOHN
T. BARKER

v.

ASSURANCE COMPANY OF AMERICA
et al.

(— Mo. —, 158 S. W. 640.)

Conspiracy — right of insurance companies to withdraw from state.

1. Foreign insurance companies doing business in a state cannot conspire or agree together to withdraw from the state in a body and cancel their policies in force therein, upon change, to their detriment, of the laws under which they are doing business.

Note. — Right of foreign corporation to discontinue business within the state.

Research has failed to disclose the existence of any other decision as to the right of a foreign corporation to discontinue its business within a state, although, as stated in the decision above reported, it seems that such a corporation, acting as an individual, would clearly be within its rights in doing so. Nor would the right to do so be affected by the circumstance that the corporation is engaged in the business of insurance, since although the business of insurance is affected by a public interest (see note to State ex rel. McCarter v. Firemen's Ina. Co. 29 L.R.A. (N.S.) 1194) to the extent of being subject to public supervision and control, it is not, nor from the nature of its business can it be, in the position of a public service corporation and bound to insure whoever may tender a premium. At the same time, in view of the generally recognized right of a state to impose such conditions, restrictions, and regulations upon the admission of a foreign corporation to do business as may seem proper, it would appear to be competent for the legislature to require as a condition of such admission that it may not, under penalty (to be enforced, perhaps, by forfeiture of securities deposited), discontinue business within the state without the consent of some state official.

But where a number of corporations combine to discontinue to do business within a state, the situation presented is that of a boycott on a large scale; and the lawfulness of the combination is to be determined by reference to the principles governing boycotts generally. That it may be unlawful for several to combine to do what any one of them acting alone might lawfully do is a doctrine which, though sometimes controverted, is supported by the weight of authority. With reference to this point it is said in 7 Labatt, Mast. & S. 2d ed. § 2662 b: "While in a criminal prosecution for conspiracy at common law the combination is considered to be the gist of the offense, so that it is not necessary to prove the doing 46 L.R.A. (N.S.)

Statute — title — sufficiency — repealing anti-trust law.

2. The anti-trust laws relating to insurance companies cannot be repealed by a statute, under a title "An Act to Regulate Insurance and the Rates of Premiums thereof, and to Provide Penalties for Violation of Its Provisions."

Same — repealing anti-trust laws — effect of provision.

3. Anti-trust laws relating to insurance companies are not repealed by a statute permitting one or more of said companies, singly or jointly, to employ for the making of general basis schedules and rates the services of experts.

Courts — original jurisdiction — temporary restraining orders.

4. The supreme court may, in aid of its original jurisdiction in quo warranto to

of any act in furtherance of the conspiracy, the contrary is the case in civil actions, where the rule is that conspiracy of itself furnishes no cause of action. This rule has two meanings: First, that there must be damage as well as conspiracy; second, that the fact of combination does not of itself confer a right of action for loss sustained by another in consequence thereof. But though the fact of conspiracy will not render actionable an act which an individual may do without incurring liability, it does not follow that a combination to do such an act is not an actionable conspiracy. The fallacy lies in assuming the converse of the original proposition to be equally true. It has sometimes, however, been assumed to be a necessary sequel of the rule that an unlawful act, and not the fact of conspiracy, is the gist of the civil action, that the act for which an action for conspiracy will lie must be something unlawful in itself. Again, it is said that many may combine to do what any one of them may lawfully do. Now, while these statements are true in so far as they express the idea that the fact of combination does not of itself render a conspiracy actionable, they are half truths, whose specious resemblance to the whole truth constitutes the source of the error which has misled some courts into taking the position that if the act complained of is not unlawful where done by an individual, it is not unlawful where done by a combination. But the great preponderance of opinion is to the effect that the unlawful means which will render a combination to do an act by such means a conspiracy are not necessarily such as would be wrongful if employed by a single individual. Various reasons have been assigned for so holding, . . . all of which approximate the truth, even though they may not fully express it. One of these is the increased power of the combination to inflict injury beyond the power of an individual, any injury inflicted by whom, though wrongful, is not actionable under the principle, *de minimis non curat lex*. Another reason (or perhaps only another form of the foregoing reason) is that the union of individual

punish a foreign insurance company for attempting a usurpation and abuse of power, issue a temporary restraining order to prevent such conduct pending the hearing.

(Walker J., dissents. Brown and Farris, JJ., dissent in part.)

(June 28, 1913.)

INFORMATION in the nature of a quo warranto for the purpose of punishing respondents for an alleged violation of the anti-trust laws. Temporary injunction granted.

Statement by Woodson, P. J.:

This is an information, in the nature of a quo warranto, instituted in this court against the respondents, foreign fire insurance companies, duly authorized and licensed to do business in this state, to find and otherwise punish them for violating the laws of the state regarding pools, trusts, conspiracies, and discriminations.

The information charges that:

"The Amazonia Fire Insurance Company and others . . . are fire insurance corporations organized under the laws of other states or foreign countries, and are doing a fire insurance business in the state of

Missouri, and at all the dates hereinafter mentioned were duly organized to do such business in the state of Missouri, having heretofore complied with the laws of the state of Missouri authorizing foreign fire insurance corporations to do business in this state; and at all times hereinafter mentioned respondents were engaged in the business of writing fire insurance contracts, policies, and agreements insuring property from loss by fire or other causes, and conducting generally a fire insurance business throughout the state of Missouri; and that for many years respondents and each of them have been doing business in the state of Missouri with the consent of the state as foreign corporations, and engaged in insuring property for the citizens and residents of Missouri against loss by fire and otherwise. That on the — day of April, 1913, each and all of respondents unlawfully, illegally, and willfully misused and abused their said franchises, rights, and privileges as foreign fire insurance companies authorized to do business under the laws of the state of Missouri in this, to wit: That on said date each of said respondents did create, enter into, become a member of, and participate in a certain pool, trust, agreement, combination, confederation, or understanding with each other and with other fire insurance corpora-

forces by agreement gives the act, by force of numbers, a coercive effect. In other words, the simultaneity of the action has the effect to create a nuisance. A supplemental reason which has been given in connection with others of the foregoing is that the fact of combination creates a presumption that the object is to do harm, rather than to exercise the rights of its members. The difficulty to be gotten over is, how an act not actionable when done by an individual can become actionable where done by persons acting in combination. This may be surmounted in various ways, all of which are perhaps equally valid, but which have appealed with different degrees of cogency to different minds. One of these is to regard the combination not as one to do the act, but as to effect the result of the combined acts. Another is to regard the plot itself as an act the intent of the parties to which is open to inquiry, although their intent in doing the act as individuals would not be open to inquiry. Here, again, we come upon the idea that there are certain acts which are so consistent with the exercise of a right by the actor as to raise a presumption, so strong as to be conclusive, that they were done in pursuance of an intention to exercise that right. They are styled acts done in the exercise of an absolute right. They are certain other acts which are not so consistent with the exercise of a right by the actor, and which are said to be done in the exercise of a common or qualified right, in respect of which the intention of the actor is open to inquiry. 46 L.R.A. (N.S.)

One of these, according to this view, is the right to combine with others. But any attempt to work out the tort involved in the infliction of injury upon another by acts done in combination which was not actionable when done by an individual, upon the theory of conspiracy, can never be wholly satisfactory. For one reason, it necessitates a resort in some cases (i. e., where a workman's employment is interfered with for the purpose of forcing him to join a union, or in boycott cases generally) to the somewhat forced presumption that the object of the combination is primarily to injure the person affected, and only remotely to benefit its members. Hence the conflict of judicial opinion. Again, by making combination an essential element of the tort, it operates to exempt an individual from liability for the same acts, done with the same intent, and producing the same injury, for which he, if acting in combination with others, might be held liable. The true view appears to be that the tort involved is a nuisance, the existence of which is dependent on the degree of annoyance inflicted upon those to whom the plaintiff looks for labor, employment, or patronage, and the actionable quality of which depends upon the point at which the right to conduct one's business without interference is to be regarded as ceasing to be merely a permissive right, and becomes also a protected right. Under this view, the fact of combination is material only as bearing upon the degree of annoyance to which one's employer or workman or customers are sub-

tions and associations of persons (whose names are unknown) against public policy and in restraint of trade, in this, to wit: That on said date each and all respondents unlawfully, illegally, and wilfully entered into an agreement to suspend operation and withdraw from sale all fire insurance in the state of Missouri on the 30th day of April, 1913, and unlawfully agreed to refuse to accept, write, issue, or sell any insurance on any properties located in said state of Missouri, and unlawfully agreed to withdraw from said state of Missouri by concerted movement simultaneously on said 30th day of April, 1913, and thus leave the citizens of the state of Missouri without adequate fire insurance protection, and unlawfully agreed to cancel all fire insurance policies heretofore written in the state of Missouri, which said action on the part of said respondents, if carried out, as they now propose, will cause a calamity in the financial world in said state of Missouri, and leave the citizens of said state without any adequate fire insurance.

"Your informant further informs the court that the said unlawful agreement, combination, confederation, and conspiracy will affect the trade, traffic, and commerce in this state, and that the same will be hindered, injured, and retarded, and the people of the

jected; and the act done in combination derives its character from the consequences which follows it under the circumstances in which it is done."

Such a combination, though unlawful in the sense of giving a right of action to anyone injured thereby, may or may not be a criminal conspiracy, according to whether it falls counter to the provisions of some statute, or whether it has a necessary tendency to oppress the public. See 7 Labatt, *Mast. & S. 2d ed. § 2663*.

It will be perceived in *STATE EX REL. BARKER v. ASSURANCE CO.*, that it was alleged in the information, and consequently admitted by the demurrer, that the general nature and object of the combination was "to act in a concerted manner, simultaneously, and with a view to crippling and destroying the financial credit of the state of Missouri and the people therein, and to deny to the state of Missouri and the people therein the right to protect their property by insurance against loss or damage by fire; and such conspiracy, confederation, and agreement is against public policy, in restraint of trade, and is intended at one blow to crush the entire business and commerce of the commonwealth of the state of Missouri." But had the object of the combination been solely to further the interests of its members by discontinuing to do business within the state for the purpose of forcing a modification of the obnoxious regulations, it would not have been an unlawful one, though it might incidentally have worked harm to others. See 7 Labatt, 46 L.R.A. (N.S.)

state will, after said 30th day of April, 1913, be denied the right to purchase fire insurance and to protect themselves and their property against loss by fire.

"Your informant further informs the court that the general nature and object of the said combination, conspiracy, and confederation, so made as aforesaid, is to act in a concerted manner, simultaneously, and with a view to crippling and destroying the financial credit of the state of Missouri and the people therein, and to deny to the state of Missouri and the people therein the right to protect their property by insurance against loss or damage by fire; and such conspiracy, confederation, and agreement is against public policy, in restraint of trade, and is intended at one blow to crush the entire business and commerce of the commonwealth of the state of Missouri.

"Your informant further informs the court that respondents and each of them are associated together in a common organization or interest called the 'Western Insurance Bureau,' which bureau is organized for the purpose of controlling the insurance business of the United States and particularly in Missouri, and for the further purpose of controlling, managing, regulating, and conducting the entire insurance business in the state of Missouri, and that respondents and each

Mast. & S. 2d ed. § 2662 a (citing *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Gray v. Building Trades Council*, 91 Minn. 181, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Martell v. White*, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 64 N. E. 1085; *Master Builders' Asso. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782; *Ulery v. Chicago Live Stock Exchange*, 54 Ill. App. 233; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136); and see also § 2725. Nor would it have been criminal, except as it may have been made so by statute.

In connection with the decision above reported, attention may be called to a case which resembles it in the circumstance that the purpose of the insurance companies in taking concerted action was to force the repeal of an obnoxious regulation. This case is *Harris v. Com.* 113 Va. 746, 38 L.R.A. (N.S.) 458, 73 S. E. 561, where it was held that concerted action by fire insurance companies doing business in a certain city, in raising the insurance rates to compel the municipal authorities to repeal the imposition of a franchise tax upon the business, is not a criminal conspiracy because of the motive of the act.

As to the legality of combinations among underwriters, see notes to *Louisville Fire Underwriters v. Johnson*, 24 L.R.A. (N.S.) 153, and *Harris v. Com.* supra. E. S. O.

of them are members of such insurance organization and association, and, by the scheme of said association and respondents and each of them, such association is authorized and empowered to and does approve rules and regulations for the government of the entire association, and all of the members thereof, and of each and all of the respondents herein, and when said rules and regulations are so fixed, as they now are, each member and each respondent herein is called upon and required and compelled by the rules of said association and by the rules of the respondents herein to obey, and that said association and that each of respondents do obey such rules, and that when said respondents created, entered into, and became a member of and participated in such illegal agreement and combination and understanding with each other and with such association to suspend business and withdraw all fire insurance from sale in the state of Missouri, and to withdraw by such concerted action from such state, each of said respondents are required and commanded, by the rules and understanding between the said association and respondents and each of them, to comply therewith, and to suspend operation in said state of Missouri, and to withdraw therefrom, and to withdraw from sale all fire insurance in said state; and such understanding, agreement, confederation, and combination is an abuse of the corporate privileges of each of said respondents and in violation of the laws of the state of Missouri, against public policy, and is in restraint of trade.

"Your informant further informs the court that there has been promulgated by said association and by each of respondents herein, and approved by such association and by each of respondents herein, rules for the control of the members thereof by which it is provided that no member of such association of insurance companies, including each of the respondents herein, shall write or sell insurance in the state of Missouri after April 30, 1913, and each of said respondents, as members of such insurance association and individually, has illegally agreed to suspend operation and withdraw from sale all fire insurance in said state of Missouri on said April 30, 1913, and to withdraw in a concerted movement from said state of Missouri, and that by the rules of such association each and all of the respondents herein are compelled and required to withdraw from said state of Missouri, and to suspend operation therein, and to withdraw from sale all fire insurance in said state, so that said association of insurance companies and the respondents herein have placed in the power of such insurance association to authorize and compel each in-

insurance company named herein to immediately withdraw from said state of Missouri, and to suspend operation therein, and to withdraw from sale all fire insurance in said state, thus leaving the people of the state of Missouri without any protection against loss by fire, and to prevent citizens of the state of Missouri from securing any fire insurance, and thus injure and destroy the commercial value of the state of Missouri, and to deprive the citizens of said state of Missouri of the right which they have heretofore enjoyed of having their property insured by said respondents or either of them against loss by fire, and that each of said respondents entered into such illegal agreement with the express and avowed purpose of injuring and destroying the credit and commercial value of the state of Missouri.

"Your informant further informs the court that the object and purpose of such association which met as aforesaid on April —, 1913, was and is to stifle competition in the insurance business in the state of Missouri by withdrawing its membership and refusing to write insurance and thus lessen competition in the insurance business in said state of Missouri, and to deny to the citizens of said state of Missouri the right to purchase fire insurance, and each and all members of such association and the respondents herein are banded together for a common cause to injure and destroy the value of property in the state of Missouri, and are acting in a rebellious and retaliatory manner, and are now threatening to immediately suspend operation and to withdraw from the state of Missouri in a concerted movement on the 30th day of April, 1913; and that respondents and each of them are now actively and earnestly engaged in carrying out said purpose by the use of every means known to them, and are now preparing to and are suspending business and withdrawing fire insurance from sale in the state of Missouri, and are refusing, by reason of such concerted movement and for the purposes aforesaid, to insure property against loss by fire in the state of Missouri.

"Your informant further informs the court that these respondents and each of them, in order to carry out the scheme of such association to create a monopoly in the insurance business in the state of Missouri and lessen competition, have combined and conspired and confederated with each other and with other members of said association (whose names are unknown) and with the officers and agents and members of other associations in similar insurance business, and organized for a similar purpose to harass and embarrass the citizens of the state of Missouri, and to injure and destroy the

business of the citizens of the state of Missouri, and to destroy the commercial credit of the state of Missouri and thus create a financial panic in said state of Missouri and a calamity which will affect each and every citizen of the state of Missouri of the right to purchase insurance on their buildings and other property.

"Your informant further informs the court that, in furtherance of such illegal conspiracy and agreement on the part of respondents, these respondents and each of them and the association aforesaid have issued circulars containing declarations that they will suspend operation in the state of Missouri, and withdraw therefrom, and refuse to write or sell insurance therein, and that they will cause all members of said association, including each of respondents, to cease from writing or selling insurance in the state of Missouri, and to cause them to suspend operation therein, thus leaving the people of the state without any fire protection; and that respondents, in pursuance of such illegal understanding, agreement, and conspiracy, are now threatening to withdraw from the state of Missouri by a concerted movement on April 30, 1913, and are threatening to refuse to write or sell insurance on property in the state of Missouri after such date.

"Your informant further informs the court that the respondents herein constitute practically three fourths of the fire insurance companies doing business in the state of Missouri and perhaps more, and that by reason of such illegal acts and conduct on the part of the respondents and each of them, coupled with their recent threats to withdraw from the state of Missouri, the people of this state will be left without any fire protection, and the business of the state and of the citizens therein will be seriously impaired, the commercial loan value of buildings destroyed, and the citizens will be denied the right to protect themselves against loss by fire, and that each of said agreements and each of them is in restraint of trade, against public policy, and in violation of the law.

"Your informant further informs the court that by reason of the premises said respondents and each of them have since the — day of April, 1913, and up to the present time, grossly offended against the laws of this state and wilfully and flagrantly abused and misused their rights, authority, and franchises, and have wilfully and unlawfully assumed and unlawfully and wilfully usurped authorities and privileges not granted to said corporations by the laws of the state of Missouri by entering into and becoming a member of said trust, combination, confederation, agreement, and understanding as aforesaid; and, in pursuance of

the aforesaid agreement, combination, trust, confederation, and understanding so made and maintained as aforesaid, respondents are now, in the state of Missouri, unlawfully and wilfully carrying out the provisions of said combination and confederation, and threatening to leave the state of Missouri and to suspend business therein, and to withdraw fire insurance from sale in said state on said 30th day of April, 1913, thus leaving the citizens of this state without any protection against loss by fire, and are now unlawfully and wilfully attempting to carry out such unlawful agreement, combination, and understanding, and that the acts and agreements of the respondents, insurance corporations, as herein set forth, constituted a wilful and malicious perversion of the franchises granted to said insurance corporations by the state of Missouri, and is illegal and wilful usurpation of privileges and authorities not granted said respondents by the state of Missouri, to the great and permanent injury of the entire public.

"Wherefore your informant, prosecuting in this behalf for the state of Missouri, asks that each of these respondents be adjudged guilty of creating, entering into, and becoming a member of and participating in a certain pool, trust, agreement, combination, confederation, or understanding with each other and other fire insurance corporations, and that such agreement, understanding, and conspiracy, so entered into, be declared illegal and void, and respondents and each of them be forbidden to again enter into such illegal agreements, combinations, and confederations, and that their acts in becoming members of such combination, confederation, and understanding be declared void, and that respondents and each of them be fined in such sums as the court thinks will punish them and cause others to refrain from doing similar acts, and that the court will restrain respondents and each of them from canceling, in pursuance of this illegal agreement, all policies or agreements of insurance heretofore issued, or direct respondents and each of them to show cause why they should not be thus restrained, and for such other and further orders and relief as to the court shall seem meet, just, and proper."

Upon the filing of this information in this court by an order duly made on April 28, 1913, the respondents and each of them were required to show cause why they and each of them should not be adjudged guilty, as charged in the information, of a conspiracy in violation of their charter powers and licenses for their acts as aforesaid; and, in addition to such order to show cause, the respondents and each of them were restrained and enjoined, individually and as parties to

such illegal conspiracy, agreement, and understanding, from canceling any and all policies in force in this state, in pursuance of and by reason of such illegal agreement. The respondents and each of them were given until the 8th day of May, 1913, on which to respond to said order to show cause, and also in which to show cause why a temporary injunction should not be issued against the respondents and each of them to prohibit them and each of them from canceling the insurance now in force on property in this state, under and in pursuance of such illegal agreement. All of the respondents were duly served with process, and all appeared by counsel. That on the 8th day of May, 1913, the defendants the Stuyvesant Insurance Company and the Pacific Fire Insurance Company filed their answers by their respective attorneys, and all of the other defendants appeared and filed their general demurrer to the bills and complaints of the state. The Massachusetts Fire & Marine Insurance Company appeared for this purpose by their attorneys, Jones, Hocker, Hawes, & Angert. The St. Paul Fire & Marine Insurance Company appeared by their attorney, Clyde Taylor. The Buffalo-German Insurance Company appeared by its attorney, Bruce Barnett. All of the other respondents appeared by their attorneys, Judson & Green, F. W. Lehman, Thos. Bates et al., and filed their general demurrers herein.

The grounds of the demurrer are:

First. That the petition does not state facts sufficient to constitute a cause of action against them or any of them.

Second. That the state is not entitled to the relief prayed for, or any other relief in this cause.

Third. That there is no law prohibiting the defendants or either of them from entering into the agreement of the nature set out in the information.

Messrs. John T. Barker, Attorney General, and W. M. Fitch, Assistant Attorney General, for relator.

Messrs. F. N. Judson, F. W. Lehmann, Thomas Bates, and Seymour Edgerton, for respondents:

At the present time there is no anti-trust statute in Missouri as to fire insurance, and this case must be dealt with under the common law.

Mo. Const. art. 4, § 33; Mo. Rev. Stat. 1909, § 8060; Milne v. Huber, 3 McLean, 212, Fed. Cas. No. 9,617.

The business of fire insurance is not so "effected with a public use or interest" that companies may be enjoined to continue therein against their will.

Hunt v. Simonds, 19 Mo. 583; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 46 L.R.A.(N.S.)

424, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Harris v. Com. 113 Va. 746, 38 L.R.A.(N.S.) 458, 73 S. E. 561; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; Aetna Ins. Co. v. Com. 106 Ky. 864, 45 L.R.A. 355, 51 S. W. 624; Niagara F. Ins. Co. v. Cornell, 110 Fed. 817; People ex rel. Pinckney v. New York Fire Underwriters, 7 Hun, 248; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Orr v. Home Mut. Ins. Co. 12 La. Ann. 255, 68 Am. Dec. 770; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 311; Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Venable v. Wabash Western R. Co. 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493.

The terms and conditions under which the business of fire insurance may be conducted will be so changed by § 10313a, Rev. Stat. 1909, when it becomes effective, and made so onerous and dangerous, that to compel the respondent companies to continue such business in the state under the changed conditions is to violate their rights under the 14th Article of Amendment to the Constitution of the United States, in that they will be deprived of their liberty and property without due process of law, and will be denied the equal protection of the law.

Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 168.

The anti-trust laws, chapter 98, Rev. Stat. 1909, do not authorize any proceedings against the respondent companies, and the present proceeding is not authorized by any principles of the common law.

Harris v. Com. 113 Va. 746, 38 L.R.A.(N.S.) 458, 73 S. E. 561; Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; Walsh v. Association, M. P. 97 Mo. App. 280, 71 S. W. 455; Nations v. Pulsee, 175 Mo. 86, 74 S. W. 1012; Hunt v. Johnston, 23 Mo. 432; Alexander v. Relfe, 9 Mo. App. 133.

This is not a proceeding in quo warranto, and so there is no more basis for a fine than for an ouster. The suit is simply for injunctive relief. The prayer for injunctive relief is not auxiliary, but is the substance of the proceeding.

State v. St. Louis Perpetual Marine F. & L. Ins. Co. 8 Mo. 330; State ex rel. Walker v. Equitable Loan & Invest. Asso. 142 Mo. 325, 41 S. W. 916; Vail v. Dinning, 44 Mo. 210; State ex rel. Hadley v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; State ex rel. Hadley v. Standard Oil Co. 218 Mo. 1, 116 S. W. 902; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; State ex rel.

Crow v. Armour Packing Co. 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645; State ex rel. Crow v. Firemens' Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; State ex rel. Snyder v. Portland Natural Gas & Oil Co. 153 Ind. 483, 53 L.R.A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; Lane v. Charles, 5 Mo. 285; State ex rel. Roland v. Dreyer, 229 Mo. 201, 129 S. W. 904.

The company is not bound to accept the new conditions, but has the option of discontinuing business in the state.

Continental L. Ins. & Invest. Co. v. Hattabaugh, 21 Idaho, 285, 121 Pac. 81; Manchester F. Ins. Co. v. Herriott, 91 Fed. 711; Home Ins. Co. v. Davis, 29 Mich. 238; Fisher v. Traders' Mut. L. Ins. Co. 136 N. C. 217, 48 S. E. 667; Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 638, 38 S. W. 85; State ex rel. Equitable Life Assur. Soc. v. Vandiver, 222 Mo. 206, 121 S. W. 45.

Messrs. Jones, Hocker, Hawes, & Angert, Bruce Barnett, and Clyde Taylor also for respondents.

Woodson, P. J., delivered the opinion of the court:

I. At this stage of the case there are only two legal propositions presented for determination, and they are presented by the demurrer. The first is, Does the petition state facts sufficient to constitute a cause of action? and the second, Has this court the authority to issue a restraining order or injunction in aid of a cause of action over which this court has jurisdiction to hear and determine? We will dispose of these questions in the order stated.

Attending the first: Counsel for respondents clearly and tersely state their position regarding this proposition in the following question propounded, viz.: "Must foreign insurance companies, doing business in this state, continue to do such business, even though they are unwilling to accept the terms and conditions prescribed by the statute upon which the business may be done, and especially where, as here, those terms and conditions were radically changed by the state after the companies came into its jurisdiction and the companies have never assented to the change?" As an abstract legal proposition, no court, in my opinion, would hesitate a moment to answer that question in the negative; but that question does not incorporate the entire case presented by the information filed by the attorney general. In other words, his charges are broader than the question in this: He charges that the "respondents did create, enter into, become a member of, and participate in, a certain pool, trust, agree-

ment, combination, confederation, or understanding with each other and with other fire insurance companies and associations of persons (whose names are unknown) against public policy and in restraint of trade in this, to wit: That on said date each and all respondents unlawfully, illegally, and wilfully entered into an agreement to suspend operation and withdraw from sale all fire insurance in the state of Missouri on the 30th day of April, 1913, and unlawfully agreed to refuse to accept, write, issue, or sell any insurance on any properties located in said state of Missouri, and unlawfully agreed to withdraw from said state of Missouri by concerted movement simultaneously on said 30th day of April, 1913, and thus leave the citizens of the state of Missouri without adequate fire insurance protection, and unlawfully agreed to cancel all fire insurance policies heretofore written in the state of Missouri, which said action on the part of said respondents, if carried out, as they now propose, "would cause great damages," etc., to the state and the citizens thereof. By this language it is seen that the attorney general does not seek to prevent any one or all of the respondents acting for itself or themselves individually, upon its or their own volition, from leaving the state, or to prevent such company or companies, if so acting, from canceling any or all of their policies insuring property in this state; but he does seek to prevent respondents from leaving the state in a body or as a body to cancel all of their policies in this state in pursuance to the unlawful, illegal, and wilful conspiracy he alleged they have entered into for the purpose of damaging the state and the citizens thereof.

There is a broad distinction between the two propositions. Under the former each and every one of the respondents may individually, of its own motion, leave the state and cancel each and every policy it has in force therein, if it sees proper to so do, provided, of course, the policy contains a provision permitting its cancellation. But not true under the latter proposition, because respondents have no more legal right to unlawfully agree to do a lawful thing than they have to agree to do an unlawful thing. State ex rel. Hadley v. Standard Oil Co. 218 Mo. loc. cit. 367, 116 S. W. 902, and cases cited. If any one or more of the respondents feels itself or themselves aggrieved because of the enactment of the statutes of 1913, known and called the "Orr Acts," then there is no valid reason, legally or morally, why it or they should not be permitted to leave the state, but in doing so they have no legal or moral right to enter into an unlawful conspiracy with themselves or with

other companies, and by agreement in pursuance thereof induce or agree with all the others to leave in a body or severally, for that matter, if it is, as stated, done in pursuance to such unlawful conspiracy. This principle of law is so well settled in England and America, under both the common law and the statutes governing the same, it seems to me that it would be useless to cite authorities in support thereof.

Since writing the above, it has occurred to my mind that the writer had occasion to consider the principle underlying this case in the case of *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997. That case involved the questions of unlawful conspiracies to injure others, and the authority of the court to resort to injunctive relief in aid thereof. Counsel for respondent in that case cited the case of *Hunt v. Simonds*, 19 Mo. 588, which seems to hold to the contrary, but we refused to follow the doctrine announced in that case, and followed the better considered cases, which are as old as the common law, which hold that two or more persons have no legal right to unlawfully conspire to injure another, even though each separately had the legal right to do what the combination had agreed to do.

We are therefore of the opinion that the respondent had no legal right, by agreement, to withdraw from the state, in a body, in pursuance to said unlawful agreement, or to cancel their policies upon property in this state in pursuance to said agreement.

II. If we correctly understand the position of counsel for respondents, they do not as a general proposition seem to controvert the proposition stated and conclusions reached in paragraph 1 of the opinion, but insist that, at the time of the making and entering into the agreement or conspiracy complained of, there was no law in this state which prevented them from so doing. This insistence, in our opinion, is untenable.

Prior to 1911 the business of fire insurance was by express terms included within the anti-trust laws of the state. See chap. 98, Rev. Stat. 1909. This chapter placed under the ban "any pool, trust, agreement, . . . to regulate, control or fix . . . the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated or fixed." This statute was sustained as valid and applying to insurance companies in *State ex rel. Crow v. Aetna Ins. Co.* 150 Mo. 113, 51 S. W. 413. This chapter, it is insisted, in so far as it related to insurance companies, was repealed in 1911 by what was known as the "Oliver law." *Laws of Missouri* 1911, pp. 267-271. We must therefore con-

sider the following matters as a basis for this proceeding as to whether or not the anti-trust laws are in force in this state, as regards insurance companies, so as to prohibit them from entering into the agreement complained of in the information filed by the attorney general in this case.

Counsel for respondents contend that the Oliver law (*Laws* 1911, pp. 267-271, §§ 1 to 12, inclusive) repealed all prior laws of the state applicable to that subject, which are contained in art. 1, chap. 98, Rev. Stat. 1909, entitled "Pools, Trusts, Conspiracies, and Discriminations."

The Oliver act, which was approved March 18, 1911, does not purport in terms to repeal any pre-existing laws, but upon the contrary § 11 by necessary implication repels any such conclusion to be drawn therefrom; for it in express terms provides that "all laws and parts of laws in conflict with this act are hereby repealed," and consequently all laws and parts of laws not in conflict therewith are not repealed thereby, but are left in full force and effect. That is the common sense of the language used and the clear design the legislature had in mind when it enacted it. The Oliver act, however, was in express terms repealed by an act of the legislature approved March 29, 1913 (*Laws* of 1913, p. 382). And by an act of the legislature approved March 29, 1913 (*Laws* 1913, pp. 549-555, inclusive), repealed art. 1 of chap. 98, Rev. Stat. 1909, composed of §§ 10298-10313, both inclusive, entitled "Pools, Trusts, Conspiracies, and Discriminations," and re-enacted in lieu thereof, to be known as art. 1, chap. 98, Rev. Stat. 1909, entitled "Pools, Trusts, Conspiracies, and Discriminations." The only difference between the article repealed and the one enacted is that the latter added to the former a new section numbered 10313a. This new section prescribes what shall be prima facie of guilt in prosecutions of insurance companies for violating the provisions of said article, but what the object or purpose of the framer of the bill was, or the intention of the legislature in enacting it, is not clear; for if the Oliver act repealed said article 1, as counsel for respondent contend, then there was no useful purpose served by the legislature repealing it again on March 29, 1913, and, if not repealed thereby, then I can see no wise purpose in repealing it in one breath and re-enacting it in the next.

But, whatever may have been the purpose of the legislature in so acting, it has but little or no bearing upon the question in hand; namely, Were there any anti-trust laws in force in this state at the date of the formation of the conspiracy complained of in the information? By reading the Oliver

act, it will be seen that neither the title thereto nor the body of the bill, mentions or refers to pools, trusts, conspiracies, or discriminations, nor to the chapter or article of the statutes containing said laws. It is therefore perfectly clear to my mind that the legislature had no such purpose in view.

But, suppose it be conceded that the legislature did intend thereby to repeal the anti-trust laws of the state in so far as they relate to fire insurance companies, then the act would be unconstitutional, null, and void, because there is nothing contained in the title of the bill calling that subject to the attention of the legislators, as commended by § 28 of art. 4 of the Constitution, which, in so far as is here material, reads as follows: "No bill . . . shall contain more than one subject, which shall be clearly expressed in its title." The title of the act reads: "An Act to Regulate Insurance against Loss or Damage by Fire, Lightning, Hail, Windstorm, and Sprinkler Leakage, and the Rates of Premium thereof, and to Provide Penalties for the Violation of Its Provisions, with an Emergency Clause." Clearly there is nothing in this title that points to the anti-trust laws of the state like a signboard points to a city, as was stated by Judge Sherwood in the case of *St. Louis v. Weitzel*, 130 Mo. 600, loc. cit. 616, 31 S. W. 1045, 1049, in the following language: "The evident object of the provision of the organic law relative to the title of an act was to have the title like a guideboard, indicate the general contents of the bill, and contain but one general subject which might be expressed in a few or a greater number of words. If those words only constitute one general subject, if they do not mislead as to what the bill contains, if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title, and does not impinge on constitutional prohibitions."

But, independent of that, there is nothing contained in the body of the Oliver act which can form even a plausible basis for the contention that it repeals the anti-trust laws of the state, in so far as they refer to fire insurance companies, without it is the following language contained in § 4 thereof, which reads as follows: "Provided, further, . . . any one or more of such companies, singly or jointly, may employ for the making of such general basis schedules and rates, and the filing of the same, the services of such experts as it, or they, may deem advisable for such purpose." Should it be conceded that it was the design of the legislature, by this provision of that section, to repeal the anti-trust laws in so far as authorizing the companies in making and fix-

ing rates are concerned, yet there is nothing contained in this record which shows that respondents, or any of them, have availed themselves of that clause by complying with its provisions in reference to filing with the insurance commissioner general and special schedules of rates for each city, town, or village in the state, etc. But waiving that point, and conceding that they have fully complied with all of said act, yet it cannot be seriously contended that said clause of said § 4 of the Oliver act repeals anything contained in the anti-trust laws, except that clause of § 10301, Rev. Stat. 1909, which forbids all agreements among insurance companies to fix the "price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm," etc., yet that act does not authorize them to combine or conspire for the purpose of charging a fixed rate irrespective of the ruling of the insurance commissioner as to the reasonableness of that rate, nor does it authorize them to conspire for the purpose of withdrawing from the state, or to limit the number of companies which shall do business herein, nor for the purpose of preventing the writing of all insurance available or limiting the amount of insurance that may be written in the state, nor for the purpose of canceling any or all insurance now in force herein. This is too plain for argument.

Moreover, when we consider the growth and great evils of the trusts and combines, and the legislation enacted in almost if not all of the states and territories of the Union and by the Congress of the United States to suppress and destroy them, it is almost inconceivable to believe that it was the design of the legislature of this state, at a single stroke, to repeal all laws regarding this, one of the oldest and greatest trusts that exists in the country. If I remember correctly, this is one of the first trusts this court declared was illegal, and in consequence thereof imposed heavy fines against the various companies which were members thereof. I am therefore firmly of the opinion that not only the anti-trust laws of the state, common law or statutory, are in full force and effect, but also that the information filed charges a good cause of action against the respondents.

III. This brings us to the consideration of the question, Has this court the jurisdiction to issue a restraining order or temporary injunction which is in aid of or ancillary to the quo warranto proceeding pending herein? When this question was first suggested, I was of the opinion that we had no such authority, but after a thorough investigation of the question I have changed

my mind and am now of the opinion that this court has that power.

Mr. High, in his estimable work on Injunctions, 4th ed. pp. 7, 8, and 11, §§ 4, 5, and 7, in treating of temporary injunctions, among other things says:

"§ 4. The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition and, without determining any question of right, merely to prevent the further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered. It cannot be used for the purpose of taking property out of the possession of one party and putting it into the possession of another, nor does it go to the extent of ordering defendant to undo what he has already done; since it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains. The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters *in statu quo*. And, where the granting of an interlocutory injunction involves the decision of a novel question of law of grave importance and serious difficulty, the injunction should be denied. And the court should not, upon an interlocutory application, enter a final decree granting a perpetual injunction."

"§ 5. It is to be constantly borne in mind that, in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing and indeed without having the means of forming a final opinion as to such rights. And, in order to sustain an injunction for the protection of property *pendente lite*, it is not necessary to decide in favor of plaintiff upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing; since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail. Nor is the decision of the court in granting or refusing a preliminary injunction conclusive upon either the court or parties on the subsequent disposition of the cause by final decree."

"§ 7. Except in cases of special injunctions to stay waste or prevent other irre-
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parable injury, the bill should generally show some primary equity in aid of which the injunction is asked, and the relief is granted as ancillary to or in support of the primary equity whose enforcement is thus sought. And it is incumbent upon the party seeking relief by interlocutory injunction to show some clear legal or equitable rights and a well-grounded apprehension of immediate injury to those rights."

The information in this case charges the respondents with a violation of the anti-trust laws of the state, and that thereby they have usurped authority and powers not granted to them by their licenses to do business in this state, for which the attorney general asks that they be fined and otherwise punished; and in addition thereto the information charges that respondents in pursuance to said usurpation and abuse of power are threatening to and will commit an irreparable injury to the state and the citizens thereof, if not restrained or enjoined from so doing during the pendency of the suit.

A similar question came before the supreme court of Ohio in the case of *State ex rel. Ellis v. Cuyahoga County*, 70 Ohio St. 341, 71 N. E. 717. In that case, as in this, it was contended by the respondents that under the Constitution of that state the supreme court had no jurisdiction to issue a temporary injunction in aid of the quo warranto proceeding therein pending. The Constitution of Ohio in regard to issuing original writs is practically the same as ours, and neither in express terms authorize the supreme court to issue an injunction; but that court held that it had the implied or inherent authority to issue an injunction in aid of a quo warranto proceeding pending therein, over which it unquestionably had jurisdiction to try and determine. In discussing that question the court said: "It is urged that we are without authority to make the order which the motion contemplates. The present action is a resort to our original jurisdiction. That we have not original jurisdiction of suits for injunctions is entirely clear. If the language of § 5573, Revised Statutes, should be thought appropriate to confer it, the effect to be given to that section would nevertheless be indicated by § 2 of art. 4 of the Constitution, which ordains that 'it (the supreme court) shall have original jurisdiction in quo warranto, mandamus, habeas corpus, and procedendo, and such appellate jurisdiction as may be provided by law.' Applying to this grant the maxim, *Expressio unius est exclusio alterius*, the conclusion is irresistible that the general assembly cannot add to the enumerated subjects of our original jurisdiction. *Marbury v. Madison*,

1 Cranch, 137, 2 L. ed. 80; Kent v. Mahaffy, 2 Ohio St. 498. But our original jurisdiction in quo warranto is not doubted, and we have to inquire whether the desired order may be made in its exercise. In the consideration of that question the case of Yeoman v. Lasley, 36 Ohio St. 416, is suggestive. The proceeding in this court was for the reversal of a judgment which the district court had rendered in a suit for the foreclosure of a mortgagor's equity of redemption. An injunction was not sought in the original suit, nor was a right to that relief presented to the court below or considered by it. The question for ultimate determination by this court was whether the district court had erred in the decision of the case which had been presented to it. But this court, upon an application originally made here, allowed an injunction in favor of one of the parties to the proceeding in error and against his adversary for 'the protection of the rights of the parties in the suit or matter under review on error.' It is true that it is said in the opinion that in allowing the injunction the court was exercising appellate, and not original, jurisdiction. But, as it was not a part of the jurisdiction invoked by the suit and exercised or refused by the district court, it could be regarded as appellate jurisdiction only because the order to be made was necessary to the proper and effective exercise of the appellate jurisdiction to reverse the judgment which the district court had rendered in the suit to foreclose. It has not been suggested, and it obviously could not be maintained, that our authority for the exercise of the original jurisdiction which the Constitution confers upon us is less complete than for the exercise of the appellate jurisdiction which we derive from the statutes. The pertinent inference from the case cited is that a court has authority to make any judicial order which, from the nature of the case, may be necessary to the effective exercise of its jurisdiction, whether original or appellate. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. Authority to determine is exercised in the form of judgments, decrees, and orders, and it implies power to make all such orders as may be appropriate to the case presented and necessary to give practical effect to the final judgment, as well as to preserve the subject of the action, pending the final determination of the case. In Kerr v. Trego, 47 Pa. 292, it is appropriately said that 'all bodies, except the legislature, are under law, and therefore for all transgressions of the law are subject to the judicial power established by the Constitution.' This is a public action, and its subject is the admin-

istration of the laws which provide for the conduct of popular elections. The more limited subject of inquiry started by this motion is the administration of those laws pending the case in quo warranto. Since the principal action involves its incidents, the court of common pleas, which alone has original jurisdiction of suits for injunctions, cannot with propriety exercise that jurisdiction with respect to the subject of the action which is pending here; and it is entirely clear from the decisions already adverted to, as well as from the obvious force of the reasons involved, that those having the apparent right should be protected in the exercise of these public functions. The power to grant an ancillary injunction for that purpose is inherent in the court which has jurisdiction of the principal subject. The case is novel only in the application of familiar principles of obvious necessity."

That ruling, in my opinion, is unquestionably correct; for it would be useless for a court to try a cause if it had no authority or means by which it could enforce or protect the rights and interests of the parties involved therein after they had been adjudicated.

It seems to me to be unanswerable to say that, where a court is given express authority to try a cause, it must also by implication have the power to do all the things that are incident to that trial or are necessary to be done in order to carry into full force and effect the judgment or decree the law authorizes the court to render therein. *Shull v. Boyd*, — Mo. —, 158 S. W. 313, not yet officially reported.

It is not doubted but what this court has jurisdiction to try and determine a quo warranto proceeding, which this is, and if it is necessary, as it appears to be by the information filed in this case, to preserve the *status quo* of the parties to the suit and the rights involved therein to issue a temporary injunction during the pendency of the proceedings, in order that full force and effect may be given to the judgment which may be rendered herein, then I think the court has the implied, if not the inherent, power to issue a temporary injunction in aid of the quo warranto proceeding.

I am therefore of the opinion that the demurrer should be overruled, and that a temporary injunction should issue.

All concur as to paragraphs 1 and 2 (Bond, J., in result), except Walker, J., who dissents from the opinion *in toto*. Lamm, Ch. J., and Graves and Bond, JJ., concur in the third paragraph; Bond, J., in result. Brown, Walker, and Faris, JJ., dissent as to the third paragraph.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

MICHAEL BAUM, Appt.,
v.
SOMERVILLE WATER COMPANY.

(— N. J. —, 87 Atl. 140.)

Water — deficient supply — liability
for fire.

A public water company is not liable to an individual for loss by fire resulting from an insufficient supply of water at insufficient pressure at fire hydrants to extinguish a fire, unless there be a contract between the parties for a sufficient supply at sufficient pressure.

(June 18, 1913.)

APPEAL by plaintiff from a judgment of the Supreme Court in defendant's favor in an action brought to recover damages for the failure of defendant to maintain sufficient pressure to extinguish a fire which had started on plaintiff's property. Affirmed.

The facts are stated in the opinion.

Mr. James L. Griggs, with Messrs. Condict, Condict, & Boardman, for appellant:

The duty of the water company toward the public, considered as individuals, is to use reasonable care to furnish a reasonable supply of water at the fire hydrants, under reasonable pressure for fire purposes, and this duty is independent of any contract between the municipality and the water company, and a failure on the part of the company to perform this duty, resulting in special injury to an individual, is actionable.

When a water company possessed of the right of eminent domain, and of franchise to lay its pipes in the streets of the municipality, undertakes the public service of

Headnote by WALKER, C.

Note. — BAUM v. SOMERVILLE WATER CO. differs from most of the cases involving the liability of a water company to an individual property owner for failure to furnish sufficient pressure of water for fire purposes, in that the attempt was to predicate the liability on the general duty assumed by the water company as a public utility, and not upon a definite contract with the municipality or with the individual property owner, to furnish water for fire purposes.

The right of a property owner to maintain an action against a water company for failure to supply water for fire purposes, as required by its contract with the municipality, is treated in the notes to *Howsmon v. Trenton Water Co.* 23 L.R.A. 146, and *Hone v. Presque Isle Water Co.* 21 L.R.A.(N.S.) 1021. See also in this connection 46 L.R.A.(N.S.)

supplying water for fire purposes, it must perform the services it has undertaken with a reasonable degree of care, or respond in damages to any member of the public injured by its negligence.

Middlesex Water Co. v. Knappmann Whiting Co. 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692; *Hall v. Passaic Water Co.* 83 N. J. L. 771, 43 L.R.A.(N.S.) 750, 85 Atl. 349; *Weller v. McCormick*, 52 N. J. L. 470, 8 L.R.A. 798, 19 Atl. 1101; *Couch v. Steel*, 3 El. & Bl. 402, 2 C. L. R. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. N. S. 515, 2 Week. Rep. 170; *Atkinson v. Newcastle & G. Water Co.* L. R. 2 Exch. Div. 441, 46 L. J. Exch. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Van Winkle v. American Steam Boiler Co.* 52 N. J. L. 240, 19 Atl. 472; *State, Olmsted, Prosecutor, v. Morris Aqueduct*, 46 N. J. L. 501, affirmed in 47 N. J. L. 311; *Long Branch Commission v. Tintern Manor Water Co.* 70 N. J. Eq. 71, 62 Atl. 474.

It is the duty of a public service corporation enjoying special franchises, and having entered upon the performance of a public calling, to exercise those franchises, and practise its public calling, with reasonable care and in a reasonable manner.

One who undertakes any act and enters into the performance of it, contract or no contract, consideration or no consideration, is bound to use reasonable care in the doing of that which he undertakes.

Any person who undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of others, is charged with a public duty to exercise such care and skill.

Plainfield-Union Water Co. v. Plainfield, 83 N. J. L. 332, 85 Atl. 321; *Freeman v. Macon Gaslight & Water Co.* 126 Ga. 843, 7 L.R.A.(N.S.) 917, 56 S. E. 61; *Woodbury v. Tampa Waterworks Co.* 57 Fla. 249, 21

section the note to *Mugge v. Tampa Waterworks Co.* 6 L.R.A.(N.S.) 1171, for a more detailed discussion of the right to maintain an action *ex delicto*. See also on this subject the later cases of *German Alliance Ins. Co. v. Home Water Supply Co.* 42 L.R.A.(N.S.) 1000, affirming 42 L.R.A.(N.S.) 1005, and *Lutz v. Tahlequah Water Co.* 36 L.R.A.(N.S.) 568.

As to duty of municipality or water company under its contract with consumer to supply water for extinguishment of fires, see note to *Niehaus Bros Co. v. Contra Costa Water Co.* 36 L.R.A.(N.S.) 1045.

As to liability of water company for destruction of property of municipality in consequence of failure to maintain sufficient water pressure, see note to *Milford v. Bangor R. & Electric Co.* 30 L.R.A.(N.S.) 526.

G. H. P.

L.R.A.(N.S.) 1034, 49 So. 556; *La Brasca v. Hinchman*, 81 N. J. L. 367, 79 Atl. 885; *Van Winkle v. American Steam Boiler Co.* 52 N. J. L. 247, 19 Atl. 472; *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A.(N.S.) 923, 70 Atl. 314.

The proper test as to whom the duty is owing to is found in the answer of the question,—Who will be benefited by the performance of the duty, or injured by a breach?

Appleby v. State, 45 N. J. L. 161; *Public Service Corp. v. American Lighting Co.* 67 N. J. Eq. 122, 57 Atl. 482; *Olmsted v. Morris Aqueduct Co.* 47 N. J. L. 331; *Kiernan v. Metropolitan Constr. Co.* 170 Mass. 378, 49 N. E. 648; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689.

The question whether the failure of the water supply was the cause of the fire loss is a question of fact for the jury.

Middlesex Water Co. v. Knappmann Whiting Co. 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692.

The public duty is independent of the contract obligation.

Appleby v. State, 45 N. J. L. 161; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Stylea v. Long Co.* 70 N. J. L. 301, 57 Atl. 448; *Washington v. Washington Water Co.* 70 N. J. Eq. 254, 62 Atl. 390; *Bordentown v. Anderson*, 81 N. J. L. 434, 79 Atl. 281; *Johnson v. Atlantic City Gas & Water Co.* 65 N. J. Eq. 129, 56 Atl. 550; *Hall v. Passaic Water Co.* 83 N. J. L. 771, 43 L.R.A.(N.S.) 750, 85 Atl. 349; *Woodbury v. Tampa Waterworks Co.* 57 Fla. 249, 21 L.R.A.(N.S.) 1034, 49 So. 556.

The public duty grows out of the enjoyment of special franchises, the possession of a virtual monopoly, and the exercise of a public calling.

Long Branch Commission v. Tintern Manor Water Co. 70 N. J. Eq. 71, 62 Atl. 474; *Lumbard v. Stearns*, 4 Cush. 60; *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186; *Guardian Trust & D. Co. v. Greensboro Water Supply Co.* 115 Fed. 184.

The public duty is measured by the nature of the business undertaken, i. e., the nature and extent of the public service professed.

Coggs v. Bernard, 2 Ld. Raym. 909; *La Brasca v. Hinchman*, 81 N. J. L. 367, 79 Atl. 885; *State, Olmsted, Prosecutor, v. Morris Aqueduct*, 46 N. J. L. 495; 1 Wyman, *Public Service Corp.* § 250.

While the contract obligation was owing to the municipal entity, the public duty was owing to the public, considered as composed of individuals.

Woodbury v. Tampa Waterworks Co. 57 46 L.R.A.(N.S.)

Fla. 249, 21 L.R.A.(N.S.) 1034, 49 So. 556; *Hays v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Appleby v. State*, 45 N. J. L. 161.

While the failure to perform the contract obligation might constitute a mere nonfeasance, the breach of public duty, the failure to use due care is negligence or misfeasance.

Ellis v. McNaughton, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; *Bill v. Smith*, 39 Conn. 206; *Kelly v. Michigan C. R. Co.* 65 Mich. 186, 8 Am. St. Rep. 876, 31 N. W. 904; *McDonald v. Union P. R. Co.* 42 Fed. 580; *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 840, 12 S. W. 554, 13 S. W. 249; *Graves County Water Co. v. Lingon*, 112 Ky. 775, 66 S. W. 725; *Lexington Hydraulic & Mfg. Co. v. Oots*, 119 Ky. 598, 84 S. W. 774, 86 S. W. 684; *Long Branch Commission v. Tintern Manor Water Co.* 70 N. J. Eq. 98, 62 Atl. 474, 71 N. J. Eq. 790, 71 Atl. 1134; *State, Olmsted, Prosecutor, v. Morris Aqueduct*, 46 N. J. L. 501, 47 N. J. L. 311; *Plainfield-Union Water Co. v. Plainfield*, 83 N. J. L. 332, 85 Atl. 321; *Bordentown v. Anderson*, 81 N. J. L. 434, 79 Atl. 281; *Washington v. Washington Water Co.* 70 N. J. Eq. 254, 62 Atl. 390; *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692.

Mr. Clarence E. Case, for respondent:

In every jurisdiction where the question has been passed upon, with the exception of Kentucky, North Carolina, and Florida, the responsibility of a water company to an individual by reason of a municipal contract is denied.

Hall v. Passaic Water Co. 83 N. J. L. 771, 43 L.R.A.(N.S.) 750, 85 Atl. 349; *German Alliance Ins. Co. v. Home Water Supply Co.* 226 U. S. 220, 57 L. ed. — 33 Sup. Ct. Rep. 32, 42 L.R.A.(N.S.) 1005, 99 C. C. A. 258, 174 Fed. 764; *Boston Safe Deposit & T. Co. v. Salem Water Co.* 94 Fed. 238; *Metropolitan Trust Co. v. Topeka Water Co.* 132 Fed. 702; *Lovejoy v. Bessemer Waterworks Co.* 146 Ala. 374, 6 L.R.A.(N.S.) 429, 41 So. 76, 9 Ann. Cas. 1068, 20 Am. Neg. Rep. 1; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Fowler v. Athens City Waterworks Co.* 63 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Halloway v. Macon Gaslight & Water Co.* 132 Ga. 387, 64 S. E. 330, 21 Am. Neg. Rep. 70, answering certified question in 6 Ga. App. 112, 64 S. E. 574; *Bush v. Artesian Hot & Cold Water Co.* 4 Idaho, 618, 95 Am. St. Rep. 161, 43 Pac. 69; *Peck v. Sterling Water Co.* 118 Ill. App. 533; *Galena v. Galena Water Co.* 132 Ill. App. 332,

judgment affirmed in 229 Ill. 128, 82 N. E. 421; *Fitch v. Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Becker v. Keokuk Waterworks,* 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Allen & C. Mfg. Co. v. Shreveport Waterworks Co.* 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 525, 37 So. 980, 2 Ann. Cas. 471; *Hone v. Presque Isle Water Co.* 104 Me. 217, 21 L.R.A.(N.S.) 1021, 71 Atl. 769; *Wilkinson v. Light, Heat & Water Co.* 78 Miss. 389, 28 So. 877; *Howsmen v. Trenton Water Co.* 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; *Houck v. Cape Girardeau Waterworks & E. L. Co.* — Mo. —, 114 S. W. 1099; *Metz v. Cape Girardeau Waterworks & E. L. Co.* 202 Mo. 324, 100 S. W. 651; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 546, 21 L.R.A. 653, 40 Am. St. Rep. 510, 56 N. W. 201; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Wainwright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987; *Smith v. Great South Bay Water Co.* 82 App. Div. 427, 81 N. Y. Supp. 812; *Akron Waterworks Co. v. Brownless,* 10 Ohio C. C. 620, 5 Ohio C. D. 1; *Blunk v. Dennison Water Supply Co.* 71 Ohio St. 250, 73 N. E. 210, 2 Ann. Cas. 852; *Beck v. Kittanning Water Co.* 8 Sadler (Pa.) 237, 11 Atl. 300; *Stone v. Uniontown Water Co.* 4 Pa. Dist. R. 431; *Thompson v. Springfield Water Co.* 215 Pa. 275, 64 Atl. 521, 7 Ann. Cas. 473; *Cooke v. Paris Mountain Water Co.* 82 S. C. 235, 64 S. E. 157; *Foster v. Lookout Water Co.* 3 Lea, 42; *House v. Houston Waterworks Co.* —Tex. Civ. App. —, 22 S. W. 277, affirmed in 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; *Nichol v. Huntington Water Co.* 53 W. Va. 348, 44 S. E. 290; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84.

The supplying of water is a governmental function.

State, Van Reipen, Prosecutor, v. Jersey City, 58 N. J. L. 262, 33 Atl. 740; *German Alliance Ins. Co. v. Home Water Supply Co.* 226 U. S. 220, 57 L. ed. 195, 33 Sup. Ct. Rep. 32; *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 173, 64 L.R.A. 231, 100 Am. St. Rep. 107, 75 Pac. 773, 15 Am. Neg. Rep. 493; *Milford v. Bangor R. & Electric Co.* 106 Me. 316, 30 L.R.A.(N.S.) 526, 76 Atl. 696, 20 Ann. Cas. 622; *Fitch v. Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982.

A municipality engaged in the business of serving water at public hydrants and elsewhere, for fire and other purposes, is not liable to a property owner for loss by fire due to negligence in supplying water. 46 L.R.A.(N.S.)

Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90; 3 Dill. Mun. Corp. 5th ed. 1340 et seq.; *Boston Safe Deposit & T. Co. v. Salem Water Co.* 94 Fed. 238; *Wright v. Augusta,* 78 Ga. 241, 6 Am. St. Rep. 256; *Fowler v. Athens City Waterworks Co.* 83 Ga. 222, 20 Am. St. Rep. 313, 9 S. E. 673; *Brinkmeyer v. Evansville,* 29 Ind. 187; *Fitch v. Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Van Horn v. Des Moines,* 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *New Orleans v. Crescent Mut. Ins. Co.* 25 La. Ann. 390; *Miller v. Minneapolis,* 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183; *Heller v. Sedalia,* 53 Mo. 159, 14 Am. Rep. 444; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 546, 21 L.R.A. 653, 40 Am. St. Rep. 510, 56 N. W. 201; *Wheeler v. Cincinnati,* 19 Ohio St. 19, 2 Am. Rep. 368; *Stone v. Uniontown Water Co.* 4 Pa. Dist. R. 431; *Grant v. Erie,* 69 Pa. 420, 8 Am. Rep. 272; *Foster v. Lookout Water Co.* 3 Lea, 42; *House v. Houston Waterworks Co.* 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; *Owen v. New York & T. Land Co.* 11 Tex. Civ. App. 284, 32 S. W. 189, 1057; *Butterworth v. Henrietta,* 25 Tex. Civ. App. 467, 61 S. W. 975, disapproving *Lenzen v. New Braunfels,* 13 Tex. Civ. App. 335, 35 S. W. 341; *Mendel v. Wheeling,* 28 W. Va. 233, 57 Am. Rep. 664; *Hayes v. Oshkosh,* 33 Wis. 314, 14 Am. Rep. 760; *Greenville Water Co. v. Beckham,* 55 Tex. Civ. App. 87, 118 S. W. 889; *Wainwright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987; *Bisbing v. Asbury Park,* 80 N. J. L. 417, 33 L.R.A.(N.S.) 523, 78 Atl. 196.

The water company assumes the position of the municipality as regards liability to an individual.

Fitch v. Seymour Water Co. 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Nichol v. Huntington Water Co.* 53 W. Va. 348, 44 S. E. 290; 3 Dill. Mun. Corp. 5th ed. pp. 1340 et seq.; *Greenville Water Co. v. Beckham,* 55 Tex. Civ. App. 87, 118 S. W. 889; *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 173, 64 L.R.A. 231, 100 Am. St. Rep. 107, 75 Pac. 773, 15 Am. Neg. Rep. 493; *Milford v. Bangor R. & Electric Co.* 106 Me. 316, 30 L.R.A.(N.S.) 526, 76 Atl. 696, 20 Ann. Cas. 622; *Allen & C. Mfg. Co. v. Shreveport Waterworks Co.* 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 522, 37 So. 980, 2 Ann. Cas. 471.

A water company is under no liability in damages to an individual, upon the theory of public duty.

Dudley v. Camden & P. Ferry Co. 42 N. J. L. 25, 36 Am. Rep. 501.

Walker, C., delivered the opinion of the court:

On the afternoon of July 8, 1909, plaintiff's stove factory and warehouse at Somer-

ville were destroyed by fire. Within the door of the warehouse plaintiff had a coil of fire hose equipped with nozzle and coupling. Directly in front of the door was a fire hydrant owned by the defendant company; also a similar hydrant on the plaintiff's grounds, with hose attached. Rising from the roof of the iron works was a standpipe which was equipped with a fire hose. At the time of the fire the hose from the hydrants and standpipe was used and directed toward the fire, but the streams were inadequate, and none of them reached the fire. The department sent the hose company and the engine company, but they were unable to put out the fire for lack of sufficient water at sufficient pressure. The defendant company was incorporated for the purpose of supplying the towns of Somerville and Raritan with water. It had assumed, plaintiff contends, the duty of using reasonable care that there should be a constant supply of water at the fire hydrants under reasonable pressure for fire purposes, and the action was brought to recover his loss resulting, as he alleges, from failure on the part of the defendant to supply sufficient water at sufficient pressure to extinguish the fire.

The questions involved in this appeal arise out of the admission and rejection of evidence and the charge to the jury; and, as stated by plaintiff's counsel, the serious question involved arose out of the very nature and theory of the action; for, although the court may have erred in the admission and exclusion of evidence and in the charge to the jury, yet, if the cause of action does not rest upon sound principles, such errors are harmless. We think that the question as to whether or not there is in law any liability of the defendant to the plaintiff is of the very essence of the action, and is dispositive of the case.

There is disclosed no contractual relation between the plaintiff and defendant, and therein this cause differs from *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692, where a company incorporated to supply water entered into a contract to furnish water to the owner of a factory with pressure sufficient for fire purposes, which factory was destroyed by fire by reason of the failure of the company to perform its agreement, and it was held that the company was liable for the damages sustained. The case at bar is more like the recent one in this court of *Hall v. Passaic Water Co.* 83 N. J. L. 771, 43 L.R.A. (N.S.) 750, 85 Atl. 349. In that case a water com-

pany was sought to be held liable for damages resulting to a mill through fire, under a contract alleged to have been made between the owner of the factory and the superintendent of the water company for a supply of water of a certain pressure at the various openings of standpipes and water pipes in the factory. The testimony failed to establish the making of the contract sued on, and the court held that the defendant company was not liable.

The gravamen of plaintiff's case here, as stated by himself, is that, had there been a reasonable supply of water at the standpipe and hydrants in and about his factory at the time of the fire, it would have been extinguished without loss. His position is that a duty was owed to the public to supply sufficient water of sufficient pressure to extinguish fires. To support this position, he cites, among other cases, *State, Olmsted, Prosecutor, v. Morris Aqueduct*, 46 N. J. L. 495, in which the proprietors of the Morris aqueduct sought to condemn lands and divert streams of water to such extent as was necessary to carry out the purposes of the corporation, and the language of the supreme court to the effect that it is well known that, when a company undertakes to supply a town with water, the original methods to obtain water to extinguish fires are abandoned by the people, and that, under such circumstances, it would be gross negligence in the company to permit the supply of water to be intermitted or diminished to any considerable extent, and thus endanger the property within the town, was employed in combating the plaintiff's contention that the defendant could not exercise the power of eminent domain further than to supply Morristown with water, when in fact the company had extended its pipes, and was supplying persons living outside of Morristown. Also *Long Branch Commission v. Tintern Manor Water Co.* 70 N. J. Eq. 71, 62 Atl. 474, a case of contention between the municipality and the water company concerning rates to be charged by the company to the municipality and private consumers for the use of water, where the matters submitted for adjudication were, what compensation ought the defendant to have for supplying water to the inhabitants of the territory governed by the commission, how should that compensation be distributed between the municipality and the private consumers, and how between the private consumers themselves. Although there was language used by the learned vice chancellor who wrote the opinion, to the effect that a company which

seeks and obtains a franchise to supply a certain territory with water for public and domestic uses is under obligation to furnish a supply which shall be equal to all emergencies which may be reasonably anticipated, including unusual droughts and unusual conflagrations, and to bear constantly in mind the prospective increase in population and a constant increase in demand for water, this observation was made with reference to the necessity of the company increasing its supply of water because of an increased consumption of it incident to increased population in the territory, and is no authority for the proposition that a water company is responsible to an individual property owner for damages suffered by him through fire, in the absence of contractual relation between the two with reference to a supply of water for fire extinguishing purposes.

It will be observed that the language used by the judges in *State, Olmsted, Prosecutor, v. Morris Aqueduct and Long Branch Commission v. Tintern Manor Water Co.* was not spoken with reference to the liability of those companies with reference to an inadequate supply of water, or lack of supply at a certain pressure, but with reference to their duty generally of acquiring the sources of supply and providing for an adequate supply,—duties of a public character, the performance of which, by the public in appropriate proceedings, could doubtless be compelled.

The case in hand, then, narrows itself to the question of duty or no duty owed by the defendant to the plaintiff at the time of the fire. As we have already seen, if there had been a contract between the parties as in *Middlesex Water Co. v. Knappmann Whiting Co.*, there would doubtless have been liability on the part of the defendant company, and that even though an inadequate supply of water at the fire was the result of some accidental cause at the time unknown to the water company, upon the principle that where damages under such circumstances result, the one of two persons who must bear the loss shall be he who has agreed to sustain it. But, in the absence of a contract, no liability exists on the part of the defendant for the benefit of the plaintiff. The common law does not impose such a liability, and we have not been pointed to any statute which creates it. In the absence of contract it does not exist.

This case was submitted to the jury under instructions which contained no error prejudicial to the plaintiff. The jury found for the defendant, and the judgment, based upon that finding, must be sustained.

46 L.R.A.(N.S.)

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK
EX REL. ROBERT SIMPSON COMPANY, Resp't.,

v.

OTTO KEMPNER et al., Appts.

(208 N. Y. 16, 101 N. E. 794.)

Search warrant — determination of right to property.

Where by statute a search warrant may be issued when property has been stolen or embezzled, when it is used as a means of committing a felony, and when it is in possession of any person with the intent to use it as a means of committing an offense, the court cannot determine the right, as between the alleged owner and the one from whose possession it was taken, to property seized under a search warrant, upon the allegation that it was stolen by a stranger who is not prosecuted for the offense.

(March 25, 1913.)

Note. — Trial of right to property in proceedings instituted by search warrant.

There is very little direct authority upon this question.

As a general proposition, it would seem that a court cannot decide the right to property in proceedings instituted by search warrant in any case except for the purpose of disposing of the property in the custody of the law when taken in aid of a public prosecution, upon the ground that any other construction would render the statute unconstitutional as authorizing an unreasonable search and seizure.

The decision rendered by the appellate division in the reported case, to the effect that the pledgee of property taken on a search warrant was entitled to a writ of prohibition against the magistrate who was about to determine the ownership of the property, under § 687 of the Code, which provides that, "if property stolen or embezzled come into the custody of a magistrate, it must, unless its temporary retention be deemed necessary in furtherance of justice, be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate," was upon the ground that the statute was unconstitutional, as denying due process of law for failure to provide for notice to be given to the pledgee as to the time or place at which the right to the possession of the articles in question shall be heard and determined. 154 App. Div. 674, 139 N. Y. Supp. 440.

The court of appeals apparently assumes that § 687 of the Code has no application in a case like the present, where the property was not taken in aid of a criminal

APPPEAL by defendants from an order of the Appellate Division of the Supreme Court, Second Department, reversing an order of a Special Term for Kings County denying an application for a writ of prohibition to prevent the determination of the title to certain personal property in a proceeding under a search warrant. Affirmed.

The facts are stated in the opinion.

Mr. John M. Perry, with Mr. James C. Cropsey, for appellants:

"The writ" of prohibition "does not issue as a matter of right, but only in the sound discretion of the court in cases of supreme necessity, where the grievance cannot be remedied by ordinary proceedings at law or in equity or by appeal."

People *ex rel.* Hummel v. Trial Term, 184

N. Y. 30, 76 N. E. 732; People *ex rel.* Burbank v. Wood, 21 App. Div. 245, 47 N. Y. Supp. 676; *Ex parte* Braudlacht, 2 Hill, 367, 38 Am. Dec. 593.

By the theft of her rings, Mrs. Small was not divested of her title to the property.

Bassett v. Spofford, 45 N. Y. 387, 6 Am. Rep. 101.

The respondent, a pawnbroker, by making an advance to the thief on the pledge of the stolen rings, acquired no property right in or lien upon the rings, and in no way lessened or impaired the property rights therein of the true owner.

25 Cyc. 671; Allen v. Megguire, 15 Mass. 490; Brandel v. Brown, 2 How. 406, 11 L. ed. 318; Freudenheim v. Selig Gutter, 201 N. Y.

prosecution, upon the ground that search warrant proceedings can be used only in the furtherance of criminal prosecutions.

The facts in *Modern Loan Co. v. Police Ct.* 12 Cal. App. 582, 108 Pac. 56, are very similar to the case of *PEOPLE EX REL. ROBERT SIMPSON CO. v. KEMPNER*, it appearing that search warrant proceedings were instituted apparently for the sole purpose of gaining summary possession of property alleged to have been stolen and in the possession of a third person, without any effort to apprehend the thief, and it was held that §§ 1408 and 1409 of the California Penal Code, which authorize the disposition and award of personal property seized under search warrants, were unconstitutional, as denying due process of law for failure to provide for the giving of notice to interested parties, or to afford them an opportunity to be heard on such proceedings, and that therefore judgment making permanent a writ of prohibition to prevent the magistrate from proceeding to determine the ownership of property taken on a search warrant was properly entered. The court said, however, concluding its opinion: "We think that it was never intended under the circumstances of this case, that the right of possession of property should be adjudicated by a magistrate, especially when the law has provided the means for settling such question by the ordinary action of claim and delivery."

In *State v. Williams*, 61 Iowa, 517, 16 N. W. 586, it was held that the court had no right, against the objection of the defendant, who had been acquitted of the offense of larceny of money taken from him by a search warrant, to impanel a jury and determine the ownership of the money. It was said the acquittal of the defendant justified the presumption that the money had not been stolen, and that the defendant was entitled to go out of the court, and be placed in the situation he was in before the money was taken, leaving any claimant of the money to pursue his remedy by an action in his own name.

In *Houghton v. Bachman*, 47 Barb. 388, it was said that the order of the magis-

trate, in disposing of property alleged to have been stolen, when taken into the custody of law to aid in the prosecution, upon proof of ownership as provided by statute, was not intended to have any effect to settle the question of title, that the accused from whom the property has been taken is not thereby deprived of his property, but is still at liberty to take any legal steps he may choose to recover the property or its possession from the person to whom it was delivered, and that the order of the magistrate would be no estoppel upon the question of title, and the court further said: "Its simple and only operation is to dispose of the possession of property already in the custody of the law, leaving the title open to vindication by any party claiming to have it." In this case it appears that the search warrant was not actually served for the reason that the officer discovered the property without a search while making the arrest, and took possession thereof by virtue of the warrant of arrest, which he had a right to do, but the disposition of the property was the same under the statute as when taken by a search warrant.

Under a statute providing for the taking of testimony by the magistrate where the grounds upon which a search warrant was issued are controverted, and for the restoration of the property to the person from whom it was taken, where it appears there is no probable cause for believing the existence of the grounds upon which the warrant was issued, and for the delivery of the property to the owner in case the property was stolen or embezzled upon his making satisfactory proof of his ownership or of his right to possession thereto,—an adjudication by the magistrate as to the owner is binding and conclusive until reversed, where the rival claimants appear and submit the issue of ownership upon testimony adduced, although there was no prosecution for larceny or embezzlement, as the statute does not require the filing of an information accusing some person of the larceny as a condition precedent to the issuing a search warrant. *Haworth v. Newell*, 102 Iowa, 541, 71 N. W. 404; *Mont-*

94, 94 N. E. 640; *Schmidt v. Simpson*, 204 N. Y. 434, 97 N. E. 966, Ann. Cas. 1913 C, 1288.

The fact that the respondent was deprived of its possession of the rings did not in any way affect its lien, if it had a lien.

Allen v. Spencer, 1 Edm. Sel. Cas. 117.

The proceeding before the magistrate, which it is sought in this action to prohibit, in no way affects title.

Houghton v. Bachman, 47 Barb. 388; *Simpson v. St. John*, 93 N. Y. 363.

The provisions of the Code of Criminal Procedure, regarding the disposition of the custody of property seized under a search, do not violate the constitutional rights of the respondent.

The provisions of the United States Constitution regarding the right of search have no application to actions in state courts.

People v. Adams, 176 N. Y. 351, 63 L.R.A. 408, 98 Am. St. Rep. 675, 68 N. E. 636.

The constitutional provision for trial by jury relates only to cases where trial by jury has been "heretofore had."

Re Curry, 25 Hun, 321.

The provisions of the Code of Criminal Procedure now under consideration in no way violate the provision of the Constitution which provides that a person shall not be deprived of his property without due process of law.

Re McAdam, 4 Silv. Sup. Ct. 469, 7 N. Y. Supp. 454; *Re Barnes*, 204 N. Y. 113, 97 N. E. 508; *Happy v. Mosher*, 48 N. Y. 313; *Arnold v. Steeves*, 10 Wend. 514; *Bellows v. Shannon*, 1 Hill, 86.

Mr. Hersey Egginton also for appellants.

gomery v. Alden, 133 Iowa, 675, 119 Am. St. Rep. 648, 108 N. W. 234.

In *Haworth v. Newell*, supra, the court said: "The process is undoubtedly intended to be an aid in detecting and punishing the crime, and it may or may not be accompanied or followed by a criminal prosecution; but whether there should be such a prosecution may depend upon the facts disclosed by the proceedings under the information and search warrant. The process is also useful in many cases in discovering and restoring to its proper owner stolen or embezzled property. But such proceedings are not designed for the final adjudication of disputed questions of title to property of that character. The trial authorized is by the magistrate without a jury. The proceedings are in the name of the state, and it is not necessary that there be any other party to them, although it is no doubt true that claimants of the property may so far identify themselves with the proceedings, and present such issues, as to be bound by the adjudication."

And in *Montgomery v. Alden*, supra, it was said: "We may assume that ordinarily a finding in a search warrant proceeding is 46 L.R.A.(N.S.)

Mr. Franklin Taylor, for respondent: The threatened adjudication of the relator's lien was in violation of the constitutional provision as to due process of law.

By the word "property" as used in article 1st, § 6, of the Constitution, is meant the physical substance, as distinguished from the abstract right, of property. The naked possession of property is what is sought to be safeguarded.

Hornsby v. United States, 10 Wall. 242, 19 L. ed. 905; *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121; *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *White v. Ward*, 157 Ala. 345, 18 L.R.A.(N.S.) 568, 47 So. 166; *Bennett v. Davis*, 90 Me. 102, 37 Atl. 864; *Eustis v. Henrietta*, 90 Tex. 468, 39 S. W. 567; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Hibbard v. People*, 4 Mich. 125.

By due process of law is meant a civil suit or proceeding conducted in accordance with prescribed rules and principles established by our jurisprudence for the protection and enforcement of private rights.

Ward v. Boyce, 152 N. Y. 191, 36 L.R.A. 549, 46 N. E. 180; *People ex rel. Witherbee v. Essex County*, 70 N. Y. 228; *Re Hatch*, 11 Jones & S. 89; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Louis v. Brown Twp.* 109 U. S. 162, 27 L. ed. 892, 3 Sup. Ct. Rep. 92; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Perry*

not conclusive as to ownership of the property; but where rival claimants appear, employ counsel, and submit the issue of ownership upon testimony adduced pro and con, the finding is conclusive, although, strictly speaking, they are not parties to the action."

Simpson v. St. John, 93 N. Y. 363, is sufficiently set out in *PEOPLE EX REL. ROBERT SIMPSON Co. v. KEMPNER*, the reported case.

In *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 52 So. 328, it was held that one from whom property had been wrongfully obtained was not precluded from maintaining an action of detinue against the sheriff to recover the possession of the same, by the fact that the sheriff had secured it on a search warrant, and the statute directed the magistrate to cause property so taken, when it was stolen or embezzled, to be delivered to the owner on satisfactory proof of his title, where the person from whom the property was taken had been substituted as a party defendant upon the suggestion of the sheriff, and pleaded the general issue. A. L. R.

v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Durant v. Abendroth*, 97 N. Y. 132; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Hallett v. Denver*, 4 Colo. L. Rep. 566; *Garvin v. Dausman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 524, 57 N. W. 206, 794; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436.

There is absolutely nothing anywhere in the act giving the possessor a right to notice of hearing, or to appear at the same, or to testify, and examine witnesses on his own behalf, or to cross-examine adverse witnesses.

Modern Loan Co. v. Police Ct. 12 Cal. App. 582, 108 Pac. 56; *Re Grout*, 105 App. Div. 98, 93 N. Y. Supp. 711.

The adjudication of the civil property rights of an innocent third party, by search warrant proceedings, violates the constitutional provision as to trial by jury.

Cooley, Const. Lim. 7th ed. 430; *Bell v. Clapp*, 10 Johns. 263, 6 Am. Dec. 339.

It is not the function of a search warrant to interfere with the possession of property by innocent third parties claiming rights therein, in the absence of a pending criminal prosecution.

35 Cyc. 1265, note 4; 25 Am. & Eng. Enc. Law, 145; *Robinson v. Richardson*, 13 Gray, 455; *Lippman v. People*, 175 Ill. 111, 51 N. E. 872, 11 Am. Crim. Rep. 356; *Com. v. Hinds*, 145 Mass. 182, 13 N. E. 397.

Chase, J., delivered the opinion of the court:

The relator is a domestic corporation engaged in business as a licensed pawnbroker. On and prior to January 26, 1912, it was in possession of two diamond rings which it held as security for a loan of \$15 made to the person who delivered the rings to it. A woman claims that she is the owner of said rings, and that they were stolen from her by her maid and pawned by said maid to the relator. No one has been convicted of the alleged theft. On January 27th an information was filed with a magistrate charging said maid with the crime of grand larceny in stealing said rings, and a warrant was issued for her arrest, but it was not executed because she was then in custody serving a sentence after pleading guilty to a charge of committing another crime. On January 26th said woman, claiming to be the owner of the rings, submitted to a magistrate an affidavit upon which he issued a search warrant, in the form provided by the Code of Criminal Procedure, directing that search be made for said rings. The warrant was served January 27th, and 46 L.R.A.(N.S.)

the rings were found and taken by the officer serving the warrant from the relator, and he held them for production before said magistrate upon the return of the warrant. A voluntary and informal notice was given to the relator by the officer serving the warrant, of the time when the return to said warrant would be made to the magistrate. At the time mentioned the relator appeared by counsel and asserted its right to the possession of said rings, and its constitutional authority to have its property rights in said rings and the possession thereof determined in a civil action. The magistrate threatened to hear and determine the validity of the relator's alleged lien on the property taken pursuant to the search warrant, and, in the event of its being determined upon such hearing that the relator's alleged lien is invalid, that the said property would be delivered to whoever was found to be the owner and entitled to the possession thereof. An adjournment was then taken. Application was thereupon made for an absolute writ of prohibition, which was denied by the special term, and granted upon appeal to the appellate division.

A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate. Code of Crim. Proc. § 791. It may be issued upon one of three grounds: (1) When the property was stolen or embezzled; (2) when it was used as the means of committing a felony; (3) when it is in the possession of any person with the intent to use it as the means of committing a public offense. Code Crim. Proc. § 792. In each of the cases last mentioned it is provided from whom the property may be taken under the warrant.

A search warrant cannot be issued for any purpose, except as stated. Its legitimate use is, and always has been, to aid in the detection and punishment of crime. As such it has been in common use since the days of Lord Coke. It was mentioned by him in the Institutes (Bk. 4, pp. 176, 177). Referring to search warrants, he says: "For justices of the peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons or stolen goods, is against Magna Charta." Sir Matthew Hale in his History of the Pleas of the Crown (vol. 2, p. 149) does not fully agree with Lord Coke, but explains the business of a search warrant, and the purposes for which it is used, and says: "I thought fit to 'insert this business in this place: (1) Because it is a business preparatory to the discovery of felons, and preparing evidence against them, and to the helping of

persons robbed to their goods. (2) Because it is found by experience of great use and necessity, especially in these times where felonies and robberies are so frequent. And therefore this means of discovering them is now grown common and usual, much more than in ancient times; and if it should be disused or discountenanced, it would be of public inconvenience; and therefore I can by no means subscribe to that opinion of my Lord Coke's, 4 Inst. cap. 31, p. 178, as it is there generally set down "that justices of peace have no power upon a bare surmise to break open any man's house to search for a felon or stolen goods either in the day or night." Referring to the goods found, Sir Matthew Hale says (p. 151): "As touching the goods brought before him, if it appears they were not stolen, they are to be restored to the possessor; if it appears they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed by indicting and convicting the offender to have restitution." See also Burns's, J. P. pp. 176, 179; 1 Chitty, Crim. Law, 5th Am. ed. from 2d London ed. p. 67.

There were formerly three means of restitution of goods to the party from whom they were stolen: (1) By appeal of robbery or larceny. If the party were convicted thereupon, restitution of the goods contained in the appeal was to be made to the appellant, for it is one of the ends of that suit. (2) By the statute 21 Hen. VIII. chap. 11. And (3) by the course of the common law. But after the felon is convicted, it can be no color of crime to take his goods again when he (the owner) finds them, because he hath pursued the law upon him, and may have his writ of restitution if he pleases. 4 Burns's, J. P. pp. 111, 115; Hale, P. C. pp. 538, 546. After goods were taken into the possession of the court, restitution to the owner was, at least to an extent, dependent upon his prosecuting the thief. The prospect of restitution was thus made an incentive to the performance of public duty in bringing the criminal to justice. Until the person charged with the theft was convicted or acquitted, the courts would not sustain an action even by a third person for the possession of the goods.

It thus appears with reasonable certainty that in England and the American colonies the search warrant was a process used preparatory to the discovery of felons, in preparing evidence against them, and to help persons robbed to recover their goods, and not to try the title of or right to the possession of goods and chattels. There did not exist at the time of the adoption of our state Constitution in 1777, any right by the

common or statute law of England and Great Britain to try the title to goods and chattels before a magistrate upon the return of a search warrant. Such right did not form a part of the law of the colony of New York on the 19th day of April in the year of our Lord 1775.

It appears in *Bell v. Clapp*, 10 Johns. 263, 6 Am. Dec. 339, that search warrants in accordance with the English practice were (1813) issued and enforced by the courts in this state. That practice doubtless continued, as we have not found a statute in this state providing generally for search warrants prior to the Revised Statutes of 1829 (pt. 4, title 7, chap. 2, art. 3, §§ 25 to 28, inclusive). See also §§ 30-34, inclusive.

A century ago it was deemed necessary, for the purpose of preserving the civil remedy of a person injured or aggrieved by a felony, to provide by statute that "in no case whatever shall the right of action of the party injured be deemed taken or adjudged to be merged in the felony or in any manner affected thereby." Rev. Laws 1813, p. 499, § 20; Rev. Stat., pt. 3, title 1, chap. 4, § 2; Code Proc. 1857, § 7; Code Civ. Proc. § 1899. The basis for a search warrant under the Revised Statutes is a complaint upon oath that "personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place." The Revised Statutes mentioned remained in full force until repealed by the Code of Criminal Procedure, which was adopted by chapter 442 of the Laws of 1881, and §§ 791-810 and 685-689, inclusive, of that Code, were then enacted. The grounds upon which a search warrant was authorized by the Revised Statutes were somewhat enlarged by the Code. The basis for the search warrant prescribed by the Code is, however, the same in general character as stated in the Revised Statutes and as established by the old English practice. A search warrant under the Revised Statutes and under the Code, like the search warrant under the old practice, is in the nature of a criminal process, and we repeat that its purpose is to aid in the detection and punishment of crime. It has no relation whatever to civil process or civil trials.

Section 807 of the Code of Criminal Procedure is new, and provides: "If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto." This section, although new in form, is in accordance with the practice as it has always existed. The grounds on which a search warrant may be issued are stated in § 792; and it is provided in § 793 that "a search warrant cannot be issued but upon probable cause

supported by affidavit naming or describing the person, and particularly describing the property and the place to be searched." Any person interested may controvert there being probable cause for issuing the warrant. The magistrate may take further testimony relating thereto, and, if he determine such controversy in favor of the person from whose possession the property was taken, he should by order return such property to him. Section 809.

There is nothing in any of the provisions of the Code of Criminal Procedure that authorizes a trial of the title to or possession of the property taken under the warrant.

In *Robinson v. Richardson*, 13 Gray, 454, 456, the court, in 1859, say: "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because without them felons and other malefactors would escape detection. *Entick v. Carrington*, 19 How. St. Tr. 1067; 1 Chitty, Crim. Law, 64. . . . All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of penal laws, must be held to be unreasonable, and consequently under our constitution unwarrantable, illegal, and void."

The case of *Simpson v. St. John*, 93 N. Y. 363, did not hold to the contrary. It was in that case held, as it was held in colonial days, that where goods are in the custody of a criminal court, pending the prosecution of the person alleged to have stolen them, their retention is within the police power, although a third person asserts his title and right to the immediate possession of such goods. The court in the *Simpson* Case sustained the defendant, the property clerk of the magistrate before whom the criminal proceeding was pending, in his refusal to deliver the goods to the sheriff on his demand, pursuant to papers in his possession as sheriff, in an action by a third person to recover possession of the goods.

Where property voluntarily or by aid of 46 L.R.A. (N.S.)

a search warrant comes into the possession of a magistrate or court from the person or possession of one charged with crime, and such person is thereafter convicted of having stolen the property that is so in the possession of the magistrate or court from the person claiming to be the owner thereof, and there are no third persons claiming such property, it has doubtless been the practice, so long as there is any record of it, to order the property delivered to the person who, as appears by the testimony taken upon the trial, is the owner thereof. Such an order is analogous to the obsolete writ of restitution. When, however, the property has been taken by a search warrant from the possession of a third person, and there is a controversy between the person from whom it is claimed that the property was stolen and the person from whom the possession of the property was taken by the search warrant, as to which is entitled to the possession thereof, a question is presented that cannot be determined upon a criminal process. It is a matter wholly between the contending parties, and of no direct concern to the state. It must be determined in a civil action, in which the parties are by Constitution entitled to notice and a hearing, and, if demanded, to a trial of the issue by jury. *Modern Loan Co. v. Police Ct.* 12 Cal. App. 582, 108 Pac. 56.

The order should be affirmed, without costs.

Cullen, Ch. J., and Gray, Werner, Willard Bartlett, Collin, and Hogan, JJ., concur.

NEW YORK COURT OF APPEALS.

MARY GREENER, Admr., etc., for Bernard Greener, Deceased, Resp.,
v.

GENERAL ELECTRIC COMPANY, Appt.

(209 N. Y. 135, 102 N. E. 527.)

Evidence — narrative statements — res gestæ.

A statement of an employee, who had fallen from a ladder, made in response to a question while he was lying on the floor, that the ladder bent under him, is narrative, and not spontaneous, and is therefore

Note. — The distinction between spontaneous or natural statements and narrative statements in its bearing upon the admissibility of statements after an accident as *res gestæ* is treated in the note to *Walters v. Spokane International R. Co.* 42 L.R.A. (N.S.) 917.

not admissible as *res gestæ* in an action to hold his employer liable for the injury.

(June 17, 1913.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Schenectady County, in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband, for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. James O. Carr, for appellant:

The statement which Carlsen says Green-er made to him occurred after the accident was over, and was not a part of the *res gestæ*.

Waldele v. New York C. & H. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41; Norris v. Interurban Street R. Co. 90 N. Y. Supp. 460; Hall v. Uvalde Asphalt Paving Co. 92 N. Y. Supp. 46; Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E. 454, 5 Am. Neg. Cas. 364; Wagner v. H. Clausen & Son Brewing Co. 146 App. Div. 70, 130 N. Y. Supp. 584; Lahey v. William Ottmann & Co. 73 Hun, 62, 25 N. Y. Supp. 897; Austin v. Bartlett, 178 N. Y. 310, 70 N. E. 855; People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690.

Mr. Edgar T. Brackett, with Messrs. Fryer & Lewis, for respondent:

The ladder which bent and precipitated the plaintiff's intestate to the floor was a permanent structure, and while in ordinary use, it gave way. Under such circumstances, negligence is necessarily imputed to the master, and the doctrine of *res ipsa loquitur* is applicable.

Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; Lentino v. Port Henry Iron Ore Co. 71 App. Div. 466, 75 N. Y. Supp. 755; Muhlen v. Obermeyer, 83 App. Div. 88, 82 N. Y. Supp. 527; Muller v. Oakes Mfg. Co. 113 App. Div. 689, 99 N. Y. Supp. 923; Ambellan v. Barcalo Mfg. Co. 118 App. Div. 547, 102 N. Y. Supp. 993; Madden v. Hughes, 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in 185 N. Y. 466, 78 N. E. 167; Cummings v. Kenny, 97 App. Div. 114, 89 N. Y. Supp. 579; Bartnik v. Erie R. Co. 36 App. Div. 246, 55 N. Y. Supp. 266, 5 Am. Neg. Rep. 432; Konigsberg v. Davis, 57 Misc. 630, 108 N. Y. Supp. 595; Horn v. New Jersey S. B. Co. 23 App. Div. 302, 48 N. Y. Supp. 348; Morris v. Zimmerman, 138 App. Div. 114, 122 N. Y. Supp. 900; Cavanagh v. O'Neill, 27 App. Div. 48, 50 N. Y. Supp. 207, 4 Am. Neg. Rep. 527, affirmed in 46 L.R.A. (N.S.)

161 N. Y. 657, 57 N. E. 1106; Ristau v. E. Frank Coe Co. 120 App. Div. 478, affirmed in 193 N. Y. 630, 86 N. E. 1132.

The declaration of the deceased, made to Carlson directly after the deceased struck the ground, "My feet is broke, the ladder bent over," was competent.

Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Scheir v. Quirin, 77 App. Div. 624, 78 N. Y. Supp. 956, 13 Am. Neg. Rep. 184; Patterson v. Hochster, 38 App. Div. 398, 56 N. Y. Supp. 467; People v. Del Vermo, 192 N. Y. 487, 85 N. E. 690; Mackay-Smith v. Crawford, 56 App. Div. 136, 67 N. Y. Supp. 541; Witmer v. Buffalo & N. F. Electric Light & P. Co. 112 App. Div. 698, 98 N. Y. Supp. 781, affirmed in 187 N. Y. 572, 80 N. E. 1122; Powers v. West Troy, 25 Hun, 561; Rex v. Osborne, 74 L. J. K. B. N. S. 311, [1905] 1 K. B. 551, 69 J. P. 189, 53 Week. Rep. 494, 92 L. T. N. S. 393, 21 Times L. R. 288; Rex v. Foster, 6 Car. & P. 325; Aveson v. Kinnaird, 6 East, 193, 2 Smith, 286, 8 Revised Rep. 455; 3 Wigmore, Ev. § 1747; Wood v. Gilboa, 76 Hun, 175, 27 N. Y. Supp. 586.

Gray, J., delivered the opinion of the court:

This action was brought to recover damages of the defendant for being the cause of the death of the plaintiff's intestate, an employee. In substance, the alleged negligence was that the defendant had provided for the use of its workmen a defective and insecure ladder, in connection with an overhead crane erected in its works, from which the deceased fell, or was thrown, to the floor of the building. The facts disclosed by the evidence were such as to warrant the jurors in finding that the deceased, who was employed as a "rigger," upon the day in question was standing on top of the carriage of the crane, when he was called to by the crane repairman, from the floor, to come down and to assist in hoisting up a piece of machinery; that, in attempting to comply with the order and to descend from his position, he stepped upon an iron ladder, extending from a crane cage, which depended from the cross girders on which the crane carriage moved, for the purpose of reaching the lateral girders and of thus using another ladder to get to the floor; that this mode of ascending, or descending, from floor to crane, was not prohibited, nor unusual; that the crane ladder, which was bolted to the floor and to the top of the crane carriage, and extended some 3 or 4 feet above it, unattached, was inadequate to the strain of the weight of the deceased, when subjected to it on this occasion; that it had bent under him, throwing him to the

floor; and that, as the result of injuries then received, he had subsequently died.

Without otherwise referring to the evidence, we think that the judgment appealed from might stand, were it not for a serious error committed by the trial court in the reception in evidence of a declaration of the deceased, made to a fellow workman after his fall, and which may have influenced the decision by the jurors of the question of fact. Whatever we may consider to have been the sufficiency of the other evidence, we could, and should, not assume that a declaration, made under such circumstances, may not have had its effect upon the jurors' minds. A witness, also employed as a "rigger," and who was standing a few feet away from where the deceased had fallen, went over to him, and, as he lay there, "asked him what had happened." Over the objection of the defendant, he was then allowed to state what the deceased said, and an exception was taken to the ruling. The witness testified: "When I asked him what had happened, he said: 'My feet is broke; the ladder bent over.'" The admission in evidence of the declarations of an injured person constitutes an exception to the general rule that excludes hearsay evidence, and is only justified when the declarations are spontaneous utterances, or exclamations. There is no confusion in the decisions of this court upon this question. *Waldele v. New York C. & H. R. R. Co.* 95 N. Y. 274, 47 Am. Rep. 41; *Martin v. New York, N. H. & H. R. Co.* 103 N. Y. 626, 9 N. E. 505; *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 680. In *Waldele v. New York C. & H. R. Co.* the question was carefully considered, and the authorities were reviewed. There, the testimony of a witness as to what the injured person had declared, a few minutes after the accident, as to how it happened, was admitted, and, for the error in the admission, the plaintiff's judgment was reversed. The vice of the evidence was held to be in the declaration being narrative of the past transaction, and thus depending for its truth upon the reliability of the statements of the deceased and the veracity of the witness. The decision was followed in *Martin v. New York, N. H. & H. R. Co.* In *People v. Del Vermo*, the witness was walking with the deceased and the defendant, when the former fell upon the sidewalk. The witness asked him "What is the matter?" and the deceased answered, "Del Vermo stabbed me with a knife." The admission of the witness's evidence as to this declaration was held proper "as a part of the *res gestæ* in the broadest sense of the term." Judge Willard Bartlett again considered the question with much care, in the light of our and of other de-

cisions, and held that the testimony was properly received. The declaration so accompanied the occurrence of the assault as to come within the exception to the general rule.

The distinction to be made is in the character of the declaration, whether it be so spontaneous, or natural, an utterance as to exclude the idea of fabrication, or whether it be in the nature of a narrative of what had occurred. In the present case, the declaration of the deceased was not spontaneous; it was called forth by the inquiry as to "what had happened," and was distinctly narrative. As it was observed in the dissenting opinion below, "it was, in effect, a statement that the falling was not accidental, nor due to the negligence of plaintiff's intestate, but that it was due to an occurrence upon which might be predicated negligence upon the part of the defendant."

For the error pointed out, the judgment must be reversed and a new trial had; costs to abide the event.

Cullen, Ch. J., and Werner, Hiscock, Collin, Cuddeback, and Miller, JJ., concur.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Appt.,

v.
EDWARD T. ROSENHEIMER, Respnt.

(209 N. Y. 115, 102 N. E. 530.)

Witness — automobile proprietor — accident — compelling to leave name — constitutional protection.

Since the legislature might prohibit the use of automobiles on the public highways, it may, without infringing the constitutional provision that no one shall be compelled to be a witness against himself, make it a condition to their use that it shall be a crime for anyone whose machine causes injury to leave the place of the accident without leaving his name and address with the person injured, or a police officer.

(Hogan, J., dissents.)

(June 17, 1913.)

APPEAL by the People from a judgment of the Appellate Division of the Su-

Note. — As to power to require one who has caused an injury to identify himself, see note to *Ex parte Kneedler*, 40 L.R.A. (N.S.) 622, which quotes from the opinion of the appellate division of the supreme court, whose decision is affirmed by the court of appeals in *PEOPLE v. ROSENHEIMER*.

preme Court, First Department, affirming a judgment of the Court of General Sessions of the Peace for New York County in defendant's favor in a prosecution for failing, contrary to the provisions of the statute, to leave his name and address after causing an accident with his automobile. Reversed.

The facts are stated in the opinion.

Mr. Robert C. Taylor, with Mr. Charles S. Whitman, for appellant:

The reckless operation of an automobile upon a public highway is a nuisance.

Johnson v. New York, 186 N. Y. 139, 116 Am. St. Rep. 545, 78 N. E. 715, 9 Ann. Cas. 824, 20 Am. Neg. Rep. 694; People v. Darragh, 141 App. Div. 408, 126 N. Y. Supp. 522, affirmed in 203 N. Y. 527, 96 N. E. 1124.

The suppression of nuisances is a proper exercise of the police power.

The statute is constitutional.

Ex parte Kneedler, 243 Mo. 632, 40 L.R.A. (N.S.) 622, 147 S. W. 983, Ann. Cas. 1913 C, 923; People v. Schneider, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; Com. v. Boyd, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; Unwen v. State, 73 N. J. L. 529, 64 Atl. 163, affirmed in 75 N. J. L. 500, 68 Atl. 110; People v. MacWilliams, 91 App. Div. 176, 86 N. Y. Supp. 357; State v. Davis, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; State v. Smith, 74 Iowa, 580, 38 N. W. 492; State v. Cummins, 76 Iowa, 133, 40 N. W. 124; People v. Henwood, 123 Mich. 317, 82 N. W. 70; State ex rel. McGlory v. Donovan, 10 N. D. 203, 86 N. W. 709; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; People v. Coombs, 158 N. Y. 532, 53 N. E. 527, affirming 36 App. Div. 284, 55 N. Y. Supp. 276; State v. Davis, 68 W. Va. 142, 32 L.R.A. (N.S.) 501, 69 S. E. 639, Ann. Cas. 1912 A, 996.

One who enjoys a bare privilege or license is bound to observe the conditions upon which the privilege is granted.

Dent v. West Virginia, 129 U. S. 114, 123, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; People ex rel. Miller v. Lyman, 156 N. Y. 407, 50 N. E. 1112; Grannan v. Westchester Racing Asso, 153 N. Y. 449, 47 N. E. 896; O'Connor v. Hendrick, 184 N. Y. 421, 7 L.R.A. (N.S.) 402, 77 N. E. 612, 6 Ann. Cas. 432; Collister v. Hayman, 183 N. Y. 250, 1 L.R.A. (N.S.) 1188, 111 Am. St. Rep. 740, 76 N. E. 20, 5 Ann. Cas. 344; People ex rel. Burnham v. Flynn, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420; People v. Metropolitan Surety Co. 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913 D, 1180.

An individual may waive statutory and even constitutional provisions for his bene-

fit, when no question of public policy or public morals is involved.

Vose v. Cockcroft, 44 N. Y. 415; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Sentenis v. Ladew, 140 N. Y. 463, 37 Am. St. Rep. 569, 35 N. E. 650; New York v. Manhattan R. Co. 143 N. Y. 1, 37 N. E. 494; Dodge v. Cornelius, 168 N. Y. 242, 61 N. E. 244; Dubuc v. Lazell, D. & Co. 182 N. Y. 482, 75 N. E. 401; Musco v. United Surety Co. 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; Re Phillips, 143 App. Div. 522, 128 N. Y. Supp. 492.

The privilege belongs exclusively to the witness, who may take advantage of it or not, at his pleasure.

Southard v. Rexford, 6 Cow. 254; Cloyes v. Thayer, 3 Hill, 564; Ward v. People, 6 Hill, 144; People v. Bodine, 1 Denio, 281; Foley v. Royal Arcanum, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; Holden v. Metropolitan L. Ins. Co. 165 N. Y. 13, 58 N. E. 771; Musco v. United Surety Co. 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171.

It is not a natural right.

3 Wigmore, Ev. 3069, 3102; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Com. v. Cameron, 229 Pa. 592, 79 Atl. 169; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 20, 20 Ann. Cas. 1138; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; Re Harris, 221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 557; Ballmann v. Fagin, 200 U. S. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212.

Messrs. James W. Osborne and Gilbert D. Lamb, for respondent:

The defendant was not a licensee, for the reason that he was not, and was not alleged in the indictment to be, a chauffeur.

He had the same rights as other users of the highway.

People ex rel. Ferguson v. Reardon, 197 N. Y. 236, 27 L.R.A. (N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Chicago v. Collins, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; People v. Williams, 35 Cal. 671, 4 Mor. Min. Rep. 185; State v. McIntyre, 19 Minn. 93, Gil. 65; State v. Parker, 43 N. H. 83; People v. Baker, 96 N. Y. 340.

The statute is void because contrary to the Constitution of the state of New York, as compelling self-incrimination.

Jaques's Case, 5 N. Y. City Hall Rec. 77; People v. Gardner, 144 N. Y. 119, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003, 9 Am. Crim. Rep. 82; People ex rel. Ferguson v. Reardon, 197 N. Y. 236, 27 L.R.A. (N.S.)

141, 134 Am. St. Rep. 871, 90 N. E. 829; 1 Greenl. Ev. § 469; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74.

The requirement that an operator of a motor vehicle, after an event on account of which such operator may be criminally charged or prosecuted, should give his name as such operator, was void as in violation of the Constitution, as depriving him of his liberty without due process of law.

Wright v. Hart, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *Ives v. South Buffalo R. Co.* 201 N. Y. 273, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156, 1 N. C. C. A. 517; *People ex rel. Moskowitz v. Jenkins*, 202 N. Y. 59, 35 L.R.A. (N.S.) 1079, 94 N. E. 1065.

All persons have, generally speaking, the right to travel the streets and highways in any vehicles they choose, not of themselves inherently dangerous to others.

People v. Kerr, 27 N. Y. 188; *Sun Printing & Pub. Asso. v. New York*, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499; *Nason v. West*, 31 Misc. 584, 65 N. Y. Supp. 651.

Even conceded licensees are unaffected by provisions inhibited by the Constitution.

Re Peck, 167 N. Y. 301, 53 L.R.A. 888, 60 N. E. 775; *Re Cullinan*, 82 App. Div. 445, 81 N. Y. Supp. 587; *Cancemi v. People*, 18 N. Y. 128; *Foley v. Royal Arcanum*, 151 N. Y. 199, 56 Am. St. Rep. 621, 45 N. E. 456.

The facts set forth in the indictment do not constitute a crime, for the reason that respondent's act in leaving the place of the injury was consistent with his innocence.

Re Atty. Gen. 155 N. Y. 443, 50 N. E. 67.

Mr. Frederic R. Couderc, for National Highways Protective Society:

The language of the statute does not conflict with even a strict interpretation of the constitutional clause.

People ex rel. Ferguson v. Reardon, 197 N. Y. 236, 27 L.R.A. (N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829; *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; *People v. Henwood*, 123 Mich. 317, 82 N. W. 70; *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894; *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709; *State v. Davis*, 68 W. Va. 142, 32 L.R.A. (N.S.) 501, 69 S. E. 639, Ann. Cas. 1912 A, 996; *Ex parte Kneeder*, 243 Mo. 632, 40 L.R.A. (N.S.) 622, 147 S. W. 983, Ann. Cas. 1913 C, 923; *Com. v. Boyd*, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; *Com. v. Horsfall*, 213 Mass. 232, 100 N. E. 362. 46 L.R.A. (N.S.)

Cullen, Ch. J., delivered the opinion of the court:

The defendant was indicted for violating subdivision 3 of § 290 of the highway law, being chapter 374, Laws of 1910, which enacts: "3. Punishment . . . for going away without stopping after accident and making himself known. . . . Any person operating a motor vehicle, who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than \$500 or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment." The demurrer was sustained by the courts below (in the appellate division by a divided court) on the ground that the statute was unconstitutional as in violation of § 6, article 1, of the Constitution of the state, which provides that no person shall "be compelled in any criminal case to be a witness against himself;" and this is the only question presented by this appeal.

Similar statutes have been passed in other states, and it has been literally reproduced in the laws of the state of Missouri. The theory on which the learned trial judge proceeded was that the statute in effect required the person operating the motor to furnish evidence tending to prove him guilty of a crime; for if the injury to a person was the result of the culpable negligence of the operator, the latter was guilty either of an assault or of a homicide, depending on whether the injuries inflicted were fatal or not. The indictment contained two counts, the first charging the injury to persons named therein to be due to the defendant's culpability; the second, that it was due to accident.

A demurrer must lie, if at all, to the whole of an indictment. The second count negatives any criminality on the part of the defendant, thus charging a case in which the defendant would not be liable for any criminal prosecution. However, in my opinion, the statute does not provide for two offenses, or provide for an offense being committed in two different ways. The object of the provision, "Knowing that injury has been caused to a person or property, due to the culpability of said operator, or to an accident," is to make the statute more clearly

applicable to all cases, however caused, than would be apparent if these words were omitted. The question, then, is whether a statute which requires a person to report the happening of an occurrence which may, though not necessarily must, involve a crime on his part, is a violation of the constitutional provision referred to.

The statute does not require the operator of the motor vehicle to state the circumstances of the occurrence tending to show his responsibility, but merely to stop and identify himself. Undoubtedly it does require him to make known a fact which will be a link in the chain of evidence to convict him of crime, if in fact he has been guilty of one. Whether the compulsory furnishing of such a link is a constitutional violation may be questioned. The learned judge who wrote for the minority of the appellate division has presented in his opinion a very strong argument in support of the proposition that the statute is a valid exercise of the police power apart from considerations of the peculiar character of a motor car. Since the decision of this case in the appellate division, the question has been presented to the supreme court of Missouri, which, in a very forceful opinion, adopted the view entertained by the judges who dissented in this case, in preference to that of the majority. *Ex parte Kneedler*, 243 Mo. 632, 40 L.R.A.(N.S.) 622, 147 S. W. 983, Ann. Cas. 1913 C, 923. In the opinion of the learned court of Missouri reference is made to statutory enactments, at least partially similar in principle to that before us, the validity of which has either been upheld by the courts or has never been questioned. As to motor vehicles, laws requiring the registry of the names of their owners and chauffeurs, and the display of the numbers of the vehicles in a conspicuous place thereon, for the very purpose of identifying the car and the person operating it, have been upheld. *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790. See *Frankfort & P. Pass R. Co. v. Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242; *St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340. Physicians are required to report deaths and their causes, druggists the sale of poisons, and failure to comply with these requirements is made a misdemeanor. Penal law (Consol. Laws 1909, chap. 40), § 1743; public health law (Consol. Laws 1909, chap. 45), § 235. Labor law (Consol. Laws 1909, chap. 31), § 87, requires a person in charge of any factory to report to the commissioner of labor all deaths, accidents, or injuries, and the details thereof. Compliance with any of these statutory regulations may, in the case of the commission of a crime by the person who is required to make the certifi-

cate or registry, prove an important factor in leading to his detection; but this is not sufficient to render the legislation invalid. Whether, as claimed by the respondent's counsel, the statute before us goes so much further in the way of self-incrimination as to render the illustrations referred to inapplicable, it is not necessary to definitely determine.

There is one ground upon which, in my opinion, the validity of the statute can be safely placed. The legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state. It has been so held in *State v. Mayo*, 106 Me. 62, 26 L.R.A.(N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512, and *Com. v. Kingsbury*, 199 Mass. 542, 127 Am. St. Rep. 513, 85 N. E. 848. Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle, on account of its size and weight, of its great power, and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion. The fatalities caused by them are so numerous as to permit the legislature, if it deemed it wise, to wholly forbid their use. *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *People v. Persce*, 204 N. Y. 397, 97 N. E. 877. If the legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure anyone in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway, or even that, in its operation, injury to persons or property shall be a crime, but only that failure by the operator, in case of such injury, to identify himself, shall be criminal. I cannot see why the greater power does not include the less. Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him,

and not a right, and that in a case of a privilege the legislature may prescribe on what conditions it shall be exercised. This principle was recognized by us in the case of *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156, 1 N. C. C. A. 517. In that case we conceded that in a work of such a nature that the legislature might prohibit its exercise altogether, it might prescribe the terms on which it could be carried on. It is in this respect that the case before us differs vitally from that of *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 27 L.R.A. (N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829, where it was held unconstitutional to compel a broker to deliver his private papers to the comptroller for examination, so that the latter might discover whether the broker had committed a crime in failing to comply with the statute imposing a tax on stock sales. The sale of property (of course we do not refer to exceptional articles, liquors, poisons, and others) is a natural right, protected by our Constitution. *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343. I do not assert that all constitutional privileges may be waived as a condition to the exercise of privileges granted by the legislature. Certain ones cannot be waived, but others may. *Vose v. Cockcroft*, 44 N. Y. 415; *New York v. Manhatten R. Co.* 143 N. Y. 1, 37 N. E. 494; *Dodge v. Cornelius*, 168 N. Y. 242, 61 N. E. 244; *Musco v. United Surety Co.* 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171. I might hesitate even in a case like the present one in upholding a statute which required the operator of a vehicle to appear and be examined as a witness on the trial of a criminal prosecution against himself for his conduct in the occurrence. But this statute goes to no such extent. It is similar to the statute regulating the places where liquor is sold. The owners are required, during the hours and days when sales are made unlawful, to keep the places of sale open to the public view, so if the vendor violates the law, he may be detected. The validity of this regulation has never been questioned. So, also, a requirement that vendors shall report the sales of liquor, and exhibit their books, showing such sales, has been held not to violate the privilege against self-incrimination. *State v. Smith*, 74 Iowa, 580, 38 N. W. 492; *State v. Cummins*, 76 Iowa, 133, 40 N. W. 124; *People v. Henwood*, 123 Mich. 317, 92 N. W. 70.

The learned counsel for the respondent cites in support of his position the opinion of O'Brien, J., in *Re Peck*, 167 N. Y. 391, 53 L.R.A. 888, 60 N. E. 775. But that opinion, so far as it discusses the question here involved, received the approval of no other

member of the court. See erratum in vol. 168 N. Y. It is not necessary to discuss at length the history and nature of the constitutional inhibition against being compelled to testify against oneself in a criminal case. That subject has received a most elaborate review in the opinion rendered by Mr. Justice Moody in the Supreme Court of the United States in *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14. It is sufficient to say that to permit its voluntary waiver violates no fundamental guaranty of liberty or personal right. On the contrary, since 1869 in this state, and I think now throughout the whole country, a defendant in a criminal case is permitted to testify in his own behalf; but when he does so, he waives his constitutional privilege, and his examination is subject to the same rules as any other witness, and his guilt or bad character may be proved from his own mouth. *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *People v. Webster*, 139 N. Y. 73-84, 34 N. E. 730; *People v. De Garmo*, 179 N. Y. 130-134, 71 N. E. 736; *People v. Hinksman*, 192 N. Y. 421-433, 85 N. E. 676. Moreover, as already said, the operator is not obliged to report the circumstances from which his culpability may be inferred, and if he be culpable it does not necessarily follow that he has been guilty of a crime. A long distance separates the negligence which renders one criminally liable from that which establishes civil liability. That a defendant can be compelled as a witness to testify to facts establishing his civil liability is unquestionable. This statute does not prescribe any new criminal liability for injury to persons by a motor vehicle. The operator commits a crime only when his conduct is such as would, in any other action on his part producing like results, make him a criminal. The primary object of the statute, in my judgment, is not to convict any person of crime, but to subject him to civil liability. I appreciate that when examined as a witness in a civil suit the defendant might claim his privilege. I also appreciate that the right to justify a disobedience of this statute by proof that the circumstances rendered him liable to criminal prosecution would be of little advantage to the defendant. He would acquit himself of one crime only by convicting himself of another. Nevertheless, when we bear in mind not only the great danger occasioned by the use of motor vehicles, but also the fact that the great speed at which they can be run enables the person causing injury to readily escape undetected, leaving parties injured in person or property unable to tell from whom they shall get redress, I think it involves no violation of public policy or of the principles of personal liberty to

enact that, as a condition of operating such a machine, the operator must waive his constitutional privilege and tell who he is to the party who has been injured, or to the police authorities, if indeed, requiring him to give such information is an impairment of his constitutional privilege, which we do not decide.

The judgment of the Appellate Division and that of the Court of General Sessions should be reversed, and judgment rendered for the people, disallowing the demurrer, with permission to the defendant, at his election, to plead to the indictment.

Werner, Willard Bartlett, Hiscock, Chase, and Collin, JJ., concur.

Hogan, J., dissents:

The statute under consideration requires a person operating a motor vehicle, knowing that injury has been done to a person due to the culpability of the operator to stop and give his name and residence, including street, and street number, and operator's license number, to the injured party, or to a police officer, or, in the absence of a police officer, to make a report to the nearest police station or judicial officer. A failure to comply with the statute is made a felony.

The indictment demurred to alleges that the defendant, while operating a motor vehicle, did run into and strike a carriage in which two ladies were riding, which said running into and striking was due to the culpability of the defendant, and which resulted in the death of one of the ladies and serious injuries to the second lady. A second count of the indictment states the same facts except that the running into and striking was an accident.

If the charge alleged in the first count of the indictment were established, the defendant might be convicted of a homicide (Penal Law, § 1052), and he would also be subject to indictment and conviction for a felony for the failure to furnish evidence which might tend to connect or identify him with the homicide by the statute here considered. From the prevailing opinion I quote the following language: "Undoubtedly it [the statute] does require him [the operator] to make known a fact which will be a link in the chain of evidence to convict him of crime, if in fact he has been guilty of one." For that reason stated, it is my judgment that the statute under consideration is in conflict with § 6 of article 1 of the Constitution, which provides that "no person shall be compelled in any criminal case to be a witness against himself."

In *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 264, 265, 68 N. E. 353, 356, 15 Am. Crim. Rep. 97, Judge Edward Bartlett, 46 L.R.A. (N.S.)

writing, quotes the language of Chief Justice Marshall in the circuit court of the United States for the district of Virginia (June, 1807) in *Burr's Trial* (1 *Burr's Trial*, 244, Fed. Cas. 14,692a), on the question whether a witness was privileged not to accuse himself, as follows: "If the question be of such a description that an answer to it may or may not criminate the witness according to the purport of that answer, it must rest with himself, who alone can tell what it should be, to answer the question or not. If in such a case he may say upon his oath that his answer would criminate himself, the court can demand no testimony of the fact. . . . According to their statement (counsel for the United States) a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." Judge Bartlett continued: "A clearer and more cogent statement of the rule it would be difficult to find." This language adopted by this court would seem to cover the case at bar. The principle therein laid down, it seems to me, has been upheld in other cases. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Intern. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 27 L.R.A. (N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829.

While the defendant in the case at bar might waive a constitutional provision, and incriminate himself, the legislature is powerless to enact a law which will require him to waive such a provision involving his personal liberty as a condition precedent to operating a motor vehicle upon the highway. While the conduct of an operator of a vehicle, in the failure to stop and render aid to an injured party, is to be deplored, the remedy here sought to correct the evil is an infringement upon the rights of individuals protected by the Constitution. Such rights it is the duty of courts to preserve, though the legislation may seem desirable to meet certain cases. *Wright v. Hart*, 182 N. Y. 330, 333, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *Sherrill v. O'Brien*, 188 N. Y. 185, 198, 117 Am. St. Rep. 841, 81 N. E. 124; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156, 1 N. C. C. A. 517.

The judgment should be affirmed.

NEW YORK COURT OF APPEALS.

SARAH A. OSBURN, Appt.,
v.

ROCHESTER TRUST & SAFE DEPOSIT
COMPANY, Exr., etc., of Sarah R. Davenport,
Deceased, et al., Repts.

(209 N. Y. 54, 102 N. E. 571.)

Will — revocation of codicil — effect.
1. Revocation of a codicil does not neces-

Note. — Revocation of codicil as affecting will.

As to the revocation of a will by a subsequent will, and the revival of the former by the destruction of the latter, see note to *Cheever v. North*, 37 L.R.A. 561; and for the subsequent cases as to the effect of the revocation of a later will to revive an earlier one, see notes to *Bates v. Hackling*, 14 L.R.A. (N.S.) 937, and *Blackett v. Ziegler*, 37 L.R.A. (N.S.) 291.

As stated in the note in 37 L.R.A. 561, a will and a codicil are quite unlike in their effect upon a prior will, for the reason that a later will is by its very nature a revocation of a former will, while a codicil is by its nature a confirmation of the former will except as to its express alteration thereof. And, accordingly, the effect upon a will of the revocation of a codicil thereto presents quite a different question from the effect of the revocation of a subsequent will.

As to the effect of the revocation of a codicil, while the authorities are comparatively few, the general rule would seem to be in accord with *OSBURN v. ROCHESTER TRUST & S. D. Co.*, that such revocation does not necessarily carry with it a revocation of the will.
46 L.R.A. (N.S.)

sarily carry with it a revocation of the will to which it was attached.

Same — restoration of will.

2. A will is not restored to its original form by revocation of a codicil by which it had been modified.

(June 10, 1913.)

A PPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, Fourth Department, sustaining exceptions directed to be heard before it in the first instance and ordering a new trial after judgment of a Trial Term for Monroe County setting aside the probate of the will of Sarah R. Davenport, deceased. Reversed.

The facts are stated in the opinion.

Mr. Albert H. Stearns, for appellant:

Whether Sarah R. Davenport, by the destruction of her codicil, destroyed her will, does not depend upon her intention.

Re *Stickney*, 161 N. Y. 42, 76 Am. St. Rep. 246, 55 N. E. 396; Re *Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272; Re *Blair*, 84 Hun, 581, 32 N. Y. Supp. 845, affirmed in 152 N. Y. 645, 46 N. E. 1145; Re *Gedney*, 17 Misc. 500, 41 N. Y. Supp. 205; Re *Andrews*, 102 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529; Re *Conway*, 124 N. Y. 455, 11 L.R.A. 796, 26 N. E. 1028; Re *Nokes*, 71 Misc. 382, 130 N. Y. Supp. 187; *Black v. Jobling*, L. R. 1 Prob. & Div. 686, 38 L. J. Prob. N. S. 74, 21 L. T. N. S. 298, 17 Week. Rep. 1108; *Gardiner v. Cour-*

Thus, in *Re Cook*, 5 Clark (Pa.) 1, where the will and codicil involved were written on both sides of a half sheet of paper, the will occupying the whole of one side and about half of the other side, and the codicil filling the remaining part of the half sheet, and the name of the testator and the concluding words of the codicil were torn off, the name and seal to the will remaining intact,—it was held, as a matter of law, in the absence of parol evidence to show an intention of the testator to the contrary, that such tearing and cancellation of the codicil did not destroy the validity and effect of the will, although, in the tearing, a part of the will written on the opposite side of the half sheet was also torn off.

And it has been held that the mere destruction and revocation of a codicil written on a separate piece of paper from the will does not amount to a revocation of the will, although the testator intended, at the time of such destruction, thereby to revoke the will. *Malone v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263.

But in *Re Brookman*, 11 Misc. 675, 33 N. Y. Supp. 575, it was held that the testator intended to, and did, revoke the entire instrument, including the will as well as

thope, L. R. 12 Prob. Div. 14, 56 L. J. Prob. N. S. 55, 57 L. T. N. S. 280, 35 Week. Rep. 352, 50 J. P. 791.

Destruction of the codicil revokes the will.

Re Brookman, 11 Misc. 675, 33 N. Y. Supp. 575; Re Francis, 73 Misc. 148, 132 N. Y. Supp. 695; Re Storms, 3 Redf. 327.

The testator, upon executing the codicil, revoked a portion of the old will and changed other provisions as to her property, making a new complete testamentary disposition of her property by means of two

papers mutually dependent upon each other, not two separate instruments.

Brown v. Clark, 77 N. Y. 369; Re Knapp, 51 N. Y. S. R. 517, 23 N. Y. Supp. 282; Re Storms, 3 Redf. 327; Re Miller, 11 App. Div. 337, 42 N. Y. Supp. 148; Van Cortlandt v. Kip, 1 Hill, 590; Caulfield v. Sullivan, 85 N. Y. 153; Canfield v. Crandall, 4 Dem. 111; Cook v. White, 43 App. Div. 388, 60 N. Y. Supp. 153, affirmed in 167 N. Y. 588, 60 N. E. 1109.

The first testamentary disposition of

the codicil, it appearing that a paper purporting to be the will of the decedent, who had frequently stated, during the last year of his life, that he had destroyed his will, and a codicil thereto beginning on the same sheet of paper upon which the will ended, with only a short blank space between, both instruments being securely tied together in one cover, were found among a bundle of canceled and worthless papers in the deceased's safe deposit box, with the signature of the deceased to such codicil erased by being crossed out in ink lines, and with the following memorandum in the handwriting of the deceased alongside the canceled signature: "May 20, '92, void, H. D. B." (deceased's initials); and it also appearing that the will, after providing for the testator's widow, divided the remainder of his estate as equally as possible among his three children; that the chief purpose of the codicil had been to readjust one child's share which had declined in value since the making of the will; and that shortly before canceling the signature and making the memorandum on the codicil, the deceased had had trouble with his brother, who was named as executor and trustee in the will, and, in settling their common business interests, had conveyed to him most of the real estate which he had devised to one of his children, against whom there was no reason for discrimination, the deceased's relations with all of his children having been entirely harmonious down to the day of his death.

Where, however, the revocation of a codicil is held not to operate as a revocation of the will, the correct rule would also seem to be, as held in *OSBURN v. ROCHESTER TRUST & S. D. Co.*, that the provisions of the will which were revoked or modified by the codicil are not revived or restored to their original form by the revocation of the codicil, as testamentary provisions once legally revoked require, in most jurisdictions, the same formalities for reinstatement as the testamentary instrument originally required to make it valid as a will.

And, accordingly, in *Debac's Goods*, 77 L. T. N. S. 374, where it appeared that the testator had duly executed a will and afterward a codicil containing a clause revoking certain parts of the will, but the codicil could not be found at his death,—although the only contention seems to have been as to whether or not the codicil should be probated with and as a part of the will, or

whether it had been revoked,—upon the court's holding that the codicil must be treated as having been destroyed by the deceased with the intention of revoking it, the will was admitted to probate only to the extent that it had not been revoked by the codicil.

But in jurisdictions where a mere intention to reinstate a revoked testamentary instrument which has remained intact, or an oral republication thereof, is sufficient, the revocation of a codicil without a revocation of the will would seem to operate to revive the revoked or modified portions of the will,—especially if there is parol evidence that such was the intention of the testator.

So, in *Stewart's Estate*, 149 Pa. 111, 24 Atl. 174, although it was held only that the orphans' court had committed no error in refusing to grant an issue to determine whether or not a codicil to a will had been destroyed by the testator or by another, it seems to be implied that the will was properly admitted to probate, and that, upon the presumption that the codicil was destroyed by the testator himself, a provision of the will with which the codicil was inconsistent was revived by such destruction, and was a valid part of the will as probated.

In *James v. Shrimpton*, L. R. 1 Prob. Div. 431, 45 L. J. Prob. N. S. 85, 35 L. T. N. S. 428, 24 Week. Rep. 740, where a widower had executed a will largely in favor of his children and grandchildren, which was subsequently revoked by his remarriage, and thereafter he executed a codicil in which he made a provision for his wife and in all other respects revived, ratified, and confirmed the revoked will; but upon his death, after that of his second wife, the codicil could not be found, he apparently having destroyed it under the misconception that such destruction would leave the will in force, although the revival thereof depended upon the codicil,—it was held that such destruction did not leave the will inoperative, but the court decreed probate of both the will and the codicil as contained in the draft from which the original was prepared for execution, on the ground that, as the testator destroyed the codicil with no intention of revoking the will, the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying.

A. C. W.

property, having been changed by the codicil, can be revived only by means of the formalities required by statute, and it is conceded that none of those formalities have been complied with in the case at bar.

Re Brewster, 72 App. Div. 587, 76 N. Y. Supp. 283; Re Conway, 124 N. Y. 455, 11 L.R.A. 796, 26 N. E. 1028; Re Storma, 3 Redf. 327; Cunningham v. Hewitt, 84 App. Div. 114, 81 N. Y. Supp. 1102; Re Pinckney, Tucker, 436; Re Campbell, 170 N. Y. 84, 62 N. E. 1070; Re Knapp, 51 N. Y. S. R. 517, 23 N. Y. Supp. 282.

A part of a will cannot be destroyed.

Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254; Re Curtis, 135 App. Div. 745, 119 N. Y. Supp. 1004; Re Barber, 92 Hun, 489, 37 N. Y. Supp. 235.

Messrs. Fred C. Goodwin, Leonard B. Bacon, William B. Lee, William N. Cogswell, and Henry G. Danforth, for respondents:

Revocation of the codicil did not operate to revoke the will.

6 Am. & Eng. Enc. Law, 2d ed. 193; Black v. Jobling, L. R. 1 Prob. & Div. 685, 38 L. J. Prob. N. S. 74, 21 L. T. N. S. 298, 17 Week. Rep. 1108; Turner's, Goods, L. R. 2 Prob. & Div. 403, 27 L. T. N. S. 322, 21 Week. Rep. 38; Savage's Goods, L. R. 2 Prob. & Div. 78, 39 L. J. Prob. N. S. 25, 22 L. T. N. S. 375, 18 Week. Rep. 766; Gardiner v. Courthope, L. R. 12 Prob. Div. 14, 56 L. J. Prob. N. S. 55, 57 L. T. N. S. 280, 35 Week. Rep. 352, 50 J. P. 791; Re Cook, 5 Clark (Pa.) 1; Stewart's Estate, 149 Pa. 111, 24 Atl. 174; Malone v. Hobbs, 1 Rob. (Va.) 346, 39 Am. Dec. 263; Re Brookman, 11 Misc. 675, 33 N. Y. Supp. 575; Re Francis, 73 Misc. 148, 132 N. Y. Supp. 695.

Hiscock, J., delivered the opinion of the court:

This appeal presents the question whether the destruction and revocation of a codicil to a will necessarily operates as a revocation of the will. It was held at the trial term that this was the result. The appellate division, however, unanimously held a contrary view.

The question is presented by very simple and entirely undisputed facts. The testatrix duly made and executed a will, and subsequently a codicil, which only modified the former by making an additional bequest of \$1,000 before creating and providing for a residuary estate. Apparently, the will and codicil were physically detached and separate instruments. Subsequently the codicil was intentionally destroyed, and thereby revoked, but the will was fully preserved, and, after the death of the testatrix, found in an appropriate place for custody, and duly admitted to probate.

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There can be, of course, no dispute concerning the proposition urged by the learned counsel for the appellant, that a will and existing codicil are to be regarded as a single and entire instrument for the purpose of determining testamentary intention and disposition. But the further proposition which he in effect urges, that a codicil so draws after it and incorporates into itself the will that the former cannot be revoked without also destroying the latter, is quite a different one, and in our judgment is sustained neither by reason nor by authority. A will and a codicil are such separate and independent instruments in point of execution that there can ordinarily be no practical objection to the revocation of the codicil alone lest it might furnish some opportunity for fraud or miscarriage of the testator's purpose. While it might often happen that the codicil would be so related to and dependent on the will that it would be impossible to destroy the latter without carrying down the former, the reverse would ordinarily not be true. There would seem to be no good reason why a testator should not be allowed to revoke a codicil, which might be, as in this case, an entirely separate and distinct instrument, without destroying his will, in itself a full and complete instrument.

That these views should prevail is practically determined by authority in this state. In Re Cunnion, 201 N. Y. 123, 94 N. E. 648, Ann. Cas. 1912 A, 834, it appeared that the testator had executed two wills. The later one could not be found after the testator's death, and no evidence was produced concerning its contents. The first will was admitted to probate, and in upholding this disposition it was held in an opinion written by Judge Chase that more than one will may exist at the same time, and that two wills may be construed together if such was the intention of the testator; that under the circumstances disclosed it was the presumption that the testator had destroyed the second will *animo revocandi*; that the later will is not necessarily a revocation of the prior will, unless by it the prior will is in terms revoked and canceled, or by the later will a disposition is made of all of the testator's property, or the same is so inconsistent with the former will that the two cannot stand together, or that the former will is revoked *pro tanto*. Thus, it was in effect held that a second will might exist with a former one, and to some extent revoke it; that the two wills, if in existence, were to be construed together, and that the revocation of the second one did not revoke the first one.

I fail to see how we can distinguish the present case from the one cited by any real,

substantial principle. There is concededly already sufficient uncertainty concerning the construction and probate of wills so that we ought not to introduce some new distinction, unless it is substantial and commended by good reasons.

The codicil in the present case did not occupy any different relationship, nor exercise any greater effect upon the will, than did the second will upon the first one in the *Cunnon Case*. The codicil simply modified the original will to the extent of a small legacy, just as the second will might have done. It was called a codicil—that is, a “little will”—instead of a will. It so happens, although this is not by any means decisive, that the codicil in this case was just as much an independent instrument physically as was the second will in the *Cunnon Case*, and if the destruction of the second will, which, while existing, was related to and necessarily to be construed with the first will, did not operate as a revocation of the latter, there is no reason why the revocation of a codicil should have any such effect.

Beyond this main question there is one minor respect in which we think that the decision of the learned appellate division was erroneous, and that is with reference to the effect of the provision in the codicil for a legacy in addition to those mentioned in the will. When the codicil modified the will by providing for an additional legacy before creation of the residuary estate, it modified and revoked the will to that extent. This revocation was consummated at the moment when the codicil was executed and published, and thereafter the will was to that extent annulled. After this revocation had thus been consummated by the execution of the codicil, the will could not be restored to its original form and tenor simply by the revocation of the codicil. A revocation of the revocation could not thus be accomplished. The effect of this is that the testatrix died intestate as to \$1,000.

It seems to be plain, and to be assumed, that the evidence in the action could not be changed on another trial. Therefore, instead of directing a new trial, the Appellate Division should have awarded final judgment in favor of defendant, sustaining the validity of the probate of the will except as to the sum of \$1,000 mentioned in the codicil, and as to which sum it should have adjudged distribution as in case of intestacy. It having failed to do this, such judgment should be rendered by this court, without costs in any court to either party.

Cullen, Ch. J., and Werner, Chase, Collin, and Hogan, JJ., concur. Willard Bartlett, J., concurs in result.
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OKLAHOMA SUPREME COURT. (Division No. 1.)

STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT, MICHIGAN,
Plff. in Err.,

v.

BOONE D. HITE, Admr., etc., of J. B.
McCarthy, Deceased.

(— Okla. —, 132 Pac. 333.)

Insurance — accident — injury in caboose.

1. An insured, under an accident policy which provided that no benefits would be paid for injuries, resulting fatally or otherwise, received while the insured was on a locomotive, freight car, or caboose used for passenger service, was killed in a train collision while on a caboose attached to a through stock freight running as an extra between Chickasha and Kansas City. At the time of his death the insured was in charge of cattle being transported to market under a live-stock shipping contract. The only persons permitted to be aboard the caboose were railway employees and drovers in charge of live-stock shipments. Held, that the caboose on which the insured was riding at the time of his death was not “used for passenger service.”

Same — qualification.

2. The words “while on a caboose,” as above used, are subject to the qualifying and concluding provision, “used for passenger service,” and should be so construed.

Same — passenger service — absence of.

3. Under said policy it was not the kind of car or the fact that the plaintiff may have been a passenger that controls, but the fact that the caboose was not at the time engaged in passenger service within the common and ordinary meaning and acceptance of that term.

Same — effect of transporting passenger in.

4. Treating the insured, in his relation to the railway company, as a passenger on one of its trains, it does not follow, in an action on an insurance policy, that the caboose in which he was riding was at the time being used for passenger service.

Same — construction.

5. If a policy of insurance is susceptible of two constructions, that one is to be adopted which is more favorable to the assured.

(May 6, 1913.)

Headnotes by SHARP, C.

Note. — As to applicability of provision in accident policy exempting insurer in case of accident on railroad trains, see note to *Kirkpatrick v. Aetna L. Ins. Co.* 22 L.R.A. (N.S.) 1255. Generally as to the scope and construction of a provision of indemnity in case of injury while riding in or on a public conveyance, see note to *Primrose v. Casualty Co.* 37 L.R.A. (N.S.) 618.

ERROR to the District Court for Grady County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the commissioner's opinion.

Messrs. Welborne & McCalla, for plaintiff in error:

The deceased being in the caboose attached to the train transporting his cattle to market, together with other shippers, under and by virtue of the shipper's contract, was a passenger for hire, and had the same rights as a passenger as if he had purchased a ticket.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 384, 21 L. ed. 627-642; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 299, 23 L. ed. 898-901; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 320, 48 Am. Rep. 10; Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 28 U. S. App. 375, 67 Fed. 209; 6 Cyc. 544, 545.

A person rightfully riding on a drovers' pass is a passenger.

4 Elliott, Railroads, § 1605; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Missouri P. R. Co. v. Ivy, 71 Tex. 409, 1 L.R.A. 500, 10 Am. St. Rep. 758, 9 S. W. 346; Union R. & Transit Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; Weaver v. Ann Arbor R. Co. 139 Mich. 590, 102 N. W. 1037, 5 Ann. Cas. 764; Solan v. Chicago, M. & St. P. R. Co. 95 Iowa, 260, 28 L.R.A. 718, 58 Am. St. Rep. 430, 63 N. W. 692; Chicago, R. I. & P. R. Co. v. Posten, 59 Kan. 449, 53 Pac. 465; Louisville & N. R. Co. v. Bell, 100 Ky. 203, 38 S. W. 3; Rowdin v. Pennsylvania R. Co. 208 Pa. 623, 57 Atl. 1125; Carroll v. Missouri P. R. Co. 88 Mo. 239, 57 Am. Rep. 382; Griswold v. New York & N. E. R. Co. 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 28 U. S. App. 375, 67 Fed. 209; Texas & P. R. Co. v. White, 62 L.R.A. 90, 42 C. C. A. 86, 101 Fed. 928, 46 C. C. A. 687, 108 Fed. 990; Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205, 3 Am. Neg. Cas. 859; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Maslin v. Baltimore & O. R. Co. 14 W. Va. 180, 35 Am. Rep. 748; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Virginia & T. R. Co. v. Sayers, 26 Gratt. 328; Ohio & M. R. Co. v. Nickless, 71 Ind. 271; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Lake Shore & M. S. R. Co. v. Teeters, 166 Ind. 335, 5 L.R.A.(N.S.) 425, 77 N. E. 599. 20 Am. Neg. Rep. 309; Southern R. Co. v. Roach, — Ind. App. —, 77 N. E. 606; Evansville 46 L.R.A.(N.S.)

& T. H. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608; Saunders v. Southern P. Co. 13 Utah, 275, 44 Pac. 932; Davis v. Chicago, M. & St. P. R. Co. 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132, 10 Am. Neg. Cas. 507; Sprigg v. Rutland R. Co. 77 Vt. 347, 60 Atl. 143, 18 Am. Neg. Rep. 264.

Messrs. McKnight & Heskett and Bond & Melton, for defendant in error:

While the deceased was a passenger in a limited sense in his relation to the carrier, yet it does not follow that the caboose upon which he was riding was used for passenger service, in contemplation of the policy.

Taylor v. Insurance Co. of N. A. 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; Capital F. Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535; Wood v. General Acci. Ins. Co. 156 Fed. 982, 88 C. C. A. 108, 160 Fed. 926; Bogart v. Standard Life & Acci. Ins. Co. 187 Fed. 851.

Sharp, C., filed the following opinion:

On the 20th day of November, 1909, at Chickasha, Oklahoma, the plaintiff in error, for a valuable consideration, executed and delivered to J. B. McCarthy a contract of insurance good for four days from date of issue, whereby it agreed to pay to the executors, administrators, or assigns of said J. B. McCarthy \$2,500, providing he (the said J. B. McCarthy) should receive bodily injuries during the term of said insurance, effected solely by external, violent, and accidental means, which should, independently of all other causes, within ninety days result in his death. On the 21st day of November, 1909, the insured received bodily injuries which were effected solely by external, violent, and accidental means, and from which injuries, independent of all other causes, he immediately and on the same day died; said accident being caused by a passenger train colliding with a caboose attached to the rear end of a freight train, the insured at the time being in said caboose. At the time, both of the issuance of the policy and of the accident mentioned, the insured was a drover in charge of cattle being shipped over the line of the Chicago, Rock Island, & Pacific Railway Company, from Anadarko, Oklahoma, to Kansas City, Missouri. The case was tried below before the court upon an agreed statement of facts, the policy or ticket of insurance, and the live-stock contract covering the shipment of cattle.

The pertinent paragraphs of the statement of facts are as follows:

"Sixth. That the said J. B. McCarthy and the said six other persons, who were on said caboose at the time of such injury, were riding on said caboose and upon said

train exclusively by virtue of said live-stock contracts, and that they had no other or further right to be on said caboose or to ride on said train, except under and by virtue of the provisions of said live-stock contracts, but defendant does not admit that all the provisions and conditions in said live-stock contracts are or were binding on said J. B. McCarthy and the other persons riding on same.

"Seventh. It is further agreed that the said freight train and the caboose on which the said J. B. McCarthy and the said six other persons were riding as aforesaid was owned, operated, and controlled by the Chicago, Rock Island, & Pacific Railway Company, and that the road over which said freight train was being operated was owned and controlled by the said railway company; that said freight train was composed of about 15 cars of cattle, two of which said cars of cattle were owned by the said J. B. McCarthy, having been shipped by him on the 20th day of November, 1909, from Anadarko, Oklahoma, for Kansas City, Missouri, through Chickasha, Oklahoma, under and by virtue of said live-stock contract heretofore referred to, a copy of which is attached to the defendant's answer and marked Exhibit A; that said J. B. McCarthy and the said six other persons who were on said caboose as aforesaid had ridden under said live-stock contracts on said train and in the caboose thereof from Chickasha, Oklahoma, as far as El Reno, Oklahoma, a distance of about 33 miles, at the time of the accident heretofore referred to; and that said train and caboose had not reached its destination at Kansas City, Missouri, at the time of said accident, but that at said time the destination of said train being Kansas City, Missouri, about 300 miles from El Reno, Oklahoma.

"Eighth. That said train and said caboose was only used for the transportation of cattle and the transportation of the employees of said railway company, together with the regular train crew in charge of said train, and for the transportation of such other persons as had live stock on said train under and by virtue of live-stock contracts, in substance identical with the one on which the said J. B. McCarthy was riding at the time of said injury.

"Ninth. That, under the tariffs, rules, and regulations of the said Chicago, Rock Island, & Pacific Railway Company, the said caboose upon which the said J. B. McCarthy was riding at the time of said injuries was not authorized or permitted to carry persons thereon, except persons in charge of live stock, riding on contracts identical in substance with the one on which the said J. B. McCarthy was riding at the time of said in-

jury, and employees of said railway company, and the regular train crew in charge of said train.

"Tenth. That under the tariff, rules, and regulations of the said Chicago, Rock Island, & Pacific Railway Company, and other railroads operating in the state of Oklahoma, in force at the time said injuries were received, the only caboose upon which persons, other than the regular train crews operating the train, to which said caboose was attached, and the employees of said railway companies and persons riding on live-stock contracts, such as the said J. B. McCarthy and the said six other persons were riding on at the time of said injury, were permitted to ride, was a caboose attached to the second section of a local freight train, and that on such caboose, attached to the second section of a local freight train, persons were generally permitted to ride on payment of the regular passenger fare, or upon regular passenger tickets issued by such railway companies."

The defendant insurance company denied liability by reason of a provision in paragraph E of the policy, which reads: "This ticket is issued by the company and accepted by the insured with the understanding and agreement that no benefits will be paid for injuries, resulting fatally or otherwise, received under or in consequence of any of the following conditions: (1) While on a locomotive, freight car, or caboose used for passenger service."

As stated by counsel for plaintiff in error, the sole question presented for our consideration is: Was the caboose in which J. B. McCarthy was riding at the time he met his death "used for passenger service?" It will be observed from the foregoing statement that the train to which the caboose was attached was a through freight train, being extra No. —, running from Chickasha to Kansas City; that the only freight being transported was live stock, consisting of about 15 cars of cattle; and that no person was riding thereon, except the train crew, the insured, and six other drovers, all riding by virtue of similar live-stock contracts, issued by the railway company, for the purpose of taking care of the live stock in their charge. Under the tariffs, rules, and regulations of the railway company, the caboose on which the insured was riding at the time the injuries resulting in his death were sustained was not authorized or permitted to carry persons thereon, except such as were in charge of live stock, riding on contracts identical in substance with the one on which the insured was riding, and the railway company's employees. Under the tenth paragraph of the stipulations it appears that, according to the tariffs, rules, and regulations of the railway company, the only ca-

boose upon which persons, other than railway employees and persons riding upon live-stock contracts, such as the said J. B. McCarthy and the other drovers, were permitted to ride, was one attached to the second section of a local freight, and that on said caboose attached to said second section of said local freight persons in general were permitted to ride upon payment of fare. In our opinion the caboose on which the insured was riding at the time of his death was not then being used for passenger service within the meaning of the insurance contract.

A caboose attached to a through freight used exclusively for the transportation of live stock to market cannot, while en route, be said to be used for passenger service, where no one but the train employees and shippers in charge under live-stock contracts, together with railway employees, are permitted to be aboard. Had the policy provided that if death ensued from injuries sustained while on a caboose, without the qualifying clause "used for passenger service," it is clear that no liability would attach. It is not the kind of car, but the character of the service in which it was at the time engaged, that we are to consider. It is a matter of common knowledge that there is attached to all freight trains a regular or improvised caboose for the necessary use and convenience of a part of the train crew. So long as no one but the railway employees are permitted to ride in such a caboose, no question that the caboose was used for passenger service could arise. It is only when others than employees are rightfully aboard such car that the question is presented. Assuming, as we think the great weight of authority holds, that a person rightfully riding on a drover's pass is a passenger (Elliott, *Railroads*, 2d ed. § 1605), it does not necessarily follow that the train or car conveying him or on which he is a passenger is at the time used for passenger service. The fact, therefore, that the deceased was rightfully in the caboose, under the terms of a live-stock contract, for the purpose of looking after and caring for the cattle being transported to market, does not change the character of the service in which the caboose was at the time being used. The caboose was a necessary part of the train, and the primary, if indeed not the sole, business in which the particular train was at the time engaged, was freight service as distinguished from passenger service. *Berliner v. Travelers' Ins. Co.* 121 Cal. 458, 41 L.R.A. 467, 66 Am. St. Rep. 49, 53 Pac. 918. That live-stock attendants were in the caboose was a mere incident to the general use and purpose for which the caboose 46 L.R.A. (N.S.)

was being employed. Provision for their care and comfort was necessary as a part of the contract for shipment of the live stock in their charge. The train was in no sense a "mixed train," carrying both freight and passengers, as the term is generally understood. The equipment consisted of freight cars and caboose, such as is generally used in the freight service. It was a through stock freight, running as an extra, and did not, neither was it authorized or permitted under the tariffs, rules, and regulations governing the train's operations to, carry persons thereon, except those in charge of live stock, riding on contracts identical in substance with that of the insured, and employees of the railway company, and the regular crew in charge of the train. Only by virtue of a contract for live-stock shipment could other than railway employees acquire a right of carriage upon said caboose. The public in general, wishing transportation, had no right to be upon said car. Opportunity for the carriage of the public, in addition to the regular passenger trains, was afforded by the second section of the local freight. No passenger fare was paid by the insured; no passenger earnings accrued to the railway company from the operations of the train.

The case of *Ætna L. Ins. Co. v. Frierson*, 51 C. C. A. 424, 114 Fed. 56, cited and relied upon by counsel for plaintiff in error, is not in conflict with our conclusions. In the contract of insurance under consideration by the court in that case, it was provided that the policy insured the principal sum of \$5,000, but provided for the payment of double that sum if the injuries from which death ensued were sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power. Among other things it was said in the opinion of the court: "The Jessie at all times continued to be under the control and management of the navigation company. The Frierson party had no exclusive rights, for she was under no charter, and she had on board a passenger who had paid a separate fare, not being a member of the Frierson party, nor within the terms of the contract under which he was being carried. The Jessie was a passenger conveyance, whose motive power was steam. Frierson was not at the time a servant or in the employment of the owners or navigators of the Jessie. He was riding on the boat under a contract based upon a good consideration, by which the Columbia Navigation Company undertook to carry him up the Kuskokwim river. These facts constitute him a passenger." McCarthy, like Frierson, was a passenger; the latter was a passenger on a passenger

conveyance, while the former was not a passenger on a caboose used for passenger service within the general meaning and acceptance of the term. There it was not provided that "the passenger conveyance" should at the time be employed "in passenger service," but simply that it should be "a passenger conveyance" whose motive power was steam. It will be noted that the court there affirmed the judgment of the circuit court, permitting the recovery of a double liability, and observed: "That the Jessie was not 'a public conveyance in the usual lines of travel as a common carrier of passengers' may be true. But, if the insurance company intended to limit the benefits of its contract to passengers who travel 'in conveyances operated in the usual lines of travel as common carriers,' it should have so stipulated." With equal force we might say that if it was the purpose of the insurance company to limit the right of recovery to those riding on a caboose, regardless of the service in which it was at the time engaged, it should have so provided. But even were we to consider that the meaning of the provision in the light of the facts before us was in doubt (which we do not), it would be our duty to give to the policy that construction which would give it effect rather than destroy it; the rule being that where the meaning of a policy of insurance is ambiguous, or if so drawn as to be fairly susceptible of different constructions, it will be construed strictly against the insurer, and that construction adopted which is most favorable to the insured. *Taylor v. Insurance Co. of N. A.* 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; *Capital F. Ins. Co. v. Carroll*, 26 Okla. 286, 109 Pac. 535; *Southern Surety Co. v. Tyler & S. Co.* 30 Okla. 116, 120 Pac. 936.

In this connection it was said by Mr. Justice Harlan, in *Travellers' Ins. Co. v. McConkey*, 127 U. S. 666, 32 L. ed. 310, 8 Sup. Ct. Rep. 1362: "Such being the contract, the court must give effect to its provisions according to the fair meaning of the words used, leaning, however,—where the words do not clearly indicate the intention of the parties,—to that interpretation which is most favorable to the insured."

A caboose attached to a through freight, running as an extra, made up exclusively of live stock being shipped to market, is not being used for passenger service within the common and ordinary meaning and acceptance of that term, and as these words are ordinary words, and the meaning of which is plain, they must be understood and applied accordingly. We therefore conclude, as did the learned trial judge, that the insured at the time of his death was not on a caboose used for passenger service within 46 L.R.A.(N.S.)

the meaning of paragraph E of the accident policy.

The judgment of the trial court should be affirmed.

Per Curiam:

Adopted in whole.

OREGON SUPREME COURT.

JAMES JOHNS, Appt.,

v.

CITY OF PENDLETON, Resp't.

(— Or. —, 133 Pac. 817.)

Municipal corporation — patented pavement — right to select.

1. The selection by a municipal corporation of a patented article for a street pavement is not prevented by a charter provision requiring the contract to be let to the lowest bidder, if the owner of the patent does not himself bid for the contract, but makes an offer to furnish the machinery for mixing the paving material, or the mixture itself for a stipulated price, on equal terms to all bidders.

Public improvements — uncertainty of notice — effect on assessment.

2. An assessment for a street improvement cannot be enforced if the description of the portion of the street to be improved is so uncertain that such portion cannot be ascertained from the notice.

Estoppel — invalid street improvement — laches.

3. Permitting the completion of a street improvement before taking steps to question its validity because of uncertainty in the notice does not estop the property owner from obtaining relief.

(July 1, 1913.)

Note. — Validity of contract for material patented or held in monopoly where a letting to the lowest bidder is required.

This note is supplemental to the note to Allen v. Milwaukee, 5 L.R.A.(N.S.) 680, which supplements a note upon the same subject in 18 L.R.A. 45.

The question whether a municipality or other public corporation which is required to let its contracts by competitive bidding, in its invitation for bids may require materials to be furnished which are the subject of a monopoly or patent, depends largely upon the further question whether or not the effect will be to prevent what the statute requires—competitive bidding. It is clear that a municipality or other public corporation cannot make a requirement of this kind for the purpose of shutting off competition and favoring some particular article.

Thus, where the statute requires that there shall be competition in bids for im-

APPEAL by plaintiff from a judgment of the Circuit Court for Umatilla County in defendant's favor in a suit to quiet title to real estate against which a lien was claimed under an assessment for a street improvement. Reversed.

Statement by McBride, Ch. J.:

This is a suit to quiet title. It originated in a dispute as to the validity of an assessment made and a lien claimed by the defendant against two lots owned by plaintiff, in order to pay for work done by the Warren Construction Company in paving a portion of Jackson street with what is called "gravel bitulithic" pavement. The pavement is composed of a patented compound, manufactured by the use of special

machinery, parts of which are also patented, and the use of the name "gravel bitulithic" is protected by copyright; the patents and right to use the name being the property of the Warren Brothers Company, a corporation distinct from the Warren Construction Company. The Warren Brothers Company, the owners of the patent, had placed on file in the office of the recorder in the city of Pendleton the following offer, called a license agreement," which is as follows:

To The Honorable Mayor and City Council, Pendleton, Oregon.

Gentlemen:

Inasmuch as it is deemed advisable by the proper authorities that bids be received

provement contracts, and that all contracts shall go to the lowest bidder, the contract and bonds of the municipality, executed in pursuance thereof, are invalidated where the manufacturer of a paving brick procured the city to invite bids for paving its streets with a designated brand of brick, as to which he had a trademark, and to let the contract upon the bids thus procured, since the effect of the stipulation as to the brick is to prevent any real competitive bidding, and the brick stipulated for as to quality being very similar to scores of other makes. *Kansas City Hydraulic Press Brick Co. v. National Surety Co.* 157 Fed. 620; to the same effect see *Atkin v. Wyandotte Coal & Lime Co.* 73 Kan. 768, 84 Pac. 1040, and *National Surety Co. v. Kansas City Hydraulic Press Brick Co.* 73 Kan. 196, 84 Pac. 1034.

In *Johnson v. Atlantic City*, 82 N. J. L. 204, 81 Atl. 1105, certiorari to review the awards of contracts for paving streets with a certain patented article, the awards were set aside, it appearing that the company to which the awards were made had a secret arrangement with the proprietors of the patented article, that gave, and was intended, to give, it a controlling advantage over all other competitors, provided the proposals were so framed that the advantages accruing from such arrangement were made available for the securing of the awards; and it being found that the proposals were so framed, and that certain officers of the city were interested in having them so framed, and in having the contract so awarded. From these facts the court drew the inference, and found the fact to be, that, owing to such machinations, the competitive bidding required by the city charter had not taken place.

It has been stated as a general proposition of law that a statute requiring competitive bidding for public improvements does not necessarily preclude a municipality from providing that bids for a public improvement shall include the use of a certain patented material or article. *Rackliffe-Gibson Constr. Co. v. Walker*, 170 Mo. App. 69, 156 S. W. 65; *Custer v. Springfield*, 167 Mo. App. 354, 151 S. W. 759, 46 L.R.A. (N.S.)

And the rule has been asserted that while the charter provision requiring competition nullifies all acts of city authorities which, under one guise or another, seek to give advantage to favorites in public work, or to foster corruption and monopoly, yet there is an exception based upon the supposed necessity of the situation; that is, that where there is a patented article or one held in monopoly, which, in the eye of the authorities, is of such exceptional value and superiority that it would be a public injury to be deprived of it, it may be required to be used; but this permission to designate the article held in monopoly being an exception, and founded on a supposed necessity, if the article can be had from other parties than those designated, it is a violation of the law to close those sources by such designation. Thus, if there is but one kind of asphalt or one make of paving brick, either can be selected, although held in monopoly; but if there are many kinds and makes of substantially the same material and value, one cannot be selected to the exclusion of the bids on any of the others. *Cleveland Trinidad Paving Co. v. McLord*, 145 Mo. App. 141, 130 S. W. 371. To same effect is *Custer v. Springfield*, supra.

Among the later cases there has been a great deal of discussion and some want of harmony as to the right of a municipality, in calling for bids for paving, to require the use of a patented paving material, on the ground that such a requirement and invitation for bids precludes real competition. Some very able courts have denied the power of a municipality to contract for paving material of a certain patented kind where the invitation for bids is limited to this particular brand, and this although the owner of the patent files with the municipality an agreement to furnish the material to the successful bidder at a designated price. *Siegel v. Chicago*, 223 Ill. 428, 79 N. E. 280, 7 Ann. Cas. 104; followed in *Chicago Title & T. Co. v. Chicago*, 224 Ill. 124, 79 N. E. 561; *Prindle v. Evanston*, 224 Ill. 345, 79 N. E. 569; *Allen v. Milwaukee*, 123 Wis. 678, 5 L.R.A. (N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 Ann. Cas. 392;

for the improvement of certain streets in the city of Pendleton, state of Oregon, with the gravel bitulithic pavement; and inasmuch as the construction of said pavement requires the use of certain patented processes and compounds; and inasmuch as competitive bidding in the letting of contracts for street improvements is deemed advisable, in order to provide for such competitive bidding, and at the same time secure the adoption of the gravel bitulithic pavement as the kind of pavement to be constructed in such streets as may hereafter be determined; the undersigned, Warren Brothers Company, as owner of all patents

and processes covering the laying of said bitulithic pavement, hereby proposes and agrees, for the consideration hereinafter named, to furnish the city of Pendleton or to any bidder to whom a contract may be awarded to pave any street or streets in the city of Pendleton with the gravel bitulithic pavement, at any time within one year from this date, or at any time thereafter until this proposition is formally withdrawn, and who shall enter into a contract with such surety or sureties as may be required by said city of Pendleton, the following materials ready for use, coupled with a free license to use any or all the pat-

Cawker v. Milwaukee, 133 Wis. 35, 113 N. W. 417.

In Siegel v. Chicago, supra, it is said that a patented material which can be obtained from but one person, firm, or corporation, may not be lawfully prescribed by an ordinance providing for the construction of an improvement by special assessment, not, however, because the article is patented, but for the reason that if it is so prescribed, competition, so far as concerns furnishing that material, is entirely absent, and a written proposition by the owner of the patent is without significance where it simply amounts to an agreement to furnish the material to any contractor bidding on the work at a fixed price, since such an offer does not obviate the objection that, under the ordinance, there can be no competition in supplying the bitulithic wearing surface.

And in this connection see also Pollock v. Kansas City, 87 Kan. 205, 42 L.R.A. (N.S.) 465, 123 Pac. 985, applying the same doctrine to a statute requiring all petitions for public improvement to state the kind of material to be used, but not the brand of material or the name of the manufacturer thereof, and holding such statute violated by a paving petition stipulating for bitulithic pavement, where, by demurrer, it is conceded that these words have a well defined and well known meaning, confined to only one kind of paving material, absolutely controlled by one company, so that the matter of competition is entirely eliminated.

The majority of the late cases considering this question with reference to paving contracts, however, sustain the right to stipulate for a particular kind of paving material which is controlled by a patent where the owner of the patent files with the municipality an agreement to furnish the material to the successful bidder at a stipulated price, although by statute such contracts are required to be let upon competitive bidding. Saunders v. Iowa City, 134 Iowa. 132, 9 L.R.A. (N.S.) 392, 111 N. W. 529; McEwen v. Cœur d'Alene, 23 Idaho, 746, 132 Pac. 308; Ford v. Great Falls, 46 Mont. 292, 127 Pac. 1004; JOHNS v. PENDLETON, distinguishing Terwilliger Land Co. v. Portland, 62 Or. 101, 123 Pac. 57.

And it has been held that a municipality 46 L.R.A. (N.S.)

may advertise for and accept a construction, the materials entering into which, or the method and operation of assembling which, are covered by letters patent, and the purpose of the law which makes provision for competitive bidding for public contracts is not destroyed by advertising for or accepting a contract of this character. Holbrook v. Toledo, 28 Ohio C. C. 284.

And in New Jersey it is also held that a city has the right to contract for the use of such special or patented pavement as it may, in the exercise of an honest discretion, find to be the most suitable for the work contemplated. Bye v. Atlantic City, 73 N. J. L. 402, 64 Atl. 1056; Milner v. Trenton, 80 N. J. L. 253, 75 Atl. 939; but it does not appear from these cases that there was any requirement that such contracts should be let by competitive bidding.

In other jurisdictions the right of a municipality to stipulate in its invitation for bids that a patented paving material shall be used is sustained, where the owner of the patent has filed with the municipality an agreement to permit the use of its patent to the successful buyer for a small consideration. Tousey v. Indianapolis, 175 Ind. 295, 94 N. E. 225 (compensation for license fixed at 25 cents per square yard); Lacoate v. New Orleans, 119 La. 470, 40 So. 267 (compensation for license, 25 cents per square yard); Reed v. Rockliff-Gibson Constr. Co. 25 Okla. 633, 138 Am. St. Rep. 937, 107 Pac. 168 (license compensation, together with rendition of certain services fixed at 42 cents per square yard).

The holding of the foregoing cases sustaining the right to invite bids for a public contract, and stipulating that a patented material shall be used where the owner of the patent has agreed, for a comparatively small portion of the actual cost of the work, to permit the use of his patent, is not necessarily in conflict with the Wisconsin and Illinois cases which hold invalid, as not competitive, contracts for public improvement, based upon bids for a patented material where the owner of the patent exacts a large portion of the total cost of the improvement, since, as a matter of fact, the contracts involved in the Indiana, Louisiana, and Oklahoma cases were based upon bids which were competitive, or at least the agreement to grant a license for the use

ents, trademarks, or tradenames now owned or which may hereafter be owned by Warren Brothers Company, necessary to lay said pavement: 1. The necessary roadway mixture for the wearing surface, having a thickness of 1½ inches (1½") after compression, prepared under the patented process of Warren Brothers Company, and delivered hot in the wagons of the city or contractor at the bitulithic mixing plant located in the city of Pendleton; said plant to be located within three (3) miles of the work to be performed. (2) The right to use any and all patents, trademarks, or tradenames now owned or which may here-

after be owned or controlled by Warren Brothers Company, which are necessary to be used in the laying of such pavement. 3. The bituminous flush coating cement necessary for coating the wearing surface, delivered on wagons of the city or contractor at the bitulithic mixing plant located as above. 4. An expert, who will give proper advice as to the building of such pavement, will be furnished to the city or contractor at the expense of Warren Brothers Company. 5. Two daily examinations of the mixture as delivered on the street will be made at the laboratory of Warren Brothers Company, to determine if uni-

of the patent did not in an appreciable degree, if at all, affect competition in the bidding, for the amount exacted by the patentee was but a small portion of the entire cost. This cannot, however, be said of the Iowa, Idaho, and Montana cases, for in these cases, like the Wisconsin and Illinois cases, the owner of the patent, by his written agreement, filed with the municipality, exacted a large portion of the total cost of the improvement. In these three classes of cases there are the Wisconsin and Illinois cases which are irreconcilable with the Iowa, Idaho, and Montana cases, but which may be reconciled with the Indiana, Louisiana, and Oklahoma cases. On the other hand, the Oklahoma case cites, apparently with approval, the Iowa case, although, as pointed out as to the facts, the two cases are dissimilar, the Oklahoma case not presenting a case wherein competition was practically destroyed, while in the Iowa case there was no competition as to a large part of the cost of the improvement.

Thus, in the Iowa case (Saunders v. Iowa City) the amount exacted by the patentee was \$1.45 per square yard, and the same amount in *McEwen v. Cœur D'Alene*, and in *Ford v. Great Falls* the amount was \$1.50 per square yard. Upon this question of amount, *JOHNS v. PENDLETON* is a border line case, the amount being \$.90 per square yard.

The doctrine of the Idaho, Iowa, and Montana cases, that a contract of this character by the owner of the patent is sufficient to except the cases from the operation of the statute requiring competitive bidding, is denied in the Wisconsin and other cases first referred to. Thus, in *Allen v. Milwaukee*, 128 Wis. 678, 5 L.R.A.(N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 Ann. Cas. 392, the court says that an offer by the owner of the patent to permit the use of the patent and furnish other considerations for the sum of \$1.40 per square yard, to be paid by the successful bidder, discloses a studied attempt to evade the purpose of the statute, so as to confer upon the patentee the contract for a large part of work to be done without even the formality of any bidding therefor; and the query is made if such a division of the work of an improvement can be dictated by the patentee, where

must he stop in absorbing into his noncompetitive contract other parts of that work? And it is said that if a patentee may absorb two thirds of the work and price, there is no logical stopping place short of complete nullification of the right of the lot owner to have competitive bidding.

And in *Pollock v. Kansas City*, 87 Kan. 205, 42 L.R.A.(N.S.) 465, 123 Pac. 985, the amount asked by the patentee was \$1.35 per square yard, where the total price of the paving was \$2, and the court said that the margin of possible competition was so small as to be negligible.

In view of the conflict of authority on the question, it may also be profitable to refer to other cases holding different specifications for bids to be in such form as not to preclude competition, and hence not violative of statutes requiring competitive bidding. Thus, in *Warren Bros. Co. v. New York*, 190 N. Y. 297, 83 N. E. 59, three different methods of paving were stipulated for. Method A, a pavement of asphalt of a designated thickness, with a base of Portland cement, concrete, and water; method B, a pavement of sheet asphalt with a bituminous concrete binder, and a Portland cement concrete base; method C, patent bitulithic pavement.

And where, by the method adopted for inviting bids and awarding the contracts, three different kinds of pavement are put in competition with each other, it is immaterial, as affecting a contract based thereon, that one of the kinds of material stipulated for is covered by a patent. *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702.

Competition is secured by calling for bids for brick for pavement and also for bitulithic pavement, since by this method the two kinds of pavement are brought into direct competition. *Campbell v. South Bitulithic Co.* 32 Ky. L. Rep. 799, 106 S. W. 1189.

And an ordinance does not violate a statutory requirement of this character where it requires the use of a paving brick of a designated kind, or other brick equally as good, to be approved by the board of local improvements. *Oak Park v. Galt*, 231 Ill. 365, 83 N. E. 209.

Nor does a requirement that a certain kind of cement, or better, be used. *Muff v. Cameron*, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116.

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formity has been accomplished in the mixture and construction, and reports thereof will be made to the proper city authorities; said samples to be sent, prepaid, to the laboratory of Warren Brothers Company, Potter street, East Cambridge, Massachusetts, by the city or contractor. The price at which this service is offered to any and all contractors who make a bid on the gravel bitulithic pavement, in the city of Pendleton, state of Oregon, is ninety cents (\$.90 per square yard of finished pavement, at which price it is also agreed to furnish the mixture for making all repairs, if any, which may be necessary for the wearing surface during the life of said patents f. o. b. Pendleton in barrels for reheating. The acceptance of bids by your city and the letting of a contract for the same is all that shall be necessary to bind Warren Brothers Company to this agreement.

Respectfully submitted,
Warren Brothers Company,
Walter B. Warren,
Vice President.

The above agreement made on the understanding that it applies only to contracts, work on which can be performed continuously, aggregating not less than 10,000 square yards.

It also appeared that it was the custom of the company to allow contractors to put in their own plants, or for the company to furnish such plants to contractors, who were allowed to manufacture the compound for themselves, paying a royalty of 25 cents per square yard to the Warren Brothers Company. In order to prevent duplication of such plants in small cities, such contractors were obligated to furnish other contractors in the same town not having such machinery the compound at the rate prescribed in the license agreement. The charter of the city of Pendleton contains the following provisions: "The council, whenever it may deem it expedient, is hereby authorized and empowered to order the whole or any part of the streets of the city to be improved, to determine the character, kind, and extent of such improvement, to levy and collect an assessment upon all lots and parcels of land specially benefited by such improvement, to defray the whole or any portion of the cost and expense thereof, and to determine what lands are specially benefited by such improvement, and the amount to which each parcel or tract of land is benefited. . . . Within ten days from the date of the first publication of the notice required to be published in the preceding section, the owners of 80 per cent or more in area

of the property within such assessment district may make and file with the city recorder a written objection or remonstrance against such proposed improvement, and such objections or remonstrance shall be a bar to any further proceedings in the matter of such improvement for a period of six months, unless the owners of one half or more of the property affected as aforesaid shall subsequently petition therefor. . . . When the improvement of any street is ordered, the recorder, upon instruction from the common council, shall immediately invite proposals for making the same, in accordance with ordinance provided, which proposals shall be opened in the presence of a majority of the common council, and the contract awarded to the lowest responsible bidder for either the whole of said improvement or such part thereof as will not materially conflict with the completion of the remainder thereof. . . ." The Jackson street improvement required 7,848.80 square yards of paving material. The plaintiff and others remonstrated against the proposed improvement, but did not specify the selection of a patented article as one of the reasons for their remonstrance. Other facts appear in the opinion. There was a decree for defendant, and plaintiff appeals.

Messrs. J. P. Winter and Johnson & Skrable, for appellant:

The contract is absolutely void.

Terwilliger Land Co. v. Portland, 82 Or. 101, 123 Pac. 57; National Surety Co. v. Kansas City Hydraulic Press Brick Co. 73 Kan. 196, 84 Pac. 1034; Smith v. Syracuse Improv. Co. 161 N. Y. 484, 55 N. E. 1077; Fishburn v. Chicago, 171 Ill. 338, 39 L.R.A. 482, 63 Am. St. Rep. 236, 49 N. E. 532; Rossville v. Smith, 256 Ill. 302, 100 N. E. 292; Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280, 7 Ann. Cas. 104; State, Kean, Prosecutor, v. Elizabeth, 35 N. J. L. 354; Nicolson Pav. Co. v. Painter, 35 Cal. 706.

The invitation for bids called for patented and unpatented articles, but asked for a total bid. There could be no separate bidding on the unpatented work. A contract let pursuant to such a bid is void.

Re Eager, 46 N. Y. 105.

The charter is the sole source of the council's power. It had no power to make the contract in question.

Smith v. Portland, 25 Or. 303, 35 Pac. 665; Terwilliger Land Co. v. Portland, 82 Or. 101, 123 Pac. 57; Jones v. Salem, 63 Or. 126, 123 Pac. 1096.

A property owner's failure to object during the progress of the improvement will not estop him from questioning an assess-

ment based on a contract which the council never had the power to make. Such a contract is void; it never was; it is subject to direct and collateral attack.

Smith v. Portland, 25 Or. 303, 35 Pac. 665; Terwilliger Land Co. v. Portland, 62 Or. 101, 123 Pac. 59; Jones v. Salem, 63 Or. 126, 123 Pac. 1098; 4 Dill. Mun. Corp. last ed. § 1455; Strout v. Portland, 26 Or. 300, 38 Pac. 126; Northport v. Northport Townsite Co. 27 Wash. 543, 68 Pac. 204; Coggeshall v. Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650.

Messrs. R. W. Montague, James A. Fee, and Charles H. Carter, for respondent:

Contracts for a patented pavement are valid.

Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185; Atty. Gen. ex rel. Cook v. Detroit, 26 Mich. 263; Holmes v. Detroit, 120 Mich. 226, 45 L.R.A. 121, 77 Am. St. Rep. 587, 79 N. W. 200; Re Astor, 50 N. Y. 363; Re Dugro, 50 N. Y. 513; Knowles v. New York, 176 N. Y. 430, 68 N. E. 860; People v. Van Nort, 65 Barb. 331; Baird v. New York, 96 N. Y. 567; Gleason v. Dalton, 28 App. Div. 555, 51 N. Y. Supp. 337; Newark v. Bonnell, 57 N. J. L. 424, 51 Am. St. Rep. 609, 31 Atl. 408; Ryan v. Pater-son, 66 N. J. L. 533, 49 Atl. 587; Bye v. Atlantic City, 73 N. J. L. 402, 64 Atl. 1056; Milner v. Trenton, 80 N. J. L. 253, 75 Atl. 939; Silsby Mfg. Co. v. Allentown, 153 Pa. 319, 26 Atl. 646; Schuck v. Reading, 186 Pa. 248, 40 Atl. 310; Hastings v. Columbus, 42 Ohio St. 585; Trapp v. Newport, 115 Ky. 840, 74 S. W. 1109; Campbell v. Southern Bitulithic Co. 32 Ky. L. Rep. 799, 106 S. W. 1189; Beazley v. Kennedy, — Tenn. —, 52 S. W. 791; Rhodes v. Board of Public Works, 10 Colo. App. 99, 49 Pac. 430; Yarnold v. Lawrence, 15 Kan. 126; State v. Shawnee County, 57 Kan. 267, 45 Pac. 616; Carey Salt Co. v. Hutchinson, 72 Kan. 99, 82 Pac. 721; Bunker v. Hutchinson, 74 Kan. 651, 87 Pac. 884; Field v. Barber Asphalt Pav. Co. 117 Fed. 925; Worthington v. Boston, 41 Fed. 23; Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 8 L.R.A. 110, 18 Am. St. Rep. 530, 13 S. W. 98; Warren v. Barber Asphalt Paving Co. 115 Mo. 572, 22 S. W. 490; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Swift v. St. Louis, 180 Mo. 80, 79 S. W. 172; Kilvington v. Superior, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; Saunders v. Iowa City, 134 Iowa, 132, 9 L.R.A.(N.S.) 392, 111 N. W. 529; Seibert v. Indianapolis, Super. Ct. Mass.; Tousey v. Indianapolis, 175 Ind. 295, 94 N. E. 225; Baltimore v. Raymo, 68 Md. 569, 13 Atl. 383; Baltimore v. Flack, 104 Md. 107, 64 Atl. 702; N. P. Perine Contract-46 L.R.A.(N.S.)

ing & Paving Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533; Dillingham v. Spartanburg, 75 S. C. 549, 8 L.R.A.(N.S.) 412, 117 Am. St. Rep. 917, 56 S. E. 381, 9 Ann. Cas. 820; Lacoste v. New Orleans, 119 La. 469, 44 So. 267; Warren Bros. v. New York, 190 N. Y. 297, 83 N. E. 59; Ford v. Great Falls, 46 Mont. 292, 127 Pac. 1004; Reed v. Rockliff-Gibson Constr. Co. 25 Okla. 633, 107 Pac. 168.

The peculiar terms of the Pendleton charter made it obligatory upon the council to specify the precise kind of pavement wanted. No general requirement would give them jurisdiction.

Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683; Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989; Rich Hill v. Donnan, 82 Mo. App. 380; Jacksonville R. Co. v. Jacksonville, 114 Ill. 502, 2 N. E. 478; Mansfield v. People, 164 Ill. 611, 45 N. E. 976; Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846; San Jose Improv. Co. v. Auzeais, 106 Cal. 498, 39 Pac. 859; Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; Otis v. Chicago, 161 Ill. 199, 43 N. E. 715; Stanbury v. White, 121 Cal. 433, 53 Pac. 940; Smith v. Duncan, 77 Ind. 92; Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; St. Joseph v. Wilshire, 47 Mo. App. 125; Coggeshall v. Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; Sanitary Dist. v. Lee, 79 Ill. App. 159; Davidson v. Chicago, 178 Ill. 582, 53 N. E. 367; Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678; Wells v. Burnham, 20 Wis. 113; Mazet v. Pittsburgh, 137 Pa. 548, 20 Atl. 693; People ex rel. Ream Pav. Co. v. Board of Improvement, 43 N. Y. 227; Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7.

The city, when it complied with the charter requirements, obtained jurisdiction, and all subsequent errors are immaterial.

Houck v. Roseburg, 56 Or. 238, 108 Pac. 186.

The use of patent pavement does not prevent the competitive conditions as to bids for the work required by statute or ordinance.

1 Abbott, Mun. Corp. § 266, p. 596; 2 Dill. Mun. Corp. 5th ed. p. 1202, also § 803, p. 1204; N. P. Perine Contracting & Paving Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533.

The property owner is estopped by his participation, by permitting the work to be completed without attempting to stop it, and particularly by the raising of other objections.

2 Page & Jones, §§ 1015, 1029; Tumwater v. Pix, 18 Wash. 153, 51 Pac. 353; Porter v. Chicago, 176 Ill. 605, 52 N. E.

318; *Boswell v. Marion*, 40 Ind. App. 289, 79 N. E. 1056; *Wood v. Hall*, 138 Iowa, 308, 110 N. W. 270; *Stewart v. Detroit*, 137 Mich. 381, 100 N. W. 613; *Pepper v. Philadelphia*, 114 Pa. 96, 6 Atl. 899; *Barlow v. Tacoma*, 12 Wash. 32, 40 Pac. 382; *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874; *Tacoma Land Co. v. Tacoma*, 15 Wash. 133, 45 Pac. 733; *Rucker Bros. v. Everett*, 66 Wash. 366, 38 L.R.A.(N.S.) 582, 119 Pac. 807; *Chandler v. Puyallup*, 70 Wash. 632, 127 Pac. 293.

McBride, Ch. J., delivered the opinion of the court:

The principal contention here urged is that the selection of a patented paving compound manufactured by a single company and exclusively controlled by it, rendered it impossible for any but a single corporation to bid, and that it is therefore inimical to that provision of the city charter of Pendleton which requires all paving contracts to be let to the lowest responsible bidder. The industry of the respective counsel has apparently covered the entire field of judicial utterance upon this question, and has brought to our notice a mass of hopelessly contradictory decisions, all plausible and some profound, indicating by their contrariety the difficulty and nicety of the question involved. On the other hand, it is argued with much show of reason that the selection of a patented article controlled by its owners renders it impossible for any but such owners or favored licensees to bid, and that a call for bids under such circumstances is a mere farce, which tends to promote monopoly, stifle free competition, and impose unnecessary burdens upon the rate payer. The argument for plaintiff is forcibly put in the language of Sanderson, J., in the case of *Nicolson Pav. Co. v. Painter*, 35 Cal. 699: "To advertise for sealed proposals, where there can be but one bidder, to open them in open session, to examine and publicly declare them, and thereupon award the work to the lowest responsible bidder, where there is and can be but one, to notify the owners of the frontage, if they so elect, to come forward and perform work which, by the paramount law of the land, they are prohibited from performing under heavy responsibilities, would be to play as broad a farce as was ever enacted behind the footlights." Although, as hereinafter shown, the case there being considered contained many elements of hardship not incident to the case at bar, it shows the attitude of many of the courts in those cases where an exclusive monopoly of a patented article exists. On the contrary, it is argued that the law imposes upon the city council

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the duty to select in advance the kind of improvement required; that it is its duty to select the best; and that, if the best and most appropriate article for its purposes happens to be a patented article which can be supplied from only one source, the authorities should not be precluded from selecting nor the public from having the best and most appropriate article, and the one which it desires, by reason of the fact that only one person can supply it. This view of the case is forcibly and clearly set forth in the language of Mr. Chief Justice McSherry in *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702, in a case involving the same patent which is the bone of contention in the case at bar. We quote: "Cities in the construction of public improvements ought to have, as have individuals, in the construction of their own private edifices, the right to select for use the article or substance best fitted and adapted to the purpose; and to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the community. 'The force of this argument must, of course, be admitted,' said the court in *Fishburn v. Chicago*, 171 Ill. 338, 39 L.R.A. 482, 63 Am. St. Rep. 236, 49 N. E. 532, and the answer to it, which is more specious than sound as given by that court, is as follows: 'It is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance, or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed.' In other words, if the city requires a particular thing and that thing is covered by a patent, or can only be supplied by one dealer, the city must get, not the exact thing it needs, but something else as closely resembling it as can be procured. Thus, if the city is in want of certain repairs for its fire engines, and those repairs are made only by one manufacturer, or are protected by a patent, they cannot be purchased lest a monopoly would be fostered; but something, not the thing needed, though resembling the thing needed, would have to be substituted."

The two opinions quoted from fairly set

forth the views of the courts in relation to the selection of patented articles where there is no opportunity for competitive bids; but in the case at bar it appears from the testimony that is not excluded that the patentee, the Warren Brothers Company, is not engaged in street work as a business. Its revenues are derived from sales of the manufactured product, from the sale and installation of machinery for such manufacture, and from royalties derived from the manufacture of the product by others. It does not appear from the testimony that there was anything to prevent any contractor who desired to do so from having a plant installed and from manufacturing the compound upon exactly the same terms that the Warren Construction Company required. Perhaps it would have been unprofitable to have done so, but by the same token it is frequently impractical for a contractor to bid upon a small contract in a town remote from his place of business. When bids are advertised for in any case, the contractor who bids the lowest usually is enabled to do so because he has facilities not possessed by less fortunate bidders. The man situated nearest the place to be improved, having the best equipment, having the best material, and having capital to purchase what the public demands, always has an advantage which enables him in a sense to monopolize contracts of this character.

The law required the city council to designate in advance and in the first instance the "character and kind" of improvement to be made, and it was its duty to choose that which, under all the circumstances, it thought the most suitable. There is nothing to indicate that it acted fraudulently, or that it did not choose the best; and, in the absence of any great number of litigants protesting here, we have the right to assume that a great majority of the ratepayers got what they wanted and are satisfied. It is not shown that anybody else sought to take advantage of the situation by proposing to the Warren Brothers Company to install a plant in Pendleton for the manufacture of gravel bitulithic pavement, nor that anybody ever applied to it to furnish the material to perform the contract in case they should see fit to bid upon it. This is not a case where the patentee of an article is himself a contractor for its use in a particular instance. The evidence discloses no more than that the pavement selected is covered by a patent the benefits of which are available to every contractor upon the same terms. If the use of patented articles, compounds, and machinery is to be excluded from all contracts let to the lowest bidder, then

municipalities are relegated to the outworn agencies and materials of a past generation, and are unable to avail themselves of the discoveries and improvements of the present. The leading case cited by plaintiff is *Fishburn v. Chicago*, supra. It is not in point in the present controversy, and the distinction is clearly made in the opinion between those cases where the article or compound selected is one composed of materials which may be furnished by a number of persons, and is unpatented, and a compound protected by patent. In that case the ordinance provided that the "cementing material shall be paving cement prepared from refined Trinidad asphaltum obtained from Pitch lake, in the island of Trinidad." The plaintiffs offered proof tending to show that there were five paving companies in Chicago using Trinidad asphaltum equal for street-paving purposes to that obtained from Pitch lake, so that the real question was not whether the council could select the best material, but whether it could arbitrarily designate the product of a particular locality when products equal in quality and identical in composition could be obtained from other localities. Such a limitation was evidently fraudulent upon the face of it, and no court could have upheld it; but, while the court by way of *dictum* discusses the cases holding that cities may avail themselves of the benefit of scientific progress by soliciting bids for patented compounds, and expresses the opinion that such practice is not sanctioned by the best authority, it recognizes the fact that it is discussing a matter not in issue in the case before it. The court says: "In Mr. Dillon's view these cases are rather overcome by the current of authority; but, if they should be accepted as stating the correct rule, they have little application to the case in hand, for the reason the monopoly created under the ordinance under consideration is not in favor of a patented article." The liability of a judge to be absurd when he attempts to decide matters not before him is strikingly illustrated in this case referred to. After admitting the disadvantages of prohibiting a city from designating a patented pavement in its advertisement for bids, even if it is the most suitable, the court suggests, as a remedy, that "the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed."

How, if the patented article is the best and most suitable, another article can be "equal in all respects to it," is not clear; but the hibernicism of the remark is evi-

dent. It is needless to marshal and discuss authorities on this question where they disagree so widely. In a general way it may be said that the following cases tend in many respects to support defendant's contention: Fishburn v. Chicago, *supra*; Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280, 7 Ann. Cas. 104; Nicolson Pav. Co. v. Painter, 35 Cal. 699; Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205. These are by no means all of the cases, but they are representative of all. Cases tending to support plaintiff's contention and the views of this court as herein expressed are Baltimore v. Flack, 104 Md. 107, 64 Atl. 702; Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185; Re Dugro, 50 N. Y. 513; Baird v. New York, 96 N. Y. 567; Newark v. Bonnell, 57 N. J. L. 424, 51 Am. St. Rep. 609, 31 Atl. 408; Yarnold v. Lawrence, 15 Kan. 126. It is assumed that this court has committed itself to the doctrine contended for by plaintiff by its decision in Terwilliger Land Co. v. Portland, 62 Or. 101, 123 Pac. 57; but such is not the case. In that case bids were advertised for improving a street with "Hassam pavement," an unpatented compound. The Hassam Paving Company had copyrighted the trade-name, but anybody could use the same ingredients in the same proportions and produce exactly the same pavement without any infringement on the copyright of the Hassam Company; but, as the bids called for Hassam pavement, nobody could submit a bid for such pavement *eo nomine* without infringing upon the copyright. If in that case the call for bids had specified the character of the compound desired by requiring it to contain sand, gravel, and cement in the same proportions as contained in the Hassam compound, anyone could have bid. It was a plain case of preferring one contractor as against others possibly having equal facilities for furnishing the identical material. We note the following distinctions between that case and this: (1) The Hassam Paving Company was actually engaged as a street contractor in laying pavement composed of its copyrighted compound. The Warren Brothers Company is not so engaged. (2) The Hassam Paving Company refused to allow other contractors to bid under their tradename. The Warren Brothers encourage contractors to bid on contracts to be filled by the use of their compound, charging a royalty for its use. (3) The identical material used in the Hassam compound as called for in the bids could have been furnished under another name or by a description of the material. It does not appear that such is the case in the present instance. In the absence of proof to the contrary, we are bound to

assume that the council of Pendleton acted in good faith and with good judgment, and that "gravel bitulithic" was the best pavement for use on Jackson street.

It is not shown in this case that any other pavement is equal to gravel bitulithic, that the cost of the pavement was excessive nor that anybody was prevented from bidding by reason of the fact that the compound was covered by patents. From all that appears the plaintiff has a good pavement, put down at a reasonable price, and has suffered no actual injury by reason of the selection of the pavement in question. He stands simply on the bare technical objection that the selection of a patented compound, as a matter of law, has a tendency to create a monopoly, and that therefore he cannot be compelled to pay for the improvement. It is very evident that the objection now raised is an afterthought, which either did not occur to him before the work was completed, or was suppressed. It is also evident that the plaintiff's real objection is not that the council of Pendleton has done something to foster a monopoly, but that it has improved the street at all. In its final analysis plaintiff's contention amounts to this: "The city council may determine the kind of improvement to be made, but must carefully exclude any patented improvement; or it must, at least, make its selection in the alternative." If it were shown that there were other pavements of a similar character and equally as good, the suggestion might have some force; but that fact does not appear in the testimony in this case. It is difficult to see how such a course could prevent favoritism from being shown in the selection of material or in the awarding of contracts. A dishonest council could just as easily select the material specified by a bidder whom it wished to favor after the bids were in as it could before they were called for. Suppose the council had called for bids for half a dozen different kinds of pavement, retaining the right to select that one which, in its judgment, was the best. It is plain that, if it were so disposed, it could have selected gravel bitulithic, and the plaintiff would have been without remedy. In this contention we are conceding, for the purposes of the argument, without so deciding, that such alternative notice would comply with the terms of the charter, which required the council to determine in advance of the notice for bids the kind and character of the improvement. There has been no device yet invented that is sufficient to make a dishonest official act honestly; the remedy is at the polls. In these days when the light of publicity is thrown upon every

act of a councilman, when the jail doors yawn before the grafting official, and the recall hovers over him, there is not that temptation for him to ply his vocation that there has been heretofore. In this particular case there is no charge made of intentional fraud on the part of the council. They complied with the letter of the law, and, as we believe, with the spirit of it. Whether they exercised the very best judgment is not for us to say.

Another objection is that the notice of intention to improve does not describe definitely the portion of the street to be improved. The description in the ordinance and notice is as follows: "Commencing on the south line of Jackson street and the southerly projected west line of Main street, thence north to the northeast corner of lot 6, block 7, Switzler's addition to the city of Pendleton, Oregon, thence west to the northwest corner of said lot 6, thence north to the northeast corner of lot 9, in said block 7, thence westerly parallel with the north line of Jackson street to the northwest corner of lot 4, block 6, Livermore's addition, thence south to the northeast corner of lot 7, in said block 6, thence west to the northwest corner of said lot 7, thence south to the southwest corner of lot 12, block 16, in Raley's addition, Pendleton, Oregon; thence east to the southeast corner of said lot 12, thence south to the southwest corner of lot 3 in said block 16, thence easterly parallel to the north line of Jackson street to a point on the west line of the property deeded to the city of Pendleton for cemetery purposes, which point is south of a point on the section line, 19.50 chains east of the $\frac{1}{4}$ section corner between sections 3 and 10, township 2 north range 32 E. W. M. (variation 23 degrees E.), thence south to a point 9.50 chains south of the said section line, thence east 2.50 chains, thence north to the south line of lot 3, block 1, in said Raley's addition, thence east to a point 230 feet due south of the southwest corner of lot 7, block 6, in said Switzler's addition; thence east 100 feet parallel with said section line, thence south 64 feet, more or less, to the north line of land formerly owned by the Pendleton Manufacturing Company, thence northeast along the north boundary of said land formerly owned by the said Pendleton Manufacturing Company, to the said section line, thence along said section line west to place of beginning." There is a discrepancy in the description, arising from the fact that block C, Livermore's addition, is wrongly designated as "block 6." All the monuments called for in block 6 as they appear in the ordinance and notice exist in block 6, and the courses called for also

correspond; but, as no distances are given, we cannot reverse the description beginning at the last call and retrace it so as to make the calls certain, especially since there is a block 6 in Livermore's addition. The description is uncertain, and cannot be ascertained from the notice itself. The notice does not refer to any map or plat of the assessment district on file, and the one actually on file is not complete in some particulars. The notice of intention to improve is jurisdictional, and the city gained no right to make the assessment against plaintiff's property. The whole proceeding was void. As held by this court in several cases, plaintiff is not estopped from enjoining the collection of the assessment by reason of having waited until the completion of the improvement. Dill. Mun. Corp. § 1455; Ladd v. Spencer, 23 Or. 193, 31 Pac. 474.

The decree will be reversed, and one entered here in accordance with this opinion.

Petition for rehearing denied.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA, Resp't.,

v.

RICH PUCKETT Appt.

(— S. C. —, 78 S. E. 737.)

Burglary — entering piazza attached to dwelling.

Entering in the nighttime with intent to commit a felony, a piazza which is attached to a dwelling house, and is inclosed with a low railing not for the protection of the dwelling, but to keep dogs and chickens off the piazza, is not burglary.

(June 30, 1913.)

Note. — Burglary by going upon piazza.

STATE v. PUCKETT seems to stand alone in passing upon the question whether simply going upon a piazza, even with felonious intent, will render one liable to conviction for burglary. No other authority upon that question has been found. But on principle that case would appear to be correct in holding such an act not to constitute burglary.

Thus, it is said that, in order to constitute burglary, the entry must be made into the house, and not merely into some outside part of the house. 6 Cyc. 182.

Although it has been said that, in order to constitute a "room" within which one may commit burglary, the partition between it and the rest of the house need not extend to the ceiling or roof of the house,

A PPEAL by defendant from a judgment of the General Sessions Circuit Court for Laurens County convicting him of burglary. Reversed.

The facts are stated in the opinion.

Messrs. Ferguson, Featherstone, & Knight, for appellant:

To constitute burglary, there must be a breaking of the "inclosing part of a dwelling house."

State v. Sampson, 12 S. C. 568, 32 Am. Rep. 513; 2 Wharton, Crim. Law, 11th ed. 1190, § 971; Clark, Crim. Law, 232, § 100.

Entering the piazza is not burglary.

Henry v. State, 39 Ala. 679.

Should a door or other aperture be partially or wholly open, and the thief enter, this is not a breaking.

2 Wharton, Crim. Law, 1191, § 971; State v. Dawkins, 32 S. C. 21, 10 S. E. 772; State v. Boon, 35 N. C. (13 Ired. L.) 244, 57 Am. Dec. 555; State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216; Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556; Green v. State, 68 Ala. 539.

Mr. R. A. Cooper for the State.

Watts, J., delivered the opinion of the court:

The defendant appellant was tried and convicted in the court of general sessions for Laurens county in January, 1913, on a charge of burglary. He was charged with breaking and entering the dwelling house of W. R. Richey in the nighttime,

but that a partition 8 or 9 feet high from the floor is sufficient (People v. Young, 65 Cal. 225, 3 Pac. 813), yet it has also been said that, under a statute making it a criminal offense to break and enter "any house, room, apartment, or tenement," a house is any structure which has walls on all sides, and is covered by a roof (People v. Stickman, 34 Cal. 242).

It has been held that, under a statute making it an indictable offense to break and enter any dwelling house, shop, or other building with intent to commit a felony therein, one cannot be properly convicted simply for entering the "yard" of a dwelling house with intent to steal. Com. v. Taggart, 3 Brewst. (Pa.) 340.

So, evidence that one came to a picket fence in front of a house, in which there was a small gate, but did not pass the gate nor come nearer to the house than 12 or 13 feet, and then went away without committing any overt act toward carrying out a possible design to break in and steal, is not sufficient to sustain a conviction for an attempt to commit burglary. Reg. v. McCann, 28 U. C. Q. B. 514.

It has also been held that breaking an area gate is not the breaking of a dwelling, so as to constitute burglary, when the area is separated from the house by a door. Rex v. Davis, Russ. & R. C. C. 322. 46 L.R.A. (N.S.)

with intent of committing a felony, on September 22, 1912. After conviction, a motion for a new trial was made by appellant, which was overruled, and after sentence appellant appeals and alleges ten specifications of error on the part of his Honor. The first five exceptions allege error on the part of his Honor in overruling the motion for a new trial, in that there was no testimony to sustain the verdict, as the evidence showed that the portion of the house entered was the piazza, unprotected and uninclosed, and was not such a place to be legally the subject of burglary, and there was no evidence that the defendant broke and entered a dwelling house as alleged in the indictment; and in holding that picket gates, in contemplation of law, put on the piazza outside of the house, constituted a protection or security to the habitation of the dwelling, when the evidence showed that the gates were not put there for any such purpose, but to keep out dogs and chickens; and in holding that under the indictment the appellant could be convicted of burglary in breaking out of said dwelling house, when there was no evidence of such breaking; and for the further reason there was no evidence of any breaking or entering in the house to steal, no breaking out, and no evidence at all of any theft or other felony committed by the appellant in consequence of such entry. The ninth and tenth exceptions raise the point there was no evidence to sustain

So, proof that one broke open a large outer gate and entered a yard from which there was no obstruction to entering a house, but that he was taken before so entering the house, though with instruments of house breaking upon him, is insufficient to sustain a conviction for burglary; the outer fence of the curtilage, not opening directly into any building, is no part of the dwelling house. Rex v. Bennett, Russ. & R. C. C. 289.

But in Com. v. Smith, 6 Phila. 305, it was held that one who arms himself with a deadly weapon and other implements of burglars, and goes to the premises of another and tries to force, and in so doing breaks, a gate which is attached to the wall of the house, and which opens upon an alley leading to the rear of the same, is properly convicted of an attempt to commit burglary.

Under the theory that a log cabin (State v. Jake, 60 N. C. (2 Winst. L.) 80 or a storehouse (State v. Outlaw, 72 N. C. 598; United States v. Johnson, 2 Cranch, C. C. 21, Fed. Cas. No. 15,485), or other room in which some person regularly or usually sleeps, is a "dwelling house," within which burglary may be committed, it might be a question whether it would not be burglary to enter a sleeping porch.

H. C. Sh.

the verdict. The facts, as developed at the trial in brief, are: That the dwelling house of Mr. Richey is on West Main street, in the city of Laurens; that the house is surrounded on the front and on the east and west ends by a piazza, with balustrade 2½ feet high. From the top of balustrade to the overhead ceiling of the piazza is an open space of 6 or 7 feet. On the front there was an opening on the piazza of 12 feet through the balustrade. On the east and west ends there was an opening of 8 feet from the back yard on each end of the piazza. There was a picket gate to each end, opening of the same height as the balustrade, leaving the open space above to the ceiling. It was the custom to keep these gates closed to keep out chickens, dogs, etc. The evidence shows the defendant appellant was familiar with the premises. On the night in question it was damp and raining; during the night Puckett was found on the piazza of the house under suspicious circumstances. There is no question about that, and there was sufficient testimony to go to the jury as to whether the gates to the piazza were closed or not. He did not enter the dwelling house proper at all, and there is no evidence that he stole anything, or made any overt act to commit a felony. The sole question is whether the piazza was such a part of the dwelling house in this case, under the facts as proven, as to make it a subject of burglary, and, if so, did the appellant break and enter it in the nighttime with intent to steal, or did he enter it without breaking in the nighttime, with intent to steal, and then break out.

Common-law burglary is the breaking and entering the dwelling house of another in the nighttime, with intent to commit a felony. There must be a breaking and entering. It must be a dwelling house; it must be in the nighttime; and it must be with the intent to commit a felony. There must be a breaking of "the inclosing parts of a dwelling house." 2 Bishop, *Crim. Law*, § 91; *State v. Sampson*, 12 S. C. 568, 32 Am. Rep. 513; 2 Wharton, *Crim. Law*, 11th ed. 1190, § 971; Clark, *Crim. Law*, § 100.

The evidence shows the appellant only on the piazza, and under the facts, as proven, it does not show that the piazza was such a part of the dwelling house as was contemplated by law, to make it an offense to enter in the nighttime against the security of the dwelling house. In the case of *Henry v. State*, 39 Ala. 679, the accused was charged with larceny under the statute imposing a penalty upon "any person who shall commit larceny in any dwelling house." Certain clothes had been stolen from the piazza in front of the dwelling

house and attached to it. The court held: "Such a piazza is not a house, and cannot be a dwelling house. It may be attached to the house. . . . A larceny committed in the piazza cannot be said to have been committed in or inside of the house."

The entry of a piazza attached to the house outside of the house, the place where callers are accustomed to wait until someone in the house responds to a ring or knock, or to enter and sit on the piazza to get out of the rain or sun, or to rest, may be a trespass or bad taste, but it is quite different from opening the closed doors of a house and intruding in the sanctity of the dwelling.

A careful examination of all the evidence in the case convinces us that there was not sufficient testimony to convict the appellant of the offense charged, and his Honor was in error in not setting the verdict aside.

The appellant was not indicted for an attempt to commit a burglary, although 2 Wharton, *Crim. Law*, 11th ed. 1041, says, "An attempt at burglary is indictable at common law;" but appellant was indicted for burglary, not an attempt to commit burglary.

Judgment reversed.

Gary, Ch. J., and Hydrick and Fraser, JJ., concur.

TEXAS COURT OF CRIMINAL APPEALS.

SAM BURNAMAN, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 159 S. W. 244.)

Evidence — to show bias of witness — acts in absence of accused.

1. Evidence that a witness for accused in a criminal case attempted to influence the testimony of other witnesses in favor of accused is properly admitted to show bias

Note. — Right to show that a witness attempted to influence other witnesses for or against accused.

This note is confined to criminal cases, but includes cases where the defendant himself was a witness. As indicated by the title, no discussion is here entered into with regard to the admissibility of evidence that third parties, not witnesses in the case, attempted to influence a witness.

While evidence introduced for the purpose of impeachment of a witness must not be collateral or irrelevant to the case, this rule does not generally exclude evidence as to a witness's mental attitude, state of feelings, capacity, animus, motive, or ill-will, or evidence which may tend to show bias, hostility, or interest. *BURNAMAN v. STATE* is in harmony with the general rule to the effect

on the part of the witness, although no predicate is laid, and he acted in the absence and without the knowledge of accused.

Same — waiver of incompetent evidence — acquiescence in admission.

2. The admission of incompetent evidence is waived by stating, after objecting to it: "All right; go ahead," without moving to exclude it after the answer is given, although an exception is noted.

Appeal — evidence showing bias of witness — failure to limit.

3. The court's failure to limit evidence tending to show that a witness in a murder case attempted to influence a witness to testify a certain way by reciting to him the facts which he wished to be given in evidence, to the impeachment of such witness, is not error, since the jury could have used it for no other purpose.

that, in criminal cases, either party has a right to show that any witness has attempted to influence any other witness for or against the accused, since proof of such an attempt would go to show bias, hostility, or interest in the former witness, and might affect his credibility. And it is not necessary, under this rule, to show that defendant was present during such attempt on the part of one of his witnesses, or knew anything about it, since evidence of such attempt is not admitted for the purpose of impeaching the defendant or showing his guilt, but only for the purpose of weakening the effect of the testimony of the witness. The general rule stated above applies to all of the four possible situations which may arise, viz., right of the state to show that a witness for the defendant has attempted to influence a state's witness; right of the state to show that a witness for the defendant has attempted to influence another witness for defendant; right of defendant to show that a witness for the state has attempted to influence a witness for the defendant; and right of defendant to show that a witness for the state has attempted to influence another witness for the state. And the rule is the same when either witness in question is the defendant himself testifying in his own behalf.

Right of state to show that defendant's witness has attempted to influence a state's witness.

The rule is settled that in a criminal prosecution the state may show, for the purpose of impeaching a witness for defendant, that such witness has attempted to influence a witness for the state in favor of the defendant. This may be shown by the testimony of the state's witness. *State v. Cook*, 13 Idaho, 45, 88 Pac. 240 (attempt of defendant's witness to persuade him to leave the state, and not to testify against defendant); *BURNAMAN v. STATE* (defendant's witness telling prosecuting witness that they must get together and understand the matter alike, so that they could tell the same story on the trial)

46 L.R.A. (N.S.)

Homicide — self-defense — shooting after necessity ceases — effect.

4. One loses his right to shoot again in self-defense after firing a shot which disabled his assailant so that there is no longer any apparent danger, and if he continues to shoot, thereby producing or hastening the death of his victim, he may be guilty of manslaughter.

(Davidson, P. J., dissents.)

(May 7, 1913.)

APPPEAL by defendant from a judgment of the District Court for Nacogdoches County convicting him of manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. King & King for appellant.

Or by cross-examination of defendant himself, testifying in his own behalf. *Carothers v. State*, 75 Ark. 574, 88 S. W. 585 (attempt of defendant to silence testimony against himself by effort to get material witness for state out of county).

Or by cross-examination of witness for defendant. *People v. Mack*, 14 Cal. App. 12, 110 Pac. 967 (attempt of defendant's witness to induce prosecuting witness to drop case, and to absent herself from the county); *Seaborn v. Com.* 25 Ky. L. Rep. 2203, 86 S. W. 223 (defendant's witness effecting the absence of state's witnesses who testified in behalf of the state before the examining court); *State v. Hack*, 118 Mo. 92, 23 S. W. 1089 (defendant's witness offering prosecuting witness money to leave the city, and not to appear against defendant); *Webb v. State*, — Tex. Crim. Rep. —, 58 S. W. 82 (attempt of defendant's witness to tamper with and suborn state's witness); *Pace v. State*, — Tex. Crim. Rep. —, 79 S. W. 531 (attempt of defendant's witness to get the prosecuting witness to drop the case); *Owens v. State*, — Tex. Crim. Rep. —, 96 S. W. 31 (defendant's witness simply asking prosecuting witness what he swore to in the grand jury room).

And if the witness for defendant denies on cross-examination that he made the alleged attempt, he may be contradicted by the testimony of the witness for the state whom he is alleged to have attempted to influence. *Lewis v. State*, 35 Ala. 380 (defendant's witness telling a witness for the prosecution that he must swear to a certain statement, and if he did not, said defendant's witness would whip him); *People v. Mack*, supra; *Sims v. State*, 38 Tex. Crim. Rep. 637, 44 S. W. 522 (defendant's witness approaching state's witness and telling him that defendant was a particular friend of the former, and asking him to be as light on defendant as possible,—that he would never lose anything by it); *Webb v. State*, supra.

But in *Gann v. State*, — Tex. Crim. Rep. —, 57 S. W. 668, it was held that a witness for the defendant should not be permitted to testify that he requested another witness

Messrs. Blount & Strong and C. E. Lane, Assistant Attorney General, for the State.

Prendergast, J., delivered the opinion of the court:

Appellant was indicted for the murder of his brother-in-law, Mike Manning. On a trial he was convicted of manslaughter, and his penalty fixed at five years in the penitentiary.

One of the state's most material witnesses was Bill Lee, who gave pertinent testimony against appellant. He and appellant's brother, Phillip Burnaman, were together near Phillip's house at the time appellant killed deceased. Immediately after the killing appellant went from the scene to said Lee and appellant's brother, Phillip, and

made certain *res gestæ* statements to them. The state introduced Bill Lee when first opening and presenting its case. He at that time fully testified to said *res gestæ* statements. After introducing other testimony, the state rested. Appellant thereupon, among other witnesses, introduced his brother, Phillip Burnaman, who was a most material witness for appellant, and gave pertinent and strong testimony in his favor, disputing, in part at least, the testimony of said Bill Lee as to said *res gestæ* statement, and adding thereto material and strong testimony tending to establish appellant's most material defense, which was self-defense. The state, in crossing appellant's brother, Phillip, did not ask him if he had attempted to get said Lee to testify as he (Phillip) did as to said additional

not to testify against defendant as to certain facts within his knowledge, upon the ground that the request was made without the authority of defendant and in his absence, and the judgment was reversed because of the wrongful admission of such testimony. The court enters into no argument in support of this position, but cites certain cases, which on examination are found not to sustain the decision. The cases cited are for the most part those where the attempt at influencing a witness sought to be proved was made by one not a witness in the case, and where the proof was offered to affect the defendant's character directly, or to show his guilt, and not for the purpose of affecting the credibility of the witness, those cases thus resting upon a different principle. Moreover, the Gann Case has since been disregarded by the Texas courts. See Webb and Pace Cases, *supra*.

The case coming nearest to the point here involved, and cited in the Gann Case, is Marshall v. State, 5 Tex. App. 273, where it was held that, under a statute providing that the confession of a defendant shall not be used in evidence against him, if at the time it was made the defendant was in the custody of an officer, or if he was not first warned that it might be used against him, evidence of a state's witness that defendant told him while in the presence and custody of the deputy sheriff, to go and see another witness and tell him to leave the country, and that if he would leave, defendant would furnish him all the money he wanted, is not admissible as a confession of guilt which could be obviated only by getting the principal state's witness out of the country.

Right of state to show that defendant's witness has attempted to influence another witness for defendant.

It is also the settled rule that the state in a criminal prosecution may, for the purpose of impeaching a witness for defendant, show that such witness has attempted to influence another witness for defendant in the

latter's favor. This may be shown by cross-examining defendant himself while testifying in his own behalf. State v. Deal, 52 Or. 568, 98 Pac. 165 (defendant attempting to persuade another witness to testify to facts favorable to defendant as of witness's own knowledge, when really they were not such); Grabowski v. State, 126 Wis. 447, 105 N. W. 805 (defendant building up his own case in taking two men as witnesses to a certain place and then bringing them to court to testify).

Or by cross-examining defendant's witness. People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833 (as to attempt of defendant's witness to bribe another witness to give false testimony in interest of defendant); State v. Hayward, 62 Minn. 474, 65 N. W. 63 (as to conversations between defendant's witnesses concerning the crime, for the purpose of ascertaining how much concert of action there was between them, and how much the story of either or both had been developed, changed, or modified by such conversations); Lowry v. State, 53 Tex. Crim. Rep. 562, 110 S. W. 911 (as to defendant's witness telling another that if she would help to destroy certain evidence and would swear for defendant, defendant would beat); Irvin v. State, — Tex. Crim. Rep. —, 148 S. W. 589 (as to witness for defendant seeing other witnesses about the defense, and approaching them in an improper way); State v. Carr, 65 W. Va. 81, 63 S. E. 766 (as to defendant's witness conversing with another such witness about the case before trial, trying to influence her in favor of the defendant).

And if, on cross-examination, such witness for defendant denies the attempt, he may be contradicted by the testimony of the other witness. People v. Wong Chuey, *supra*; Barry v. State, 37 Tex. Crim. Rep. 302, 39 S. W. 692 (defendant's witness interested in procuring another to testify for defendant or in fabricating testimony); Lowry v. State, *supra*.

Thus, evidence is admissible to the effect that a witness has gone to another witness and told her to stand up for defendant, and

material *res gestæ* statement, or what appellant had said to them and exhibited to them immediately after said killing. In rebuttal, after appellant had closed his testimony, the state reintroduced said Lee, who testified, denying pointedly the testimony of appellant's brother, Phillip, as to said additional claimed *res gestæ* statement. (The court, in approving appellant's bill raising this question, allowed it in connection with the full statement of the evidence, as shown by the statement of facts.) The witness Phillip Burnaman, after having testified for appellant, was excused by the court from further attendance, with no-

tice to both parties, and had gone to his home, some miles distant, and his further attendance was not had, and he was not again placed on the stand.

We here quote in full what then occurred and what said witness Lee testified:

State: Now, the other question we want to ask this witness in regard to the statement of that absent witness, we can't do it unless we have him here to ask the question.

Court: Well, if that is all, stand him aside.

State: We will ask the question.

not to tell anything against him. *Pearson v. State*, 56 Tex. Crim. Rep. 607, 120 S. W. 1004.

And it is proper for the state to prove that certain witnesses met a brother of defendant in defendant's presence, and with his knowledge and at his instigation, one of the witnesses received a horse and saddle with which to leave the country, and avoid testifying, especially where it appears that defendant had already inquired if such witness could be bribed, and had made arrangements with regard to the payment of his debt. *Clark v. State*, — Tex. Crim. Rep. —, 43 S. W. 522.

And in *Parker v. State*, 11 Ga. App. 251, 75 S. E. 437, it was held to be proper to ask a witness for defendant whether he did not attempt to bribe or suborn another witness in the case, provided counsel expects to prove that to be the fact; but the court adds that, if the question is asked merely for the purpose of discrediting the witness, and without any bona fide intention of proving the facts referred to, counsel simply hoping to leave a trail of indefinable prejudice in the minds of the jury, his conduct would be most reprehensible.

But in *Burks v. State*, 72 Ark. 461, 82 S. W. 490, it was held erroneous to permit the prosecuting attorney to ask the father of the defendant what he gave another witness to testify in the case for the defendant; such a question does not ask whether the one witness has bribed another to testify, which the court says would have been permissible, but assumes that where there was bribery and simply asks how much had been paid for the testimony. It therefore appears to have been asked simply to prejudice the defendant and other witnesses in the eyes of the jury, and was highly improper.

Right of defendant to show that a state's witness has attempted to influence a witness for the defense.

It is likewise the right of the defendant, for the purpose of impeaching a state's witness, to show that such witness has attempted to influence a witness for the defense. This may be shown by cross-examination of such state's witness. *Scott v. State*, 113 Ala. 64, 21 So. 425 (showing that the witness for the prosecution "ran" another person away

from the town, in order to keep him from testifying for defendant); *State v. Koller*, 129 Iowa, 111, 105 N. W. 391 (showing an attempt by the prosecuting witness to dissuade some of defendant's witnesses from attending and testifying in his behalf); *Richardson v. State*, 90 Md. 109, 44 Atl. 999, 15 Am. Crim. Rep. 222 (showing that the state's witness offered to pay a certain sum to keep a witness for the defendant away until after the trial, or that he offered a bribe to another witness, to induce him to testify, after that other had informed him that he knew nothing but hearsay about the case); *Sapp v. State*, — Tex. Crim. Rep. —, 77 S. W. 456 (showing that the state's witness induced another party to go off the bond of one of defendant's witnesses, the bond being for another offense, because the latter witness was one for defendant).

And if such state's witness denies the allegation, he may be contradicted by the testimony of the other. *Richardson v. State* and *Sapp v. State*, *supra*.

Right of defendant to show that a state's witness has attempted to influence another witness for the state.

And finally, the defendant, for the purpose of impeachment, has a right to show that a state's witness has attempted to influence another witness for the state. This may be shown by cross-examining the one alleged to have made the attempt. *State v. Rutledge*, 135 Iowa, 581, 113 N. W. 461 (one prosecuting witness endeavoring to intimidate others); *State v. Hakon*, 21 N. D. 133, 129 N. W. 234 (state's witness offering to bribe another to testify falsely); *Green v. State*, 54 Tex. Crim. Rep. 3, 111 S. W. 933 (cross-examining prosecuting witness as to his admission to another state's witness of his own bad position in the case, and as to his effort to coach the other as to the evidence he should give).

And if such state's witness denies the allegation, defendant should be given opportunity to contradict him by the testimony of the other. *Green v. State*, *supra*. And, generally, when a witness has denied on cross-examination that he was active in getting testimony, he may be contradicted by other witnesses. *Hamilton v. People*, 29 Mich. 173, 1 Am. Crim. Rep. 618.

Defendant: We object if there is no predicate laid.

State: It is a question I don't think a predicate has to be laid for; the court can pass on that proposition.

Q. I will ask you whether or not, since the morning of the homicide there, that means the killing, after you met Sam, since that time the brother of Sam, that is, Phillip, has approached you and told you that you and him must get together and understand this matter alike, so that you could tell it alike when you came to court?

A. Yes, sir.

Defendant: We object to that; that is

certainly not impeaching testimony to begin with, and if there is any,— all right; go ahead; we don't care.

A. Phillip has talked to me twice about that. In the conversation with Phillip, he undertook to call my attention to the fact, and asked me if I didn't see cut places there; that was a day or so, a couple of days, after the killing took place; I went back up there to work, and he says, "Didn't Sam show us that cut place on his jumper?" and I says, "No, he didn't show it to me," and he says, "I saw it somewhere," and says, "It seems to me like it was when he come up here," and he says, "You want

Or the attempt of one state's witness to influence another may be shown by cross-examining the one upon whom the attempt is alleged to have been made. *Salm v. State*, 89 Ala. 56, 8 So. 66 (showing that another prosecuting witness induced the one testifying to swear out a warrant against the defendant charging him with a criminal offense); *Sue v. State*, 52 Tex. Crim. Rep. 122, 105 S. W. 804 (showing that another state's witness tried to get the one testifying to testify falsely).

And in the proceedings against the Five Popish Lords for high treason, and the subsequent trial of Lord Viscount Stafford, in 1680, reported in 7 Howell's State Trials, beginning at p. 1217, it appears at pp. 1400 et seq. that witnesses for the prosecution were allowed to testify as to attempts by another state's witness to bribe them to swear falsely against the defendants.

Also, the defendant may show that witnesses have formed a conspiracy against him, as evidencing the spirit which animates such witnesses, and aiding the jury in placing a proper estimate upon the value and importance of their testimony. *State v. Breeden*, 58 Mo. 507.

And a letter written by a detective who is also a witness for the state, to another witness for the state, telling her that it is time for her to get busy and to keep him posted, and asking if she knows anything of value, written after the alleged crime and before the trial, is relevant and admissible in evidence as tending to illustrate the interest which the witnesses have in the case. *Goforth v. State*, — Ala. —, 63 So. 8.

As said in *Salm v. State*, supra, proof that one witness attempts to influence another against the accused shows unfriendliness towards the latter, and is competent evidence, not necessarily as discrediting such witness, but as a circumstance to be weighed by the jury in determining whether bribery or ill feeling does not to some extent color the testimony thus given.

But it has been held that where two state's witnesses give substantially the same account of the affray when arrested about the same time in widely separated places, it is not reversible error for the court upon the trial to refuse to permit defendant to ask one of these witnesses if he did not have a private conversation with the other

soon after the crime was committed; such a question was said not to be proper cross-examination, and not necessary to lay the foundation for impeachment. But the court adds that if such conversation occurred, it would be proper for the defendant to show it by his own witnesses. *State v. Munchrath*, 78 Iowa, 268, 43 N. W. 211.

And the defendant should not be allowed to prove that one state's witness hired out another state's witness to a third state's witness, where there is nothing to show that such hiring would tend to prejudice or bribe any one of them against the defendant, neither the state nor the defendant having had anything to do with the hiring. *Green v. State*, 168 Ala. 90, 53 So. 286.

And examination of one witness as to what he has told another witness he is going to testify to in the case does not tend to show that the testimony of the first was suggested to him by the second (but the converse), and such examination should not be allowed with that alleged object. *Sylvester v. State*, 46 Fla. 166, 35 So. 142.

Nor is it reversible error to exclude evidence that a witness for the prosecution was implicated in an attempt to procure false testimony from other witnesses, when such evidence is not offered to show his bias or to affect his credibility, but only on the broad ground that evidence of any such attempt is admissible as such, especially when the witness thus attacked has not testified as to any facts in dispute. *Com. v. Min Sing*, 202 Mass. 121, 88 N. E. 918.

And in an early English case, it was held that when a witness for the prosecution has been examined in chief, and has not been asked on cross-examination as to any declarations made by him or acts done by him to procure persons corruptly to give evidence in support of the prosecution, it is not competent for the defendant to prove by his witnesses such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the declarations or acts alleged; and this rule was held to apply even though the discovery of his attempt to corrupt witnesses occurred after his examination in chief and cross-examination. *Queen's Case*, 2 Brod. & B. 311, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183.

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to understand this has got to go to court," and I says, "Well, I know it. I have been summoned to go to court."

Q. And what was it he said to you when he was talking, that you answered while ago that you must get together on the matter?

Defendant: We object to that.

Court: What was it?

State: I asked him what was it the brother, Phillip, said about getting together.

Defendant: Go ahead and relate it again.

A. I started to preaching one evening, and Phillip saw me coming, and come and met me, and he stopped me and says, "You know this little thing is going to be in before the grand jury now right away, and we want to get together—"

Defendant: We object because this is the statement between two witnesses in the absence of the defendant.

Court: It only goes to the credibility of the witness.

Defendant: There is no predicate laid for it.

Court: I don't think it is a character of matter that requires a predicate.

Defendant: We except to the ruling of the court.

"And he says we want to get together and tell this matter so we can tell it alike," and I told him that I had done told it once just like I saw it,—that was the way I was trying to tell it, and I rode off and left him standing there in the road. After Sam came up there where me and Phillip were after the shooting, and on that same morning before the body was moved, I saw Sam Burnaman again; he was leading his horse as we were moving Mike; we met him coming leading his horse out of the pasture; we were in about 7 or 8 steps of him; I don't know whether his jumper was buttoned at that time or not; I didn't notice anything wrong with his clothes or torn places anyway, but I didn't notice him much because I was helping carry Mike. I never at either of those times noticed that his clothing were torn and his breast open, or anything of that kind.

By his second bill appellant claims that the court committed reversible error in failing and omitting to limit the effect of the said testimony of Bill Lee to impeachment purposes alone of his brother, Phillip. His contention is that it is error for the court to have permitted, over his objections, the state to prove that his brother, Phillip, undertook to persuade said Lee to change or manufacture his testimony, unless it be shown that he was connected with or authorized the same. The state contends that this testimony by Lee was ad-
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missible as original evidence, for the purpose of showing the bias and interest of Phillip in his brother's favor; that it shows or tends to show the motive of Phillip in testifying as he did in appellant's favor.

It has many times been decided by this court, and we think it is elementary, that the "motives which operate upon the mind of the witness when he testifies are never regarded as immaterial or collateral matters. A party may prove declarations of the witness which tend to show bias, interest, prejudice, or any other mental state or status, which, fairly construed, might tend to affect his credibility." *Pope v. State*, — Tex. Crim. Rep. —, 143 S. W. 613, and cases therein cited and principles therein held. The rule is that the hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or other witnesses may be called who can swear to facts showing it. In *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189, the rule is thus stated:

"The hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice, and as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility." This rule was again reasserted in *Brink v. Stratton*, 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148.

Mr. Underhill, in his excellent work on Criminal Evidence, § 248, says: "The bias of the witness and his interest in the event of the prosecution are not collateral, and may always be proved, to enable the jury to estimate his credibility. They may be proved by his own testimony upon cross-examination, or by independent evidence. . . . The bias of the witness may be shown either by independent testimony, or by questions put to him upon his examination." This court has expressly held this in several decisions. *Cockrell v. State*, 60 Tex. Crim. Rep. 128, 131 S. W. 221; *Porch v. State*, 51 Tex. Crim. Rep. 11, 99 S. W. 1122; *Bonnard v. State*, 25 Tex. App. 195, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462. So has our court of

civil appeals at Galveston. *Trinity County Lumber Co. v. Denham*, — Tex. Civ. App. —, 29 S. W. 553. To the same effect, see also *People v. Mallon*, 116 App. Div. 425, 101 N. Y. Supp. 814, affirmed in 189 N. Y. 520, 81 N. E. 1171; *Morgan v. Wood*, 24 Misc. 739, 53 N. Y. Supp. 791. In 30 Am. & Eng. Enc. Law, 2d ed. 1127, it is said: "In some states evidence showing that a witness is interested in the result of litigation, or otherwise biased in favor of or against one of the parties, is admissible, without first examining the witness on the subject [citing the decisions of several states so holding]." In the same section, however, it is further stated: "The weight of authority is to the contrary, however, at least where the bias is sought to be shown by the declarations of the witness himself." Again in 40 Cyc. p. 2676, it is laid down: "A party seeking to show interest or bias of an adverse witness is not confined to cross-examination, but may introduce independent evidence for the purpose [citing many decisions, some the same as cited in 30 Am. & Eng. Enc. Law, above noted]." Again, in the following section the further rule is laid down, indicating that the foundation for this must first be laid by asking the witness himself. We think it is evident that the two rules are not in conflict. The latter proposition in both of these authorities indicates that the latter rule is where it is attempted, by independent testimony, to show such bias, interest, etc., by the witness having made statements contradicting his testimony on the trial. The distinction in the books is not always kept clear. So, in this case, if it had been attempted to impeach the witness Phillip Burnaman by showing by the witness Lee that he had made statements theretofore in contradiction of his testimony on the trial, and such had been attempted to be introduced, then, as a foundation therefor, it would have been necessary to have asked the witness Phillip Burnaman himself such questions before such contradictory statements could have been proven. If the appellant had not used as a witness his brother, Phillip, and his brother had not given such material testimony in behalf of appellant, the testimony of Lee on this point would not have been admissible at all. It is because his brother, Phillip, testified, that said Lee's evidence showing Phillip's interest and bias in appellant's favor became admissible.

Appellant cites many cases in his brief to the effect that it is error to permit the state, over his objections, to prove that his friends, relatives, or attorneys have undertaken to persuade a witness to give, change, or manufacture testimony in his 46 L.R.A.(N.S.)

favor, unless it be shown that the appellant was connected therewith, or authorized the same. This also is a correct legal proposition, and the cases cited by appellant sustain his proposition; but, as stated above, that is not what was attempted in this case. The testimony of Bill Lee was introduced, not for the purpose of showing indirectly or directly that appellant authorized or requested his brother, Phillip, to get Lee to change his testimony, or show that Phillip's attempted tampering with the witness Lee was at his instance, or that he was connected therewith, but simply for the purpose of showing the bias and interest of Phillip in behalf of appellant. And we think the evidence of Bill Lee on this point could not have been reasonably or otherwise construed to be that Phillip's attempted tampering with Lee was at his instance, or in his behalf, with his knowledge or consent.

It is also elementary that it is improper for the court in his charge to limit the effect of proof which shows the motive or interest of either the appellant or any material witness for him. Such a charge would clearly be upon the weight of the testimony, and a comment thereon, which is prohibited. The appellant requested no charge in this case. He attempted to raise the question by motion for new trial alone.

Again, as shown above, when this testimony was first offered by the state, and the appellant first indicated that he was objecting thereto, it is shown that he said: "All right; go ahead; we don't care." And when the witness was asked to repeat it, appellant again said: "Go ahead, and relate it again," and the witness did so. No motion was then, or afterwards, made to exclude this testimony. So that under no phase, as we see it, did the court commit any reversible error in admitting this testimony under the circumstances.

Now let us see if the court should have limited the effect of said Lee's testimony on this point, and by not doing so committed reversible error. The rule is as stated by Mr. Branch in his *Criminal Law of Texas*, § 367: "Testimony does not have to be limited, where it can only be used by the jury for the purpose for which it was introduced. *Leeper v. State*, 29 Tex. App. 69, 14 S. W. 398; *Franklin v. State*, 38 Tex. Crim. Rep. 348, 43 S. W. 85; *Sue v. State*, 52 Tex. Crim. Rep. 129, 105 S. W. 804; *Rice v. State*, 54 Tex. Crim. Rep. 167, 112 S. W. 299; *Wright v. State*, 56 Tex. Crim. Rep. 358, 120 S. W. 458; *Wilson v. State*, 60 Tex. Crim. Rep. 1, 129 S. W. 614; *Malcek v. State*, 33 Tex. Crim. Rep. 20, 24 S. W. 417; *Brown v. State*, 41 Tex. Crim. Rep.

233, 53 S. W. 866; Harrold v. State, 46 Tex. Crim. Rep. 570, 81 S. W. 728." And as again laid down by him in § 873, subd. 3, p. 555: "If impeaching testimony can only be used by the jury to impeach a witness, it is not necessary to charge on the subject at all. Brown v. State, 24 Tex. App. 170, 5 S. W. 685; Magee v. State, — Tex. Crim. Rep. —, 43 S. W. 512; Robinson v. State, — Tex. Crim. Rep. —, 63 S. W. 870; Newman v. State, — Tex. Crim. Rep. —, 70 S. W. 953; Watson v. State, 52 Tex. Crim. Rep. 90, 105 S. W. 509; Waters v. State, 54 Tex. Crim. Rep. 327, 114 S. W. 628; Thompson v. State, 55 Tex. Crim. Rep. 120, 113 S. W. 536; Schwartz v. State, 53 Tex. Crim. Rep. 451, 111 S. W. 399; Poyner v. State, 40 Tex. Crim. Rep. 640, 51 S. W. 376; Givens v. State, 35 Tex. Crim. Rep. 563, 34 S. W. 626; Blanco v. State, — Tex. Crim. Rep. —, 57 S. W. 828."

Take this evidence as succinctly and pertinently stated by appellant's bill, which shows the state was permitted to prove by Lee that Phillip Burnaman approached him and said to him as follows: "Say, we must get together on this little thing. You know they are going to have us before the court?" I said: 'Yes; I reckon they will, but all I am trying to do is to tell the truth about it.' So Phillip Burnaman then said to me again: 'Well, we want to get together on this matter; now you know that he (Sam) came down to us after he killed Mike, and told us that he had to kill him, because Mike was coming on him with his knife; that they had had a fight down in the field, and Mike had cut his jumper, and he showed us the place where Mike cut him?' and I told him that I did not notice that, nor hear him say that, and he said, 'Now we must get together on this matter.'" This testimony could not have been used by the jury for any other purpose whatever than to show Phillip's interest in behalf of appellant and his bias in his favor, and thus affect his credit as a witness. It could not have been used by the jury in any way to establish appellant's guilt, or to disprove his defense. Hence the court did not err in failing to charge limiting it to the impeachment of Phillip Burnaman.

The court in his charge, in giving general definitions and laying down general propositions on self-defense, in a separate paragraph, charged: "If defendant in the course of the fatal altercation fired a number of shots, you are instructed that if the first shot was fired under circumstances amounting to self-defense, the defendant had the right in self-defense to continue to shoot as long as it reasonably appeared to him that he was in danger. And if such first

shot was fired in self-defense, and defendant fired other shots into the head or body of deceased, thereby producing or hastening the death of deceased, when it no longer reasonably appeared to him that he was in danger, then such later shots would not be in self-defense (but the offense in such case would be of no higher grade than manslaughter)." Appellant objected to this paragraph of the charge, and especially to the last line or two thereof, inclosed in parentheses, as above shown, claiming that it was an undue limitation and restriction of his right of self-defense. The testimony shows that the shooting of the deceased by appellant was with a 22-target rifle; that, in order to fire each shot, a lever had to be worked to eject the shell as it was fired, and thereby or otherwise shift the next cartridge from the magazine into the barrel of the gun before it could be again fired; that the appellant shot the deceased thus, though rapidly, nine separate and distinct times, each of the nine shots taking effect in the body of deceased. The doctors testified that three of these separate and distinct shots were fired into the top of the head in such course as to show that they were evidently fired after the deceased had fallen and was lying prostrate on the ground; that at least five of the balls which were shot into the body of the deceased were necessarily fatal. It was further shown, by the physical facts on the ground, that the deceased never approached appellant nearer, as appellant himself testified, than "30 feet or something like that." And they were some fifteen or sixteen steps apart. Appellant claimed and testified in effect that he believed deceased was coming on him for the purpose of attacking him with a knife, and that the indications by the deceased's movements with his hand indicated that, if not with a knife, with some other deadly instrument. The testimony was overwhelming that deceased was wholly unarmed, except a small pocketknife, which was found in his pocket closed when searching for arms immediately after the killing; that there were no other arms of any character on or about the person of deceased when he was killed. Appellant himself in effect testified that he saw no knife or other weapon in appellant's hand at any time immediately prior to or at the killing. It was also overwhelmingly shown later, when the body of the deceased was removed to his home, and he was undressed in preparation for burial, that his person and pockets were again searched, and no other arms of any kind were found in his pocket or otherwise about his person, other than said small pocketknife belonging to deceased, which

was closed and in his pocket. It was shown that deceased's wife, after his pants were removed in preparation for burial, took them, laid them on a barrel in another room in her residence, and at that time no other knife was in his pocket or otherwise about his pants. It is true that some witnesses on the trial testified that the next day they examined his pants, picking them up off of said barrel, and that then there was found a large knife belonging to one of the witnesses in the pants pocket of the deceased. Even if that knife was so found after that length of time in his pocket, it was closed and in his pocket.

Under the circumstances we think that the general proposition laid down in said last-above quoted charge was a correct proposition. Certainly it cannot be contended with any show of reason that appellant had the right to continue to shoot into the head or body of the deceased when it no longer reasonably appeared to appellant that he was in any danger from the claimed assault or attempted assault by deceased upon him. And clearly after several necessarily fatal shots had been fired into his body, and he was lying prostrate on the ground 30 feet from the appellant, he did not have any right, in self-defense or otherwise, to fire three or more other fatal shots into the top of the head or body of the deceased.

Besides this, in the latter portion of the court's charge, when he submitted appellant's claimed self-defense to the jury, he correctly and fully submitted it in every phase that the evidence raised, in appellant's favor. And even if the general definition and principle laid down in the charge quoted was incorrect, it would not have the effect, and could not have had the effect, of unduly limiting or restricting appellant's right of self-defense, and could not and did not in any way mislead the jury, or have a tendency to do so, against appellant.

The court, in submitting appellant's defense of self-defense, we think, clearly submitted it in accordance with the law and the evidence from both phases,—self-defense separate and distinct from threats, and then, in a separate paragraph, his defense based on threats by the deceased against him. The charges of the court on these subjects are lengthy. It is unnecessary to quote them. Upon a careful consideration of all of appellant's criticisms of the court's charge, we think none of his criticisms show any reversible error, and that appellant's rights on both of these theories were clearly, fully, and accurately submitted in accordance with the law and 46 L.R.A.(N.S.)

the evidence applicable thereto in this case. Appellant requested no special charge on the subject.

There are no other questions presented which are necessary to review.

The judgment will be affirmed.

Davidson, P. J., dissenting:

I cannot agree with the opinion of the majority affirming this judgment. The propositions announced and rules laid down in the prevailing opinion are so directly contrary and opposed to what has been the settled law in Texas so long that I feel impelled to enter this dissent. I deem it unnecessary to enter into a discussion at length of these matters, inasmuch as Messrs. King & King have filed such an able, elaborate, and unanswerable brief I shall content myself with adopting that brief and argument as my dissenting opinion. In their argument every proposition presented and affirmed by my brethren has been so successfully met from a legal standpoint I could not improve upon it; therefore, I adopt it as my dissenting opinion. It is as follows:

"In the preparation of his opinion the writer draws certain inferences from the evidence, which we do not believe the record justifies. He adopts that portion of the defendant's evidence suitable for the holding, but ignores the remaining part of his testimony. The questions are not at all new to the criminal jurisprudence in this state; and while we would not invoke the rule of *stare decisis*, yet this court has so uniformly held with the contentions here made, therefore we cannot but insist that the opinion of affirmance is not the law in this state, and a rehearing should be granted.

"The court erred in its opinion of affirmance, in holding that the testimony of Lee, recited in bill of exception No. 1, that appellant's brother approached him and undertook to have him change or compromise his testimony, was not collateral to the main issue, and that same was admissible as original testimony, though it does not appear from the record or the bill that appellant was responsible therefor. The following authorities amply sustain this proposition: *Hoy v. State*, 39 Tex. Crim. Rep. 340, 45 S. W. 916; *Rice v. State*, 51 Tex. Crim. Rep. 280, 103 S. W. 1156; *Garcia v. State*, — Tex. Crim. Rep. —, 74 S. W. 916; *Clark v. State*, — Tex. Crim. Rep. —, 43 S. W. 522; *Pace v. State*, — Tex. Crim. Rep. —, 79 S. W. 532; *Sims v. State*, 38 Tex. Crim. Rep. 644, 44 S. W. 522.

"The fact that appellant's brother, who had testified in support of his defense, had been excused by the court, and was at the

time absent, does not serve to change the rule announced by the above authorities. It is shown in the statement of facts that appellant's brother was excused by the court in the presence of the prosecuting officers, and that they knew he was then leaving town, and, when the state proposed to introduce the witness Lee to give the testimony complained of in the bill, that they did not believe the testimony was admissible without a predicate made, while appellant's brother was upon the stand. On page 87 of the statement of facts, and at the bottom of the page, as the state began to introduce such testimony, we find that the defendant objected, first, because no predicate had been laid, and that the state replied: 'It is a question I don't think a predicate has to be laid for; the court can pass on that question,'—and again, on page 88 of the statement of facts, when the defendant earnestly insisted upon his objection for the reason that the occurrence happened in the absence of the defendant, the court said: 'It only goes to the credibility of the witness.'

"Defendant: 'There is no predicate laid for it.'

"Court: 'I don't think it is a character of matter that requires a predicate.'

"The state not only knew that no predicate had been laid when appellant's brother was testifying, but knew that the witness had been excused, and would not longer be in attendance upon the court, and stated, in effect, at the time the testimony was offered, that it was necessary to lay a predicate. The court took a different view from that entertained both by counsel for appellant or counsel for state, and admitted the testimony as original evidence, the theory upon which the opinion of affirmance holds that it was admissible.

"The opinion holds that it was admissible as original evidence, but then proceeds to assert that it was for the purpose of impeaching appellant's brother as a witness, and that it could have been considered for no other purpose by the jury.

"Mr. Wharton in his *Criminal Evidence*, 9th ed. § 484, explaining what a collateral issue is, quotes from a Pennsylvania case as follows: 'The test of whether or not a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?' See also *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. 609.

"Impeaching testimony, whether of the general reputation of a witness, or proof of contradictory statements, or proof of

his interest or bias, is always a collateral inquiry. It could not be used by the state for the purpose of supporting its contention. Whether a witness is or not, thus impeached, does not in the least affect the true facts. It is receivable only in support of the contention that the witness is, or is not, telling the facts as they existed, and therefore necessarily collateral to the main inquiry.

"It is conceded in the opinion of affirmance that it is never admissible to allow the state to prove, over objection, that friends, relatives, or attorneys of the party upon trial had undertaken to persuade a witness to give changed or manufactured testimony in his favor, unless it be shown that the appellant was connected therewith, or authorized the same; but the writer of the opinion holds the testimony was not offered for such purpose, but for the purpose of impeaching appellant's brother as a witness. We submit that it is not a question as to the purpose of the state in offering the testimony, but is a question as to the effect the testimony offered would have. It being shown that the witness who approached Lee was appellant's brother, the jury could not but conclude that appellant was responsible therefor. The following cases are ample authority in support of the proposition that such testimony was not admissible: *Estep v. State*, 9 Tex. App. 367; *Barbee v. State*, 23 Tex. App. 203, 4 S. W. 584; *Rushing v. State*, 25 Tex. App. 612, 8 S. W. 807; *Luttrell v. State*, 40 Tex. Crim. Rep. 651, 51 S. W. 931, 11 Am. Crim. Rep. 226; *Garcia v. State*, — Tex. Crim. Rep. —, 74 S. W. 916; *Rice v. State*, 51 Tex. Crim. Rep. 255, 103 S. W. 1156; *Lounder v. State*, 46 Tex. Crim. Rep. 122, 79 S. W. 552; *Day v. State*, 62 Tex. Crim. Rep. 413, 138 S. W. 127; *Day v. State*, 62 Tex. Crim. Rep. 448, 138 S. W. 130; *Grimes v. State*, — Tex. Crim. Rep. —, 141 S. W. 283; *Brown v. State*, — Tex. Crim. Rep. —, 150 S. W. 437; *Branch's Crim. Law*, § 862.

"While the proposition here announced and supported by the authorities cited is stated in the opinion of affirmance to be sound, yet the court holds that it was admissible to show the bias of appellant's brother, and to, in this way, impeach him as a witness, even in the absence of predicate laid. In reply to this holding we assert that it has ever been the law, where proof of tampering with the witness would not be admissible as original evidence, that it is inadmissible for impeachment, and that error in admitting it is not cured by limiting the same in the charge to impeachment. *Rice v. State*, 51 Tex. Crim. Rep. 281, 103 S. W. 1156; *Garcia v. State*, —

Tex. Crim. Rep. —, 74 S. W. 916; Swain v. State, 48 Tex. Crim. Rep. 104, 86 S. W. 335; Hoy v. State, 39 Tex. Crim. Rep. 340, 45 S. W. 916.

"In the case of *Garcia v. State*, supra, Judge Henderson, speaking for the court, uses this language: 'True, the witness had been introduced by appellant, and had testified to an alibi in his favor; but this did not authorize the introduction of illegitimate testimony against appellant on the pretext of impeaching this witness. Unless appellant sent his father to see prosecutor, in order to compromise the case, he would not be bound by anything that his father did in that connection.'

"In *Hoy v. State*, supra, Judge Davidson, speaking for the court, says: 'The very reason given by the court for the admission of the testimony should have excluded it. If it was not legitimate as original evidence, certainly it could not be used for the purpose of impeaching a witness. Irrelevant and inadmissible evidence does not become admissible or proper because sought to be used for the purpose of impeachment.'

"In the case of *Rice v. State*, supra, Judge Henderson, upon a motion for rehearing, discussing a similar question, says: 'Of course, it will not be contended that this testimony is original testimony inhering in or appertaining to the case; it transpired long after the case. If appellant was shown to be connected therewith, it would constitute original testimony against him as a circumstance suggesting consciousness of guilt in fabricating testimony, and tampering with witnesses comes under that category; but, as stated, the evidence was not offered as original testimony, but as impeaching evidence. Clearly it was introduced upon a collateral issue, and was confessedly offered to affect the credibility of the witness Ed Prather.' Further discussing the question, the court approvingly quotes from Wharton's *Criminal Evidence* [9th ed. § 484], as follows: 'Applying this test, was the evidence here offered pertinent to the case, or was it a contradiction upon a collateral issue, and not upon any issue involving defendant's guilt or innocence? Evidently it was upon a collateral issue, and both court and counsel so regarded it. The court attempted in its charge to limit this testimony to the impeachment of Ed Prather, but, as has heretofore been held by this court, when illegal testimony for impeachment purposes has been admitted, and this of itself is of a hurtful character, it is impossible for the court to limit it so as not to prove injurious to appellant.' He cited, as supporting the proposition so an-

nounced, *Cogdell v. State*, 43 Tex. Crim. Rep. 178, 63 S. W. 645; *Morton v. State*, 43 Tex. Crim. Rep. 533, 67 S. W. 115; *Casey v. State*, 49 Tex. Crim. Rep. 174, 90 S. W. 1018.

"This confronts us with this situation: The opinion of affirmance is committed to the proposition that the testimony showing that appellant's brother attempted to have a witness compromise or change his testimony, in the absence of appellant and without his knowledge, is clearly not admissible, and this court, from all the authorities above cited, has uniformly held that illegal testimony is never admissible under the guise of impeaching a witness in the case, and further, under authorities cited, going so far as to hold the error thus committed cannot be cured by a charge of the court limiting the illegal testimony to purposes of impeachment.

"Again the testimony, if otherwise admissible, being collateral, was not admissible in the absence of a predicate laid while appellant's brother was upon the stand, and this court erred in its opinion of affirmance in holding the same admissible in the absence of such predicate. The writer of the opinion of affirmance holds that the testimony was admissible to show the interest and bias of appellant's brother as a witness. If admissible at all, it was for the purpose of affecting his standing as a witness. He loses sight, however, of the fact that this is but one way of attacking the credibility of a witness. As stated above, the credibility of a witness is always a collateral inquiry. Whether or not a witness is credible has nothing to do with the guilt or innocence of the party upon trial, and all evidence except that tending to establish guilt or innocence is, according to the rule announced herein above, as quoted by Mr. Wharton's *Criminal Law*, collateral evidence.

"In the language of the writer of the opinion, 'is is elementary' that all impeaching evidence must be supported by a predicate. The common-law rule upon the subject, announced as far back as the *Queen's Case*, 2 Brod. & B. 312, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183, is to the effect that when a witness has been examined on one side, it is not competent for the opposite party to introduce evidence to show his bias, feeling, or partiality towards the parties, unless the witness has been previously questioned himself as to that point. Even in the discussion of this principle in 40 Cyc. p. 2676, and in 30 Am. & Eng. Enc. Law, 1127, cited in the opinion, it is there stated that the great weight of authority is in support of the position here taken, and against the holding of the opinion.

"We now pass to the rule as it has been uniformly announced by the courts of this state, both in criminal and civil cases, and we here assert, that, in so far as we have been able to find, there can be no authorities of the Texas courts found in support of the holding made by the honorable judge in the opinion in this case. All of the authorities hold just to the contrary of the rule as announced in the opinion. *Barry v. State*, 37 Tex. Crim. Rep. 302, 39 S. W. 692; *Mitchell v. State*, 38 Tex. Crim. Rep. 170, 41 S. W. 816; *Nite v. State*, 41 Tex. Crim. Rep. 348, 54 S. W. 763; *Martinez v. State*, — Tex. Crim. Rep. —, 53 S. W. 635; *Galveston, H. & S. A. R. Co. v. La Prelle*, 22 Tex. Civ. App. 594, 55 S. W. 125. For a full and complete discussion of all the authorities, see note in 82 Am. St. Rep. 54.

"Discussing this question in the case of *Barry v. State*, supra, Judge Henderson, for the court, says: 'Nor do we believe it was proper for the state to elicit from Mrs. Jackson testimony to the effect that, on the morning after the homicide, she was at Mrs. Ford's, and that Mrs. Ford endeavored to make her remember that on a certain occasion the deceased, Healey, rubbed his hand on the stomach of Mrs. Barry, the wife of the defendant, and asked her (Mrs. Barry) when the "damn little bastard was going to be borned," and, on the witness replying that she "did not hear deceased use that language," that then Mrs. Barry said to her, "You will have to remember it," or, "You must remember it." Now, if Mrs. Ford had been placed on the stand, and she had been examined as to this matter, for the purpose of showing that she was interested in procuring testimony for defendant, or fabricating the same, and she had denied making this suggestion to Mrs. Jackson, then Mrs. Jackson might have been examined upon this point solely for the purpose of impeachment.' It was exactly an effort of this kind to have the witness Lee change his testimony, or remember things to which he had not testified, that he says appellant's brother undertook to have him do; that is, appellant's brother tried to make the witness remember having heard appellant make the statements when he approached the two immediately after the killing. We therefore take it that this case is as near in point with the facts in the case under discussion as could be found. Again, the same judge, in the case of *Mitchell v. State*, supra, used the following language: 'Now, it would have been perfectly competent, in order to show that the witness John Pierce was prejudiced against appellant, that he endeavored to have his em-

ployers discharge him, but the witness Pierce should have been first asked about this matter to afford him an opportunity of denying or explaining the same. His explanation might have been such as to have obviated the necessity of any contradictory evidence. If he had denied the same then, as showing prejudice on his part against appellant, it would have been competent to have contradicted him upon this collateral matter.'

"In the case of *Martinez v. State*, — Tex. Crim. Rep. —, 53 S. W. 635, Judge Brooks, discussing this identical question, uses the following language: 'We think the court erred in permitting the witness Green to contradict the witness Arrera, because there was no predicate laid for said contradiction. Appellant's defense was an alibi. His sister and brother-in-law had testified to facts, if true, that would have entitled appellant to an acquittal. If the witness Florentio Arrera had been asked the question as to whether or not he stated to the witness Green, at the time indicated in the bill, that appellant was not at the house, said witness might have been able to give some explanation as to the reason for making said false statement that would not have wholly destroyed his testimony.' And further in said opinion he says: 'It is a well-known rule of evidence that, where a party proposes to contradict a witness, the predicate must first be laid by asking the witness if he did not make a certain statement at a certain time and place, and to a certain party.' He cites in support of the holding *Jordan v. State*, 10 Tex. 479; *Walker v. State*, 6 Tex. App. 576; *Mason v. State*, 7 Tex. App. 623.

"In the case of *Galveston, H. & S. A. R. Co. v. La Prelle*, 22 Tex. Civ. App. 594, 55 S. W. 125, Chief Justice Fisher, for the court of civil appeals, uses the following language: 'The appellee, on the trial of the case, did not lay any predicate for the introduction of this evidence, by first inquiring of witness Dillon as to whether such a request for information had been made of him, for the names of the absent witnesses, and giving the time and place of such request.' He reversed and remanded the case upon this one question, and in the opinion cited the Queen's Case, hereinabove mentioned, and from which opinion the statement hereinabove made is taken.

"Again the court erred in its opinion of affirmance, in holding that it was not necessary to limit the testimony of the witness Lee, as complained of in bill No. 1, for the purpose of impeachment of appellant's brother as a witness, even if the testimony

was admissible, as presented in appellant's bill of exceptions No. 2.

"It might be that a jury of lawyers would know how to draw a distinction between the purpose of admission of testimony and the effect of its admission, but how it can be held that the average layman could draw this distinction is beyond comprehension. It is not a question as to the purpose the state or the court had in admitting the testimony. This purpose should have been made known by a charge from the court to the jury limiting the evidence to the purpose for which it was admitted; if it was admissible, the jury had nothing to do with the purpose that may have been hidden in the mind of the prosecuting attorney or buried in the 'breast' of the court in offering certain testimony. They deal with the effect of testimony, and not with the purpose for which it was introduced, and it has always been held that, if the evidence could be used by the jury as an incriminating fact, or to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious or prejudicial to appellant, then it is the duty of the trial court to limit or restrict the effect of such testimony in his charge, so that no unwarranted results could ensue. This is practically the language used by the court in the case of *Winfrey v. State*, 41 Tex. Crim. Rep. 538, 56 S. W. 919. See also *Maines v. State*, 23 Tex. App. 576, 5 S. W. 123; *Washington v. State*, 23 Tex. App. 336, 5 S. W. 119; *Davidson v. State*, 22 Tex. App. 373, 3 S. W. 662; *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300; *Wilson v. State*, 37 Tex. Crim. Rep. 385, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Benjamin v. State*, 57 Tex. Crim. Rep. 291, 122 S. W. 542; *Harvey v. State*, 57 Tex. Crim. Rep. 5, 136 Am. St. Rep. 971, 121 S. W. 501. This is true, and has been held to be true by this court, even though the evidence is offered to impeach the credibility of the witness by showing his bias or interest in favor of the party upon trial. *Coker v. State*, 35 Tex. Crim. Rep. 57, 31 S. W. 655; *Pearson v. State*, 56 Tex. Crim. Rep. 612, 120 S. W. 1004.

"As stated above, the jury have to do with the effect of the testimony, and not the purpose for which it is introduced. How can they know the purpose of the testimony unless the court informs them in his charge? It is true that a contradictory statement can be used to impeach the testimony of the party who testifies differently from the statement made, but here we have a different proposition. To show that a man's brother approached a witness in his case, and undertook to have

him change or compromise his testimony, would be very persuasive to the jury that the defendant and his family were fabricating a defense, and it would but be the natural course of human nature to so conclude, in the absence of a charge specifically telling the jury the purpose, and only purpose, for which they could consider the testimony.

"The rule is plainly announced by Judge Henderson in *Wilson's Case*, 37 Tex. Crim. Rep. 385, 39 S. W. 373, as follows: 'The general rule is that whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the right of the party, then it becomes the imperative duty of the court in its charge to so limit and restrict it as that such unwarranted results cannot ensue; and the failure to do so will be radical and reversible error, even though the charge be not excepted to.'

"Again, in *Taylor's Case*, 22 Tex. App. 529, 58 Am. Rep. 656, 3 S. W. 753, 'It is permissible, where motive is the important question, to prove other transactions of a similar character, . . . but where, however, this is permissible, it is always important that the charge of the court should properly limit and restrict the jury, in their consideration of such testimony, exclusively to the purposes of its admission, unless they should give it unwarranted weight as evidence proving the main fact.'

"In the case of *Bennett v. State*, 43 Tex. Crim. Rep. 243, 64 S. W. 255, discussing the necessity of limiting testimony, the following language is used: 'But, without an instruction on the subject, would the jury confine their consideration of said testimony to that purpose alone? Would they know the object of its introduction? It must be remembered that jurors are, for the most part, unacquainted with the rules of law, and therefore the necessity on the part of the court to instruct them with reference to their duties.'

"Now, whatever appellant's brother said to the witness Lee, it was subsequent to and no part of the transaction in which appellant shot and killed deceased, and, as said in the quotation last above, 'Would the jury confine their consideration of said testimony to that purpose alone? Would they know the object of its introduction?' In the present case, would not the jury conclude that the testimony was admitted for all purposes, and, if so, would it not

be natural for them to conclude that appellant was responsible for his brother's acts?

"The court, in its opinion of affirmance, overlooked entirely the case of *Coker v. State*, supra, decided by the sage of the criminal law of this state, Judge Hurt. In that case the state was undertaking to locate the shoes worn by Coker at the time of the homicide; it being shown that the shoes would likely reveal the truth as to whether or not the defendant committed the offense. His mother was one of his strongest witnesses, and the state was undertaking to show, and did show circumstantially, that she had hidden his shoes. An objection was reserved to the testimony, and it was also objected that the court did not limit the testimony, and Judge Hurt, in disposing of the question, in reversing the case, used the following language: 'Again, if Mrs. Sallie Coker concealed the shoes, appellant was not responsible for her acts. She, however, being a witness for him, the state, for the purpose of proving that she was very much biased in his favor, if not wholly corrupt, and therefore wholly unworthy of belief, could show it. This evidence, however, was not limited to the only purpose for which it could have been introduced. The jury were not instructed to consider it only for the purpose of impeaching Mrs. Coker. In the absence of instructions clearly and emphatically limiting it to its proper use, the jury would, in all probability, reason thus: The mother knew her son to be guilty; she knew or believed that his shoes, if found, would convict him; hence her conduct. She concealed them from the officers.' That case is directly in point with that feature of the question now under discussion. There it was attempted to show that the mother of Coker, and who, by the way, was a witness in his behalf, had suppressed testimony, and Judge Hurt clearly holds that it was the duty of the trial court to specifically and emphatically limit the effect of the testimony to the purpose of impeaching Mrs. Coker as a witness. This completely answers the opinion of this court, wherein it is stated that the testimony was admissible because appellant's brother was a witness in the case.

"Again, in *Pearson's Case*, supra, this court, then composed of its present presiding judge and Associate Judges Brooks and Ramsey, through a majority of the court, held, in discussing the following question, propounded to Pearson's witness White while upon the stand, to wit: 'You are the man that went around to Mr. Pearson's daughter just after the killing, and

told her not to tell anything on him, didn't you?'—that, while the same was admissible to show the interest and bias of the witness, it was nevertheless the duty of the court to limit such testimony to the purpose for which it was admitted. The presiding judge of this court wrote the opinion in the *Pearson Case*, and dissented, holding that the testimony was not admissible for any purpose, and cites the cases which appellant cites in his brief as sustaining his dissent. The other two judges disagreed with the presiding judge as to the admissibility of the testimony, but held that it was the duty of the court to limit the effect of the same, and therefore permitted the reversal of the case.

"Again, the court erred in holding the charge of the court instructing the jury, if defendant fired a number of shots, and the first shot was fired in self-defense, still if he continued to shoot, so as to hasten the death, when it no longer reasonably appeared to him that he was in danger, that such later shots would not be in self-defense; but the offense in such event would be of no higher grade than manslaughter. 'If the defendant in the course of a fatal altercation fired a number of shots, you are instructed that if the first shot was fired under circumstances amounting to self-defense, the defendant had the right in self-defense to continue to shoot as long as it reasonably appeared to him that he was in danger; and if such first shot was fired in self-defense, and defendant fired other shots into the head or body of deceased, thereby producing or hastening the death of the deceased, when it no longer reasonably appeared to him that he was in danger, then such later shot would not be in self-defense; but the offense in such event would be of no higher grade than manslaughter.' The charge is an undue limitation and restriction of defendant's right of self-defense, for the reason the testimony nowhere suggests the issue presented. All the testimony shows the shots were fired rapidly, and that it was a continuous transaction; hence the charge presented an issue justifying defendant's conviction for manslaughter not raised by the testimony. Under the charge the jury were justified in finding, as they did, for manslaughter, notwithstanding they might have believed that the first shot produced the death, and that it was fired in self-defense. It is no offense to fire an additional shot, if death resulted from the first shot. Besides the court does not present in his charge to the jury the converse of the proposition. It was a charge upon weight of evidence, and calculated to

lead the jury to the conclusion that the court was of the opinion that appellant was at least guilty of manslaughter because he had fired some eight or nine shots. *Clark v. State*, 56 Tex. Crim. Rep. 296, 120 S. W. 179; *Smith v. State*, 57 Tex. Crim. Rep. 455, 123 S. W. 701; *Duke v. State*, 61 Tex. Crim. Rep. 19, 133 S. W. 433; *Jones v. State*, 44 Tex. Crim. Rep. 408, 71 S. W. 962; *Swain v. State*, 48 Tex. Crim. Rep. 98, 86 S. W. 335; *Best v. State*, 61 Tex. Crim. Rep. 554, 135 S. W. 581; *Foster v. State*, — Tex. Crim. Rep. —, 148 S. W. 583.

"This charge authorized appellant's conviction for manslaughter if he fired a shot after Manning's death, even though the first shot was fired in self-defense. It is no offense to fire a shot into the body of one who has expired. If this was true, he would be guilty of manslaughter if he went now and fired into the body of deceased. That he fired after the death of deceased is receivable as evidence only for the purpose of arriving at the motive with which he fired the first shot. There being no question of an abandonment of the difficulty on the part of the deceased, and all the evidence showing that it was a continuous transaction, we submit, if the first shot was in self-defense, that all were in self-defense, and that it was error to permit his conviction for manslaughter under the terms of this charge.

"The judge writing the opinion infers that appellant fired shots after deceased was upon the ground, whereas, all of the testimony is to the contrary. The doctor used by the state testified that all of the shots were straight in, with the exception of two, and that they ranged slightly downward. He could not even approximate the degree of the range; and defendant, the only eyewitness, testified that all shots were fired before deceased fell. A minute description is given in the opinion as to how long it took to operate the gun, for the purpose, we presume, of destroying the idea that it was a continuous transaction. The evidence upon this point is that it was a four-arm rifle, one of those rifles that works with a slide, that you did not have to throw it back and forth like an ordinary Winchester, but that you could shoot it as fast as you could work the trigger. Appellant testified that it was a repeating Remington, four-arm rifle, and that he could shoot it as rapidly as he could work his hand, and that he did not shoot after Manning fell. Miss Maud Layton testified that she heard the shots, and it went just like firecrackers. This was all the testimony as to how the shots were fired, and we submit that it

showed a continuous transaction, without ceasing or interruption, and if so, and the first shot was fired in self-defense, all were fired in self-defense. The testimony does not suggest the idea of an abandonment of the difficulty, or of a cessation of the shooting, and the same is in line with the opinion by Judge Harper in the case recently decided, wherein he held that the shots were a continuous transaction.

"Taking the case upon the whole, each of the questions discussed, appellant is entitled to a reversal."

Replication to dissenting opinion.

In complete reply to the brief and argument of Messrs. King & King, appellant's attorneys, made the dissenting opinion herein, the stenographer is hereby directed to give, immediately following this, the brief and argument of Hon. C. E. Lane, Assistant Attorney General, and Messrs. Blount & Strong, in behalf of the state, citing and quoting the authorities as given by them.

Prendergast, Judge.
Harper, Judge.

The said brief and argument of Hon. C. E. Lane, Assistant Attorney General, and Messrs. Blount & Strong for the state, is:

"(1) In view of the fact that the opinion affirming this case so thoroughly and completely disposes of every question raised by appellant, we really deem it unnecessary to file a reply to the motion for rehearing filed herein; but, in view of the fact that the opinion of affirmance is not concurred in by all members of the court, we desire to cite a few additional authorities.

"Attorneys for appellant in presenting the motion for rehearing seem to have a misconception of the purpose for which the testimony of the witness Bill Lee was introduced by the state. They seem to be laboring under the impression that this testimony was introduced by the state for the purpose of showing that the brother of defendant was undertaking to tamper with the witness Bill Lee, and to corruptly influence him to testify falsely in behalf of defendant, and all the authorities cited in the motion for rehearing are cases of this character, and, in our judgment, do not touch the real question presented. As stated by the court in its opinion affirming this case, such was not the purpose of the testimony, and there is nothing in the testimony that could possibly lead the jury to believe that such was the purpose,—the only purpose for which the testimony was offered, and for which it could

be possibly used by the jury, was to show the interest and bias of the witness Phillip Burnaman in behalf of his brother, the defendant, and the trial court so stated to the jury when the testimony was admitted, using this language: 'It only goes to the credibility of the witness.' We are aware of the rule that the trial court can only charge the jury in writing, yet, in passing upon the proposition of whether or not the jury probably used this testimony for any other purpose to the detriment of the defendant, and especially in the absence of a requested special charge to limit this testimony, we believe the court is authorized to consider this, because under the authorities, in the absence of a special charge, it must, at least, reasonably appear that the jury, in all probability, did use the testimony improperly against the defendant. That this testimony was clearly admissible to show the interest and bias of the witness Phillip Burnaman, and that, too, without laying a predicate, we call the court's attention to the following additional authorities: Earle v. State, — Tex. Crim. Rep. —, 142 S. W. 1181; Pope v. State, — Tex. Crim. Rep. —, 143 S. W. 611; Sexton v. State, 48 Tex. Crim. Rep. 498, 88 S. W. 348; Warren v. State, 54 Tex. Crim. Rep. 448, 114 S. W. 380; Lowry v. State, 53 Tex. Crim. Rep. 562, 110 S. W. 911; Burnett v. State, 53 Tex. Crim. Rep. 515, 112 S. W. 79; Clark v. State, — Tex. Crim. Rep. —, 43 S. W. 522; Sue v. State, 52 Tex. Crim. Rep. 129, 105 S. W. 804; Renn v. State, — Tex. Crim. Rep. —, 143 S. W. 167; Burnam v. State, — Tex. Crim. Rep. —, 148 S. W. 757; Sims v. State, — Tex. Crim. Rep. —, 45 S. W. 705; Tow v. State, 22 Tex. App. 175, 2 S. W. 582; Porch v. State, 51 Tex. Crim. Rep. 7, 99 S. W. 1122.

"In the case of Tow v. State, above cited, Judge Willson, speaking for the court, says: 'After she (Mrs. Cowan) had testified on the trial, the defendant offered to prove that about two hours before the homicide she said that she made her son, James Cox (the deceased), clean up the shotgun and load it with twelve buckshot in each barrel, and told him if defendant came on her premises to kill him. This proposed evidence, upon objection made thereto by the state, was rejected. This ruling of the court was erroneous. If for no other purpose, the offered evidence was competent to disclose the unfriendly state of the witness's feeling towards the defendant, and the malignant character of such feeling. It is always competent to show the animus, the state of feeling of the witness toward the party against whom such witness testified, and in such exam-

ination great latitude is allowed.' See Tow v. State, 22 Tex. App. 175, 2 S. W. 582."

We call the court's attention to the fact that no predicate was laid before offering to prove these declarations of the witness Mrs. Cowan. The court holds such declarations admissible as independent and original testimony to show bias, interest, etc.

"In the case of Clark v. State, above cited, Judge Hurt, speaking for the court, says: 'It appears by bill of exceptions No. 6 that appellant introduced one Peter King, a negro, who testified to material facts for the defendant. Counsel for the state, on cross-examination, asked the witness "if he did not, during the trial of this case, go to Jonas Williams (a negro witness for the state), and offer to give him \$10 for the purpose of paying a fine assessed against Williams's daughter, at Scurry, Texas, if he (Williams) would not testify against him (King) at this trial?" King replied that he did not do so. Afterwards Jonas Williams was placed on the stand, and testified that Peter King had offered him \$10, etc. Appellant objected to this testimony, and the court overruled the objections, and defendant excepted. This evidence was clearly admissible. Its object was to show the interest and anxiety of Peter King in behalf of appellant. The jury had a right to know what his feeling and interests were, so as to pass upon the credit to be given to his evidence. It was that character of testimony that would not be used by the jury for any other purpose than as going to the credit of Peter King.' See Clark v. State, — Tex. Crim. Rep. —, 43 S. W. 522.

"In the case of Sexton v. State, above cited, this court, in an opinion delivered by Judge Davidson, held that it was permissible to elicit from a witness for defendant 'that she (the witness) had lived in adultery, with the defendant for five or six years,' and that she knew the 'defendant had a living wife and child while she was living with him in adultery' for the purpose of showing her motive and bias in the case then on trial for swindling of defendant, and the friendship and close relation to the defendant, and the opinion does not show that this testimony was limited to the purpose for which it was introduced.

"In the case of Burnett v. State, above cited, Judge Ramsey, speaking for the court, says: 'There can be, we think, no doubt that it is always permissible, in every case where it can be shown by competent evidence, to make proof of the hostile attitude of any witness in respect to any party or any cause before the court. Such evidence is clearly admissible for the

purpose of affecting the credibility of witnesses and the weight of their testimony. 2 Enc. Ev. 406; *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816; *Watts v. State*, 18 Tex. App. 381. See 53 Tex. Crim. Rep. 516, 112 S. W. 79.

"In the case of *Porch v. State*, 51 Tex. Crim. Rep. 11, 99 S. W. 1122. Judge Brooks, speaking for the court, says: 'Of course, it is a well-known rule of law that declarations and acts of witnesses out of the presence of appellant cannot bind appellant; but this rule has its qualifications. Declarations of witnesses who testify for the state or defense, which show their bias, prejudice, or favoritism, may be introduced for the purpose of showing said bias, prejudice, or favoritism.' See *Porch v. State*, 50 Tex. Crim. Rep. 335, 99 S. W. 102.

"In the case of *Renn v. State*, above cited, this court, speaking through Judge Harper, in a very able and well-considered opinion, upon the identical question here involved, after citing numerous authorities in support of his position, and that of the majority of the court, quotes with approval the following from *American & English Enc. of Law*, vol. 30, p. 1102: 'Disparaging evidence of matters otherwise collateral may be received when it tends to show the temper, disposition, or conduct of the witness in relation to the cause or parties; and not only is this evidence admissible on cross-examination of the witness, but other witnesses may be questioned by the opposite party in relation thereto'—citing authorities. This case is not only directly in point on the admissibility of this testimony, but also directly in point on the proposition that it was not necessary to lay a predicate before same was admissible.

"In the case of *Sue v. State*, 52 Tex. Crim. Rep. 129, 105 S. W. 808, the court, speaking through Judge Brooks, on the admissibility of this character of testimony, says: 'Bill of exceptions No. 43 shows that while the witness Dr. Shields, for the state, was on the stand, the following questions were propounded to him by the state: "State whether or not the witness John Daniels, a witness for the defendant, had told him, Shields, in the town of Winsboro, about six months ago, if he, Shields, would assist him, Daniels, in testifying that the malt corn hauled to Shield's mill by the witness Daniels belonged to the witness J. S. Warren, that they would send the old scoundrel, meaning him, Warren, to the penitentiary." Appellant objects to same because the same is irrelevant and immaterial, and was an attempt by the state to impeach the witness Daniels

upon an immaterial issue, and had no connection whatever with this case, and throws no light whatever upon same. This testimony was pertinent, in that it showed animus on the part of the defense's witness Daniels against the state, and favoritism on his part to the appellant.'

"The court, in the same case, upon the question of limiting testimony of this character, says: 'Bill No. 45 complains that the court erred in its failure and refusal to limit the testimony of the witness Alex Brice, wherein he testified that the defendant's witness Will Lemmons had said to him, on the 8th or 9th of January, 1907, at Perryville, Texas, that the state in this case is up against a hard proposition, as the defendant's attorney and his Uncle John Nixon and he, Lemmons, were all working for the defendant in this case, and that this was a hard proposition for the state to go up against. This testimony could not possibly have been used for any other purpose. Therefore, it was not necessary to limit the same [citing numerous authorities].' 'When testimony could not be legitimately or rationally used for any other purpose, it is not error to refuse to limit same for that purpose.'

"In the recent case of *Burnam v. State*, — Tex. Crim. Rep. —, 148 S. W. 759, this court, speaking through Judge Harper, in passing upon the admissibility of this character of testimony, says: 'In bill No. 6 it is complained that the state was permitted to ask Myrtle Lindsenby, a witness for defendant, if Jim Burnam, an uncle of defendant, had given her a pair of shoes. If it was a question of whether or not Jim Burnam had attempted to bribe the witness, the defendant not being connected with it, it would, perhaps, have been inadmissible, but the objections were that it was calculated to prejudice defendant with the jury, and to impeach the testimony of the witness. The relations existing between the parties, the state of their feelings, their bias and prejudice, have always been held to be admissible; and, if the testimony was adduced to show the relation existing between the Burnam family and the witness, it would be admissible for that purpose. *Earle v. State*, — Tex. Crim. Rep. —, 142 S. W. 1181, and *Pope v. State*, — Tex. Crim. Rep. —, 143 S. W. 611.' It does not appear that any predicate was laid before this testimony was offered, but same was offered as original and independent testimony, to show the bias and interest of the material witness for the defendant. It does not appear, either, that this testimony was limited for the purpose for which it was introduced.

"Mr. Branch in his Criminal Law, in discussing the admissibility of this class of testimony (§ 461, p. 545), says: 'The motives which operate upon the mind of the witness when he testifies are never regarded as immaterial or collateral matters. A party may prove declarations of witnesses which tend to show bias, interest, prejudice, or any other material state or status which, fairly construed, might tend to affect his credibility [citing the following authorities in support of this proposition: *Mason v. State*, 7 Tex. App. 623; *Sager v. State*, 11 Tex. App. 111; *Bonnard v. State*, 25 Tex. App. 195, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462; *Bennett v. State*, 28 Tex. App. 540, 13 S. W. 1005; *Green v. State*, 54 Tex. Crim. Rep. 7, 111 S. W. 933; *Gelber v. State*, 56 Tex. Crim. Rep. 462, 120 S. W. 863; *Reddick v. State*, — Tex. Crim. Rep. —, 47 S. W. 993].' These authorities conclusively settle the proposition that this testimony was clearly admissible for the purpose of showing the bias and interest of the witness Phillip Burnaman, who was a very material witness for appellant.

"(2) We feel that we should apologize to the court for further burdening the record in this case, and we would not do so but for the fact that counsel for appellant, after this case was submitted on motion for rehearing, requested time of the court in which to file an additional brief, and, as we understand, were granted by the court until the 11th of the present month (June) to do so. No additional argument was filed by that date; hence if one is filed, we will not have an opportunity, probably, to see it before this case is finally disposed of.

"We have carefully re-read the motion for rehearing filed in this case, and most of the authorities cited therein, and, after doing so, we are still convinced, as we were when this case was originally submitted, that there is not a serious question raised by the record in this case, and it strikes us that counsel for appellant are rather seeking to drive this court to a retraction of the original opinion of affirmance by constant insistence rather than by citation of authority in support of their contention.

"In our reply to the motion for rehearing, we devoted most of same to argument and citation of authorities that the testimony of the witness Lee as to what the witness Phillip Burnaman said to him was admissible for the purpose of showing the bias and interest of said witness. We did this for the reason that counsel for appellant seemed to rely principally upon the inad-

missibility of this testimony for a reversal of this case. We believe the authorities cited by the court, and in this reply on this proposition, have even convinced counsel for appellant that this testimony was admissible for that purpose.

"In view of the fact that we are not apprised of just what the 'additional argument' of counsel will be, we desire to refer, in a brief way, to the assignment of error that this testimony should have been limited by the trial court.

"Mr. Branch, in his Criminal Law (§ 366), states the rule with reference to limiting testimony as follows: 'If impeaching testimony could be used by the jury for purposes other than impeachment, so as to exercise a strong, undue, or improper influence with the jury as to the main issue, injurious and prejudicial to defendant, the charge must limit it so that no unwarranted results would ensue [citing numbers of authorities].'

"Judge Brooks, in the case of *Sue v. State*, 52 Tex. Crim. Rep. 122, 105 S. W. 804, lays down the rule as follows: 'When testimony in a trial for murder could not have been legitimately or rationally used for any other purpose than that for which it was used, there was no error in failing to limit the same to that purpose.' This rule is cited with approval in the case of *Wright v. State*, 56 Tex. Crim. Rep. 358, 120 S. W. 458.

"Now the court will notice, in the rule laid down by Mr. Branch and approved by this court, that the testimony must be such, if not limited, that it could exercise a strong, undue, or improper influence with the jury as to the main issue, injurious and prejudicial to defendant. Under this rule the court must conclude from this record that the testimony of the witness Lee could legitimately and rationally be used by the jury to exercise a strong, undue, or improper influence with the jury in finding appellant guilty of the offense with which he was charged. That is, that it was such testimony that the jury would probably use, if not limited, to establish the fact that appellant unlawfully killed deceased; and, in passing upon this proposition, this court must presume that the jury who tried this man was at least of average intelligence, and had some regard for the oath administered to them and the charge of the court delivered to them.

"The testimony of the witness Lee, in effect, was 'that Phillip Burnaman came to him on two different occasions, and told him that they ought to get together on what appellant said to them just after the killing, as they would soon have to go to

court,' and then repeated what he (Phillip) understood appellant to say on that occasion, and the only reply made by the witness Lee was that he expected to tell the truth about the matter. This certainly does not show an attempt on the part of Phillip Burnaman to bribe the witness Lee, but it shows, not only a great interest on the part of Phillip in his brother, but a strong bias in his favor. This does not fall in the class of cases cited by appellant at all. All those cases are where the friends and relatives had undertaken to improperly or corruptly influence the witness. Can it be said that there was anything in the conversation between the witness Lee and Phillip Burnaman that tended in any way, or could have been used in any way by the jury, to establish the guilt of appellant for unlawfully killing deceased, which was the main issue to be established? Can it be said, from the mere fact that Phillip Burnaman was a brother of appellant, and had this conversation with the witness Lee, that an intelligent jury would presume that appellant was responsible for the conversation, and would therefore override the charge of the court and send this man to the penitentiary on presumption instead of evidence? Juries in Texas are ordinarily men of average intelligence, of at least sufficient intelligence to understand and regard their oaths; and, as said by Judge Brooks in the Wright Case, supra: 'It is utterly irrational to presume that a sworn jury would disregard their oaths and convict a man of murder on the theory that they thought he had committed burglary.' Outside of showing the interest of the witness Phillip Burnaman, what occurred between him and the witness Lee was favorable to appellant, for Phillip stated on that occasion just what he testified to in the case, which was favorable to defendant, and it therefore tended to corroborate Phillip's testimony, because it showed that he was making the same statement the day after the killing that he made on the trial. The witness Lee made no statement as to how he understood the matter; therefore the naked fact that Phillip had this character of conversation with Lee is the one thing that appellant claimed that the jury could use to his disadvantage, and in order for this case to be reversed, this court must determine that an intelligent jury, duly sworn, did permit this fact to exercise a strong, undue, or improper influence in determining the guilt of appellant of manslaughter. To our minds, if the court will pardon the expression,

it is absolutely absurd to impute to a jury any such want of common sense, and would, indeed, be going far into the field of imagination and speculation, and would write into the jurisprudence of this state a precedent, if followed, that would result in the improper reversal of many cases.

"The case of Clark v. State, — Tex. Crim. Rep. —, 43 S. W. 522, is a case, in our judgment, disclosing facts which were much more calculated to injure the rights of appellant than the facts of the case at bar, and we desire to call the court's special attention to the opinion of Judge Hurt in this case, as follows: 'It appears by bill of exceptions No. 6 that appellant introduced one Peter King, a negro, who testified to material facts for the defendant. Counsel for the state, on cross-examination, asked the witness "if he did not, during the trial of this case, go to Jonas Williams (a negro witness for the state), and offer to give him \$10 for the purpose of paying a fine against Williams's daughter, . . . if he (Williams) would not testify against (we construe this to mean contrary) him (King) at this trial." King replied that he did not do so. Afterwards Jonas Williams was placed on the stand, and testified that King had offered him \$10, etc. Appellant objected to this testimony, and the court overruled the objections, and defendant excepted. This evidence was clearly admissible. Its object was to show the interest and anxiety of Peter King in behalf of appellant. The jury had a right to know what his feeling and interests were, so as to pass upon the credit to be given his evidence. It was that character of testimony that would not be used by the jury for any other purpose than as going to the credit of Peter King.' Certainly, if the testimony set out above in the Clark Case, which was offered to show the interest of a defendant's witness, should not have been limited by the court to the purpose for which it was offered, it will require no further argument that the testimony in the case at bar was not that character of testimony requiring, at the hands of the court, a charge limiting same.

"In our reply to the motion for rehearing heretofore filed, we referred to and quoted from the case of Sue v. State, 52 Tex. Crim. Rep. 122, 105 S. W. 807, 808, and we desire here again to call the court's particular attention to this case, and the authorities cited therein by Judge Brooks, on the question of it not being necessary to limit testimony of this character. As heretofore stated, this court, to grant this

motion for rehearing, must be convinced that the jury permitted this testimony to exercise a strong, undue, or improper influence as to the main issue, and that they could legitimately and rationally use it for that purpose, and in this connection we call the court's special attention to the fact that the record shows in this case that, at the time the trial court admitted this testimony, he stated, in the presence and hearing of the jury, the specific purpose for which it was admitted, and while we understand that charges in felony cases to a jury must be in writing, yet we submit, in passing upon the proposition as to whether or not the failure to limit this testimony did cause the jury to permit same to exercise an improper influence on them in the consideration of the case, that this court can and should take into consideration this statement of the trial court at the time he admitted the testimony, for the reason that it absolutely destroys the proposition asserted by appellant that the jury did use this testimony for some other purpose than that for which it was admitted.

"Judge Brooks, while on the bench, rendered an opinion in which he held that a verbal declaration of this kind could and should be taken into consideration in passing upon the proposition as to whether appellant was probably injured by the failure to limit testimony. The writer of this read this opinion within the last two weeks, but we have so far been unable to put our hands on it again, and therefore will be unable to cite it; but, without reference to this opinion by Judge Brooks, it seems to us to be a sound proposition of law that this court is fully authorized to take into consideration the entire record in the case in passing upon this matter.

"No special charge was requested by appellant limiting this testimony, and this court has repeatedly held, in the absence of a special charge, that it must be apparent that injury was done the defendant by failure of the court in its main charge to charge on any particular phase in the case.

"In addition to the authorities cited above, and those cited in our reply to the motion for rehearing heretofore filed, we call the court's attention to the following additional authorities: *Blanco v. State*. — Tex. Crim. Rep. —, 57 S. W. 828; *Waters v. State*, 54 Tex. Crim. Rep. 327, 114 S. W. 628; *Wright v. State*, 56 Tex. Crim. Rep. 358, 359, 120 S. W. 458; *Treadway v. State*, — Tex. Crim. Rep. —, 144 S. W. 655; *Harrelson v. State*, 60 Tex. Crim. Rep. 46 L.R.A.(N.S.)

534, 132 S. W. 783; *Branch, Crim. Law*, § 873, p. 555, last subdiv.

"We submit that this court cannot reasonably arrive at the conclusion that the jury in this case could legitimately and rationally use this testimony in establishing the main issue, and that said testimony did exercise a strong, undue, or improper influence with the jury for said purpose, and therefore there was no error in failing to limit said testimony. Certainly none in the absence of a requested special charge.

"We submit that the appellant in this case, from the record before this court, has had a fair and impartial trial at the hands of an intelligent jury, that his punishment is indeed lenient for the crime committed, and that the motion for rehearing should, we earnestly insist, under the authorities, be overruled.

"(3) That the trial court properly charged on defendant's right to continue to shoot so long as it reasonably appeared to him that he was in danger, etc., we cite the following additional authorities: *Clark v. State*, 56 Tex. Crim. Rep. 295, 120 S. W. 179; *Smith v. State*, 57 Tex. Crim. Rep. 455, 123 S. W. 698; *Swain v. State*, 48 Tex. Crim. Rep. 104, 86 S. W. 335; *Branch, Crim. Law*, § 452, p. 278. Under these authorities—in fact under the unbroken line of decisions in this state—it would have been reversible error under the facts in this record for the trial court to have failed to have given the charge which was given on the right of defendant to continue to shoot so long as it reasonably appeared to him that he was in danger.

"On the proposition that the trial court properly charged the jury in this same paragraph of his charge that defendant did not have the right to continue to shoot after the danger ceased, as viewed from his standpoint, we call the court's attention to the opinion of this court, speaking through Judge Harper, in the case of *Renn v. State*, — Tex. Crim. Rep. —, 143 S. W. 167. It is certainly an elementary proposition of law that defendant has not the right to continue to shoot and inflict wounds that hasten or contribute to the death of the deceased after the danger has ceased, as viewed from his standpoint, and this is what the trial court told the jury in the case at bar, and the trial court only instructed the jury on this phase of the law in connection with his charge presenting one phase of manslaughter.

"If the trial court had not given the latter part of the paragraph of the charge on this subject, as follows: And if such

first shot was fired in self-defense, and defendant fired other shots into the head or body of deceased, thereby producing or hastening the death of deceased, when it no longer reasonably appeared to him that he was in danger, then such later shots could not be in self-defense; but the offense in such event would be no higher than manslaughter,—the jury might have found from the evidence that the first shot was fired in self-defense, but that other shots which hastened or contributed to the death of deceased were fired not in self-defense, and have found the defendant guilty of murder in the second degree; hence it was incumbent upon the trial court to give the portion of the charge above quoted. But in justice to the state, the court should have required the jury to find that the ingredients of manslaughter existed at the time of the firing of the last shots, before they would be justified in reducing the offense to manslaughter, but instead of so doing he simply charged the jury that under such circumstances defendant could be guilty of no higher offense than manslaughter, and certainly the defendant cannot complain at this charge, as it was presenting one phase of the case raised by the facts in a most favorable light to him. We therefore submit that there is nothing in the contention of appellant on this charge."

Petition for rehearing denied June 25, 1913.

UTAH SUPREME COURT.

COMMERCIAL NATIONAL BANK, Reapt.,
v.

DAVID ECCLES et al., Appts.

(— Utah, —, 134 Pac. 614.)

Party wall — easement — effect of injury to wall.

An easement in a party wall is not destroyed by the destruction by fire of the owner's building, which so weakens the wall that it cannot be used for the purposes

Note. — Party wall: effect of destruction of building to terminate adjoining owner's easement of support.

The earlier cases upon this subject are collected in the note to *Bowhay v. Richards*, 19 L.R.A.(N.S.) 883.

Upon the theory that when a party wall is destroyed by fire, lapse of time, or otherwise, in the absence of a contract for rebuilding it, the easement therein is at an end, it was held in *Fewell v. Kinsella*, — Tex. Civ. App. —, 144 S. W. 1174, that 46 L.R.A.(N.S.)

desired by the owner, if it remains sufficient for the purposes of the easement; but the owner must, if he desires to replace it, protect the rights of the owner of the easement and reconnect his building with the new wall.

(Frick, J., dissents.)

(June 7, 1913.)

APPEAL by defendants from a judgment of the District Court for Weber County in plaintiff's favor in a suit to enjoin the removal of a wall in which plaintiff claimed an easement. Affirmed.

Statement by McCarty, Ch. J.:

This action was originally commenced against David Eccles, S. T. Whitaker, and Roy Sheedy to enjoin them from tearing down and removing a certain stone and brick wall situated along the south of defendant Eccles' land, which constituted the north boundary of the land and building owned by the plaintiff. During the pendency of the action on this appeal, David Eccles died, and the cause is continued in the name of his administrator. For the purpose of brevity and convenience, the name of Eccles will be used in this opinion, instead of the administrator. It appears from the record that the other defendants have no interest in the subject-matter of the action other than as employees of the defendant Eccles; hence further reference will not be made to them.

The findings of fact made by the trial court, all of which are within the issues, are, so far as material here, as follows:

"(2) That the defendant David Eccles is the owner and in possession of the following described real property situated in Ogden City, Utah, to wit: A part of lot seven (7), block twenty-five (25), plat 'A,' Ogden City survey, and further described as beginning at the northeast corner of said lot seven (7), running thence south along the west boundary of Washington avenue 71.80 feet to the," etc.

"(3) That the plaintiff, Commercial National Bank of Ogden, was and is the owner and holds the title to certain lands lying

where one party tears down a building in order to erect another, and where because of the dangerous character of the wall, that is also removed by order of the city council, and the other party thereupon builds a new wall wholly on his own premises, the former party has no easement of support therein and may be prevented from using the same.

And in *Ebert v. Mishler*, 234 Pa. 609, 83 Atl. 596, where the chief controversy arose over rights in a common alley, it appears that adjoining buildings resting upon a party wall were accidentally destroyed by

south of the land of the defendant, and that between such lands so owned by the plaintiff and the south boundary of defendant's land described in finding of fact No. 2 there is an intervening irregular strip of land which the plaintiff purchased from the defendant David Eccles in the year 1903, and paid to said defendant for said irregular strip of land the sum of \$1,894, and upon said strip of land the north side of the plaintiff's building was constructed and is situated.

"(4) That along the south boundary of the premises described in the second finding of fact there is a stone foundation and a brick wall upon said foundation extending upward from the ground three stories; that said foundation is 36 inches thick, that the first story of said brick wall is 32 inches thick, and the two upper stories are 28 inches thick. That the said wall is situated wholly upon the said ground belonging to the defendant David Eccles.

"(5) That the plaintiff constructed its building upon its land immediately south of the said land of the said defendant David

Eccles in the year 1903, and at that time, for the sum of \$634.67 paid to the said defendant, the plaintiff purchased and became the owner of an easement in the foundation and brick wall situated along the south boundary of said defendant's premises from the basement to the center of the sills of the third story, and the said plaintiff has used said wall for the support and maintenance of its building situated on its said premises from the time of the construction of the same. That no interest in the wall and foundation other than the easement aforesaid, and no interest in the lands upon which said wall stands, was purchased by the plaintiff from the defendant.

"(6) That the joists supporting the roof and different floors of plaintiff's building situated upon its said land along the north side thereof rest upon and are supported by the wall on the south boundary of said defendant's land, and the steam and water pipes attached to and as a part of plaintiff's building are now attached to and placed in said wall, and were placed there at the time of its construction under the

fire, and one party thereupon removed his half of the wall which was left standing after the fire and used the material therefrom in re-erecting his building wholly upon his own land; and it is said that in the absence of any agreement for the restoration of the wall, neither party may call upon the other for its restoration, but that the easement in the wall ceases and either may dispose of his portion of the premises as he pleases; the party wall having been obliterated, either party has the right to decline to rebuild, or he may rebuild upon his own lands without reference to the former rights in the wall; and one party having rebuilt wholly upon his own lands, the other party, if he desires to rebuild, must likewise erect wholly upon his land.

But it seems that if one party rebuilds the wall, not wholly upon his own premises, but as a party wall, the easement of the other party therein will revive.

Thus, under a deed of a parcel of ground, directing the grantee to erect thereon a building with a party wall for the use of both parties, and reserving to the grantor a perpetual easement in such wall, such easement not being confined to the use of the wall first erected, but being a continuing right which applies to any wall so erected by the grantee, when buildings constructed pursuant to such stipulation with a party wall are accidentally destroyed by fire, so long as the grantee has no building on his lot, the easement of the grantor in the wall is in abeyance; but when the grantee rebuilds, the easement is revived. Accordingly, while the grantor may not compel the grantee to rebuild in order that the former may again have the use of the wall, yet whenever such grantee does rebuild, he is under obligation to prepare the wall at

his own cost for the use of the grantor, and the latter cannot be compelled to bear any portion of the expense of such preparation. *Frisbie v. Bigham Masonic Lodge*, 133 Ky. 588, 118 S. W. 359.

It will be observed that it is held in *COMMERCIAL NAT. BANK v. ECCLES*, that the mere destruction by fire of a building which so weakens the party wall that it cannot be retained and used as a support for the kind of building which the owner contemplates constructing in place of the one destroyed, but which does not interfere with the support given to the other party, does not terminate the easement of the latter therein; and if the owner of the burned building removes such wall, he must replace it with one which will afford the same support to the other party.

Similarly, it was held in *Lexington Lodge v. Beal*, 94 Miss. 521, 49 So. 833, that the accidental destruction by fire of one building resting upon a party wall, leaving the adjoining building intact and leaving the wall reasonably safe as a support for that building, at least with a moderate degree of re-enforcement, but leaving the wall incapable of supporting the new building contemplated by the owners of the one destroyed does not give the adjoining owner the right, by refusing permission to the other to tear down and rebuild, to compel the latter either not to build again or to build only such a structure as the wall remaining may suffice to support; the owner of the burned building, has the right to tear down the insufficient or dangerous party wall and replace it with a stronger and better one, provided he gives to the adjoining building the same support as it had in the old wall.

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rights granted to plaintiff by the said defendant, and that the said wall, together with the openings for the joists and other supports and for the placing the steam and water pipes therein, are necessary for the support of plaintiff's said building, and are a part of said building, and the rights to have the joists and other supports, steam and water pipes, placed in the north wall of said defendant's building belong to and are a part of the rights belonging to plaintiff's easement in and to said wall.

"(7) That at the time of the construction of plaintiff's building on its said premises, and prior thereto, and since that date, up to and including the 15th day of November, 1911, there was situated upon the premises of the defendant David Eccles a five-story brick and stone building with a basement, and that the said building was on said 15th day of November, 1911, partially destroyed by fire, but that the walls of said building were left standing, and that the south wall was and is sufficient and ample for the support and maintenance of the plaintiff's building as constructed on its said premises.

"(8) That the said five-story building on the lands of defendant has been twice wholly destroyed by fire, so that the walls alone were left. That by reason of the action of said fires and the elements thereof said south wall has been so impaired and damaged that it is insufficient upon which to safely rebuild or to support such a building as was formerly situated and supported on defendant's land, and that same is insufficient to support such higher modern building as defendant proposes to erect on his land.

"(9) That the plaintiff's building has no other or additional support along its north side, save the support of the said wall, and that the taking out and removing of said wall would cause the plaintiff's building to fall and become a mass of ruins.

"(10) That the said defendant David Eccles is desirous of and intends to construct a new and more modern building upon his said land, and that the said south wall of said building is insufficient in its present condition to support the building which the said defendant contemplates and is desirous of and intends to construct upon said premises, and that the said wall cannot be made sufficiently strong to support the contemplated building without great expense and without reinforcing same by taking additional space of the said defendant's premises, and for that reason the said defendant desires to remove and tear down the present wall along the south boundary of his said premises to make

room for and permit the construction of the new building as aforesaid.

"(11) That prior to the institution of this action the said defendant David Eccles served written notice upon the plaintiff of his intention to tear down and remove said wall,—but without offering any easement or support in the new wall which he proposed to construct, or any protection or support to the plaintiff's premises by reason of the removal of said wall,—and maintained and contended that the said plaintiff had no right or interest in the present wall, and should have no right or interest in the wall to be constructed.

"(12) That all of said plaintiff's building is occupied by tenants, and that the Fred M. Nye Company hold the ground or first floor and basement under lease, and have therein an extensive and large stock of men's furnishing goods."

As conclusions of law the court found:

"(1) That the plaintiff is the owner of an easement for the support of its building in the present wall situated on the defendant's premises along the south boundary thereof, and that the said plaintiff is entitled to a like easement and support and right in the wall to be constructed by said defendant over and along the south boundary of his said premises.

"(2) That the defendant David Eccles is the owner of the said wall and the ground on which it has stood, subject only to the easement of support of the plaintiff in such wall, as stated in the findings of fact.

"(3) That said wall is insufficient to support another building of like kind as that destroyed, and insufficient to support such new and modern building as defendant proposes to erect, and that the defendant David Eccles is entitled to tear down and remove the wall situated along the south boundary of his said premises, exercising such due care and diligence in the prosecution thereof as will prevent injury to the plaintiff's premises.

"(4) That the said defendant will be required to replace said wall at his own expense with such new and stronger wall as will meet the requirements of his said new proposed building, and shall so construct the said wall so as to afford and give to the plaintiff the same easement, right, and support and use for its building in the said wall to be constructed as the plaintiff now has and enjoys in the present wall."

A judgment responsive to and supported by the foregoing findings of fact and conclusions of law was rendered in favor of plaintiff. The judgment, among other things, provides that "David Eccles is hereby permitted to remove the wall men-

tioned . . . at his own expense, with due care so as not to injure plaintiff's building; . . . and the said plaintiff is hereby adjudged and is hereby awarded the same rights, easement, and support in the wall to be constructed by said defendant David Eccles, and the south boundary of his premises, as plaintiff now has and enjoys in the present wall." To reverse the judgment, defendants appeal.

Messrs. Richards & Boyd and Boyd, DeVine, & Eccles, for appellants:

The destruction of a party wall for the purpose for which it was used during the easement attaching thereto ends the easement and all rights thereunder.

Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491; Heartt v. Kruger, 121 N. Y. 386, 9 L.R.A. 135, 18 Am. St. Rep. 829, 24 N. E. 841; Odd Fellows' Asso. v. Hegele, 24 Or. 16, 32 Pac. 679; Bonney v. Greenwood, 96 Me. 335, 52 Atl. 786; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Sherred v. Ciasco, 4 Sandf. 480; Fewell v. Kinsella, — Tex. Civ. App. —, 144 S. W. 1174; Bowhay v. Richards, 81 Neb. 764, 19 L.R.A.(N.S.) 883, 116 N. W. 677; Harber v. Evans, 101 Mo. 661, 10 L.R.A. 41, 20 Am. St. Rep. 646, 14 S. W. 750.

Messrs. Valentine Gideon and John G. Heywood, for respondent:

The right which plaintiff secured in that wall still existed and would exist in any wall that the defendant might construct along the particular strip of land, even had the entire wall been destroyed.

Frisbie v. Bigham Masonic Lodge, 133 Ky. 588, 118 S. W. 359.

A division wall may become a party wall, actual or presumed, although such wall has been built exclusively on land of one of the owners.

Brown v. Werner, 40 Md. 15; Bright v. Bacon, 131 Ky. 848, 20 L.R.A.(N.S.) 386, 116 S. W. 268; Brondage v. Warner, 2 Hill, 145; Heartt v. Kruger, 121 N. Y. 386, 9 L.R.A. 135, 18 Am. St. Rep. 829, 24 N. E. 841.

The judgment was correct.

Putzel v. Drovers & M. Nat. Bank, 78 Md. 349, 22 L.R.A. 632, 44 Am. St. Rep. 298, 28 Atl. 276; Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 833; Heine v. Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637; Evans v. Jayne, 23 Pa. 34; Dermott v. Fowler, 2 Hayw. & H. 124, Fed. Cas. No. 18,289; Field v. Leiter, 18 Ill. App. 155; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Martin v. Martin, 44 Kan. 295, 24 Pac. 418; Socher's Appeal, 104 Pa. 609; Richey v. Bues, 31 Utah, 262, 87 Pac. 903. 46 L.R.A.(N.S.)

McCarty, Ch. J., delivered the opinion of the court:

One of the grounds upon which appellants ask for a reversal of the judgment is that the findings of fact are not supported by the greater weight of the evidence. We do not deem it necessary to a clear understanding of the questions presented, for us to either review the evidence in detail or set forth the substance thereof. We think it is sufficient to here state that we have carefully examined the record; and, while we find that there is a conflict in the testimony of some of the witnesses on certain issues, we are of the opinion that the findings of fact are supported by a clear preponderance of the evidence. The wall in question is entirely upon the land of appellant Eccles, and, as found by the court, respondent has "no interest in the lands upon which said wall stands." There is much evidence, however, which tends to show that respondent purchased an interest in and became part owner of the wall up to the third story thereof. But since the court found that respondent acquired an easement only in the wall, and as respondent has not appealed or filed a cross assignment of errors, we shall, for the purposes of this appeal, assume that respondent acquired no greater property right in the wall than an easement.

The important question, therefore, is: Did respondent's right to an easement in the wall terminate when the wall was rendered useless to appellant Eccles by the destruction of his building of which the wall formed a part? The position of appellants on this question is clearly stated by their counsel in their printed brief as follows: The purposes of the wall were "to support mutually two buildings, one of five stories and the other (respondent's building) of two stories. The rights of the adjoining owners therein were mutual, a cross easement, each with the right to have its building supported. When from calamity or accident such wall became useless for either of these mutual purposes, the condition or relation ceases. The purposes were gone." And again they say: "The destruction of a party wall for the purpose for which it was used during the easement attaching thereto ends the easement and all rights thereunder." Respondent acquired by purchase from appellant an easement in the wall up to the third story thereof, and has used the same as the north wall of its building. The joists of respondent's building are fastened to and rest on the wall.

The authorities practically all agree that, where a party has acquired an easement of support in a party wall, the accidental de-

struction of the wall terminates the easement and extinguishes all rights arising thereunder. Therefore, if the wall in question had been rendered useless or unsafe as a support to respondent's building, or if it had been entirely destroyed by the fire, it might be argued with much force that such impairment or destruction terminated the easement. But this case does not fall within this well-recognized rule. Under existing conditions respondent's easement—property right—in the wall is just as valuable and available as a support to its building as it was before the destruction of appellant Eccles' building. The question therefore arises: May Eccles, because of the destruction by fire of his building, which so weakened the wall that it cannot be retained and used as a support for the kind of building he contemplates erecting on the site of the one destroyed, deprive respondent of its property, easement, in the wall, which furnishes the same support to its building as it did before the fire occurred? To permit Mr. Eccles to tear down the wall and remove this support from respondent's building, without requiring him, at his own expense, to erect another wall in its place, and thereby provide the same support for respondent's building as the present wall furnishes, would in effect be a confiscation of respondent's property.

It does not follow because the wall is unsafe as a support for the kind of building appellant Eccles intends to erect that he has the right to terminate respondent's easement of support therein for its building, and proceed to take down and remove the wall to the irreparable damage of respondent. That Eccles has the right to remove the wall and erect another in its stead suitable for the building he contemplates erecting no one will deny, but in doing so he is bound to use ordinary care to avoid injury to respondent's building, and to rebuild without unnecessary delay. *Putzel v. Drovers' & M. Nat. Bank*, 78 Md. 349, 22 L.R.A. 632, 44 Am. St. Rep. 298, 28 Atl. 276; *Lexington Lodge v. Beal*, 94 Miss. 521, 49 So. 833. In the case last cited the principle of law applicable to the case at bar is well illustrated in the following language: "Where one of the buildings supported by a party wall has been destroyed, and the wall itself has been so weakened as to be dangerous or insufficient as a support for the building which the owner of the destroyed building is about to erect, he has the right to tear down the insufficient or dangerous party wall, and replace it with one stronger and better, provided he gives to the adjoining house the same right of support as it had in the old one. He

is but exercising his legitimate rights of property. If it follows from this that the owner of the adjoining building will be put to inconvenience while the work of demolition and construction is going on, this is an unavoidable consequence attendant upon the adoption and use of party walls. It cannot be the law that the fortunate adjoining owner, whose building is not destroyed, and who may be content with the wall, although weakened or partially destroyed, can, by refusing to the co-owner, whose building has been destroyed, permission to tear down and rebuild the wall, compel him either not to build again or to build only such a structure as the wall remaining may suffice to support. . . . While the adjoining owner, whose building has been destroyed, and who wishes to tear down an insufficient or dangerous party wall, and rebuild, will be accorded this right, it must be exercised so as to work no avoidable injury to the owner of the adjoining building. He will be liable if the work is done negligently and damage to the co-owner results therefrom." See also 30 Cyc. 781, 782.

The judgment is affirmed, with costs to respondent.

Straup, J., concurring:

I concur. The plaintiff, for a valuable consideration, purchased an interest, not in defendant's building, but a portion of the south wall of his building five stories high. The portion of the wall in which such interest was purchased was but three stories high, and in length that of plaintiff's building. It was purchased to furnish the north wall for its building three stories high, and to support the north side of it. True, it purchased no interest in the soil. But the interest purchased in the wall and the purpose for which it was purchased necessarily gave the plaintiff an interest also in the soil upon which the wall rested, so long as it remained and was suitable for such purpose. Such interest was perpetual and unconditional. The defendant's building was injured by fire. The south wall was injured to such an extent as not to be sufficient, as found by the court, to support a building as was formerly supported on the defendant's land or such a building—ten or eleven stories high—as the defendant proposes and intends to erect. But that portion of the wall in which the plaintiff for a valuable consideration purchased an absolute and perpetual interest was not materially injured, and is sufficient to safely and properly support the plaintiff's building in the future as it did in the past, and for such uses and purposes is substantially as good now as it was before. That interest, that use, that purpose—the

thing bought, the thing sold and for which the plaintiff paid its money—was not destroyed or materially impaired. The plaintiff still has what it had bought and what the defendant had sold. That the wall was damaged or impaired for other purposes is the defendant's misfortune. The plaintiff is not to blame for that, nor should it be charged with it by compelling it to surrender that which it bought and paid for and still owns and possesses. Observations are made that the defendant should not suffer the whole loss occasioned by the accidental fire. Everyone under such circumstances must bear his own loss. What the plaintiff suffered in such respect it must bear. So, too, must the defendant. The plaintiff with respect to the question in hand suffered none, for it still has about all it had before the fire. That the defendant has not is his, not the plaintiff's loss. And for this reason do I see a distinction between the case here and one where had the wall been wholly destroyed or damaged, or that portion of it in which the plaintiff has an interest. For, in the latter, the interest of the plaintiff as well as that of the defendant would be destroyed or damaged. The thing in which they both had a common interest would no longer exist or be useful to either. But they had no common interest in the whole wall. The common interest was only to the extent of three stories and the length of plaintiff's building. That was all the defendant sold and all the plaintiff bought. Above or beyond that, the defendant granted, and the plaintiff acquired, no interest. The thing so bought and sold, and the purpose for which it was bought and sold, were unrestricted and unconditional. Of course, they had the right to make their own bargain; but that is the bargain made by them. So, above or below the third story, wind may blow and fire rage, but if they do not damage or impair what the defendant sold and granted, and what the plaintiff unconditionally bought and paid for and still possesses and enjoys, I see no reason why it should be compelled to surrender it because the defendant sustained a loss of property in which the plaintiff was given and had no interest whatever. Then it is also said that, if the plaintiff is permitted to use the new wall for the same purpose it used the old, it is granted or given something without consideration. Not so. It now has what it theretofore bought and paid for. The wall, for that purpose, is substantially as good now as it was before the fire. It, however, is not sufficient to support such a building as the defendant proposes and intends to erect. So the court, under its equitable powers, and as is proper, 46 L.R.A.(N.S.)

has given the defendant the right to remove it if he will erect another and give back to the plaintiff what he, by tearing down and removing the old wall, will take from the plaintiff. Thus, the surrender of what the plaintiff now has, and what it had theretofore bought of the defendant and now owns, possesses, and enjoys, is the consideration for requiring the defendant, if he takes down and removes the old wall, to erect a new one and give the plaintiff that right and interest in it which it owned, possessed, and enjoyed in the old wall at the time of its removal by the defendant. That is but equity, and is, I think, within the adjudged cases.

Frick, J., dissenting:

I regret my inability to agree with the conclusions reached by my associates. I cannot do so, for the reason that, if the judgment in this case becomes the settled law in this jurisdiction, much unnecessary litigation as well as much injustice must inevitably result between the owners of adjoining buildings, one of which, as in this case, is made uninhabitable through its destruction by fire. My associates base their conclusions entirely upon the one fact found by the court, that the wall in question was not entirely destroyed by the fire, but that a portion sufficient for the purposes of respondent was left standing, although such portion is entirely useless as a wall for the proposed building which appellant intends to erect, or for a building similar to the one that was destroyed. It is conceded upon all sides that the wall in question stands entirely upon the land of appellant; that the respondent never had nor now has any interest in the soil on which the wall rests; and that, if it has any rights whatever, it is merely an easement in the remaining wall, and nothing more. It is also conceded that appellant's building was accidentally destroyed by fire, and that the remaining walls are wholly insufficient to support another building, and are therefore practically useless to him. My associates also concede, stating the fact in their own language: "The authorities practically all agree that, where a party has acquired an easement of support in a party wall, the accidental destruction of the wall terminates the easement, and extinguishes all rights arising thereunder." In view of this concession, so frankly stated, I need not refer to the authorities upon the subject. They, however, seek to exclude this case from the consequences stated above, for the reason, they say, that the remaining wall is just as valuable and available as a support to its (respondent's) building as it was be-

fore the destruction of appellant Eccles' building. In this statement, therefore, is contained the theory upon which my associates approve the judgment of the court below. This theory, in my judgment, is wholly fallacious. By the enforcement of it the loss occasioned by the fire is placed wholly upon appellant, and the respondent is permitted to escape from the consequences thereof, although it is conceded that appellant's building, as such, and his walls for every purpose that he could use them for walls, are destroyed. Moreover, it is in effect held that, while respondent had a right or easement in the building that was destroyed by fire, it nevertheless has sustained no loss. From such holding it follows that if the wall in question had suffered greater destruction, or if it had been entirely destroyed, then respondent's rights or easement thereunder would have been extinguished. From this I am authorized to assume that if respondent had been so unfortunate as to have its building destroyed by the fire in question, or by another, it would have lost all right to join another building to any new building that appellant might choose to erect, but since it had the good fortune not to lose all, therefore it has lost nothing, and appellant must not only stand the whole loss, but in case he chooses to improve and use his own property by erecting thereon a suitable building he must yield a portion thereof to the use of respondent without any consideration whatever. I say without consideration; since it must be conceded that all respondent purchased was an easement in one of the walls of appellant's building, and when that building was destroyed the easement, in my judgment, was also destroyed. If this be true, how can respondent claim a right in an entirely different wall from that in which it purchased the easement? It seems to me that the fact which in my judgment is controlling is entirely overlooked. This fact is that respondent acquired an easement in a wall only while it was and continued to be a part of a building, and that when the wall from any cause over which the appellant had no control was so affected that it no longer was fit to support the building of which it was a part, so that the building ceased to exist, then the wall must also be held to have ceased to exist for the purposes of the easement. When, therefore, the building was destroyed, the wall for all practical purposes was also destroyed, and hence the easement, in the language of my associates, was extinguished.

If respondent desired to obtain an easement for all time in any building that ap-

pellant might erect in place of the old one, if that should be destroyed, it should have entered into a contract to that effect. Would anyone familiar with the record in this case seriously contend that the respondent could have obtained what my associates now hold it did obtain for the amount it paid for the alleged easement in the old wall, namely, an easement in a new wall which may continue for an indefinite period, or for so long as the building may last, and, if the old walls happen to continue to stand, that the easement would continue for all time?

But it is contended that, if respondent is not permitted to attach its building to the new one, it means a practical confiscation of its property rights in the remaining wall. This assumes that the respondent acquired a right in a wall which continued after it had been destroyed to such an extent that it could not longer be used as appellant's building, or as a part of any new one he might erect upon the ruins of the old. Respondent is thus given a right in a thing that has ceased to exist for the purposes contemplated by the parties when the easement was acquired, and has ceased to exist for every purpose except a pile of brick or stone and mortar which by accident, merely, is left large enough to answer the purpose of respondent, although it answers no other purpose whatever. The mere fact that the wall has to be removed by the wrecker, instead of having been consumed by the fire, cannot change its character either as a matter of fact or as a matter of law. Nor can any amount of words make that a wall which merely constitutes the *débris* of a ruined building. Neither was it contemplated by the parties that it should be so. The fact that the respondent now claims that the wall is sufficient for its purpose is the result of mere accident, and is not based upon any contractual rights. For the purposes of the easement the wall was destroyed when it no longer could be used as a part of appellant's building nor as a part of any building he might choose to erect. Had appellant wilfully destroyed the building, or torn it down for the purpose of erecting another, with the intention of preventing the respondent from using the wall, the conclusion reached by my brethren might be justified. Under the undisputed facts in this case the conclusion reached, in my judgment, is not only unsound, but it takes from one and gives to another that which the court has no right to take or grant. In my judgment adjoining owners should be permitted to make their own arrangements, if they can with respect to the

rights one may obtain in the property of the other.

The judgment should therefore be reversed and the action dismissed.

WASHINGTON SUPREME COURT.
(Department No. 1.)

STATE OF WASHINGTON, Resp.,
v.

CHARLES PRYOR, Appt.

(— Wash. —, 132 Pac. 874.)

Witness — credibility — hysteria.

To affect the credibility of a witness who testifies that instruments were used on her

Note. — Effect of insanity on competency of witness.

The early cases on this question are presented in the note to *State v. Myers*, 37 L.R.A. 423, and the present note is supplementary thereto, except that no attempt has been made in the present note to include cases of the class presented in the two last subdivisions of the early note, the same being reserved for future annotation.

STATE v. PRYOR appears to be the only reported case in which it was sought to show that the witness was suffering from hysteria at the time of the event testified to. Evidence to show that fact is undoubtedly competent for the purpose of affecting the credibility of the witness, within the rule established by the cases holding it competent to show various other forms of mental disturbance, but it seems that proof of mental disturbance at the time of the events narrated does not necessarily render the witness incompetent, but goes to the credibility only, except where it is otherwise provided by statute.

In *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170, it was held that the court has no power to require the complaining witness, after she has testified, to submit to a personal examination to determine whether or not she was afflicted with hysteria. It was said, however, that in a case where the judge was seriously doubtful of the mental competency of a proposed witness, he might impose a medical examination as a condition of allowing the witness to testify, to which she might refuse to submit.

In general.

As shown in the earlier note, the rule is now well established that a person afflicted with insanity is not thereby rendered incompetent as a witness if he has sufficient understanding to comprehend the obligations of an oath, and is capable of giving a correct account of the matter which he has seen or heard with reference to the action at issue. *Pittsburgh & W. R. Co. v. Thompson*, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720; *McKinstry v. Tuscaloosa*, 172 Ala. 344, 54 So. 629; *Cuesta v. Goldsmith*, 1 Ga. 46 L.R.A.(N.S.)

to effect an abortion, evidence is admissible that at the time of the alleged offense she was suffering from hysteria, which caused her to have hallucinations and illusions.

(June 13, 1913.)

A PPEAL by defendant from a judgment of the Superior Court for King County convicting him of abortion. Reversed.

The facts are stated in the opinion.

Messrs. A. G. McBride and J. E. McGrew, for appellant:

The evidence of hysteria was admissible.

1 Wharton & S. Med. Jur. § 518; *Holcomb v. Holcomb*, 28 Conn. 177; 1 Bishop, Crim. Proc. § 1141; 1 Greenl. Ev. 13th ed. § 365; 25 Cent. L. J. 225;

App. 48, 57 S. E. 933; *People v. Enright*, 256 Ill. 221, 99 N. E. 936; *Covington v. O'Meara*, 133 Ky. 762, 119 S. W. 187; *Barker v. Washburn*, 200 N. Y. 280, 34 L.R.A.(N.S.) 159, 140 Am. St. Rep. 640, 93 N. E. 958; *Batterton v. State*, 52 Tex. Crim. Rep. 381, 107 S. W. 826; *Burns v. State*, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987.

A person is not necessarily incompetent to testify because of his impaired mental condition at the time of the occurrences in question, as ordinarily such infirmity goes to the weight of the witness's evidence, not to competency to testify, unless the impairment is substantially total or such as to render the person unconscious of the obligations of an oath. *Burns v. State*, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987.

A statute prohibiting persons from being witnesses "who are of unsound mind at the time of their production" does not prohibit one from becoming a witness who has sufficient understanding to apprehend the obligation of an oath, and who is capable of giving a fairly correct account of the things he has seen or heard, although he may be afflicted with some form of insanity. *State v. Simes*, 12 Idaho, 310, 85 Pac. 914, 9 Ann. Cas. 1216; *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Adams v. State*, 5 Okla. Crim. Rep. 347, 114 Pac. 347.

A statute providing that persons of unsound mind are incompetent as witnesses is but a declaration of the common law; whether the person offered as a witness is so unsound in mind and memory as to be totally incapable of testifying is an open question under such a statute as at common law. *Pittsburgh & W. R. Co. v. Thompson*, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720.

The declarations of one having sufficient intelligence to take care of himself and remember friends, relatives, and acquaintances, are admissible upon the question of pedigree, although he has not sufficient mental capacity to transact business or manage and control property. *Champion v. McCarthy*, 228 Ill. 87, 11 L.R.A.(N.S.) 1052, 81 N. E. 808, 10 Ann. Cas. 517.

One who was shown to have a delusion

Sarbach v. Jones, 20 Kan. 497; 2 Elliott, Ev. § 756; Wharton, Crim. Ev. 9th ed. § 370; 1 Roscoe, Crim. Ev. 8th ed. p. 118; Dejarnette v. Com. 75 Va. 867, 29 Am. & Eng. Enc. Law, p. 611; State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

Messrs. John F. Murphy and H. B. Butler for the State.

Gose, J., delivered the opinion of the court:

The defendant was convicted of the crime of abortion, and has appealed from the judgment entered upon the verdict of the jury.

The statute (Rem. & Bal. Code, § 2448) provides that "every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to pre-

serve her life or that of the child whereof she is pregnant, shall . . . use, or cause to be used, any instrument or other means, shall be guilty of abortion." The information charges that the appellant, in King county, on the 6th day of September, 1911, with the intent to produce the miscarriage of Regna Abramson, did (omitting qualifying words) use a speculum and a rubber catheter, which instruments he then and there inserted into her private parts; such miscarriage not being necessary to preserve her life, or the life of the child whereof she was then pregnant. This is a second appeal. See 67 Wash. 216, 121 Pac. 56.

The appellant challenges the sufficiency of the evidence to support the verdict. This point was pressed with much earnest-

touching his physical condition, but sound on all other matters, was properly permitted to testify concerning another matter, where it appeared that his testimony was clear, coherent, and consistent, and there was no reason to doubt his capability of testifying fully and truthfully. Pittsburgh & W. R. Co. v. Thompson, supra.

The fact that a witness had suffered an illness which may at times have affected his mentality furnishes no ground for excluding his testimony, where it appears to be thoughtful, to the point, and consistent with other testimony in the case. Brown v. Armstrong & L. Co. 239 Pa. 549, 87 Atl. 11.

The court is not warranted in entirely rejecting the testimony of a witness in considering whether the conclusion of the jury was right, where there was evidence that he had epileptic fits, and had one about five or six hours before the occurrence about which he was called to testify, that such fit would leave a person for a time in a dazed condition, and that two hours before the transaction, he was under the influence of intoxicating liquor and pretty drunk, where it appeared the testimony was given in a clear and intelligible manner, and the witness withstood a cross-examination covering 104 pages of the record as creditably as the average witness, and there was nothing in his testimony to indicate that he was not able to give a correct account of what he saw and heard, or that he did not do so. People v. Enright, 256 Ill. 221, 99 N. E. 936.

The mere fact that the state accuses a defendant with rape in having had carnal knowledge of a female who was at the time incapable of giving legal consent by reason of unsoundness of mind does not *per se* establish the incompetency of such female to testify against the accused. State v. Simes, 12 Idaho, 310, 85 Pac. 914, 9 Ann. Cas. 1216; State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

In such case the court should examine and pass upon the grounds of objection as if made against the competency of another witness. Ibid.

In Adams v. State, 5 Okla. Crim. Rep. 347, 46 L.R.A.(N.S.)

114 Pac. 347, the prosecutrix in a similar case was permitted to testify over objection of accused that she was incompetent, and the ruling was sustained and the conviction affirmed, though it was not contended that the indictment charging the offense established the incompetency of the witness.

But in Lee v. State, 43 Tex. Crim. Rep. 285, 64 S. W. 1047, it was held that the female named in the indictment which charged the accused with rape in having had carnal knowledge of a female "being so mentally diseased at the time as to have no will to oppose the act" was an incompetent witness to prove the *corpus delicti* of the offense charged, especially where the statute provided that no persons could testify who were in an "insane condition of mind when the events happened of which they are to testify."

The mere statement by the plaintiff in his bill of particulars filed in his action for personal injuries, that by reason thereof he was suffering from paranoia, is not sufficient to establish his incompetency to testify. Cole v. Barber, 33 R. I. 414, 82 Atl. 129.

A party to a compromise is competent to testify as to his mental condition at the time of its execution. Louisville & N. R. Co. v. Carter, 23 Ky. L. Rep. 2017, 66 S. W. 508.

Competency a preliminary question for the court.

The question whether a person who is offered as a witness has sufficient understanding to be competent as a witness is a preliminary question for the court to decide. Pittsburgh & W. R. Co. v. Thompson, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720; McKinstry v. Tuscaloosa, 172 Ala. 344, 54 So. 629; People v. Tyree, — Cal. App. —, 132 Pac. 784; Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S. E. 983; Covington v. O'Meara, 133 Ky. 762, 119 S. W. 187; Bowdle v. Detroit Street R. Co. 103 Mich. 272, 50 Am. St. Rep. 366, 61 N. W. 529, 4 Am. Neg. Cas. 180; State v. Whitsett, 232 Mo. 511, 134 S. W. 555; Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698; Adams v. State, 5 Okla. Crim.

ness at the bar; the argument being that the instruments themselves and the evidence of the medical experts show that the instruments could not have been inserted in the uterus or cervical canal. The appellant admitted that the girl was pregnant by him, and that he used the instruments upon her, but says that he did so for a lawful purpose; namely, to treat excoriations "in the cervix of the uterus."

Touching this question the court gave the jury the following instruction: "In this case it has been admitted that Regna Abramson was pregnant and by the defendant, and that the defendant, on or about the date

mentioned in the information, inserted in the private parts of said Regna Abramson the speculum and catheter introduced as exhibits in this case. The only question left for you to determine is: Were such instruments, or either one of them, used with intent thereby to produce a miscarriage, the same not being necessary to preserve either the life of Regna Abramson or of the child whereof she was pregnant? If either instrument, when inserted, was so inserted with that intent, then it makes no difference whether such was the right kind of an instrument, or how far in it penetrated,—whether it actually entered the uterus or

Rep. 347, 114 Pac. 347; Mills v. Cook, — Tex. Civ. App. —, 57 S. W. 81.

The inquiry for the court on the preliminary examination when the person is offered as a witness is limited to his understanding of the obligations of an oath and ability to comprehend the examination as a witness. Wright v. Southern Exp. Co. 80 Fed. 85.

In State v. Simes, 12 Idaho, 310, 85 Pac. 914, 9 Ann. Cas. 1216, it was said that the preliminary examination for testing the competency of a person offered as a witness should be made with special reference to the scope of inquiry and subject-matter about which the witness is to testify. "It would be clearly unfair to test the competency of the witness on the particular subject on which he is insane, when in fact he would not be called upon to testify on that subject, and, indeed, he might be perfectly rational and clear on other subjects."

It is within the discretion of the trial court to say which side should first examine the witness as to his competency. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

The question of competency of a witness, after the hearing of evidence, is so largely a question of fact, and so peculiarly within the knowledge and discretion of the trial court, that the appellate court will not interfere unless the record shows a clear case of error. Ibid.; Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698; Mills v. Cook, — Tex. Civ. App. —, 57 S. W. 81; People v. Harrison, 18 Cal. App. 288, 123 Pac. 200; People v. Tyree, — Cal. App. —, 132 Pac. 784; Czarecki v. Seattle & S. F. R. & Nav. Co. 30 Wash. 288, 70 Pac. 750; Burns v. State, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987.

The refusal of the trial court to grant a new trial upon the ground that one of the material witnesses who testified at the trial was, at the time, of such mental unsoundness as to render him incompetent or of such mental condition as to require instructions to the jury in weighing his testimony, will not be disturbed, where the testimony of the witness appears clear and intelligent, with no indication of mental aberration, and the trial court found that while the witness was subject to certain hallucinations, and that insanity had been hereditary in his family, he was capable of

making an intelligent and connected statement; and that if the fact of his mental infirmity, as shown on the motion for new trial, had been known at the trial, no instructions to the jury relating thereto would have been necessary. Czarecki v. Seattle & S. F. R. & Nav. Co. 30 Wash. 388, 70 Pac. 750.

If timely request is made, the court should examine into the present mental status of the proposed witness before permitting him to testify before the jury. Mills v. Cook, — Tex. Civ. App. —, 57 S. W. 81.

In Williams v. State, 30 Ohio C. C. 342, it was held that, upon objection to the mental capacity of one offered as a witness, the court is not bound to stop the trial to test his mental capacity.

Credibility of witness for the jury.

After the court has determined that the witness offered is competent to testify, the question of his credibility immediately becomes a matter for the consideration and determination of the jury. People v. Tyree. — Cal. App. —, 132 Pac. 784; Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S. E. 983; State v. Simes, 12 Idaho, 310, 85 Pac. 914, 9 Ann. Cas. 1216; Bowdle v. Detroit Street R. Co. 103 Mich. 272, 50 Am. St. Rep. 366, 61 N. W. 529, 4 Am. Neg. Cas. 180; Burns v. State, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987.

Presumption of competency; burden of proof.

Persons tendered as witnesses are presumed to be sane and competent to testify until the contrary is shown. People v. Harrison, 18 Cal. App. 288, 123 Pac. 200; Covington v. O'Meara, 133 Ky. 762, 119 S. W. 187; Cole v. Barber, 33 R. I. 414, 82 Atl. 129; Batterton v. State, 52 Tex. Crim. Rep. 381, 107 S. W. 826.

And the burden rests upon the person asserting the contrary to show not only mental weakness, but that it is of such a nature and extent as to render him mentally incompetent in respect to relating the facts of the case, or to comprehend the nature and obligations of an oath. People v. Harrison. 18 Cal. App. 288, 123 Pac. 200; Batterton v. State, 52 Tex. Crim. Rep. 381, 107 S. W. 826.

not, or actually caused an abortion or not,—if it, whatever kind it be, and however or wherever it was inserted, was so inserted with intent thereby to cause an abortion, then you will find the defendant guilty.” The instruction is terse, lucid, and admittedly correct. The girl testified that the appellant told her that he inserted the instruments for the purpose of relieving her of the child. The state’s medical witnesses say that the instruments could have been inserted into the uterus. This is denied by the medical experts offered by the appellant. Measured by the law as announced by the court, it is obvious, without further com-

ment, that this assignment cannot be sustained.

The appellant sought to show by medical testimony that Regna Abramson, who testified for the state, while sane at the time she testified, was, at the time she charges the crime to have been committed, suffering from hysteria, which caused her to have “delusions, hallucinations, . . . and illusions.” The state’s counsel objected on the ground that the testimony was irrelevant and immaterial. The court in sustaining the objection, among other things, said: “The man did insert that instrument, or he did not, with intent; he did or

It is not enough to merely object to a witness on the ground of mental incapacity, or even to charge that he has been adjudged *non compos mentis*. There must be established a *prima facie* case of incapacity before the presumption of sanity is overcome. *Covington v. O’Meara*, 133 Ky. 762, 119 S. W. 187.

Evidence to establish incompetency.

As shown by the earlier note, evidence is admissible for the purpose of affecting the credibility of the witness, to prove that the witness was or is subject to insane delusions; that his mind and memory are impaired by disease; that his conduct is stupid and his talk irrational; that he was previously, or subsequently became, insane; that he has been examined and found of imbecile mind and weak memory; and that at the time of the events narrated there was evidence of mental disturbance.

But testimony of a physician as to the condition of the mind of a person as he found it at a period some two years before such person was produced as a witness is properly excluded as too remote, after the court had ruled upon the competency of the witness and his testimony had been received. *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200.

It was also said in the above case that such testimony could not be admitted for the purpose of impeachment, because it is not one of the modes prescribed by the statute (Code Civ. Proc. §§ 2051, 2052) for impeaching a witness. *Ibid*.

A certificate from the War Department, showing that the witness was discharged from the Army because of mental imbecility, is incompetent to discredit his testimony, as it was a mere *ex parte* statement by a person not shown to be qualified to speak as to the mental condition of the witness, and was also an attempt to impeach the witness on a collateral matter. *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026.

A party cannot permit a witness to testify and then prove that he is insane. *People v. Enright*, 256 Ill. 221, 99 N. E. 936.

Accordingly it was held in the above case that an offer to prove that a witness was insane for a number of years was properly denied where no objections were made when 46 L.R.A.(N.S.)

he was offered as a witness. The court said: “If a party knows before the trial that the witness is incompetent on account of mental condition, the objection must be made before he has given any testimony, and if the objection appears upon the trial it must be interposed as soon as it becomes apparent.”

An offer to prove, after the witness had testified, that he was a person of unsound mind, is properly denied where it appears that his testimony is clear, coherent, and as consistent as that of the other witnesses in the case, and there was no objection when he was offered as a witness, or a request that he be examined on his *voir dire*. *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555.

The mere fact of mental derangement on some subject unconnected with the subject-matter of the litigation, and which does not affect the testimony of the witness in any way, is not to be considered by the jury in determining his credibility. *People v. Enright*, *supra*.

Accordingly it was held in the above case that an offer to prove by four women, one of them the wife of the witness, that he had been in the habit of indecently exposing himself to women and children, and that in their opinion he was insane, was properly excluded, where the witness had testified as to what he had seen and heard at the time of the shooting by the accused, who was on trial for murder. *Ibid*.

—effect of inquisition, etc.

A person who has been adjudged insane is not, in all cases, incompetent as a witness. His testimony is admissible if he has sufficient understanding to comprehend the obligation of an oath and to be capable of giving a correct account of the matters he has seen or heard in reference to the questions at issue; and whether he has that understanding is a question for the judge to determine in each case, the credit to be given to his testimony being ultimately for the jury to decide.

Proof that one was adjudged insane is no evidence that he is insane when he is offered as a witness four years afterwards, it appearing that he is at large and that he

he did not; that is the whole question." The court was both right and wrong in this utterance; right so far as he stated the fact at issue, and wrong in so far as he reached the conclusion that the testimony was inadmissible. The appellant used the instruments, either for the purpose of committing an abortion, or for a lawful purpose; namely, that of medically treating the uterus. The evidence offered and rejected was admissible upon the question of the credibility of the girl's testimony. It touched the very heart of the case; namely, was there a criminal intent? It was competent for the same reason that testimony tending to show her intoxication at the time of the occurrence would have been competent. 1 Wharton & S. Med. Jur. 4th ed. § 518; 40 Cyc. 2573; 2 Elliott, Ev. § 756; Wharton, Crim. Ev. 370a; 1 Bishop, New Crim. Proc. § 1142; Holcomb v. Holcomb, 28 Conn. 177; Sarbach v. Jones, 20 Kan. 497; Dejarrette v. Com. 75 Va. 867, 40 Am. Rep. 750.

Wharton & Stille thus states the rule: "On the other hand, Morel calls attention to the well-substantiated fact that patients of these classes [sufferers from hysteria] sometimes tenaciously cherish delusions and hal-

lucinations that they have been the subject of sexual wrongs from others (*e. g.*, rape, abortion, impregnation), and detail the circumstances of such wrongs with a consistency and exactness which, in those unacquainted with the patient's condition, secure belief."

"Delusions and hallucinations constitute that species of mental unsoundness which is marked by persistent and incorrigible beliefs that things which exist only in the imagination of the patient are real." 16 Am. & Eng. Enc. Law, 2d ed. 563.

In considering this question in the Holcomb Case the court said: "This inlet to the understanding may be perfect, so far as any human eye can discern, the moral qualities may all be healthy and active, the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delusions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly as upon his disposition to describe them

talks rationally. Covington v. O'Meara, 133 Ky. 762, 119 S. W. 187. The court said: "While it has been said that where one had been proved and adjudged to be of unsound mind arising from mania, the presumption of law is, in a controversy, whether a writing executed by him was executed in a lucid interval, that his condition is unchanged until the contrary is shown (Carpenter v. Carpenter, 8 Bush, 287), that rule does not apply to one offered as a witness in the presence of the court, unless the judgment of lunacy is so recent, or the witness is still confined in an asylum, as to raise the presumption of fact that his condition has not materially changed since the verdict. The judgment of a court finding one of unsound mind is never conclusive that he remains so; much less is it conclusive that his condition continues so as to disqualify him as a witness in his own or another's behalf. The utmost effect of it, as bearing on the competency of the person as a witness, is to raise the question of his competency, when it is for the judge to then decide, upon the witness's appearance, conduct, speech, and any outside testimony that might be offered, whether he is competent. So, when, after having heard the witness depose, and having observed his bearing, the judge overrules an objection as to the competency of the witness, although recently found to be insane, the testimony of that witness becomes a matter solely of credibility."

A record of proceedings before justices for the purpose of determining whether a person was a proper person to be admitted to the insane hospital for treatment was not admissible in evidence six years afterwards, to affect the credibility of the person as a 46 L.R.A. (N.S.)

witness. Hicks v. State, 165 Ind. 440, 75 N. E. 641.

Proof that a person had been adjudged a lunatic does not establish his incompetency, where it appears that he had been out of the asylum more than six years and appears intelligent and perfectly sane. Singleton v. State, 57 Tex. Crim. Rep. 560, 124 S. W. 92.

The finding upon inquiry that one is an idiot and incompetent to manage his own affairs, and the appointment of a committee for him, is not conclusive that he is not a competent witness at a time several years later, but he may be permitted to testify, if, upon questioning, he appears to be competent to do so. Barker v. Washburn, 200 N. Y. 280, 34 L.R.A. (N.S.) 159, 140 Am. St. Rep. 640, 93 N. E. 958.

Proof that the person has been found insane, and is an inmate of an insane asylum, affords prima facie evidence that he is of unsound mind, and operates to throw the burden of proving competency upon the party offering him as a witness. Pittsburgh & W. R. Co. v. Thompson, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720.

And in State v. Cremeans, 62 W. Va. 134, 57 S. E. 405, it was held that when a witness is offered to testify in a case, and objection is made to his competency, and an offer is made to show that the witness had been confined in an asylum for the insane and also had been put in jail on a charge of lunacy and had not been discharged from his lunacy, he should not be permitted to testify until the court has made a careful examination as to the facts, as well as to the condition of the mind of the witness at the time, and has found that he is competent. A. L. R.

honestly, and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity. We are therefore of opinion that the insanity of a witness at the time of the transaction about which he is called to testify does impair the force of his testimony, and is a matter proper to be considered by the triers to whom his testimony is submitted; and if this matter is to be considered by the triers we do not perceive any reason why it should not be treated like any other fact."

In the Dejarnette Case it is said: In all "inquiries relating to insanity every reasonable latitude should be allowed in the examination of witnesses, however false or unfounded the court may consider the defense."

The state relies upon the case of State v. Hayward, 62 Minn. 474, 65 N. W. 63. In that case the court remarked that the temporary aberrations or delusions sought to be proven were remote in point of time, and were not of the same type or character as the delusions claimed to have existed in the mind of the witness at the time of the occurrence to which the witness testified. In other respects it differs so widely in its facts from this case that a discussion of it would not be profitable.

The judgment is reversed, with directions to grant a new trial.

Crow, Ch. J., and Fullerton, Mount, and Parker, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

JOHN TEYNOR et al., Respts.,

v.

CHLOE HEIBLE et al., Appts.

(— Wash. —, 133 Pac. 1.)

Husband and wife — separate estate — homestead entry.

1. Government land secured by homestead entry by a man who was unmarried when

Note. — Character of property as community or separate, where title is initiated before marriage, but not completed until after.

As to character of property as community or separate, where title is initiated before, but not completed until after, death of one spouse, see note to Creamer v. Briscoe, 17 L.R.A.(N.S.) 154.

As to effect of contracting or dissolving marriage after the initiation, but before the 46 L.R.A.(N.S.)

his entry was made is separate property, although he married before making final proof and securing his patent.

Judgment — distributing estate — collateral attack.

2. A decree of distribution of a decedent's estate is subject to collateral attack if notice of application therefor is not given for the time which the statute makes a prerequisite to the making of such decree.

Same — presumption to uphold — contrary to evidence.

3. Personal service of notice cannot be presumed to uphold a decree distributing a decedent's estate, where it recites that from the affidavits on file the court finds that due notice was given, where the only affidavits on file show attempted service by publication, which did not meet the statutory requirements.

(July 1, 1913.)

A PPEAL by defendants from a judgment of the Superior Court for Adams County in plaintiffs' favor in an action brought to partition certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Lovell & Davis for appellants.

Messrs. Adams & Naef, for respondents:

If either spouse before the marriage has acquired an equitable right to property, which is perfected after marriage, the property is separate.

Forker v. Henry, 21 Wash. 235, 57 Pac. 811; Cunningham v. Krutz, 41 Wash. 190, 7 L.R.A.(N.S.) 967, 83 Pac. 110; Curry v. Wilson, 57 Wash. 513, 107 Pac. 367; Eckert v. Schmitt, 60 Wash. 24, 110 Pac. 635; Rogers v. Minneapolis Threshing Mach. Co. 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014.

The publication of a void summons does not confer jurisdiction upon the court.

Bauer v. Widholm, 49 Wash. 310, 95 Pac. 277; Dolan v. Jones, 37 Wash. 176, 79 Pac. 640; Smith v. White, 32 Wash. 414, 73 Pac. 480; Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536; Thompson v. Robbins, 32 Wash. 149, 72 Pac. 1043; Culver v. Phelps, 130 Ill. 217, 22 N. E. 809.

There can be no presumption against the record.

1 Black, Judgm. 277; Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann.

consummation, of right under homestead entry, see note to Cunningham v. Krutz, 7 L.R.A.(N.S.) 967.

As to the applicability of community property laws of the state to real property acquired from the Federal government, see note to Krieg v. Lewis, 26 L.R.A.(N.S.) 1117.

It is a general rule, sustained by practically every case in which the question is raised, that where one spouse before the marriage has acquired an equitable right to

Cas. 464; *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370, 15 S. W. 682; *Harris v. Sargeant*, 37 Or. 41, 60 Pac. 608; *State ex rel. LeBrook v. Wheeler*, 43 Wash. 183, 86 Pac. 394; *McGowan v. Smith*, 22 Wash. 625, 61 Pac. 713.

Fullerton, J., delivered the opinion of the court:

This action was brought by the respondents against the appellants for the partition of certain real property. The land in question was acquired from the United States under the homestead laws by one Peter Teynor, who died without lineal

heirs. The respondents are his father and mother. The appellant Chloe Heible was his wife at the time of his death. The other appellants claim an interest in the land through mortgages or contracts to convey, executed by Chloe Heible. Peter Teynor entered the land in the year 1901. He was then a single man, never having theretofore been married. On January 1, 1903, he intermarried with the appellant Chloe Heible. He made final proof under the homestead laws on September 12, 1906, and thereafter a patent to the land from the United States was duly issued to him. He died intestate on October 30, 1906, without

property, which is perfected after the marriage, the property is separate, and not community.

Harris v. Harris, 71 Cal. 314, 12 Pac. 274; *Morgan v. Lones*, 80 Cal. 317, 22 Pac. 253; *Re Lamb*, 95 Cal. 397, 30 Pac. 568; *Re Boody*, 119 Cal. 402, 51 Pac. 634; *Humbird Lumber Co. v. Doran*, — Idaho, —, 135 Pac. 66; *Lawson v. Ripley*, 17 La. 238; *Barbet v. Langlois*, 5 La. Ann. 212; *Morgan's Succession*, 12 La. Ann. 153; *Wade's Succession*, 21 La. Ann. 343; *Medlenka v. Downing*, 59 Tex. 32; *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281; *Gardner v. Burkhardt*, 4 Tex. Civ. App. 590, 23 S. W. 709; *Texas & N. O. R. Co. v. Speights*, — Tex. Civ. App. —, 59 S. W. 572, reversed on other grounds in 94 Tex. 350, 60 S. W. 659; *Laufer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549; *Alford Bros. v. Williams*, 41 Tex. Civ. App. 436, 91 S. W. 636; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *Rogers v. Minneapolis Threshing Mach. Co.* 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014. See also *Lake v. Lake*, 52 Cal. 428; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

Thus, in *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, the court said:

"It would seem that, under the homestead laws, residence and improvement are required as conditions precedent to the grant of the title. It is evidence that equities attach upon such settlement and improvement which entitle the settler to the continued possession and ultimate title. A consideration of the authorities from those states in which the community property law exists seems to establish the principle: 'If either spouse before the marriage has acquired an equitable right to property, which is perfected after marriage, the property is separate.' There is, perhaps, considerable uncertainty as to a uniform rule concerning the right of the community to reimbursement out of the separate estate of the spouses benefited, for expenditures of money and time and effort made in performing conditions and perfecting and completing the title. But the rule also seems to prevail in favor of the community as to the title initiated during the community, and perfected after the dissolution of the marriage. In the first case, the title takes effect as of time before the community, and the property is therefore separate; and in 46 L.R.A. (N.S.)

the other as of a time during the community, and is therefore community property."

So, in *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281, the court said: "Power was single when it [the contract for the lands] was entered into, and the right to earn the lands acquired by it was his separate property. The title relates to its origin, and must take the impress of its character from it."

And in *Re Lamb*, 95 Cal. 397, 30 Pac. 568, the court said: "The land in controversy was not community property at the date when the deceased made and recorded her declaration claiming the same as a homestead, but it was the separate property of the petitioner. The petitioner had, before his marriage, made application to enter the land as a homestead under the laws of the United States; and although he had not, at the time of such marriage, fully completed the term for which he was to reside upon and cultivate it, so as to entitle him to receive a patent therefor from the United States, still he had fully performed all of the conditions required of him by such laws up to that date, and by his prior acts of entry, residence, and cultivation, he had acquired an equitable interest in the land, which, of course, was his separate property, and to which the legal title afterwards conveyed by the patent related; and that which was before separate property, to which he had but an equitable title, was, after the issuance of such patent, still his separate property, and held by him under the legal title conveyed by such patent."

A woman's interest in a headright certificate issued after her second marriage to the heirs of her first husband becomes her separate property. *Laufer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549.

The filing of another application during the existence of the marriage, for the land in question, together with an additional tract, does not deprive the land of its character as separate property, where the first application was filed before the marriage. *Gardner v. Burkhardt*, 4 Tex. Civ. App. 590, 23 S. W. 709.

In *Akin v. Jefferson*, 65 Tex. 137, where a man before marriage purchased certain lands with his own money, and after marriage, by money out of the community funds, compromised a suit brought against

having parted with the title acquired by him under the homestead patent.

Letters of administration on Peter Teynor's estate were issued out of the superior court of the county in which the land is situated to John A. Willis, the father of the appellant Chloe Heible. The administrator performed the duties of his trust, and on October 26, 1908, filed his final account with the estate, together with a petition asking for the distribution of the property thereof, praying that his account be settled and allowed, and that the estate be distributed to those lawfully entitled thereto. The court, sitting in probate, en-

tertained the petition and made an order, dated as of the date on which the petition was filed, appointing November 16, 1906, as the time for hearing the petition, further ordering that the clerk of the court give notice thereof by causing notices to be posted in three of the most public places in the county in which the land is situated "at least two weeks before said day of settlement and hearing of petition, and publish notice thereof, according to law, for two weeks before said day of settlement and hearing upon the petition" in a certain designated newspaper. Proof by affidavit was made of the posting and publishing by the

him for the land, the court said that if, by the original purchase, he secured a good title, the land was his separate property; but if, by the first purchase, he got no title, and acquired none by limitation before marriage, the lands then became community property.

In most of these cases the land was public land upon which the entry had been made before marriage and the patent granted afterward; but the same rule has been applied where the land was held under contract of sale at the time of the marriage, and the legal title acquired subsequent thereto. *Lawson v. Ripley*, 17 La. 238; *Wade's Succession*, 21 La. Ann. 343; *Medlenka v. Downing*, 59 Tex. 32; *Welder v. Lambert*, supra.

So, also, the same rule has been applied where one spouse went into adverse possession before marriage, but the limitation period did not expire until after marriage. *Texas & N. O. R. Co. v. Speights*, — Tex. Civ. App. —, 59 S. W. 572 (reversed in 94 Tex. 350, 60 S. W. 659, upon the ground that the statute of limitation had been so interrupted as not to give possession); *Alford Bros. v. Williams*, 14 Tex. Civ. App. 436, 91 S. W. 636. In *Sauvage v. Wauhup*, — Tex. Civ. App. —, 143 S. W. 259, however, it was held that this rule did not apply to property the sole claim to which was adverse possession, but applied only where the right to land is referred to some legal or equitable claim appearing before marriage. The court does not cite any authorities to the precise point decided. The court said that the *Speights* Case was not authority, as it had been reversed by the supreme court of the state, and that in the *Williams* Case a single spouse claimed the land as the assignee of a land certificate; the court, however, in the *Williams* Case, said that the claim under the land certificate was merely another and distinct ground for the decision.

In a few cases the facts were such as to render the general rule cited above inapplicable.

Thus, the fact that a land certificate was granted to a single man will not cause the land to be his separate property, where he was married before actual location was made. *Phillips v. Palmer*, 56 Tex. Civ. App. 91, 120 S. W. 911. This decision is based 46 L.R.A.(N.S.)

upon the ground that the certificate before location was personal property, and under the express terms of the Texas statute, personal property of the spouses before marriage became common property.

So, mere possession of the land by a partnership of which the husband was a member is not sufficient to overcome the presumption that the land, patents for which were applied for and acquired long after marriage, became community property. *Re Boody*, 113 Cal. 682, 45 Pac. 858.

And mere possession by a single man, without any title, of lands purchased subsequent to marriage, with common funds, does not make the lands separate property. *Johnson v. Johnson*, 11 Cal. 200, 70 Am. Dec. 774; *Pancoast v. Pancoast*, 57 Cal. 320.

So, the mere payment of the surveyors by one of the spouses before marriage will not, however, deprive the land of its character as community property. *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612.

In *Davidson v. Woodward*, 84 C. C. A. 495, 156 Fed. 915, writ of certiorari denied in 209 U. S. 547, 52 L. ed. 920, 28 Sup. Ct. Rep. 758, the general rule was recognized, but held not to apply where a contract for the purchase of certain lots was made before the marriage, but was abandoned, and subsequent to marriage another contract was made, and the property was paid for by community funds.

In *Wadkins v. Producers' Oil Co.* 130 La. 308, 57 So. 937, affirmed in 227 U. S. 368, 57 L. ed. 551, 33 Sup. Ct. Rep. 380, the settlement was made before the entryman's marriage, but the marriage and the death of the wife both occurred between the time of the application for the preliminary homestead entry and final proof. In such a case it was held that the land did not fall into the community. The real point at issue in this case, however, was the effect of the dissolution of the community between the time of the preliminary application and the final proof. This is the question discussed in the note to *Creamer v. Briscoe*, 17 L.R.A. (N.S.) 154.

In some cases it has been held that the land the initial steps to acquire which were taken by one of the spouses before marriage was separate property, although the money to acquire the final title thereto had been

clerk, and on the day fixed for the hearing the court entered a decree in which it approved the final account and distributed the estate. That part of the decree relating to the proof of service of notice of the time of the hearing recited that it appear "to the court by affidavits on file herein that due and regular notice, as required by law and the order of this court, was given of the hearing hereof." The order distributed the whole of the estate to the appellant Chloe Heible as the sole heir at law of Peter Teynor, deceased. In making the order of distribution the probate court proceeded on the theory that the real property was, when acquired from the United States, the community property of Peter Teynor and Chloe Teynor, his wife, and that it descended on the death of Peter Teynor, under the statutes of the state governing the descent and distribution of community real property, to the wife, since the entryman died without issue.

The court in the case now before us, on the same state of facts, held the property to be the separate property of Peter Teynor, and to have descended on his death, under the statutes governing the distribution and descent of separate property, one half to

the father and mother of the deceased, and one half to his wife, Chloe Teynor, holding further that the decree of distribution entered in the administration proceedings was void because entered without sufficient notice. The first question suggested by the record relates, therefore, to the nature of the title acquired by Peter Teynor in virtue of his homestead entry. Did the land become, on his acquisition of the title thereto, his separate property, or did it become the community property of himself and his then wife, the appellant in this proceeding?

On the question our own cases are out of harmony. Indeed, they seem incapable of being reconciled, whether considered with relation to the facts upon which they are founded, or with relation to the reasons by which they are thought to be sustained. The cases in which the question of the nature of the title acquired by a homestead entry from the United States is considered are the following: *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Bolton v. La Camas Water Power Co.* 10 Wash. 246, 38 Pac. 1043; *Kromer v. Friday*, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *Re Feas*,

paid out of community funds subsequent to marriage.

Thus, where the pre-emption declaration and exclusive occupation of a woman preceded her marriage, the land becomes her separate property, although the patent was not issued until marriage; and this is so even if the money paid the government was community money, where, with full knowledge of the husband, the land was proved up and paid for in her name. *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274. The court said: "Even if it appeared that the money was paid out of community funds, the land would be the separate property of the wife. With full knowledge and consent of the plaintiff [the husband], the land was proved up and paid for in her name, and the proof of her occupation and 'declaration,' or affidavit, was as necessary a prerequisite to the acquisition of the government title as was the payment of the price. The patent is a record which proves the facts which preceded its issue, on proof of which the proper officers of the United States were authorized to issue it. For certain purposes, the possession of either spouse is the possession of both. But here the pre-emption declaration and exclusive occupation of the defendant preceded her marriage with the plaintiff, and constitute part of the acts which culminated in the certificate of purchase and patent. The plaintiff ought not to be permitted to ignore her declaration and possession (without proof of which she could not have received the benefits of pre-emption), and treat the acquisition of the government title simply as an ordinary purchase, made after marriage, with com- 46 L.R.A. (N.S.)

munity funds. Under the pre-emption laws, a woman, after her marriage, may secure a pre-emption based on occupancy, the right to which is her separate property. That was done in this case, and the plaintiff, who seeks to benefit by the transaction, cannot say the pre-emption title was not acquired legally and regularly."

So, land held by an unmarried man under a contract of sale, a part of the consideration of which he had paid, becomes his separate property, although the legal title is not acquired until after marriage, and part of the remaining instalments are paid by the money of his wife, and part by community money. *Woodward v. Davidson*, 150 Fed. 840.

In the case of *Morgan v. Lones*, 80 Cal. 317, 22 Pac. 253, it was determined that the occupant of lands for whose benefit the town site acts were passed had an equitable interest in the lands, and, if such occupant is an unmarried woman, and marries, such interest is her separate property; and this is so, although the patent from the government to the municipal authorities has not issued and the husband advanced the funds necessary to get a conveyance from the municipal authorities.

In Louisiana, however, it is the rule that if the property or any part of it is paid for by community money, the community is to be reimbursed to that extent. *Barbet v. Langlois*, 5 La. Ann. 212; *Morgan's Succession*, 12 La. Ann. 153.

In the following cases the court held that although the preliminary steps for acquiring the land were taken before marriage, and the title acquired during the existence there-

30 Wash. 51, 70 Pac. 270; *Ahern v. Ahern*, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023; *Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; *James v. James*, 35 Wash. 655, 77 Pac. 1082; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Hall v. Hall*, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108; *Cunningham v. Krutz*, 41 Wash. 190, 7 L.R.A.(N.S.) 967, 83 Pac. 109; *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Rogers v. Minneapolis Threshing Mach. Co.* 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; *Delacey v. Commercial Trust Co.* 51 Wash. 542, 130 Am. St. Rep. 1112, 99 Pac. 574; *Krieg v. Lewis*, 56 Wash. 196, 26 L.R.A.(N.S.) 1117, 105 Pac. 483; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

Grouping the cases according to their facts, and the decision of the court upon the facts, in the first group can be placed the cases of *Philbrick v. Andrews* and *Re Feas*. In these cases all that appeared in the record was that the land was occupied by the entryman and his wife at the time final proof was made and patent issued, and it was assumed, as if not subject to controversy, that the property was the

community property of the husband and wife.

In the second group can be placed *Forker v. Henry* and *Rogers v. Minneapolis Threshing Mach. Co.* In the first case the land was settled upon and entered as a homestead by a single woman who lived thereon for some four years and then married. Thereafter, while the marriage relation continued, she made final proof and was granted a patent. In *Rogers v. Minneapolis Threshing Mach. Co.* the land was settled upon and entered by a married man living with his wife. Some two years later, while living on the land, the wife died, leaving issue. A year and a half thereafter the entryman married a second time, and two years after the second marriage made final proofs and received a patent. In each of the cases the land was held to be the separate property of the entryman.

In the third group can be placed *Kromer v. Friday*; *Ahern v. Ahern*; *James v. James*, and *Cox v. Tompkinson*. In these cases the wife resided upon the land with her husband at the time of its entry, and continued to reside thereon until her death, which occurred in each instance prior to making final proof and the receipt of pat-

of, nevertheless the property fell into the community; but, as will be seen, there were peculiar facts in each case which may tend to distinguish them.

In *Hawkins v. Stiles*, — Tex. Civ. App. —, 158 S. W. 1011, the statute provided that any settler on certain lands was entitled to purchase not to exceed 160 acres at 50 cents per acre upon his having the land surveyed and the field notes returned to the General Land Office before a fixed date,—the payment of the 50 cents per acre also to be made before such date. Certain settlers having had their lands surveyed and the field notes duly returned, assigned their interest to an unmarried man, who subsequently married, and then paid the 50 cents per acre out of community funds and received his patents. It was held that under the statute the payment of the 50 cents per acre was an essential part of the inception of the title, and as the payment was made during the community, and out of community funds, the land became community property. The court said: "We are constrained to believe that under this statute no title could be acquired unless its terms were complied with; that three things were essential to obtaining title on the part of the Rawlses, or those who claim under them; to wit, they must have been settlers, they must have had the land surveyed and the field notes returned to the land office, and must, in addition, have paid the purchase money. Without the concurrence of these three elements, no title vested; and the mere surveying and filing of field notes was not the inception or origin of title, as contended by appellees, but furnished, at most, merely a

basis for the privilege of purchasing. . . . If the settler saw fit to accept and comply with the terms of the statute within the time prescribed, then it offered to convey the land to him in preference to any other person wishing to purchase. There was not, in advance of such compliance, any right acquired by the settler. . . . It is true that, without the performance of the first two conditions, no preference was even granted; but it is likewise true that, without the paying of the money, no actual right or title vested. Others had the right to buy without such conditions, by merely paying the purchase price, giving the actual settler a mere preference to purchase the tract upon which he settled. A failure to exercise this right of purchase, after performing the first two conditions within the prescribed time, terminated this privilege. Consequently we think no right to the land in question began or sprang into existence until all three of the conditions were complied with; and therefore all these requirements, in our judgment, were conditions precedent to the vesting of title in the Rawlses or their transferees."

Under the principle that the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, it was held in *Kromer v. Friday*, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229, that a patent for homestead land will not relate back to the time of making final proof, so as to cut out the rights of a woman under a marriage ceremony performed between the two dates, where, long prior to final proof, she had been living with the claimant as his wife.

W. M. G.

ent, although occurring after the full period of residence required by the Federal statute as preliminary to making final proof had expired. The property acquired was held to be community property.

In the fourth group can be placed *Bolton v. La Camas Water Power Co.* and *Cunningham v. Krutz*. In the first of these cases the wife resided on the land from the time of its entry by the husband until the residence period expired, but died before the making of final proof and the issuance of patent. In the second case the entry was made by a married man living with his wife. The wife died some three years later, after a continuous residence on the land subsequent to the entry. A few months later the husband commuted the entry and received a patent for the land. The property was held in each case to be the separate property of the husband.

In the fifth group can be placed *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Krieg v. Lewis*, and *Eckert v. Schmitt*. In these cases the wife resided with the husband on the homestead from the time of the original entry until after the making of final proof, and in two of them until after patent was issued. The land acquired was held to be the community property of the spouses.

In the sixth group can be placed the cases of *Towner v. Rodegeb*; *Hall v. Hall*; and *Delacey v. Commercial Trust Co.* In the first case the land was settled upon prior to the extension of the public surveys thereover, and prior to the time the land was subject to entry under the public land laws. The settler died before the land became so subject to entry, and it was held that he had no estate of inheritance therein or estate of any kind that was cognizable in proceedings instituted on his estate in the probate court. In *Hall v. Hall* the parties thereto, while husband and wife, settled upon unsurveyed lands of the United States, and lived thereon together as husband and wife for a period of more than five years. Prior to the time the lands were open to entry they were divorced, and subsequent to the divorce the lands became subject to entry, and the husband entered the same as a homestead, and subsequent thereto made final proofs and received a patent. It was held that his divorced wife had no interest in the property. In *Delacey v. Commercial Trust Co.* it was held that a mere settlement on government land by a husband and wife conferred no community interest in the land.

The arguments thought to sustain these 46 L.R.A.(N.S.)

several conclusions we shall not set forth. It is manifest, however, that no reasoning based upon principle can reconcile the first with the second group, or the third with the fourth. It is the opinion of the court now that the property in each of these groups, if nothing more appeared in the record than is shown in the opinion, should have been held to be the separate property of the entryman. In other words, the rule should be that, in all cases where the marital relation does not exist at the time of the original settlement and entry, and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land. The folly of any other rule is illustrated by the case of *Rogers v. Minneapolis Threshing Mach. Co.* 48 Wash. 19, 92 Pac. 774, 85 Pac. 1014. This case we have placed in the second group, but it belongs under its facts in the fourth group also. In that case it will be remembered that the entryman was married at the time he made entry on the land; that his then wife died, leaving issue, some two years later, after a continuous residence thereon; that about a year later the entryman married a second time, resided with his second wife on the property for some two years more, and made final proof and received a patent. If a community interest is impressed on the land by the fact of marriage at the time of its entry, as is held in the fourth group of cases, and if a community interest is also impressed by the fact of marriage at the time of the making of final proof and the issuance of the patent, as is held in the first group, then this land was impressed with the interests of two distinct communities, the one in favor of the issue of the first wife and the other in favor of the second wife. A rule that leads to such incongruous results is certainly not to be commended.

The facts of the case at bar bring it within the cases found in both the first and second groups of cases as we have listed them; and, since we conclude that the decisions in respect to the first group rather than in the second were wrong in principle, we hold the property in question here to have been the separate property of the husband on its acquisition from the government.

The second question suggested by the record is the validity of the decree of distribution entered in the probate proceedings. This present action is a collateral attack upon the decree, and it is conceded that, unless the record shows affirmatively a want of jurisdiction, it is conclusive upon all the

world. We think the record does show affirmatively a want of jurisdiction. The statute relating to decrees of distribution in probate proceedings provides that such decrees may be made on the application of the executor or administrator, or anyone interested in the estate, but only after "notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator." Rem. & Bal. Code, § 1589. The statute relating to the sale of real estate by an executor or administrator provides that the court, after the petition for the sale is filed, shall "make an order directing all persons interested to appear at a time and place specified, not less than four nor more than eight weeks from the time of making such order," and that a "copy of such order to show cause shall be personally served on all persons interested in the estate at least ten days before the time appointed for the hearing of the petition, or shall be published at least four successive weeks in such newspaper as the court shall order." Id. §§ 1499, 1500. From an examination of the dates before set out it will be observed that in this instance the time lapsing between the date of the order to show cause and the time fixed for the hearing was only twenty-one days, and that less than three weeks elapsed between the first publication of the order and the time fixed for the hearing. The notice actually shown in the record, therefore, was clearly insufficient to give the court jurisdiction to make the order.

But the appellant says that, since this action is a collateral attack on the decree, all intendments are in favor of its validity, and, since personal service on the persons interested ten days prior to the time fixed for the hearing is made equivalent to published notice, the court will presume, in the absence of a showing to the contrary, that such a service was made. But, as we say, we think the record does show on its face to the contrary. The recital in the judgment is that the court finds from the "affidavits on file" that due service was made. As the only affidavits on file, or that were put on file, show service by publication only, the idea of any other service is clearly negatived. "If a want of jurisdiction affirmatively appears upon the face of the . . . record, the judgment will be held to be void upon collateral as well as direct attack." Wick v. Rea, 54 Wash. 424, 103 Pac. 462.

The judgment appealed from will stand affirmed.

Ellis, Morris, and Main, JJ., concur.
46 L.R.A.(N.S.)

WASHINGTON SUPREME COURT.
(Department No. 1.)

STATE OF WASHINGTON, Appt.,
v.

W. R. CRAWFORD et al., Respts.

(— Wash. —, 133 Pac. 590.)

Constitutional law — denial of due process — excessive penalty.

Imposing a penalty of a fine of not exceeding \$1,000, or imprisonment of not exceeding one year, or both, for violation of the statute forbidding the exaction of more than 5 cents for one continuous ride on a street car within any city or town, is, although no minimum is prescribed, so excessive as to deny railway companies due process of law.

(July 8, 1913.)

Note. — Excessive penalty as denial of due process of law.

This note deals only with cases where the gist of the objection was the excessiveness of the penalty imposed, to the exclusion of cases where the right to impose any penalty at all was disputed upon the ground that it was discriminatory, or obnoxious to other constitutional objections; e. g., penalties for failure of railroad to pay claims (see note in 42 L.R.A.(N.S.) 102, and other notes there referred to); so the question whether a penalty is obnoxious to the constitutional provision against cruel and unusual punishments is excluded. See on that question, note in 35 L.R.A. 567.

The view taken in *STATE v. CRAWFORD*, that a penalty (not to exceed one year's imprisonment, or fine not to exceed \$1,000, or both) imposed upon a railway company for the violation of a public-service law is so excessive as to deny the railway company due process of law, finds sanction in *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, which holds that a statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws. The court said: "For disobedience to the freight act the officers, directors, agents, and employees of the company are made guilty of a misdemeanor, and upon conviction may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense. and therefore might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act rend-

APPEAL by the State from a judgment of the Superior Court for King County, which reversed a judgment of the County Court, convicting defendants of violating the provision of the public-service law limiting the fares which might be charged for street car service. Affirmed.

The facts are stated in the opinion.

Messrs. W. V. Tanner, Attorney General, Stephen V. Carey, Assistant Attorney General, John F. Murphy, and S. H. Steele, for appellant:

The term "penalty," used in the title of the act, is broad enough and specific enough to sustain a criminal prosecution.

22 Am. & Eng. Enc. Law, 654; *Huntington v. Attrill*, 146 U. S. 657, 666, 36 L. ed.

1123, 1127, 13 Sup. Ct. Rep. 224; 30 Cyc. 1335; *United States v. Choteau*, 102 U. S. 603, 611, 26 L. ed. 246, 249; *United States v. Reisinger*, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; *The Strathairly*, 124 U. S. 558, 571, 31 L. ed. 580, 583, 8 Sup. Ct. Rep. 609; *United States v. Mathews*, 23 Fed. 74; *Blum v. Widdicomb*, 90 Fed. 220; *State v. Hardman*, 16 Ind. App. 357, 45 N. E. 345; *State v. Ames*, 47 Wash. 328, 92 Pac. 137; *State v. Merchant*, 48 Wash. 69, 92 Pac. 890; *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

The penalties are not excessive.

State ex rel. Railroad Commission v. Oregon R. & Nav. Co. 68 Wash. 160, 123 Pac. 3. Mr. Scott Calhoun for respondents.

ers the party guilty of a felony and subject to a fine not exceeding \$5,000, or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company."

So, in *Consolidated Gas Co. v. Mayer*, 146 Fed. 150, a gas company is held to be denied due process of law by a statute which makes a charge for gas in excess of the statutory rate a complete defense in an action to collect, and by a statute limiting the charge for gas to a certain rate, and subjecting gas companies to a \$1,000 forfeiture for each violation of the act, the penalties being so drastic and ruinous as practically to debar the company from making a test of the law. Same effect on subsequent hearing, 157 Fed. 849, affirmed on this point in 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

And commenting upon a statute which prescribed similar cumulative penalties for every charge of more than a certain sum per head for yarding cattle, where a few days' violation of the statute by merely charging a higher rate would exhaust the entire value of the property in satisfaction of the penalties incurred, Mr. Justice Brewer, writing the opinion in *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L.R.A. (N.S.)

46 L. ed. 92, 22 Sup. Ct. Rep. 30, says: "A statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others tantamount to a denial of the equal protection of the laws."

So, penalties of \$500, payable to the person aggrieved, for every violation of an act prescribing the maximum rates which railway companies may charge for the carriage of passengers within the state, and fine or imprisonment or both, imposed upon any agent of the company violating the act, are held in *Ex parte Wood*, 155 Fed. 190, to be so excessive and ruinous as to deny the company due process of law.

In *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061. 116 N. W. 885, a penal clause of a general police regulation of tenement houses was the effect that every person violating the act should be guilty of a misdemeanor, and, upon conviction thereof, should be subject to a fine of not less than \$10 nor more than \$200, or by imprisonment in the county jail not less than fifteen days and not more than sixty days, or by both such fine and imprisonment, at the discretion of the court; and for each day after the first that such violation should continue, such person should be subject to a fine of \$10, at the discretion of the court, in addition to that hereinbefore provided. The court, in holding the act unconstitutional, said that where the penal feature of a police regulation is so severe, having regard to the character of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging house purposes, and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws, rendering the act void, irrespective of whether its provisions would otherwise be valid.

But penalties of from \$100 to \$10,000, imposed upon a railway company for failure

Gose, J., delivered the opinion of the court:

Section 25 of the public-service commission law (Laws 1911, p. 558) provides: "No street railroad company shall charge, demand, or collect more than 5 cents for one continuous ride within the corporate limits of any city or town. . . ." Section 95 of the act is as follows: "Every officer, agent, or employee of any public-service company, who shall violate or fail to comply with, or who procures, aids, or abets any violation by any public-service company of any provision of this act, or who shall fail to obey, observe, or comply with any order of the commission, or any provision of any order of the commission, or who procures, aids, or abets any such public-service com-

pany in its failure to obey, observe, and comply with any such order or provision, shall be guilty of a gross misdemeanor." The Code (Rem. & Bal. § 2267) provides: "Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than \$1,000, or by both." The defendants were prosecuted, convicted, and sentenced in the justice court of Seattle precinct, King county, for an alleged violation of the provisions of § 25 of the public-service commission law. The charge is that the defendants, being the officers, employees, agents, and servants of the Seattle, Renton, & Southern

or refusal to obey an order made by a state railroad commission, fixing reasonable rates, are, in *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 937, held not to be so excessive as to deny the company the equal protection of the laws. The court, commenting upon *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, stated that the statutes involved in that case differed so widely from the Oregon statutes involved here, in the severity of the penalties prescribed, as to render the *Young Case* not authoritative in this case.

So, where an act to establish minimum rates for the transportation of crude oil and the products thereof, and to forbid rebates, imposed upon the common carrier for a violation of the act penalties of \$500, payable to the person injured, together with a reasonable attorney's fee, and made the giving of rebates a misdemeanor punishable by fine and forfeiture of the right to do business, it was held in *Tucker v. Missouri P. R. Co.* 82 Kan. 222, 108 Pac. 89, that the penalties prescribed by the act in question were not so oppressive that their natural effect would be to intimidate carriers from resorting to the courts to test its validity. The court, in speaking of *Ex parte Young*, supra, said: "Compared with the drastic penalties prescribed by the legislature of the state of Minnesota, those of the Kansas statute are mild indeed. The latter are not imposed upon officers, agents, or employees; they affect the corporation only, are merely pecuniary, and are neither extravagant nor unreasonable."

In *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.* 68 Wash. 160, 123 Pac. 3, it is held that the Washington Railroad Commission act which imposes upon a railroad company penalties for failure to comply with orders of the commission for furnishing additional facilities cannot be held unconstitutional, as contravening the 14th Amendment of the Federal Constitution, in that the penalties are excessive, since, as stated by the Supreme Court of the United States, in passing upon a similar contention in *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364-367, 37 L. ed. 769-771, 13 Sup. 46 L.R.A. (N.S.)

Ct. Rep. 870: "The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. . . . And the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control."

If the penalties are imposed for the violation of an order passed after notice and an opportunity for a hearing, it cannot be said that the parties affected have been denied due process of law. Thus, it was held in *Wadley Southern R. Co. v. State*, 137 Ga. 497, 73 S. E. 741, that a state statute which confers on a railroad commission the power to require railroads to afford the usual and like customary facilities for interchange of freight to patrons of each and all routes or lines alike, and to make just and reasonable rules for preventing unjust discrimination, and provides for notice and an opportunity of a hearing of the railroad company thereby affected by any order of the commission, and for a violation of an order of the commission, imposes a penalty on the corporation in a sum not to exceed \$5,000, at the discretion of the trial judge, and also subjects any person violating or abetting the violation of the order to punishment for a misdemeanor, does not offend the constitutional guaranty of due process of law and the equal protection of the laws, in that the railroad thereby affected is prevented from testing the validity of the statute or the order of the railroad commission because of excessive penalties. The court said: "The distinction is obvious between a case where the statute imposes a penalty for disobedience to an order of the commission, made after notice and an opportunity to be heard, and the case of a statute which imposes serious and heavy penalties for its violation, where the validity of the statute depends upon the existence of facts and their effect, which can only be determined after an investigation of a most complicated and technical character. An illustration of the latter case may be found in *Ex parte Young*, supra."

J. D. C.

Railway Company, a railway corporation operating a street railway within the corporate limits of the city of Seattle, unlawfully charged and collected from the complaining witness a 10-cent fare for one continuous ride within the corporate limits of the city. Upon appeal to the superior court a demurrer to the complaint was sustained. The state prosecutes an appeal.

The point urged by the respondents in support of the judgment is that the railway company is, by the terms of the statute, denied the equal protection of the law, and that its property is liable to be taken without due process of law, because it may only have a hearing upon a claim of the unconstitutionality of the statute, at the risk, if mistaken, of being subjected to such heavy and successive penalties as to practically foreclose it of the right to litigate that question. This view has received the sanction of the Supreme Court of the United States. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. A like principle was announced in *Ex parte Wood* (C. C.) 155 Fed. 190.

In the *Young Case* certain stockholders of the Northern Pacific Railway Company brought suit in the Federal court against the company, the members of the State Railroad and Warehouse Commission, and the attorney general of the state of Minnesota. The object of the suit was to prevent compliance with the provisions of certain acts of the legislature of the state of Minnesota and certain orders of the State Railroad and Warehouse Commission, prescribing the rates which should be charged for transportation of passengers and commodities upon railroads within the state. The bill, among other things, prayed that the attorney general and the members of the commission be enjoined from enforcing the provisions of the several acts. The court gave a temporary restraining order as prayed for. On the next day the state, on the relation of its attorney general, commenced an action in the state court against the railway company, the object of which was to compel the company to put into effect the rates and charges fixed by the laws of the state. Thereupon, and in response to a rule to show cause why he should not be punished as for contempt, the attorney general, after a hearing, was held to be in contempt of the Federal court, out of which the temporary restraining order had issued. He thereupon sued out a writ of habeas corpus in the Federal Supreme Court. In discussing the effect of extreme and cumulative penalties in the several legislative acts, the court said: "It may therefore be said that when the penalties for disobedience are by fines so enor-

mous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event. We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The fine to be imposed under the Minnesota statute was heavier than that provided by our statute, but the principle is the same. Here the penalty is "punishment by imprisonment in the county jail for not more than one year, or by a fine of not more than \$1,000, or by both." It is apparent that in the operation of a street railway

in the city of Seattle, the officers and agents of the operating company might violate the statute 1,000 times, or perhaps many thousand times each day, and in each instance would subject themselves to the penalty of the law.

The attorney general argues that the statute gives the courts a wide discretion in the matter of punishment, and that they are permitted to impose a fine as low as 1 cent and to impose a jail sentence as short as one hour. This is true, but it is also true that their discretion would permit the maximum sentence. As an illustration of the practical working of the act, it seems proper to observe that the justice court imposed a sentence of thirty days' imprisonment in the King county jail.

The attorney general cites *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.* 68 Wash. 160, 123 Pac. 3, and insists that it announces a view that sustains the constitutionality of the law. In that case, after a full hearing upon the merits, the railway company appearing by counsel, the commission entered an order requiring the railway company to erect a suitable station at Hay and Whitman county, for the accommodation of passengers and freight, the same to be completed within forty-five days after the service of the order. The time for complying with the order expired on September 24, 1909, but the station was not completed until the 11th day of January following. The railroad company did not seek a review of the order within the time prescribed by law, or at all; hence, under the statute (Rem. & Bal. Code, § 8629) the order became "final and conclusive." The suit was for a recovery of a penalty for noncompliance with the order, and a judgment was entered for \$1,000. In the discussion of the case the court said that the railroad company appeared at the hearing, submitted its testimony, and raised no question as to the sufficiency of the complaint or the jurisdiction of the commission under the complaint to make an investigation of its station facilities at Hay. It was held that the proceeding was regular, that the commission had jurisdiction, and that the railroad company having failed to review the order as it was permitted to do under the statute, the order became, in the language of the statute, "final and conclusive." The distinction is obvious. The necessity for the station had been legally adjudged, and the penalty was imposed under the statute because of the failure of the railroad company to obey the order. This distinction was recognized by Mr. Justice Brewer in *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, where 46 L.R.A. (N.S.)

he said: "It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and if extreme or cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented."

The view we have taken of the case makes it unnecessary to consider the other questions discussed by counsel.

The judgment is affirmed.

Parker, Mount, and Chadwick, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 1.)

WASHINGTON FINANCE CORPORATION, Appt., v.

R. E. GLASS et al., Resp'ts.

(— Wash. —, 134 Pac. 480.)

Bills and notes — alteration — reducing amount payable — effect.

1. Indorsing upon a note before negotiations of a fictitious payment for the purpose of reducing its amount is within the provision of the negotiable instruments act, which avoids a note in favor of non-assenting parties in case of a material alteration which is defined to be *inter alia* a change in the sum payable.

Same — execution — time occurs.

2. An indorsement of a fictitious payment on the back of a note to reduce it to the amount which the discounting bank is willing to advance upon it occurs before execution of the note, for the purpose of determining its effects upon the instrument.

Same — holder in due course — bank directing alterations.

3. A bank which directs the indorsement of a fictitious payment upon a note to reduce it to the amount which it is willing to advance upon it before discounting it is not a holder in due course, so as not to be affected by the alteration, under the negotiable instruments act.

(August 11, 1913.)

Note. — Indorsement of payment on bill or note as a material alteration.

In *Johnston v. May*, 76 Ind. 203, where a note signed by a maker and surety was left in the hands of the maker to deliver to the payee, and at the time of delivery a fictitious credit was indorsed on the note, the indorsement was held such a material alteration

APPPEAL by plaintiff from a judgment of the Superior Court for King County in defendants' favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Bogle, Groves, Merritt, & Bogle, for appellant:

The alteration, in order to be material, must vary the original legal effect and operation of the note made by a party to the contract, without the express or implied consent of some other party to the contract.

2 Cyc. 142.

The indorsement, having been made subsequent to its execution by makers, is no part of the note itself, and does not, therefore, change the "sum payable," within the meaning of the statute, so as to constitute a material alteration.

1 Randolph, Com. Paper, 300, 301; 2 Dan. Neg. Inst. 4th ed. § 1396; Hakes v. Russ,

as to release the surety; and this is the view taken in WASHINGTON FINANCE CORP. v. GLASS.

In the Johnston Case it was said that the fact that the indorsement reduced the amount for which the surety could be held liable did not prevent the alteration from being regarded as a material one, the criterion for determining the materiality of an alteration being whether the note sued upon is the same as that executed by the surety.

On the contrary, where a note was executed by a principal maker and a surety, and left in possession of the principal maker with the understanding that it was to be delivered to the payee therein as evidence of the purchase price of cattle, and the principal maker purchased other cattle, giving in payment thereof the note in question, and indorsed thereon as a credit the difference in the purchase price of the cattle, the indorsement of the credit is not such an alteration as will discharge the surety. Laub v. Rudd, 37 Iowa, 617. "This indorsement," says the court, "effects no change upon the face of the note. It is the same note as respects date, amount, payee, and time of payment as before. If the note had been negotiated and after that (the amount of the indorsement) had been credited thereon, no one would claim that such an alteration had been made as would discharge the surety. The effect is just the same when the credit is indorsed at the time of negotiation."

The mere indorsement of a credit on a joint and several note was held not to be a material alteration of the same in Hakes v. Russ, 99 C. C. A. 327, 175 Fed. 751; but in this case, where, in the sale of a horse to a number of persons, the vendor agreed to obtain the signature of a certain number of persons to the note, but, instead, accepted cash payment from some of them and indorsed the amounts received on the note, relieving them from signing the joint and several obligation for the purchase price, the

99 C. C. A. 327, 175 Fed. 751; Theopold v. Deike, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193; Wade v. Withington, 1 Allen, 561; Hewins v. Cargill, 67 Me. 554; Boutelle v. Carpenter, 182 Mass. 417, 65 N. E. 799; Lau v. Blomberg, 3 Neb. (Unof.) 124, 91 N. W. 206; McDaniels v. Lapham, 21 Vt. 222; Com. v. Ward, 2 Mass. 397; Buhl v. Trowbridge, 42 Mich. 44, 3 N. W. 245; Reed v. Culp, 63 Kan. 595, 66 Pac. 616; 3 Randolph, Com. Paper, § 1754; Merchants' & M. Bank v. Evans, 9 W. Va. 373; Holthouse v. State, — Ind. —, 97 N. E. 130; Meeker v. Shanks, 112 Ind. 207, 13 N. E. 712.

No matter what the discount, appellant could have recovered the full amount of the note from the makers, in the absence of any showing of bad faith on their part.

Selover, Neg. Inst. § 172; Dan. Neg. Inst. § 750; 2 Randolph, Com. Paper, 117; McNamara v. Jose, 28 Wash. 461, 68 Pac. 903;

failure to have the note signed by all the purchasers according to the agreement with each of those who did sign was held to be a material change in the contract.

In Hawkins v. Humble, 5 Coldw. 531, where a promissory note was given for the hire of a slave, and before the period of hiring expired the slave returned to his former owner and there remained, and the hirer and owner compromised the matter without the knowledge or consent of the surety on the note, and entered a credit on the note for the amount the hire was reduced on account of the slave's return, it was held there could be no recovery on the note against the surety. The slave having returned to his owner, there could be no recovery on the obligation for his services except on a new contract under the law of this state; and it was held that it was not competent for the principal debtor to waive his legal rights under the original contract and decline to take advantage of the forfeiture so as to bind the surety, nothing is said as to the indorsement being a material alteration, but the case is decided on the ground above stated.

As between the parties, the striking out of the word "forty" from an amount in a note for \$840, and an indorsement on the back of the note, to the effect that "this note changed to \$800—\$40 advanced October 12, '99. G. G. November 2, '99," which indorsement was made by the payee after a partial payment thereof by the maker, who instructed the payee to indorse the amount on the note as interest, but, instead, indorsement was made as above stated,—is not a material alteration. Whitehead v. Emmerich, 38 Colo. 13, 87 Pac. 790.

In the following cases there was not an indorsement of payment on the note, but another method of effecting the same result was used:

In State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. 413, the owners of real estate

Meeker v. Shanks, 112 Ind. 207, 13 N. E. 712; Snyder v. Van Doren, 46 Wis. 602, 32 Am. Rep. 739, 1 N. W. 285; Luckenbach v. McDonald, 164 Fed. 296.

Mr. W. W. Felger, for respondents:

The note in this case was materially altered without the knowledge or consent of the respondents Stokes and wife, and such alteration vitiated the note as to them.

Parsons, Bills & Notes, 1st ed. 544, 549-552, 582; Dan. Neg. Inst. 4th ed. §§ 1375, 1376, 1384, 1396; Stephens v. Graham, 7 Serg. & R. 505, 10 Am. Dec. 485; Wood v. Steele, 6 Wall. 80, 82, 18 L. ed. 725, 727; Reese v. United States, 9 Wall. 13, 21, 19 L. ed. 541, 544; Martin v. Thomas, 24 How. 315, 317, 16 L. ed. 689, 690; Angle v. North Western Mut. L. Ins. Co. 92 U. S. 330, 340, 23 L. ed. 556, 559; Sheley v. Sampson, 5 Kan. App. 465, 46 Pac. 994; Pelton v. San Jacinto Lumber Co. 113 Cal. 21, 45 Pac. 12; Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363; Bowers v. Briggs, 20 Ind. 139; Judah

v. Zimmerman, 22 Ind. 388; Schnewind v. Hacket, 54 Ind. 248; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Collier v. Waugh, 64 Ind. 456; McCoy v. Lockwood, 71 Ind. 319; Dietz v. Harder, 72 Ind. 208; Johnson v. May, 76 Ind. 293; Bowman v. Mitchell, 79 Ind. 84; Eckert v. Louis, 84 Ind. 99.

One interested in a note cannot tamper with or alter the note in any particular.

Eckert v. Louis, 84 Ind. 99; Johnson v. May, 76 Ind. 293.

Any alteration of a note which may change the maker's liability is material.

Flint v. Craig, 59 Barb. 319; Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Dobyms v. Rawley, 76 Va. 537; Huntington v. Finch, 3 Ohio St. 445; Richardson v. Feller, 9 Okla. 513, 60 Pac. 270; Johnson v. May, 76 Ind. 293; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Ruby v. Talbott, 5 N. M. 251, 3 L.R.A. 724, 21 Pac. 72; Moore v. Hutchinson, 69 Mo. 429; Palmer v. Poor, 121 Ind.

executed a mortgage thereon to secure a note executed by a third person for \$1,500. In negotiating the note, the payee, being unable to negotiate it for the full value, obtained \$1,000 thereon and placed on the face of the note, below the signature, an indorsement to the bank discounting it, followed by the statement that "the said principal sum being reduced to \$1,000," and also indorsed a statement of like effect on the mortgage. This was held not to be a material alteration of the note, the court stating: "There has been no change in the original physical form of the note by erasure or interlineation; and while it may be conceded that a note may be altered by indorsements or memoranda thereon without disturbing its physical appearance . . . yet if the memoranda or indorsements do not have the legal effect to alter the legal import and operation of the note, but express a new, distinct, and collateral agreement between the payee and principal named therein, it will only be evidence of the new agreement intended, and it cannot be said that the note, the evidence of the prior agreement, was thereby altered. . . . This was not an alteration of the note, but in legal effect a credit of \$500 on it."

The court further said that it was not contended that the new or collateral agreement was detrimental in any way to the mortgagors.

Where an accommodation note for \$2,500 is indorsed by the payee, with a direction to the cashier of the bank at which it is made payable to "pay on within \$750," the note was held in *Douglass v. Wilkinson*, 17 Wend. 431, affirmed in 22 Wend. 559, to be a valid obligation for \$750.

In *Merchants' & M. Bank v. Evans*, 9 W. Va. 373, where a joint accommodation note signed by several parties for \$6,000 was, without the knowledge of the sureties, discounted at a bank for \$4,000, the cashier indorsing upon the note "discounted for \$4, 46 L.R.A.(N.S.)

000, and should be so read," such indorsement was held not to invalidate the note, since this was equivalent to the bank's paying the full amount of the note and immediately receiving back the difference.

On the contrary it has been held where an accommodation note for \$3,000 is executed and placed in the hands of one of the parties, who discounts it at a bank—which had knowledge of the relation sustained to the note by the surety—for \$2,000, the cashier writing across the face of the note, "this note was discounted for \$2,000, which amount is due upon it," the note as a contract to pay \$3,000 never had any legal existence or vitality; and as the surety never assented to the change wrought in the character and legal effect of the note, he is not bound to pay it as a note for \$2,000, and is relieved from the contract by the alteration. *Portage County Branch Bank v. Lane*, 8 Ohio St. 405.

The court in this case holds that the original contract never became a valid and binding agreement, and therefore it was not necessary to determine what would have been the effect of a modification of the agreement reducing the amount for which the surety was liable; for, says the court, the proposition of the surety for a loan of the original amount "was never accepted by the plaintiff, nor any modification of that proposition ever assented to by Lane (the surety); the paper never had as against him any legal vitality, and to hold him liable thereon for any amount, or for the money actually loaned by the plaintiff, would be to create a liability of a surety by mere implication, which all the authorities forbid."

As to memorandum on back of note at the time of execution as substantive part thereof, see note to *Kurth v. Farmers' & M. State Bank*, 15 L.R.A.(N.S.) 612.

W. A. E.

135, 6 L.R.A. 469, 22 N. E. 984; *Sanders v. Bagwell*, 37 S. C. 145, 16 S. E. 714, 770; *Citizens' Nat. Bank v. Williams*, 174 Pa. 66, 35 L.R.A. 464, 34 Atl. 303; *Craighead v. McLoney*, 99 Pa. 211; 2 *Dan. Neg. Inst.* § 1394; *Marshall v. Gougler*, 10 Serg. & R. 164; *Low v. Argrove*, 30 Ga. 129; *Warder, B. & G. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300; *Lee v. Butler*, 167 Mass. 426, 59 Am. St. Rep. 466, 46 N. E. 52; *Newman v. King*, 54 Ohio St. 273, 35 L.R.A. 471, 56 Am. St. Rep. 705, 43 N. E. 683; *Greenl. Ev.* 568; *Central Nat. Bank v. Efrd*, 91 S. C. 135, 74 S. E. 136; *Wicker v. Jones*, 159 N. C. 102, 40 L.R.A. (N.S.) 69, 74 S. E. 801; *Wood v. Steele*, 6 Wall. 82, 18 L. ed. 727; *Montgomery v. Crossthwait*, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; *Columbia Distilling Co. v. Rech*, 151 App. Div. 128, 135 N. Y. Supp. 206; *Pelton v. San Jacinto Lumber Co.* 113 Cal. 21, 45 Pac. 12.

Chadwick, J., delivered the opinion of the court:

Defendant Glass solicited the defendants Stokes and wife to join him and his wife as makers of a promissory note for the sum of \$15,000. Stokes and wife agreed to do so upon condition that he would secure the signatures of W. A. Ridgway and wife and William Houston and wife. This Glass agreed to do, and the note was accordingly signed by Stokes and wife. No effort was made, so far as the record shows, to secure the other names. The note was turned over to Ridgway to negotiate for the benefit of Glass. At the time the note was executed it was not known where or of whom the money could be obtained, and the space provided for the name of the payee was left blank. Ridgway took the note to the Spokane & Eastern Trust Company, at Spokane, and endeavored to obtain a loan in the sum of \$15,000. At first the negotiations hung on the question of discount; the bank demanding the sum of \$1,000. For reasons, which to the bank seemed sufficient, coupled with the possible reason that Ridgway refused to guarantee the loan for more than \$11,000, the bank finally refused to loan more than \$11,000, subject to a discount in the same proportion, or eleven fifteenths of \$1,000. The bank then filled in the name of Ridgway as payee, and had him indorse the note in blank, and took a personal guaranty of its payment. It then paid him the sum of \$10,240.14, being \$11,000 less the agreed discount. To make the note conform to the contract made with Ridgway, the bank indorsed a payment of \$4,000 on the back of the note. Ridgway paid the proceeds of the note to Glass. The defendants Stokes and wife have never ratified

the changes made in their contract. The note was not paid when due, and this suit was brought to compel payment. The defendants Stokes and wife have set up several defenses; only one of which will be noticed by us; i. e., a material alteration. The court found that there was a material alteration of the note, and defendants Stokes and wife were absolved of all liability. A judgment was rendered in their favor. Plaintiff has appealed.

It is the contention of the appellant that the judgment is ill founded in law, for the reasons that the alteration is not material, in that it reduced the amount to be paid, and was therefore for the benefit of the makers, that an indorsement of a payment on the back of an instrument is not an alteration within the meaning of the statute, and that the alteration, if any, was made before the note was executed, and hence is not within the prohibition of the negotiable instruments act. That act provides:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." § 3514, Rem. & Bal. Code.

"Any alteration which changes—(1) the date; (2) the sum payable, either for principal or interest; (3) the time or place of payment; (4) the number or the relations of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." § 3515, Rem. & Bal. Code.

We had occasion to discuss these sections in the case of *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230. There, as here, the instrument did not find favor in the current of trade, and to meet the demands of the bank to which the note was offered, other names were added as makers. We held that this was a material alteration within the meaning of the statute. It was insisted that Pedersen should not be heard to make the defense of material alteration, for the reason that the change was for his benefit, in that the addition of other names as makers tended to reduce *pro tanto* his primary liability. We contented ourselves with quoting the statute, which seemed too plain for discussion, and by reference to

Daniel on Negotiable Instruments, §§ 1375 and 1387.

Whatever comfort may be extracted from the older authorities, we are quite clear that it was the purpose of the negotiable instruments act to avoid and make impossible just such a situation as is presented in this case. There was a purpose in the adoption of the negotiable instruments act, declared in the propaganda which preceded its adoption, and manifested in the act itself, and that is that all cases arising under it should, if possible, be decided by reference to it, and not by reference to any equities existing between the parties. It may be in a given case that an indorsement of a payment would be for the benefit of a surety or an accommodation maker. In another case it might work his destruction. So, too the addition of another name as a maker, or the extension of the time of payment, would theoretically be for the benefit of the surety or accommodation maker, but the law regards not the purpose or the effect of the change. *Handsaker v. Pedersen*, supra; *Dan. Neg. Inst.* § 1375. It is enough that, whether advantageous or not, the change results in a contract upon which the minds of all parties have not met. *Wood v. Steele*, 6 Wall. 82, 18 L. ed. 727. The statute cannot be read in any other way. Therefore, in order to avoid such contingencies, the negotiable instruments act was drawn, and when adopted displaces the law merchant, which had become, through the mediumship of hard cases, saturated with permissible causes of action and defenses of an equitable nature. In his first criticism of the proposed law (14 *Harvard L. Rev.* 241), Professor Ames, dean of the Harvard Law School, admits this virtue. "Especially to be commended are those sections of the new Code which settle, and in the right way, certain questions which have been a prolific source of litigation and antagonistic decisions." See, generally, the reprint of Ames-Brewster controversy, Brannan, *Negotiable Instruments Law*, 2d ed. p. 162 et seq.

There is no ambiguity or doubt in the statute we have quoted. It says a change of the sum payable is a material alteration, and to put its intent beyond the cavil of a doubt it was provided that any "change or addition which alters the effect of the instrument in any respect is a material alteration." This view makes it unnecessary to go beyond the statute, or to discuss the many admittedly conflicting authorities on alterations of instruments under the law merchant.

But it is said that an indorsement of a payment on the back of an instrument is not a material alteration; that the statute 46 L.R.A.(N.S.)

is intended to cover only such changes as touch the face of the instrument. Whether an indorsement, made in good faith after the instrument has been given currency, would be a material alteration we are not called upon to decide. We are quite clear, however, that the indorsement of a fictitious payment as a condition precedent to the acceptance, negotiation, discount, or delivery of a note to the original payee or lender of the money, changes "the effect of the instrument, . . ." as well as the sum payable, and is an act proscribed by the statute. It must be borne in mind that the bank never intended to loan \$15,000. It did not loan \$15,000. No money was paid in excess of \$10,240.14, nor was any sum actually paid in good faith, or at all, to be indorsed on the note. The whole transaction, in so far as the contract pretends to deal with any sum in excess of \$10,240.14, is a fabrication. There are reasons for holding a fictitious payment to be a material alteration. All of them are referable to the principle that a person has a right to make his own contracts. The law, as we now have it, was not drawn solely with reference to the right of the payee of a note. There is nothing sacred in a contract drawn in the form of a promissory note. A payee or holder is not permitted to recover on his part of a contract alone, nor can he insist that the law make a contract for him, or the other contracting party. He must recover upon the contract made by his adversary, and if the instrument has been so changed that it does not voice the original will of the maker, there can be no recovery. A case in point is that of *Johnston v. May*, 76 Ind. 293. There had been an indorsement of a fictitious credit. The court said: "We need not argue, for the purpose of showing that such an alteration of the note was a material alteration, for that is manifest; and the facts found by the court show that this alteration was made in the absence and without the authority of the appellee, and without his knowledge or consent, by the principal in the note and the payee thereof, or one of them, before or at the time of its delivery. Under the decisions of this court such an alteration will vitiate and avoid the note, and prevent a recovery thereon from the appellee. *Holland v. Hatch*, 11 Ind. 497, 71 Am. Dec. 363; *Schnewind v. Hackett*, 54 Ind. 248; *Collier v. Waugh*, 64 Ind. 456; *McCoy v. Lockwood*, 71 Ind. 319; *Dietz v. Harder*, 72 Ind. 208. It may be said, however, that the effect of the alteration of the note, in this case, was to reduce its amount and diminish the appellee's liability, and therefore he ought not to be heard to complain of such an alteration. In the case of *Coburn v. Webb*,

56 Ind. 96, 26 Am. Rep. 15, the effect of the alteration of the note in suit was the same as in the case now before us, to diminish the amount of the surety's liability, and the same point seems to have been made in that case as the one now under consideration. Upon that point, in the case cited, this court said: 'This change of the note did not, perhaps, operate to the prejudice of Coburn. But that is not the legal criterion by which to determine whether an alteration of a note destroys it. The question is, Is the note sued upon the same note, in legal effect, as that signed by Coburn? If the alteration made the note a different one in legal effect, then it is not Coburn's note, and he is not bound by it. These views are fully sustained by the current of authorities in this state and elsewhere.' This case meets the first two propositions advanced by counsel, and we can safely rest our decision of them upon it, and the Handsaker Case, and the authorities therein cited. We have not overlooked the insistence of counsel that the Indiana case is substantially overruled in later cases, but we do not so read the books. In *Meeker v. Shanks*, 112 Ind. 207, 13 N. E. 712, it was held that the name of the payee might be changed without avoiding the contract of an accommodation maker, on the theory that "it was immaterial to the surety who advanced the money, so that the person for whose accommodation he signed obtained the benefit of it." It is enough to say that the alteration here complained of was not discussed. The authority of *Johnston v. May* was not denied. *Holthouse v. State*, — Ind. App. —, 97 N. E. 130, was a case on a contractor's bond, and was decided with reference to the general rules of the law. The negotiable instruments act was in no way involved. It was not relied on by counsel, or considered by the court. The case of *Merchants' & M. Bank v. Evans*, 9 W. Va. 373, should be mentioned. This case is seemingly in point, and is relied on by appellant. A note for \$6,000 was signed by seven people, one of whom was the principal maker. The bank discounted the paper for \$4,000 only, and the cashier indorsed upon it at the time, "Discounted for \$4,000, and should be so read." Upon suit brought it was held that, "the original transaction, in its legal effect, amounted to a loan of \$6,000 to all the makers of the note, and a payment thereon forthwith of \$2,000, which, in effect, was credited at the time upon the note by the indorsement, which the cashier at once made upon it." And "the fact that \$4,000 only, instead of \$6,000, was loaned without the consent of some of the makers of the note, who were sureties, does not vitiate the note; for the party who received

the money, had he received in cash the \$6,000, would have had a perfect right, without the consent of his sureties, to have paid back at once \$2,000 to the bank." This case stands alone so far as we have been able to trace the decisions. It is not cited or commented on by any of the prominent text-writers. In our judgment it is not sound when applied to the state of facts there occurring. We have no doubt an actual bona fide transaction would be upheld by the court. It was not so in that case; neither is it so in this. In the instant case, if the bank took the paper at its face, and Glass, for whose benefit the note was discounted, had thereafter found that he did not need the full \$15,000, and had repaid the \$4,000, there could be no doubt of the right to recover. There would have been a loan and a repayment. The case shows no such state of facts. The payment, if it can be so called, was a fiction. The fault of the West Virginia case lies in this: The court assumes that the legal effect of the transaction amounted to a loan of \$6,000 and a payment forthwith of \$2,000. This is not true. There can be no loan without credit. The makers of the note never had credit for the \$6,000. Therefore there could not be a loan of \$6,000 and a payment of \$2,000. The object of the note in the present case was to establish a credit for \$15,000. If it were not so, respondents might not have signed the note. No such credit was ever established. Whether a transaction of the kind occurring in the two cases is a material alteration depends upon its faith. If the transaction is real, and based upon the full credit of the note, it is not a material alteration; if the credit is simulated, and the indorsement of a payment is a subterfuge, it is.

It is next contended that the indorsement was made after the execution of the note, and therefore forms no part of it (1 Randolph, Com. Paper, pp. 300, 301; Dan. Neg. Inst. § 1396; 7 Cyc. 629), and many cases are cited to sustain the proffered issue. Counsel for respondent has cited cases to sustain the contrary of this doctrine. No purpose will be served by reviewing and distinguishing these cases. Counsel for appellant indulges in a learned argument, but it seems to us that they admit their case away when they say: "It is true that words on the back of a note made at the time of or prior to the execution of said note, if they in any way affect the operation of the note, are considered as a material part of the note, and that an alteration of such words would be a material alteration, and that the writing of an indorsement on the back of a note, if made contemporaneous with the note, is considered as a part of the

note; but an indorsement made subsequent to the execution of the note is not considered as a part of the note itself."

The real question confronting the court is: When was the note executed? A note is distinguished by its parts and particular requisites. It must be in writing, and signed by the maker or drawer; it must be an unconditional promise to pay a sum certain; and it must be payable to order or bearer. There are certain other requisites not now necessary to enumerate. Rem. & Bal. Code, § 3392. Keeping this section of the statute in mind, it is the law that until a note meets these requirements it is not executed. A note is executed when it is complete in its parts and launched on the current of trade. This note sued on, although signed by certain parties, and in this sense executed by them, was not an executed instrument within the meaning of the law. It was not ready for delivery, nor was it delivered, until the name of the payee was inserted and the indorsement made. "Execution of a note requires both a signature and delivery. In a legal sense the word 'execute' includes delivery, and implies a complete contract." Words & Phrases, Title "Execute." See also *Nicholson v. Combs*, 90 Ind. 516, 46 Am. Rep. 229; *Bagley v. McMickle*, 9 Cal. 430. The bank refused to accept or discount the note until the fictitious payment was indorsed upon it. As the note was admittedly indorsed before delivery, and delivery being an essential element of execution, it follows that the change was made before execution, and is therefore material. Dan. Neg. Inst. § 1396. We are not called upon to decide what the legal effect of an indorsement after execution would be.

Neither can the plaintiff recover under the provision of the negotiable instruments act, wherein it is provided that when an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor. Rem. & Bal. Code, § 3514. The Spokane & Eastern Trust Company was not a holder in due course. *First Nat. Bank v. Barnum* (D. C.) 160 Fed. 245. The bank had notice of the infirmity. It was a party to, and participated in, the act of alteration.

Other defenses are urged; but, being satisfied that no recovery can be had for the reasons stated, we will not pursue our inquiry further.

Affirmed.

Crow, Ch. J., and Gose, Mount, and Parker, JJ., concur.
46 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

SOUTHERN COTTON OIL COMPANY et al., Apts.,
v.
NAPOLEON HILL COTTON COMPANY et al.

(— Ark. —, 158 S. W. 1082.)

Subrogation — loan to pay mortgage — want of agreement for.

Agreement that a mortgage shall be kept alive in favor of one who advances money to pay it, and that he shall be subrogated to its lien, is not necessary to effect such subrogation as against the holder of an inferior judgment lien of the existence of which he is ignorant, if he makes the advance with the understanding that the mortgage shall be satisfied and that he shall have a first lien upon the property.

(Hart and Smith, JJ., dissent.)

(June 30, 1913.)

A PPEAL by plaintiffs from a decree of the Chancery Court for Independence County dismissing a complaint filed to se-

Note. — Right of one advancing money to pay off a lien or encumbrance, upon security which proves defective, to be subrogated to such lien or encumbrance.

This note is supplemental to the note to *Capen v. Garrison*, 5 L.R.A. (N.S.) 838, to which reference is made for the earlier cases and for a discussion of the cause of the differences of opinion manifested by the decisions.

As to the right to reinstatement of a mortgage released or discharged by mistake, see notes appended to *Attkisson v. Plumb*, 58 L.R.A. 788, and *Errett v. Wheeler*, 26 L.R.A. (N.S.) 816.

As to revival of, or subrogation to, discharged mortgage in favor of assignee of equity of redemption, who pays it, as against junior lien, see note to *Capitol Nat. Bank v. Holmes*, 16 L.R.A. (N.S.) 470.

As to the right generally of one advancing money for the purchase price of property to be subrogated to the vendor's lien, see note to *Bell v. Bell*, 37 L.R.A. (N.S.) 1203.

In *Hughes v. Thomas*, 131 Wis. 315, 11 L.R.A. (N.S.) 744, 111 N. W. 474, 11 Ann. Cas. 673, the court said: "It seems to be well settled, and we think on sound principles, that where the security given for the loan which is used to pay off an encumbrance turns out to be void, although the party taking it expected to get good security, he will be subrogated to the rights of the holder of the lien which the money advanced is used to pay; and that in such case the party advancing the money cannot be regarded as a stranger or volunteer."

cure subrogation to the liens of certain mortgages which had been satisfied and discharged. Reversed.

Statement by Kirby, J.:

Appellants brought suit for subrogation to the lien of certain mortgagees, whose mortgage debts were paid off by the money loaned by it for the purpose under the agreement that it would be given a first mortgage lien upon the property. J. U. Martin testified that on December 31, 1903, he gave a mortgage upon the lands, and the gin situate thereon, to Hugh Wright for \$1,600, and on April 6, 1909, another on the same property to G. E. Yeatman for \$800. On the 23d of April, 1909, the appellee company recovered a judgment against him in

the Independence circuit court, where the land was situate, which constituted a lien thereon. Martin applied to the Southern Cotton Oil Company to borrow money to pay off the two prior mortgages upon the land and gin, and on the 4th of February, 1910, borrowed from it \$2,200, giving a mortgage upon the property to secure same. With this money he paid off both of said mortgage debts, and the mortgages securing them were satisfied of record. There was no agreement that the lien of the mortgages should be kept alive, but Martin told appellee that the money was to be used to pay them off, and that the mortgage securing its payment would be a first lien upon the land; that when he got the money he would pay off the other two, and the

Where the security fails of its purpose because of some defect in its execution, or because of want of authority or capacity in the person executing it.

In *Marx v. Clisby*, 130 Ala. 502, 30 So. 517, where the executor of a will, who was also made the trustee for the children of the testatrix, wrongfully executed a mortgage upon the trust estate in order to obtain money to pay the debts of the testatrix, it was said that, assuming an absolute want of authority in the trustee to borrow the money, yet he having borrowed and appropriated it to relieving the estate of debt for which it was liable, the lender would be subrogated to the rights of those creditors whose debts were paid out of the money loaned by him.

In *Helm v. Lynchburg Trust & Sav. Bank*, 106 Va. 603, 56 S. E. 598, it was held that the lender of money upon the security of a deed of trust is, in case the deed of trust proves to have been forged, entitled to be subrogated to the lien of taxes and of a prior valid encumbrance discharged by it out of the proceeds of the loan.

In *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39, it was held that one who released a mortgage held by him in order that the owner, who was about to make a sale of the property, might use the amount due him in purchasing property in another state, on which it was agreed that he should have a mortgage when the transaction should be completed, was entitled, upon the mortgage turning out to be invalid because of nonjoinder of the mortgagor's husband, to be subrogated to the lien of the vendor of the purchased property.

In *Re Lee*, 105 C. C. A. 111, 182 Fed. 579, it was held that where money is loaned in pursuance of an express agreement that it is to be used to discharge an existing encumbrance on the borrower's property, and that the lender is to have the first lien upon the property to secure its payment, and the money is so used, such lender may be subrogated to the rights of the encumbrancer whose debt has been paid, 46 L.R.A. (N.S.)

not only as against the borrower, but also as against his trustee in bankruptcy, and as against anyone else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money was lent.

In *Re Automobile Livery Service Co.* 176 Fed. 792, it was held that where at the time certain automobiles were pledged to secure a loan to pay the purchase price, the title to the pledged property was in the maker for his security for the purchase price, the lender, in case the pledge is to be regarded as invalid for want of authority in the officers of the borrower, in the absence of a resolution of its directors, to give the pledge, is entitled, as against the borrower's trustee in bankruptcy, to be subrogated to the lien of the maker of the automobiles to satisfy which the proceeds of the loan were used.

In *Scott v. Land, Mortg. Invest. & Agency Co.* 127 Ala. 161, 28 So. 709, where money was loaned for the purpose of discharging a vendor's lien, the lender taking a mortgage which turned out to be invalid on account of its being defectively acknowledged and the lands being a homestead, it was held that, there being no intervening equity, the lender was entitled to be subrogated to the vendor's lien.

In *Bell v. Bell*, 174 Ala. 446, 37 L.R.A. (N.S.) 1205, 56 So. 956, it was held that one who advanced money to pay the purchase price of real estate under an agreement that he should be secured by mortgage was entitled to subrogation to the vendor's lien as against the rights of the wife of the vendee, who did not comply with the statutory requirements in executing the mortgage so as to bind her interest therein.

In *Davies v. Pugh*, 81 Ark. 253, 99 S. W. 78, one who at the request of a husband advanced money to pay off a mortgage constituting a valid lien on his homestead, and to whom the mortgage and note were delivered by the mortgagee, and who subsequently surrendered the old mortgage and note upon receiving as security a mortgage on the property which purported to be ex-

title would be cleared up. It was his intention to make it a first lien, and the Cotton Oil Company understood that there were no other encumbrances against the land, after the payment of said mortgages, prior to its own; that it had a first lien by reason of its mortgage, as was intended to be given it upon the loan being made. The Cotton Oil Company had no knowledge in fact of appellee's judgment lien against the property at the time it made loan and took its security. Its representative, who agreed to make the loan, said: "I didn't know there was a judgment against it; I agreed to advance him the \$2,200, and understood that the record would be cleared so that our mortgage would be first, and that there wouldn't be anything else against the prop-

erty in any way; I wouldn't have advanced the money under any other conditions, and the advances being on the condition that our mortgage would be first; I advanced it with the understanding that Martin was to have the existing mortgages satisfied, and give me a mortgage, which I considered would be a first lien." The index to the record of the judgment only showed a judgment against W. R. Rice et al. The chancery court found that there was no agreement, express or implied, between appellant Martin or the older mortgagees that it should be subrogated to their rights under their mortgages, and that it agreed to loan Martin the \$2,200, and take a mortgage on the property, believing at the time that it was getting a first lien thereon, and from

secured and acknowledged by the husband and wife, but which proved invalid because it was not in fact signed by the wife, was held entitled to be subrogated to the lien of the discharged encumbrance, although he did not show an agreement at the time that he should hold the mortgage as security, since he did in fact hold it, and under all the circumstances such an agreement may fairly be inferred.

In *Dixon v. National Loan & Invest. Co.* — Tex. Civ. App. —, 40 S. W. 541, and *Flynt v. Taylor*, 100 Tex. 60, 93 S. W. 423, one whose mortgage securing a loan a part of which, by the agreement of the parties, was used to pay a vendor's lien, was invalid by reason of the property being a homestead, was held entitled to subrogation to the rights of the vendor.

But in *Davis v. Davis*, 81 Vt. 259, 130 Am. St. Rep. 1035, 69 Atl. 876, one who advanced money on request of a husband to pay off a mortgage on certain premises signed by the husband and his wife, taking as security a mortgage signed by the husband alone, was held not to be entitled to be subrogated to the lien of the mortgage discharged as against the wife's claim of homestead. The court said: "It is essential to a right of subrogation independent of agreement that the person making the payment be one who is under some obligation regarding it, or who has some interest to be protected by it. Payment by a stranger at the request of the debtor will not entitle the payer to subrogation unless there was an understanding to that effect."

And in *Askew v. Parker*, 131 La. 753, 60 So. 233, where a loan, the proceeds of which were used in paying a debt secured by vendor's privilege, was secured by a mortgage the foreclosure of which was resisted on the ground that the property was homestead property, it was held that the lender was not entitled to be subrogated to the vendor's claim; the conditions prescribed by the Code for the taking place of legal subrogation not existing, and there being no conventional subrogation.

A decision which is not exactly within 46 L.R.A. (N.S.)

the scope of this note, but which may be of interest in the present connection is *Murphree v. Clisby*, 108 Ala. 339, 29 L.R.A. (N.S.) 933, 52 So. 907, where it is held that one who loaned money to an insane person with which to purchase real estate, without knowledge of the borrower's insanity, taking back a mortgage thereon, was not entitled to be subrogated to the rights of his debtor against the vendor, so as to compel the vendor to return the purchase money to him.

Where the security fails because of partial or total want of title in the person giving it.

In *Hughes v. Thomas*, 131 Wis. 315, 11 L.R.A. (N.S.) 744, 111 N. W. 474, 11 Ann. Cas. 673, it was held that one who advanced money to an executor who was also life tenant of the property, to pay a mortgage executed by the testator, expecting to receive security on the fee, but whose security bound only the life estate, was entitled to subrogation to the rights of the mortgagee,—especially where there were no intervening rights, or prejudice worked to anyone.

In *Brown v. Hooks*, 133 Ga. 345, 65 S. E. 780, it appeared that a decedent devised to his daughter, who was his sole heir at law, a life estate in certain lands, with remainder to her children. The daughter asserted title in fee to the land adversely to the will, contending that the instrument was invalid; and borrowed a sum of money from one who knew of the will, sufficient to pay off the debts of the estate, giving a mortgage and certain personal sureties, whom the lender afterwards voluntarily released, for the repayment of the loan. Subsequently, during the lifetime of the daughter, the mortgage was foreclosed and the land bid in by the mortgagee. The will was afterward duly probated; and the daughter having died, her children brought ejectment. The court adhered to the rule laid down in *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 384, that subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which in the event of

said loan the debts held by Ware and Yeatman should be paid and the mortgages satisfied. The complaint was dismissed for want of equity, and from the decree appellants appeal.

Messrs. John W. & Joseph M. Stayton, for appellants:

One who pays a debt at the instance of the debtor is not a volunteer.

Rodman v. Sanders, 44 Ark. 507; 3 Pom. Eq. Jur. § 1212; *Chaffe v. Oliver*, 39 Ark. 542; *Davies v. Pugh*, 81 Ark. 257, 99 S. W. 78; *Re McGuire*, 137 Fed. 967; *Cumberland Bldg. & L. Asso. v. Sparks*, 49 C. C. A. 510, 111 Fed. 652; *Tradesmen's Bldg. & L. Asso. v. Thompson*, 32 N. J. Eq. 133; *Tyrrell v. Ward*, 102 Ill. 29; *Home Sav. Bank v. Bier-*

stadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Draper v. Ashley*, 104 Mich. 527, 62 N. W. 707; *Wilton v. Mayberry*, 75 Wis. 191, 6 L.R.A. 61, 17 Am. St. Rep. 193, 43 N. W. 901; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Union Mortg. Bkg. & T. Co. v. Peters*, 72 Miss. 1058, 30 L.R.A. 829, 18 So. 497; *Dillon v. Kauffman*, 58 Tex. 696; *Rachal v. Smith*, 42 C. C. A. 297, 101 Fed. 159.

Where the rights of innocent third persons have not intervened, the release will not prevent the person making the payment from becoming the equitable assignee of the claim paid.

Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625; *Cobb v. Dyer*, 69 Me. 494; *Dillon v. Kauffman*, 58 Tex. 696; *Whiteselle v. Texas*

default by the debtor he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor; and held that as against the remaindermen the lender was not entitled to be subrogated to the rights of creditors of the estate; and that the fact that the lender was himself a creditor of the estate did not bring him within that class of persons who could be said to have an interest in the estate to protect which it was necessary for him to pay off the decedent's debts. With reference to the conclusion that no equitable subrogation could be implied in the lender's favor from the fact of the payment of the debts of the estate, the court said: "Three important, vital, controlling facts unite in pointing to this conclusion as the only possible one under the evidence in this record and the law applicable to the issues involved: First, while the claims against the estate, as appears from the receipts given or memoranda made upon the accounts and notes, were paid by Brown, he was in fact lending the money to Mrs. Hooks; he became her creditor and she his debtor, and they recognized this relation, as was shown by papers executed by her to secure Brown for the loan made by him. In the second place, this loan was made by Brown to Mrs. Hooks to protect the interest of Mrs. Hooks in the property, as heir at law of V. A. Clegg, and not of the interest which she took under the will,—to aid her in freeing the estate of the deceased from charges against it, and not to protect any interest of the plaintiffs in the present action; for Mrs. Hooks and Brown ignored all possibility of Mrs. Hooks' children, who were remaindermen under the terms of the will of Clegg, having any right whatever in the estate. Mrs. Hooks was claiming adversely to the will, and adversely to any rights that her children might have had under the provisions of the will. Admitting that Mrs. Hooks and Brown acted in good faith, it still 46 L.R.A. (N.S.)

stands as a fact that their attitude towards the claims of the plaintiffs in this action was one of hostility to their rights and an absolute denial of the existence of those rights. And the third fact to which we have referred as being of vital importance is that, when Brown advanced the money to pay off the debts against the estate, he took not only Mrs. Hooks' obligation to repay, but also took security—and solvent personal surety—upon that same obligation, which subsequently he voluntarily released. Under such a state of facts as this, under the broadest doctrine of subrogation recognized by the decisions of this court, the defendant in the court below was in no position to invoke the application of the doctrine."

In *Fife v. Ohio Invest. Co.* — Ind. App. —, 100 N. E. 392, where a chattel mortgagee, having removed the mortgaged property to another county without the mortgagor's consent, gave a second mortgage thereon for a loan, a part of which was applied as a partial payment on the debt secured by the first mortgage, it was held that the facts were insufficient to give the second mortgagee the right of subrogation to the first mortgage; the court remarking, however, that had the second mortgagee furnished the money to pay the whole debt secured by the first mortgage and its security failed or proved insufficient, the claim of subrogation would stand on a better foundation.

Where the security fails because of some intervening lien or encumbrance of which the person taking it was ignorant.

In *Frederick v. Gehling*, 92 Neb. 204, 137 N. W. 998, it was held that as against a judgment creditor bidding in the land at an execution sale for much less than its actual value, a mortgagee whose mortgage was on record before the execution sale and was given to secure a loan with which prior mortgages shown by the certificate of liens to be prior to the lien of the judgment were paid upon an understanding with the mortgagor that it should be the first lien, was entitled to subrogation to the lien of the prior mortgages, the land

Loan Agency, — Tex. Civ. App. —, 27 S. W. 309; Ploeger v. Johnson, — Tex. Civ. App. —, 26 S. W. 432; First Nat. Bank v. Ackerman, 70 Tex. 315, 8 S. W. 45; Mustain v. Stokes, 90 Tex. 358, 38 S. W. 758; Pridgen v. Warn, 79 Tex. 588, 15 S. W. 559; Hicks v. Morris, 57 Tex. 658; Focke, W. & Co. v. Weishuhu, 55 Tex. 33; Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030; Cason v. Connor, 83 Tex. 26, 18 S. W. 668.

Where the debtor makes an agreement with the person advancing the money to pay off the encumbrance he should have a first lien on the property, and the money is so used, the person advancing it will be subrogated to the rights of the creditor whose debt has been discharged.

Wilkins v. Gibson, 113 Ga. 31, 84 Am. St.

being of sufficient value to pay both the judgment creditor's claim and the lender's mortgage.

In Brown v. McLean, 18 Ont. Rep. 533, one who had advanced money to pay off existing mortgages, taking a mortgage for the amount in ignorance of an execution against the lands of the mortgagor, which were in the hands of the sheriff at the time, was held entitled, as against the execution creditor, to be subrogated to the rights of the original mortgagees, upon the ground of mistake, he having acted under a belief that he was obtaining a first charge upon the property; and it was further held that he was not disentitled to relief because, by using ordinary care, he might have discovered the existence of the execution, the execution creditor not having been prejudiced thereby.

In Morris v. Bentley, 2 Terr. L. Rep. 253, one who had taken a mortgage in reliance upon a search of the register, which showed only one other encumbrance upon the property, which he caused to be discharged, was held entitled to subrogation to the lien thereof as against another encumbrancer whose mortgage did not appear on the register, but which, having been filed with the registrar who had entered it on the daybook only, would otherwise have been entitled to priority.

In Platte Valley Cattle Co. v. Bosserman-Gates Live Stock & Loan Co. 45 L.R.A. (N.S.) 1137, 121 C. C. A. 102, 202 Fed. 692, a case which upon its facts does not fall within the scope of this note, the party seeking subrogation being a purchaser of the mortgaged property, it was said that a third person, not a volunteer, who pays and procures a release of a first lien upon property under an agreement with the owner that as purchaser or first lienor he shall have the pecuniary benefit of such payment, becomes subrogated in equity as against an inferior lienor whose burden is not increased by such subrogation to the rights held by the first lienor before the payment was made.

In New England Mortg. Secur. Co. v. Fry, 143 Ala. 637, 111 Am. St. Rep. 62, 42 46 L.R.A. (N.S.)

Rep. 204, 38 S. E. 382; Straman v. Rechtime, 58 Ohio St. 443, 51 N. E. 44; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Gans v. Thieme, 93 N. Y. 225; Sidener v. Pavey, 77 Ind. 241; Detroit F. & M. Ins. Co. v. Aspinwall, 48 Mich. 238, 12 N. W. 214; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; Campbell v. Trotter, 100 Ill. 281; Green v. Milbank, 3 Abb. N. C. 138; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; George v. Butler, 16 Utah, 111, 50 Pac. 1032; Thompson v. Connecticut Mut. L. Ins. Co. 139 Ind. 325, 38 N. E. 796; Johnson v. Barrett, 117 Ind. 551, 10 Am. St. Rep. 83, 19 N. E. 199; Bennett v. First Nat. Bank, 128 Iowa, 1, 102 N. W. 129, 5 Ann. Cas. 899; Young v. Morgan, 89 Ill. 199; Stevens v.

So. 57, it appeared that A, whose land had been sold under an execution, borrowed money from B with which to redeem it, giving a mortgage as security for the loan, and on the same day giving another mortgage to C. Subsequently, being unable to pay B's mortgage, A conveyed the property to B. It further appeared that B applied to D for a loan and proposed as security a mortgage on certain lands, including those acquired from A; that D refused to make the loan unless C would declare that she had no interest in said lands and would join in the mortgage, which C accordingly did. Upon the maturity of D's mortgage D applied to E for a loan with which to pay it. E refused to make such loan unless C would declare that she claimed no interest in the lands proposed to be mortgaged as security, and C accordingly did make such declaration. Thereafter B mortgaged the property to the cross complainant for a loan to be used in paying off, so far as it would go, the mortgage previously executed to E, representing in the application for the mortgage that the lender would have a first lien on said lands, and that the balance to E not paid out of the loan would be arranged with B by other securities. The loan was accordingly made and E's mortgage was discharged of record. Upon this state of facts it was held that cross complainant was entitled, as against C, to be subrogated to the lien and rights acquired by B by reason of his having furnished the money with which A redeemed the mortgaged premises from the execution sale but that it had no equity of subrogation, as against C, to the lien of D's mortgage.

In Wachsmuth v. Penn Mut. L. Ins. Co. 147 Ill. App. 510 (judgment affirmed on another ground in 241 Ill. 409, 26 L.R.A. (N.S.) 411, 132 Am. St. Rep. 226, 89 N. E. 787), it was held that one lending money to discharge an encumbrance on the property of a decedent, on the representation that there were no claims against the estate, was not entitled to be subrogated to the lien of such encumbrance as against

King, 84 Me. 291, 24 Atl. 850; Yapple v. Stephens, 36 Kan. 680, 14 Pac. 222; Backer v. Pyne, 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21; Armstead v. Neptune, 56 Kan. 750, 44 Pac. 998; Moore v. Lindsey, 52 Mo. App. 474.

Messrs. George B. Rose and Ernest Neill, for appellees:

The Southern Cotton Oil Company never requested that the mortgages be kept alive; it knew that they were to be satisfied and it made no objection. It made the loan and took no measures to secure subrogation.

Cohn v. Hoffman, 50 Ark. 108, 6 S. W. 511; Handford v. Edwards, 89 Ark. 151, 23 L.R.A.(N.S.) 190, 115 S. W. 1143; Rodman v. Sanders, 44 Ark. 504; Bank of Commerce v. Lawrence County Bank, 80 Ark. 197, 117 Am. St. Rep. 85, 96 S. W. 749, 10 Ann. Cas. 211.

Kirby, J., delivered the opinion of the court:

It is not contended that there was any express agreement between Martin and appellant that it should be subrogated to the rights of the prior mortgagees upon the payment of their debts out of the money which it loaned for that purpose, but it is insisted that, since it made the loan with the express understanding and agreement that its security upon the property therefor should constitute a first lien, the other mortgage debts having been paid off with its money, it is entitled to subrogation to the rights of said mortgagees, as against the judgment lien of appellee, of which it was ignorant when it made the loan and took its security. It was not a volunteer

in the payment of these other mortgage debts; the loan having been negotiated from it by the mortgage debtor for the express purpose of paying them. "One who pays a debt at the instance of the debtor is not a volunteer." *Rodman v. Sanders*, 44 Ark. 504.

The doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties without regard to form, and its purpose and objects is the prevention of injustice. Cyc. also says: "And generally where it is equitable that a person, not a mere stranger, intermeddler, or volunteer, furnishing money to pay a debt, should be substituted for or in the place of the creditor, such person will be so substituted." 37 Cyc. 371.

In *Chaffe v. Oliver*, 39 Ark. 542, this court said: "Subrogation, in its literal and equitable significance, is the demanding of something under the right of another, to which right the claimant is entitled, for the purposes of justice, to be substituted in place of the original holder. Its phases are various, but it preserves its characteristic features throughout. It is the machinery by which the equity of one man is worked out through the legal rights of another. . . . It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked wherever justice and good conscience demand its application, in opposition to the technical rules of law which liberate securities with the extinguishment of the original debt. This equity arises when one not primarily bound to pay a debt, or remove

creditors of decedent effecting a sale of the realty in satisfaction of their claims.

In *Manks v. Whiteley* [1912] 1 Ch. 735, 81 L. J. Ch. N. S. 457, 106 L. T. N. S. 490 [1912] W. N. 87, it appeared that the owner of property charged with two mortgages offered to sell his equity of redemption, without, however, disclosing the existence of the second mortgage. The purchaser accepted conditionally upon finding someone to advance money to pay off the mortgage. A lender was found who agreed to advance a sum of money on first mortgage, and who did advance the sum, which was paid over to the original mortgagee. The transaction being completed by three contemporaneous instruments: (1) a reconveyance by the original mortgagee to the purchaser; (2) a conveyance by the owner to the purchaser; and (3) a mortgage by the purchaser to the lender. It was contended that the original mortgage should be treated in equity as having been kept alive for the benefit of the purchaser and his mortgagee, who together advanced the money for the discharge. The court of appeal conceived itself bound by the de-

cision in *Toulmin v. Steere*, 3 Meriv. 210, 17 Revised Rep. 67, to hold that where the payer of an encumbrance is owner in fee of the mortgaged estate, and the debt is not his own debt, the presumption is that he does not intend to keep the charge alive for his own benefit, and that to rebut this presumption there must be evidence of actual intention to keep it alive. *Fletcher Moulton*, L. J., however, dissented, and after examining the earlier English cases bearing upon the question held *Toulmin v. Steere* to have been wrongly decided, and characterized as an absurdity the result of the doctrine therein, as exemplified in the case under consideration, that a man is in greater danger from an equitable charge of which he has no notice than of one of which he has notice, because he can have had no conscious intention with regard to the former, seeing that he did not know of its existence. This case appears, from a subsequent application to the court, to have been appealed to the House of Lords, which, at the time of the compilation of this note, had not yet disposed of the appeal.

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an encumbrance, nevertheless does so; either from his legal obligation, as in case of a surety, or to protect his own secondary right; or upon the request of the original debtor, and upon the faith that, as against the debtor, the person paying will have the same sureties for reimbursement as the creditor had for payment. And this equity need not rest upon any formal contract or written instrument. Like the vendor's lien for purchase money, it is a creation of a court of equity from the circumstances." The theory of equitable assignment, as laid down by Pomeroy, is: "In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection. The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit; such a person is in no true sense a mere stranger and volunteer." 3 Pom. Eq. Jur. § 1212.

In *Capen v. Garrison*, 193 Mo. 335, 5 L.R.A. (N.S.) 838, 92 S. W. 368, the court said: "Equity will not ingraft this doctrine on the transaction in the face of a contract that negatives the idea of subrogation. In other words, the contract may be silent on the subject, yet not inconsistent with the idea of subrogation, or, on the other hand, it may be silent on the subject, yet its terms expressly or by implication forbid the application of the doctrine. So, it may be said that equity may apply the doctrine, although the contract does not, either expressly or by legal implication, call for it; but it will not apply it if the contract, either expressly or by legal implication, forbids it. The parties may not have had subrogation in their minds at all when they made the contract, but that fact alone would not control in a question of application of the doctrine. Equity will apply it, though the parties may never have thought of it, if it is not inconsistent with the contract or in violation of anyone's legal rights, and if justice demands it. . . . The usual application of this principle occurs where a person, at the request

of the debtor, pays the mortgage debt, or where one interested in the property pays an encumbrance to protect his own interest, or where he stands in the relation of surety to the debt."

It is undisputed that both the mortgagor, Martin, and the mortgagee, appellants, understood when the mortgage was executed that the debts secured by the two prior mortgages were to be paid with the money advanced on this mortgage, and that it would be a first lien against the property for the money so advanced. It was not agreed, and it was not the intention of the parties, that said other mortgages should be assigned to appellee upon the payment of the debts secured by them with money advanced by it, it is true, but it would have had the right to insist upon such assignment; and, since its security failed to constitute a first lien because of the judgment of appellee, of which appellant was ignorant at the time of taking its mortgage, we see no reason why equity should not treat it as an assignee of the first mortgages, discharged with the money advanced by it, and under its doctrine of equitable assignment, and effectuate the agreement with the lender that its security should be a first lien. It had the right after its mortgage was made, to apply the money advanced in payment of the other mortgages and take an assignment thereof to protect itself, and in holding that appellant became the equitable owner of said mortgages upon their payment with the money so advanced by it, and in applying the doctrine of subrogation, the appellee company is in no worse position than it would have been if said mortgages had not been paid, and no injustice is done it; for it cannot complain that the subrogation makes its position less favorable than it would have been if appellant company had not made the loan and advanced the money to pay off said mortgages. It can by a proper procedure force the payee to have the credit or satisfaction of the judgment set aside if it has been entered, and the said judgment will continue and remain a binding obligation against the judgment debtor, constituting a lien against his property as though no such credit or satisfaction was entered. Having made the payment, it was entitled to the benefit of the doctrine of subrogation, and became the assignee of the claims paid, and, not being a volunteer or stranger, it is immaterial that a release, instead of an assignment, was made. No rights of innocent third persons having intervened, the release does not prevent the person making the payment or

furnishing the money therefor from becoming the equitable assignee of the claims paid. *Sidener v. Pavey*, 77 Ind. 241; *Cumberland Bldg. & L. Assn. v. Sparks*, 49 C. C. A. 510, 111 Fed. 652; *Rachal v. Smith*, 42 C. C. A. 297, 101 Fed. 159; *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 382. See also 5 L.R.A.(N.S.) 845, third division of case note to *Capen v. Garison*.

Appellees insist that the case should be affirmed as controlled by the decision in *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511. In that case a person furnished the money to pay the remaining note due for purchase money of the land, and there was no agreement nor understanding that he was to succeed to the vendor's lien, and no assignment of the note was taken by him. Nor was there any element of mistake therein, as in this case, and the court said: "No circumstance connected with the transaction manifested an intention to keep the lien alive for his protection." Here the parties expressly agreed that the appellant, mortgagee, was to have a first lien upon the premises; and, while it is true they thought that the record of its mortgage and the payment of the debt secured by the two prior mortgages and their release would effectuate that purpose, it failed to do so because of the lien of the judgment of appellee intervening, of which appellant was ignorant, and should not be charged with negligence in failing to discover it, since an examination of the index to the record of judgments would not have disclosed it.

It follows from the principles announced that, under the doctrine of equitable assignment and subrogation, appellant the Southern Cotton Oil Company was entitled to subrogation to the rights of the prior mortgagees to the amount of their claims paid by the money advanced by it, and to the satisfaction therefor out of the property prior to the payment of the lien of appellee, which must be postponed to such payment.

The decree is reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion, subrogating appellant to the right to foreclose liens against said property for the amount so paid the prior mortgagees, and if the same is not paid, that the property shall be sold, and that amount of the proceeds thereof paid to said the Southern Cotton Oil Company, free from the lien of the judgment.

Hart and Smith, JJ., dissent.

Petition for rehearing denied.

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UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

GREAT WESTERN LIFE INSURANCE COMPANY, Plff. in Err.,
v.

ESTA M. SNAVELY.

(— C. C. A. —, 206 Fed. 20.)

Insurance — incontestable clause — applicability to reinstatement.

A provision in a life insurance policy that it shall be incontestable after one year applies to proceedings taken to secure reinstatement after default in payment of premiums, so that after the lapse of a year from reinstatement the policy cannot be avoided for fraud in securing it, although insured agrees in his application for reinstatement that the policy shall be void if any statement is untrue.

(June 12, 1913.)

ERROR to the District Court of the United States for the District of Montana to review a judgment in plaintiff's favor in an action brought to recover the amount al-

Note. — Applicability of incontestable clause to false statements made in application for reinstatement.

The holding of the court in the case above reported, that the "incontestable clause" of an insurance policy equally precludes the insurer from contesting the policy for falsity of statements made in the reinstatement certificate, as for falsity of statements made in the original application, accords with the only other decision directly in point, *Teeter v. United L. Ins. Asso.* 159 N. Y. 411, 54 N. E. 72, affirming 11 App. Div. 259, 42 N. Y. Supp. 119.

It also receives indirect support from *Pacific Mut. L. Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204, and *Ash v. Fidelity Mut. Life Asso.* 26 Tex. Civ. App. 501, 63 S. W. 944, which place their decision that the insurer may contest the policy on the ground of falsity of statements made in the application for reinstatement, on the ground that the period of contestability had not yet expired.

The doctrine is also supported by the statement made by the court in *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918: "It is true, it has been held that a reinstatement makes a new contract; but the old contract is looked to for the terms, conditions, and stipulations of the new contract. The old contract in the present case being that the policy should be 'incontestable after three years from its date,' upon the payment of three annual premiums, the new contract (there being neither in the application for reinstatement nor the original policy anything to the contrary) would be governed by the same terms; and the period

teged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert and Morrow, Circuit Judges, and Wolverton, District Judge.

Messrs. H. J. Miller and James F. O'Connor, for plaintiff in error:

Plaintiff cannot recover.

Sweeney v. Metropolitan L. Ins. Co. 19 R. I. 171, 38 L.R.A. 297, 61 Am. St. Rep. 751, 36 Atl. 9; Filley v. Pope, 115 U. S. 213, 29 L. ed. 372, 6 Sup. Ct. Rep. 19; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Angell, Fire & Life Ins. § 307; Ash v. Fidelity Mut. Life Asso. 26 Tex. Civ. App. 502, 63 S. W. 944.

The reinstatement application constitutes a new contract, and to it the court must look to see what the parties agreed to.

Pacific Mut. L. Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204; Reagan v. Union Mut. L. Ins. Co. 189 Mass. 555, 2 L.R.A.(N.S.) 821, 109 Am. St. Rep. 659, 76 N. E. 217, 4 Ann. Cas. 362; Welch v. Union Cent. L. Ins. Co. 108 Iowa, 224, 50 L.R.A. 774, 78 N. W. 853.

Messrs. E. M. Niles and Fred L. Gibson, for defendant in error:

A condition of a policy of life insurance that the policy shall be void if premiums are not paid when due means only that the policy shall be voidable, and the breach may be waived.

Grigsby v. Russell, 222 U. S. 149, 56

of incontestability would be reached three years from the date of the original policy, notwithstanding the fact that one of the three annual premiums required to be paid had not been paid at maturity, and a lapse and reinstatement had taken place. The failure to take advantage of the right of forfeiture, and the consent for reinstatement, restores the original contract in all its vigor. Especially is this true where there was no notice of any character to the insured that such a radical change in his contract would be brought about by a lapse and reinstatement."

The fact that a policy is renewable from quarter to quarter, instead of being for a period of years, upon condition of the payment of premiums, will not deprive the insured of the benefit of a clause making it incontestable after two years from its date. Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157.

The questions whether the period during which a policy is contestable on the ground of falsity of statements made in connection with an application for reinstatement runs from the date of issuance of the original policy or from the date of the reinstatement, and the question whether the reinstatement has the effect to set the period of contestability for falsity of statements 46 L.R.A.(N.S.)

L. ed. 133, 36 L.R.A.(N.S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913 B, 863.

Under a provision in the policy, the insured may be entitled, on such conditions as are imposed therein, to a restoration of the policy, which after such restoration continues to be the contract of the parties as before.

25 Cyc. 847; Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157.

Insured was compelled to subscribe to certain conditions which should not have been required of him. Such conditions are not valid and binding.

25 Cyc. 849; Coburn v. Life Indemnity & Invest. Co. 52 Minn. 424, 54 N. W. 373; Mutual L. Ins. Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 443; Mutual Reserve Fund Life Asso. v. Austin, 6 L.R.A.(N.S.) 1064, 73 C. C. A. 498, 142 Fed. 398; Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; Grier v. Mutual L. Ins. Co. 132 N. C. 542, 44 S. E. 28.

The incontestable clause precludes any defense after the stipulated period, on account of false statements which were warranted to be true, even though they were made fraudulently.

25 Cyc. 872; Reagan v. Union Mut. L. Ins. Co. 4 Ann. Cas. 364, and note, 189 Mass. 555, 2 L.R.A.(N.S.) 821, 109 Am. St. Rep. 659, 76 N. E. 217; Massachusetts Ben. Life Asso. v. Robinson, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918; Wright v.

made in the original application running anew, which are involved in some of the cases above cited, are merely specific aspects of a broader question, viz., whether the effect of the reinstatement is to create a new contract incorporating the terms of the former contract, or merely to continue the former in force; and so cannot be properly discussed in the present note.

For note on the general question of incontestability of life insurance under provisions of the policy, or of a statute, see 42 L.R.A. 247.

As to validity of provisions making policy incontestable from date, see note to Reagan v. Union Mut. L. Ins. Co. 2 L.R.A.(N.S.) 821.

As to defense of want of insurable interest as affected by incontestable clause of policy, see note to Bromley v. Washington L. Ins. Co. 5 L.R.A.(N.S.) 747.

As to applicability of incontestable clause to nonpayment of premiums, see note to Thompson v. Fidelity Mut. L. Ins. Co. 6 L.R.A.(N.S.) 1039.

As to the effect of a stipulation in an application or policy of life insurance that it shall not become binding unless delivered to assured while in good health, upon operation of incontestable clause, see subdivisions of notes in 17 L.R.A.(N.S.) 1145, and 43 L.R.A.(N.S.) 726.

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Mutual Ben. Life Asso. 118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186; Kansas Mut. L. Ins. Co. v. Whitehead, 123 Ky. 21, 93 S. W. 609, 13 Ann. Cas. 305; Teeter v. United Life Ins. Asso. 159 N. Y. 411, 54 N. E. 72; Pacific Mut. L. Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204; Wright v. Mutual Ben. Life Asso. 118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186.

Wolverton, District Judge, delivered the opinion of the court:

On December 27, 1907, plaintiff in error, in consideration of the sum of \$164.70 then paid, and a like sum to be paid in advance for each and every year for twenty years, issued to Arthur G. Snively a twenty-year life policy of insurance for \$5,000, payable in case of his death to Esta M. Snively, his wife, the defendant in error, as beneficiary. The application for the insurance was made a part of the policy. The contract contained, among other things, the following provisions:

"A grace of thirty days, during which this contract will remain in full force, will be allowed in the payment of all premiums except the first.

"In case of default in the payment of any premium or interest, the company will reinstate the contract at any time, if not previously surrendered for its cash value, upon written application by the insured to the company at its home office with evidence of insurability satisfactory to the company, payment of all premiums that would have been paid in the intervening time if no default had been made, with interest thereon at the rate of 5 per cent per annum computed from the premium due date, and payment or reinstatement, with interest at like rate, of any indebtedness existing at the time of default.

"This contract is incontestable after one year from date of issue."

The insured defaulted in the second payment, due December 27, 1908, for more than thirty days, and did not pay the same until March 5, 1909; but upon such payment the policy was reinstated by the insurance company. In order to secure the reinstatement, the insured was required to and did sign what is denominated a "Certificate of Health and Revival Contract," and among other things made declaration as follows:

"I hereby declare to and agree with said company that I am now in good health and free from every ailment and complaint; . . . that I have not had any injury, sickness, or ailment of any kind; and that I have not consulted or been prescribed for

by any physician or received any medical treatment since the date of my original application on which said policy was issued, except as here stated:

"Operation appendicitis, Sept. 1—08. Off duty two weeks. Entirely recovered.

"And I hereby renew the statements and agreements contained in said original application, and expressly agreed that if any answer or statement contained therein, except as modified in this contract, or if any statement made or contained herein, be untrue in any respect, then said policy is and shall continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect."

As a defense the insurance company set up that the reinstatement of the policy was consented to upon the strength of this certificate, and that the same was false, fraudulent, and untrue, in that the insured was then afflicted with a serious malady, of which he subsequently died. The insured paid the third instalment of premium when due, and thereafter, to wit, on July 3, 1910, died.

Trial was proceeded with before a jury; but, when the defendant came to offer proof in support of its defense, it was not allowed to introduce such proof, on the ground that the policy was by its terms rendered incontestable. Whereupon a verdict for plaintiff was directed, and from the judgment entered thereon the defendant predicates error.

It is the contention of counsel for plaintiff in error that the representations made by the insured for reinstatement of the policy are in effect warranties, and, the insured having expressly agreed that if such representations were untrue in any respect the policy should remain inoperative, it follows that the reinstatement is nugatory and of no effect, and hence that the company should have been permitted to introduce its proofs showing the falsity of the statements made. This depends wholly upon the operative effect of the clause rendering the policy incontestable after one year.

It will be noted that the insured died more than one year after the policy was reinstated, a fact which renders it unnecessary to inquire whether the reinstated policy became a new contract or merely a revival of the old. In either case, death occurred more than one year after the negotiations were consummated. It can hardly be disputed that the terms of the old contract became the terms of the new or revived contract, call it what you will, so far as applicable to the new conditions; for it is the policy that is reinstated, and it contains the terms which constitute the contract. No new policy is issued, but

the old becomes again the contract, and the parties must look to that for its terms and conditions, and to none other. Among others, the incontestable clause remains in the policy, and must be given effect if applicable to the conditions attending the negotiations for reinstatement.

The incontestable clause in the present policy is very general, excepting nothing from its scope, and by the strong current of authority precludes any defense after the expiration of one year on account of false statements, warranted to be true, although they may have been made for a fraudulent purpose. This is true as spoken of the original policy. The grounds for its support are that insurance companies, in order to obtain business, represented that they will issue policies incontestable as to certain matters after a designated period, and individuals negotiate with them on that basis. Furthermore, the clause constitutes in effect a short period of limitation, which it is perfectly competent for the parties to agree upon. While it is true that fraud vitiates all contracts, yet in contracts of the kind, where the beneficiaries are placed at a disadvantage because the dead cannot speak, it is not contrary to public policy for the parties to agree that the company shall be precluded upon the subject after some specified time, reasonable, within which to make investigation. The clause lends stability to the contract, and renders life insurance of greater value to the insured and beneficiary. The subject is exhaustively and ably discussed in *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918. See also *Wright v. Mutual Ben. Life Asso.* 118 N. Y. 237, 6 L.R.A. 731, 16 Am. St. Rep. 749, 23 N. E. 186; *Teeter v. United Life Ins. Asso.* 159 N. Y. 411, 54 N. E. 72; *Austin v. Mutual Reserve Fund Life Asso.* (C. C.) 132 Fed. 555; s. c. 6 L.R.A. (N.S.) 1064, 73 C. C. A. 498, 142 Fed. 398; 25 Cyc. 872.

Now, if it be said that the reinstated policy is a new contract, about which we pass on opinion, the incontestable clause must needs speak from the date of the reinstatement. It must do this, or else it is a dead letter in the contract. Further, if the clause precludes the defense of false representation and fraud in the original contract, by a strong parity of reasoning it would preclude a like defense as to the new contract, for both were secured upon the representations of the insured as to his physical fitness, condition of health, etc. But the fraud is charged only as to the later representations. Speaking of a policy containing an incontestable clause, which had been reinstated, the court in 46 L.R.A. (N.S.)

Teeter v. United Life Ins. Asso. supra, said: "Thereupon the policy of insurance was restored in full vigor as of that date (the date of the reinstatement), and by its very terms it was to become incontestable after two years."

The two years having elapsed from that date, it was held that the company was barred by the terms of the contract from contesting the policy on the ground that the statements contained in the reinstated certificate of the insured touching the state of his health were untrue. In *Pacific Mut. L. Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204, where it was held that the revived policy became a new contract, the court, in its preliminary reasoning, said: "If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract."

The reasoning appeals to us as logical and sound, and the conclusion suggested must inevitably follow from the premises. We conclude, therefore, that the District Court committed no error in the present controversy, and its judgment will be affirmed.

MARYLAND COURT OF APPEALS.

CHARLES S. HAYDEN et al., Receivers
of J. H. Seward & Company, Appts.,
v.

CITIZENS NATIONAL BANK OF BALTI-
MORE et al.

(120 Md. 163, 87 Atl. 672.)

**Insolvency — unlawful preference —
surt to set aside — necessity of dis-
solution of corporation.**

1. The receiver of an insolvent corporation cannot, without a decree of dissolution, maintain a bill to set aside a set-off by a bank of a fund deposited by the corporation with it, upon its unmatured note to the bank, as an unlawful preference to an indorser of the note.

**Note. — Right of bank to set off un-
matured claim against deposit of
debtor.**

This note is supplemental to the note to *Armitage Herschel Co. v. Jacob Bar-
net Amusement Co.* 27 L.R.A. (N.S.) 811.

Generally as to the effect of immaturity of claim at the time of insolvency proceedings upon the right of set-off, see notes to *Richardson v. Anderson*, 25 L.R.A. (N.S.)

Bank — insolvent customer — set-off of unmatured note.

2. A bank may set off upon the deposit account of an insolvent corporation its unmatured note held by the bank at the time of insolvency.

(April 8, 1913.)

A PPEAL by complainants from a decree of the Circuit Court of Baltimore City, dismissing their bill filed to set aside a set-off by the defendant bank of a fund deposited by an insolvent corporation with it upon its unmatured note as an unlawful preference. Affirmed.

The facts are stated in the opinion.

Messrs. Charles W. Wisner, Jr., and W. W. Parker for appellants.

Messrs. William L. Marbury and Jesse Slingluff, for appellees:

A bank has a lien on the deposits of an insolvent depositor to the extent of the indebtedness owing by such depositor to the bank, and can appropriate such deposits to the payment of the obligations held by it, whether due or not.

Records v. McKim, 115 Md. 299, 43 L.R.A. (N.S.) 197, 80 Atl. 968; Farmers' & M. Bank v. Franklin Bank, 31 Md. 404; Miller v. Farmers' & M. Bank, 30 Md. 392; Colton v. Drovers' Perpetual Bldg. & L. Asso. 90 Md. 85, 46 L.R.A. 388, 78 Am. St. Rep. 431, 45 Atl. 23; McShane v. Howard Bank, 73 Md. 157, 10 L.R.A. 552, 20

393; Merrill v. Cape Ann Granite Co. 23 L.R.A. 313; Fera v. Wickham, 17 L.R.A. 456; and Nashville Trust Co. v. Fourth Nat. Bank, 15 L.R.A. 710.

The holding in *HAYDEN v. CITIZENS' NAT. BANK*, that the insolvency of the depositor in a bank, and the appointment of a receiver for it, the depositor being a corporation, entitles the bank to offset against the deposit an unmatured note against the corporation, is sustained by many cases referred to in the foregoing notes, although it is also denied by many cases also referred to in said notes.

In a late case it is held that a bank summoned as garnishee in an action against an insolvent depositor may set off against the general deposit impounded by the garnishment, a note held by it against the depositor, which was not due when the garnishee summons were served, and it is said that the insolvency of the debtor is the foundation for this relief. *Wunderlich v. Merchants' Nat. Bank*, 109 Minn. 468, 27 L.R.A. (N.S.) 811, 134 Am. St. Rep. 788, 124 N. W. 223, 18 Ann. Cas. 212.

But it has been held that the mere fact that the debtor is a nonresident of the state is not sufficient to entitle a bank to an equitable set-off of its unmatured claim against the debtor upon his deposit, where it has been garnished by another creditor. 46 L.R.A. (N.S.)

Atl. 776; *Irish v. Citizens' Trust Co.* 163 Fed. 880; *Sweetser v. People's Bank*, 69 Minn. 196, 71 N. W. 934; *Thomas v. Exchange Bank*, 99 Iowa, 202, 35 L.R.A. 379, 68 N. W. 780; *Kentucky Flour Co. v. Merchants' Nat. Bank (Fidelity Trust & S. V. Co. v. Merchants' Nat. Bank)* 90 Ky. 225, 9 L.R.A. 108, 13 S. W. 910; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Georgia Seed Co. v. Talmadge*, 96 Ga. 254, 22 S. E. 1001; 5 Cyc. 553; 34 Cyc. 674; *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; *Morse, Banks & Bkg. § 329*; *Schuler v. Israel*, 120 U. S. 506, 30 L. ed. 707, 7 Sup. Ct. Rep. 648.

The plaintiffs having alleged a case of fraud and collusion, their bill cannot be supported on any other ground.

Spies v. Chicago & E. I. R. Co. 6 L.R.A. 565, 40 Fed. 39.

Mr. Randolph Barton also for appellees.

Stockbridge, J., delivered the opinion of the court:

In June, 1909, a certificate of incorporation was executed by three persons as incorporators for the purpose of the conduct of a fruit and produce commission business under the name of "J. H. Seward & Company, Incorporated." The certificate of incorporation provided for an authorized capital of \$50,000, of which amount three shares were subscribed for at the first meet-

It is, however, said that if the bank's debt was due and the depositor had been insolvent, or if the depositor was insolvent and also a nonresident, such special circumstances might have formed the basis for invoking equitable aid. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

Where a bank, through fraudulent representations of the debtor as to his financial condition, has been induced to renew his note, upon discovering the fraud, it may disaffirm the transaction, cancel the credit given, and offset the amount due it against a deposit of the debtor. *Mann v. Franklin Trust Co.* 143 N. Y. Supp. 660.

The balance of a regular bank account at the time of filing a petition in bankruptcy is a debt due to the bankrupt from the bank, and, in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it, although the same were not due at the time of the bankruptcy. *Germania Sav. Bank & T. Co. v. Loeb*, 110 C. C. A. 263, 188 Fed. 285. For other cases as to the effect of insolvency proceedings upon right of set-off, see note to *Richardson v. Anderson*, 25 L.R.A. (N.S.) 393.

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ing of the incorporators, and subsequently stock was issued for a cash subscription to the amount of \$16,500. The stockholders, in whose names these certificates were made out, do not appear to have individually paid for the stock so issued in their names, but the amount of the subscriptions was apparently paid by Mrs. J. H. Seward, the wife of the man whose name was given to the corporation, and who became president of it and continued in such capacity down to the appointment of a receiver on January 6, 1911. The method employed in making payment for some of the stock was devious and with no sufficient reason appearing therefor, and the holders of the stock named in the certificates do not make it entirely clear whether they received, or thought they received, the stock issued in their names as a gift, or whether the stock was in reality the stock of Mrs. J. H. Seward, and the business, therefore, her business, conducted under the form of a corporation. This, however, is not material to the case as presented by the record.

The corporate entity so created began business in the month of June, 1909, and continued for eighteen months, when proceedings were instituted by Mrs. J. H. Seward by a bill alleging the insolvency of the corporation, and praying for the dissolution of the corporation, the appointment of a receiver, and other relief. On the same day that the bill was filed, in accordance with a resolution adopted by the board of directors, an answer was filed, admitting the insolvency of the company, and assenting to the appointment of a receiver, and upon such bill and answer a receiver was appointed on the 6th day of January, 1911. The answer did not give any assent to the dissolution, nor did the decree attempt to dissolve the corporation. Thereafter, on the 4th of May, 1911, the bill of complaint in this case was filed.

At the time of the appointment of the receiver there stood to the credit of J. H. Seward & Company, Incorporated, on the books of the Citizens' National Bank, the sum of \$21,250.51. At the same time the bank was the holder of the four following promissory notes of the corporation, which it had discounted: One for \$9,200, due January 6, 1911; one for \$2,300, due January 19, 1911; one for \$3,000, due March 14, 1911; and one for \$4,500, due April 12, 1911,—in all, \$19,000. It also held a few small notes of customers of J. H. Seward & Company which had been indorsed by the corporation and discounted at the bank. All four of the notes mentioned above were notes of the corporation, bearing the indorsement of Josephine A. Seward, the wife of J. H. Seward. On January 6, 1911, the 46 L.R.A. (N.S.)

date of the appointment of the receiver and of the maturity of the note for \$9,200, the same not having been paid, the bank charged it as a debit against the amount of the deposit standing to the credit of the corporation, and on the day following it in like manner debited the remaining notes which it held of the Seward Company.

It claimed the right to do this under what is known as the banker's lien, and the present bill seeks to set aside this setting off of \$19,000 against the deposit of \$21,000 as being an attempt to create an unlawful preference in favor of the bank,—one which would operate at the same time to discharge the liability to the bank of Mrs. J. H. Seward as indorser upon the notes, and in the alternative is a prayer to require Mrs. Seward to pay to the receivers the \$19,000 so appropriated by the bank to the payment of its own debt. The bill alleges a fraudulent collusion between the corporation and the bank in that the bank had knowledge of the financial condition of Seward & Company, and that the \$21,000 of credit had been accumulated there for the purpose of carrying out the scheme of unlawful preference to the bank and release the liability of the indorser.

That the alternative relief prayed against Mrs. Seward in the bill cannot be granted is sufficiently established by the case of *Hughes v. Hall*, 118 Md. 673, 85 Atl. 946, decided at the October term, 1912, of this court, in the language of Judge Pearce, when he said: "It cannot be successfully contended . . . that a prior decree of dissolution is not essential to the maintenance of a bill by a receiver to set aside an unlawful preference."

In considering the question of the right of the bank to assert a lien for the benefit of notes of a customer which it has discounted, but which are not yet due, there has been some diversity of decision in this country, and in such states as New York (*Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319), Missouri (*Kortjohn v. Continental Nat. Bank*, 63 Mo. App. 166), South Carolina (Bank of Spartanburg v. Mahon, 78 S. C. 408, 59 S. E. 31), Illinois (*Commercial Nat. Bank v. Proctor*, 98 Ill. 558), Wisconsin (*Oatman v. Batavian Bank*, 77 Wis. 501, 20 Am. St. Rep. 136, 46 N. W. 881), and Michigan (*Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 23 L.R.A. 305, 39 Am. St. Rep. 565, 57 N. W. 576, 4 Am. Neg. Cas. 159), it is held that, in order that the bank may assert the lien and maintain the set-off, the debt must be due. In Wisconsin there is an express statute to that effect, and in Michigan a substantially similar statute. In New York the decisions, while asserting

the broad, general proposition, qualify it in two ways: First, that if the note is a demand note, it may be set off against the deposit of a customer under the lien (*People v. St. Nicholas Bank*, 44 App. Div. 313, 60 N. Y. Supp. 719); and, second, in the leading case of *Jordan v. National Shoe & Leather Bank*, supra, it is expressly stated that the "insolvency of a party sometimes moves equity to grant a set-off which would not be allowed at law." In other states the right of set-off is distinctly recognized as existing in favor of a bank, whether the note be due or not. *Kentucky Flour Co. v. Merchants' Nat. Bank* (Fidelity Trust & S. V. Co. v. Merchants' Nat. Bank) 90 Ky. 225, 9 L.R.A. 108, 13 S. W. 910; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 15 L.R.A. 710, 18 S. W. 822; *Georgia Seed Co. v. Talmadge*, 96 Ga. 254, 22 S. E. 1001; *Skunk v. Merchants' Nat. Bank*, 16 Ohio L. J. 353, where the Ohio court held that when a depositor becomes insolvent, the bank holding notes not due, which it had discounted for him, and the proceeds of which had gone into his deposit account, the bank could, as against the insolvent or his assignee, withhold enough of the deposit to protect such notes; *Stewart v. National Security Bank*, 6 W. N. C. 399, in which the Pennsylvania court sustained the right of lien upon the ground that the establishment of insolvency operated to mature all debts; *Ainsworth v. Bank of California*, 119 Cal. 470, 39 L.R.A. 686, 63 Am. St. Rep. 135, 51 Pac. 952; *Dommon v. Boylston Bank*, 5 Cush. 194; and *Thomas v. Exchange Bank*, 99 Iowa, 202, 35 L.R.A. 379, 68 N. W. 780. The doctrine announced in these cases has likewise received the approval of the Supreme Court of the United States in *Schuler v. Israel*, 120 U. S. 506, 30 L. ed. 707, 7 Sup. Ct. Rep. 648. In that case a creditor of the depositor had attached the fund in the hands of the bank, and the bank endeavored to assert its lien for the benefit of a note which it had discounted and which was then not yet due, and in sustaining the right of the bank to the lien, the Supreme Court based its ruling on the ground that the bank had the same right against the garnishee as in defending itself against its debtor; and that in the latter case, by filing a bill alleging the debtor's insolvency, and showing that, if compelled to pay its debt to him its claim, which was not yet due, would be lost, it could be relieved by a proper decree and procure a set-off of the two claims. The view in this state has been consistently in accord with the line of cases last cited. *Farmers' & M. Bank v. Franklin Bank*, 31 Md. 404; *Miller v. Farmers' & M. Bank*, 30 Md. 392; *Colton v. Drivers' Perpetual* 46 L.R.A. (N.S.)

Bldg. & L. Asso. 90 Md. 85, 46 L.R.A. 389, 78 Am. St. Rep. 431, 45 Atl. 23, in which case the note involved matured after the insolvency of the bank and the appointment of the receivers; *Richardson v. Anderson*, 109 Md. 641, 25 L.R.A. (N.S.) 393, 130 Am. St. Rep. 543, 72 Atl. 485, in which case the authorities both here and elsewhere were fully and ably reviewed by Judge Thomas; and *First Denton Nat. Bank v. Kenney*, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913 B, 1337.

In view of these repeated decisions, the rule of law in this state is too firmly established to be lightly shaken, and the decision of the court below must be affirmed, unless the evidence discloses some fraud on the part of the bank, or such facts properly brought to the knowledge and attention of the bank as to properly charge them with knowledge which would make the acts done tantamount to a fraud. There are quite a number of these which were strenuously insisted upon by the appellants as being sufficient to justify such a finding, but upon a careful and exhaustive examination of each and every one of these, the evidence given falls far short of what is required to justify a finding of collusion and fraud.

The decree of the Circuit Court of Baltimore City, appealed from, will therefore be affirmed.

Decree affirmed; costs to be paid by the appellants out of the funds in their hands.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES H. VREELAND, Respt.,
v.

FOREST PARK RESERVATION COMMISSION, Appt.

(—N. J. —, 87 Atl. 435.)

Eminent domain — forbidding use of property — prevention of fire.

The act entitled "An Act for the Protection of Woodlands," approved April 12, 1909 (P. L. p. 102), violates the constitutional prohibition against taking private property for public use without compensation, and affords no support for an attempt to take private lands without compensation.

(June 18, 1913.)

Headnote by BERGEN, J.

Note. — Legislation for fire protection is usually upheld as an exercise of the police power, and legislation regulating the destruction of property to prevent the spread of fires in emergencies is said to be declaratory of the common-law right of self-preservation, and is likewise usually justified under the police power.

A PPEAL by defendant from a decree of the Chancery Court enjoining the entry upon plaintiff's land for the purpose of clearing, for the prevention of fires, a strip along the right of way of a railroad. Affirmed.

The facts are stated in the opinion.

Messrs. Nelson B. Gaskill, Assistant Attorney General, and Edmund Wilson, Attorney General, for appellant:

The act in question is a valid exercise of the police power of the state intended to promote the general welfare of the citizens of the state.

There is a well-recognized distinction between the taking of property and the regulation of the use of property with possible consequential injuries thereto, under the exercise of the police power.

Freund, Pol. Power, 1904 ed. ¶ 504; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 472, 24 L. ed. 527, 530; Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. ed. 1115, 1116; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; Hennington v. Georgia, 163 U. S. 299, 308, 309, 41 L. ed. 166, 170, 171, 16 Sup. Ct. Rep. 1086; New York, New York, & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Opinion of Justices, 103 Me. 506, 19 L.R.A.(N.S.) 422, 69 Atl. 627, 13 Ann. Cas. 745; Com. v. Alger, 7 Cush. 53; Com. v. Tewksbury, 11 Met. 55; Hodges v. Perine, 24 Hun, 516; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 18 Ann. Cas. 989; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Judicial Construction of 14th Amendment, 26 Harvard L. Rev. 17.

In determining the constitutionality of police regulation, the presumption is in favor of validity.

9 Enc. U. S. Sup. Ct. Rep. 523; Wilson ex rel. Booth v. McGuinness, 78 N. J. L. 371, 75 Atl. 455.

For annotation on various questions in relation to fire limits and building regulations, consult Index to L.R.A. Notes "Buildings, § 4.

Generally, as to validity of regulations for fire protection other than building regulations, see note to State v. Wittles, 41 L.R.A.(N.S.) 456.

It is clear that cases arising under legislation of the classes referred to, supra, are not in point on the question raised in VREELAND v. FOREST PARK RESERVATION COM. 46 L.R.A.(N.S.)

Mr. William I. Lewis, for respondent: Chapter 74 of the P. L. of 1909 is unconstitutional.

Trees are private property.

Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Stocum v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.

The act authorizes the defendant to take such property.

Glover v. Powell, 10 N. J. Eq. 211; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Ten Eyck v. Delaware & R. Canal Co. 18 N. J. L. 201, 37 Am. Dec. 233; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Ward v. Peck, 49 N. J. L. 42, 6 Atl. 805; Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810; Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61; Miller v. Craig, 11 N. J. Eq. 175; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392.

The act practically extends the railroad's right of way by two hundred feet, without expense to it, and without compensation to the owner. Under such circumstances compensation is necessary.

Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810.

If the proposed action of the defendant amounts to a taking of the property, then it cannot be justified under the police power.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Re Cheesebrough, 78 N. Y. 232; People ex rel. Cook v. Nearing, 27 N. Y. 306; People ex rel. Williams v. Haines, 49 N. Y. 588; Miller v. Craig, 11 N. J. Eq. 185; Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Glover v. Powell, 10 N. J. Eq. 211; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Ten Eyck v. Delaware & R. Canal Co. 18 N. J. L. 200, 37 Am. Dec. 233; Carson v. Coleman, 11 N. J. Eq. 106; Tide-water Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; Grey ex rel. Simmons v. Paterston, 60 N. J. Eq. 385, 48 L.R.A. 717, 83

VISSION. The statute there involved seems to have been an attempt actually to take property and use it permanently for the prevention of possible future fires, and to justify, under the guise of the police power, an act that could be justified only under the power of eminent domain. While there have been analogous cases involving other subjects, a search has not revealed any such involving legislation for the prevention of fires.

J. W. M.

Am. St. Rep. 642, 45 Atl. 995; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 329, 56 Am. Rep. 1, 7 Atl. 432.

Bergen, J., delivered the opinion of the court:

The bill of complaint in this cause charges that the Erie Railroad Company, under the direction and authority of the Forest Park Reservation Commission of the state of New Jersey, threatens to enter upon complainant's lands, and there, at a distance of not less than 100 feet nor more than 200 feet from the outer rail on each side of the track of the railroad of the defendant corporation, and extending parallel with it, to clear a strip of complainant's land not less than 10 feet wide, of trees, brush, grass, and turf, and expose the bare earth, and then and there to cut down said trees growing on said strip and dig up the said land, as authorized by a statute of this state, entitled "An Act for the Protection of Woodlands," approved April 12, 1909; and the prayer is that the Forest Park Reservation Commission and the Erie Railroad Company be enjoined from so doing. The regularity of the proceedings had under the act are not questioned, and the answer of the Erie Railroad Company admits that it intends to enter upon the complainant's land and cut down the trees thereon, clear the grass and turf, and expose the bare earth, so far as it may be necessary to comply with the statute of this state. It also admits that no offer of compensation to the complainant has been made, and that no proceedings have been taken for the purpose of condemning the land, under the right of eminent domain or otherwise. The statute which the defendants claim authorizes the intended entry upon the complainant's land provides that wherever there is woodland, meaning thereby land or swamp upon which there is a growth of woods or brush, joining the right of way, or less than 110 feet from the roadbed of a railroad upon which are operated locomotives using coal or wood for fuel, there shall be constructed a fire line, in the manner threatened by defendants as described in the bill of complaint, which defendants claim is a justification for their proposed action. The complainant challenges the constitutionality of this act upon the ground, as he claims, that it is a taking of his land for public use without compensation. This contention was sustained in the court of chancery, and a decree made granting the restraint prayed for, from which decree the defendants appeal.

That the complainant will be deprived of the ordinary use of his property, and

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required to submit to its spoliation to a considerable extent, is not denied, but this the defendant claims is an incident arising from the exercise of police powers to which the complainant must submit for the general public good. We have no doubt that the proposed action amounts to a taking of the complainant's land. The trees and brush thereon are to be cut down, the grass destroyed in such a manner as to expose the bare earth, and where the land is swampy, a ditch not less than 3 feet wide is to be dug to the level of permanent water. In addition to this, all logs, fallen branches of trees, brush, grass, and other combustible material will be cut and removed from complainant's land, between this strip and the railroad, a distance not less than 100 feet, but it may be 200 feet. The threatened appropriation of the strip of land 10 feet or less in width will deprive the complainant of all beneficial use of the land involved, and is a taking of land which cannot be justified, as a proper exercise of police powers. There is nothing in the nature of the land or its use, that creates a nuisance to be abated. The sole purpose of the statute is to protect the public from a non-existent, but possible, condition, if sparks of fire should be thrown from the engines of the defendant railroad company, running over land adjacent to that of the complainant, and for that purpose authorizes the appropriation of private lands lying adjacent to railroads for the purpose of preventing the spread of fires caused by the railroad company, for the benefit of property other than that of the owner of the land taken.

In *Re Cheesebrough*, 78 N. Y. 232, the statute declared that, whenever it appeared necessary for the protection of the public health that any part or parcels of land should be drained by other means than sewers, the board of health of the municipality affected was empowered to direct the same to be done, and if the necessary drains could not be connected with a sewer, the drainage should be carried to the adjacent river. Under this statute the authorities entered upon the petitioner's land and constructed an outlet through his lands into the Harlem river for all of the drains it was thought necessary to build; and there it was held that no statute could confer authority to construct such a drain through the land of petitioner without compensation to him for the land taken, if done without his consent. The opinion of the court of appeals was delivered by Judge Earl, in which he said: "But there never can be any necessity under the police power or

the law of necessity to permanently appropriate land to the public use without compensation. It may temporarily be interfered with or appropriated; necessity may justify so much, but when the necessity passes away, the right ceases."

In the case under consideration, nothing appears which justifies the appropriation of the complainant's land under the police power. The contemplated action is not a regulation of the use by the complainant of his property, nor does any condition exist which may be interpreted to create an emergency which would warrant the taking of private property for use or destruction, for the general good, without compensation. All that appears is that, in order to establish a fire line on each side of all of the railroads of the state, the adjacent land may be taken without compensation, and being an actual permanent appropriation for the protection of the public against the possible spread of fire, the complainant is entitled to compensation. As the statute under which the defendants justify authorizes the taking of his land without compensation, it contravenes art. 1, § 16, of the Constitution, which declares, "Private property shall not be taken for public use without just compensation."

The decree appealed from should be affirmed.

WASHINGTON SUPREME COURT.
(Department No. 1.)

FRANK BUTY, Appt.,
v.

JULIA GOLDFINCH et al., Respts.

(— Wash. —, 133 Pac. 1057.)

Limitation of action — suit on tax deed — precluding defense.

A statute limiting the time in which actions to attack tax deeds must be brought does not apply to prevent an owner in pos-

session from setting up the invalidity of a tax deed for lack of jurisdiction in a proceeding by the holder against him for the possession.

(August 1, 1913.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover real estate claimed under a tax title. Affirmed.

The facts are stated in the opinion.

Mr. William C. Keith, for appellant:

The law relating to limitation of actions to cancel tax deeds applies to the facts in the case at bar.

Huber v. Brown, 57 Wash. 657, 107 Pac. 850; Baylis v. Kerrick, 64 Wash. 410, 116 Pac. 1082; Fleming v. Stearns, 66 Wash. 655, 120 Pac. 522.

Messrs. A. G. McBride and H. S. Tremper, for respondents:

No service of process having been secured, no jurisdiction existed to render judgment in the tax proceeding.

Anderson v. Turati, 39 Wash. 155, 81 Pac. 557; Jones v. Seattle Brick & Tile Co. 56 Wash. 166, 105 Pac. 238; Silverstone v. Harn, 66 Wash. 444, 120 Pac. 109; Rust v. Kennedy, 52 Wash. 472, 100 Pac. 998; Olson v. Johns, 66 Wash. 12, 104 Pac. 1116.

Limitations cannot run against a nullity.

Maher v. Potter, 60 Wash. 444, 111 Pac. 453.

Defendant paid the taxes for eight years under color of title, coupled with open and notorious possession for more than seven years.

Povah v. Lee; 29 Wash. 112, 69 Pac. 639; Krutz v. Isaacs, 25 Wash. 571, 66 Pac. 141; Philadelphia Mortg. & T. Co. v. Palmer, 32 Wash. 455, 73 Pac. 501; Balch v. Smith, 4 Wash. 497, 30 Pac. 648; Dennis v. Northern P. R. Co. 20 Wash. 320, 55 Pac. 210; Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 Pac. 30; Olson v. Howard, 38 Wash. 19, 80 Pac. 170.

Note. — *Statutory limitation of time for relief against tax deed as affecting right to set up invalidity of tax title as a defense.*

As to statute limiting time for attack on tax sale, or creating a conclusive presumption as to its validity, as applied to a sale under proceedings void for jurisdictional defects, and under which possession has not been taken, see note to Nind v. Myers, 8 L.R.A. (N.S.) 157.

On the question of practice, it seems to be quite generally held that where the purchaser at tax sale applies for a writ of assistance, or otherwise seeks to gain possession, the owner may file a petition in the 46 L.R.A. (N.S.)

same proceeding to vacate the sale on the ground of invalidity. 37 Cyc. 1373, note 18.

While there are a few exceptions to the general rule as above stated (see 37 Cyc. 1373, note 18), the subject of this note presupposes the correctness of the general rule, and no case decided against the defendant by reason of any exceptions is included.

"Within the proper and constitutional bounds it is entirely competent for the legislature to prescribe a short period—e. g., three, five, or seven years—within which the courts may take cognizance of actions brought to overturn tax titles." For citations supporting this proposition and showing the period prescribed by several states,

A deed of conveyance should be required. *Snyder v. Parker*, 19 Wash. 276, 67 Am. St. Rep. 724, 53 Pac. 59; *Marshall v. Williams*, 21 Or. 268, 28 Pac. 137; *Boyer v. Paine*, 60 Wash. 57, 110 Pac. 682; 27 Cyc. 993; *Plummer v. Ilse*, 41 Wash. 5, 2 L.R.A. (N.S.) 627, 111 Am. St. Rep. 997, 82 Pac. 1009; *Clamby v. Copland*, 52 Wash. 580, 100 Pac. 1031; *Ballinger*, Anno. Codes & Statutes, § 804.

Parker, J., delivered the opinion of the court:

The plaintiff commenced this action in the superior court, seeking recovery of real

see note in 2 L.R.A. 514. So far as the effect of such statutes is limited to actions brought for the purpose of attacking the tax title, their constitutionality is here assumed; but where an attempt is made, as in *BUTY v. GOLDFINCH*, to extend their operation so as to deny to the former owner the right to set up the illegality of the tax title as a defense, to that extent their constitutionality is here considered.

Cases turning upon a statute which limits the time in which a tax title holder may bring an action are not here considered, as such statutes are intended to have directly the opposite effect to that of the class here considered. And it is equally clear that statutes such as the one considered in *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473, which have been construed to "cut both ways" (see *Falkner v. Dorman*, 7 Wis. 388, and *Knox v. Cleveland*, 13 Wis. 246), will not give rise to many cases in point, for the tax title holder's right of action is barred at the same time as that of the patent title holder. The tax title holder in possession has no need of bringing an action after the patent title holder's right to affirmative relief is gone, and if out of possession, his right of action is barred whether or not his tax title is valid. If the land is vacant and he claims only constructive possession (see *Coleman v. Peshtigo Lumber Co.* *infra*), or if he has been wrongfully deprived of possessing (*Geekie v. Kirby Carpenter Co.* *infra*), and brings the action after the limitation has run, then the case comes properly within the scope of this note. This was an earlier statute than the one quoted in *Brunette v. Norber*, *infra*.

Assuming that the holder of the patent title is barred by a statute of limitation from attacking the tax deed as invalid in a direct action brought for the purpose, and that the tax title holder is not barred from his right of action, and exercises his right, may the former set up the invalidity of the tax deed as a defense?

Where the patent title holder is in possession.

The great weight of authority supports the doctrine that statutes taking away from the owner, who has always had active physical possession of the property, the right to 46 L.R.A. (N.S.)

property, claiming title thereto under a tax deed executed by the treasurer of King county in pursuance of a tax foreclosure judgment rendered in the superior court of that county. The defendant, being in possession of the property, and claiming to have been in possession ever since prior to the tax foreclosure, defended upon the ground, among others, that the tax foreclosure judgment and deed were void for want of jurisdiction, because there was no service of any process whatever in the foreclosure action, either personal or constructive, upon either of the defendants therein named; this defendant and her then hus-

set up as a defense the illegality of the tax title, are unconstitutional in that they deprive him of his property without due process of law.

In harmony with this doctrine practically all statutes of limitation except that of Mississippi and possibly that of Wisconsin, have been construed as not intended to apply to the defense of the owner in possession.

BUTY v. GOLDFINCH is in harmony with both phases of the doctrine as stated.

The holding that if such statute was intended to bar the right of the former owner, who has always held possession, from attacking the validity of the tax deed as a defense, the statute is unconstitutional, is supported by *Baker v. Kelley*, 11 Minn. 480, Gil. 358; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558, as to deed for taxes on land, assessed at a time when the land was not taxable.

And in *Stoudenmire v. Brown*, 48 Ala. 699, in an action in ejectment by the holder of a tax deed against the patent title holder, the court declared unconstitutional, as offending the due process of law clauses of both the state and Federal Constitutions, a statute making the tax deed conclusive evidence of the regularity of the sale, proceedings, etc., after the limitation period.

To the same effect is *Groesbeck v. Seeley*, 13 Mich. 329, where the action was by a tax title holder against the patent title holder in possession, who was permitted to attack the validity of the deed in the face of a statute plainly forbidding such an attack after five years. See long quotation from this opinion in *BUTY v. GOLDFINCH*.

And in *Corbin v. Hill*, 21 Iowa, 70, in an action by a tax title holder to recover from the patent title owner the possession of the property, it was held that it is not competent for the legislature to make the deed conclusive evidence against the owner so as to override the facts of illegality, or estop him from proving the truth. The decision, however, went in favor of plaintiff on the ground that the tax deed was not invalid, the trial court's decision allowing the attack.

In *Quinlon v. Rogers*, 12 Mich. 168, in a suit by the tax title holder to recover possession from the patent title holder, a statute making the deed conclusive evidence after two years was held to be unconstitutional.

band being named as the defendants therein, they being the record owners as well as the actual owners of the property, and it being their community property. This defense was met by the plaintiff by denial of the alleged want of service in the tax foreclosure action, and by invoking the three-year statute of limitation against actions to set aside and cancel tax deeds. A trial before the court resulted in findings and judgment in favor of the defendant, and in quieting her title as against the claims of the plaintiff, reserving a lien upon the property in his favor for a small sum on account of taxes paid by him thereon. From this

disposition of the cause the plaintiff has appealed to this court.

On May 1, 1903, and for several years prior thereto, respondent was the wife of T. B. Daly. On that day they were divorced. While they were husband and wife they acquired title to the property herein involved as their community property, taking title thereto in the name of the husband, T. B. Daly. The property was then wild, unimproved, and unoccupied. Soon thereafter and prior to their divorce they commenced to clear and improve the property, doing sufficient work thereon to render plainly visible their actual physical pos-

sitional; but this holding was based upon the ground that another section of the same statute had been previously (8 Mich. 430) declared void, which former decision had deprived the owner of his right to have his day in court, as provided by the statute, even within the two years, and that the section before the court was dependent upon the void section, and fell with it.

And the holding that such statutes were never intended to bar the original owner in possession from attacking the validity of the tax deed as a defense is supported by:

—*Myers v. Coonradt*, 28 Kan. 211, where the court, after discussing a ruling by another court that the former owner is so barred where the land has remained unoccupied during the limitation period, says: "But whether that ruling be correct or not, it does not apply to a case in which the original owner is in actual possession. In such a case the initiative does not lie with him; he may rest secure in his possession and title until somebody attacks them, and when so attacked he may show any defect in the title of the assailing party. It is also true that said § 141 prescribes the five-years limitation not merely upon an action for the recovery of land, but also one to defeat or avoid a sale or conveyance of land for taxes. And it may be that the original owner in possession might be unable after the expiration of five years to maintain an action to remove the cloud which the tax deed casts upon his title; but it does not follow that because he may not maintain an action to quiet his title, that the opposing title, the tax deed, is to be adjudged perfect, and the holder thereof allowed to recover possession from him."

—*Salter v. Corbett*, 80 Kan. 327, 102 Pac. 452, where the court said: "The five-year statute of limitations which protects tax deeds was unavailing to the plaintiff, for the reason that it is exclusively a defense and cannot be used as a cause of action. The prima facie effect of the deed was therefore the most that the plaintiff could establish."

—*Daniels v. Case*, 45 Fed. 843, where such a provision limiting the time within which actions against tax purchasers must be commenced was held to have no application in actions brought by the tax title holder.

In *Harris v. Mason*, 120 Tenn. 668, 25 46 L.R.A. (N.S.)

L.R.A. (N.S.) 1011, 115 S. W. 1146, it was held that a statute providing that "no suit shall be commenced in any court of this state to invalidate any tax title to land after three years from the time said land was sold for taxes" does not prevent all impeachment of such title after three years, and that the patent title holder could impeach the tax title, setting up its invalidity as a defense in an action of ejectment by the tax title holder. Presumably the former owner was in possession.

Under the section of the Louisiana Constitution, quoted in *Ashley Co. v. Bradford*, infra, if the tax debtor remains in actual or constructive possession of the land, he is not barred from attacking the tax deed for invalidity as a defense. *Poitevent & F. Lumber Co. v. Honey Island Land & Timber Co.* 100 C. C. A. 279, 176 Fed. 733.

In *Taylor v. Danley*, 83 Kan. 646, 112 Pac. 595, 21 Ann. Cas. 1241, it was held that a tax deed valid upon its face, though fatally defective, is protected from attack by the five-year limitation statute, but that the holder thereof, by seeking affirmative relief, subjects the deed to attack for every reason for which it might have been attacked before the five years had elapsed. In 90 Kan. 1, 132 Pac. 533, a case between the same parties, the court makes the above summary of its former holding; but in the latter case the decision went off on the ground that plaintiff, as holder of the tax title, was barred by the two-year limitation.

In *Martin v. Barbour*, 140 U. S. 634, 35 L. ed. 546, 11 Sup. Ct. Rep. 944, affirming 34 Fed. 701, the holder of the patent title was permitted to show defects in the tax title while opposing the confirmation of the sale by the land commissioners after the statutory period had elapsed, but this holding was based upon the ground that the owners had been deprived of a substantial right, and not upon the ground that their plea was a defense, as distinguished from an affirmative action.

But the Mississippi statute, which provides "that all sales of lands hereafter made for nonpayment of taxes due under any law of this state shall be valid to all intents and purposes,—said lands subject to redemption as provided by law,—and that no such sale shall be impeached or questioned in any manner, or for any cause, sav-

session thereof. The trial court found, in substance, that respondent's possession of the property thus commenced was thereafter open, notorious, and continuous until the trial of this action in October, 1912. In November, 1903, Rosa D'Elia, claiming to be the owner of a delinquent tax certificate against the property, commenced an action in the superior court of King county to foreclose the same by filing therein her application in usual form. Thereafter judgment of foreclosure was rendered in that action in her favor. Thereafter sale of the property was made by the treasurer of King county in pursuance of that judgment, when he executed a tax deed to Rosa

D'Elia on January 23, 1904; she being the purchaser at that sale. Thereafter appellant acquired by mesne conveyances whatever right, title, or interest in the property Rosa D'Elia had acquired by the tax foreclosure and sale, and on February 23, 1912, commenced this action against respondent to recover possession of the property. The commencement of this action, it will be noticed, was over eight years after the execution of the tax deed, upon which appellant rests his claim to the property. In March, 1906, T. B. Daly conveyed all his interest in the property to respondent, his former wife; the decree of divorce not having divested either of them of their

ing fraud or mistake in the assessment or sale of the same, or upon the proof that the tax for which the same were sold had been paid prior to such sale, and no suit to set aside any title acquired under such sale, hereafter to be made, shall be brought, unless within five years from the date of the sale," prevents all attacks on the validity of the tax title except those allowed by the statute, no matter how made. *Sigman v. Lundy*, 66 Miss. 522, 6 So. 245; *Carlisle v. Yoder*, 69 Miss. 384, 12 So. 255. The court in *Sigman v. Lundy*, said: "As to the sales thereafter to be made, it added the assurance that after the lapse of five years no hostile claim should be asserted. Whether the purchaser at tax-sale or the former owner was in possession of the land sold, whether the land was occupied or vacant, the security afforded by the act existed. The provision as to future sales was intended to be, and was, an irrevocable and irrepealable stipulation that, after the lapse of the time named, no assailing of the title should be made. It was, and was intended to be, a part of the contract into which the purchaser would enter,—an inherent, continuing element of right secured, running with the land, and a perpetual security of the title."

Oconto County v. Jerrard, 46 Wis. 317, 50 N. W. 591, and *Milledge v. Coleman*, 47 Wis. 184, 2 N. W. 77, are frequently cited as supporting the Mississippi cases, and it is true that the court uses language that seems to commit it to that position. But both cases were actions by the patent title owner out of possession to recover possession from the tax title holder, and of course they are not in point on the question here under annotation. It will be seen, *supra*, that the Wisconsin statute is interpreted as one that "cuts both ways." These two cases were cited as binding upon the Federal courts as a rule of construction in Wisconsin, by the court in *Geekie v. Kirby Carpenter Co.* 108 U. S. 385, 27 L. ed. 160, 1 Sup. Ct. Rep. 315, in which case the party claiming under the tax title was plaintiff, but the controversy was not concerning land, but logs cut from the land, and it clearly appeared that possession of the logs had been wrongfully taken from the plaintiff. Although the court does not place the decision upon this 46 L.R.A. (N.S.)

ground, it is quite evident that the question here under annotation was not squarely before it. See *Nicholson v. Hale and Millikin v. Lockwood*, *infra*.

The statute of limitations will bar an attack by the former owner, who wrongfully dispossessed the tax title holder after the period of limitations had expired, upon the validity of the tax deed as a defense in an action by the tax title holder to regain possession. *Nicholson v. Hale*, 73 Kan. 599, 85 Pac. 592; *Millikin v. Lockwood*, 80 Kan. 600, 103 Pac. 124.

Where tax title holder has actual or constructive possession.

The courts agree upon the proposition that where the holder of a tax title valid upon its face takes possession legally, and holds adversely during the limitation period, his title cannot thereafter be attacked on the ground of illegality by the former owner, even as a defense.

Also they agree that a tax deed to vacant land, valid upon its face, when recorded gives the holder thereof constructive possession as long as the land remains vacant, and that if such constructive possession is uninterrupted by the actual possession of the former owner during the whole limitation period and up to the time of bringing the action, the tax title cannot be attacked by the former owner, even as a defense.

In *Walker v. Boh*, 32 Kan. 354, 4 Pac. 272, the court, in construing a statute which provided "any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of land sold for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter," recognized the rule as above stated with reference to constructive possession, but, on account of the fact that the plaintiff who held the tax title had been out of the state practically all of the limitation period, refused to apply it, and allowed the former owner to plead the illegality of the tax deed as a defense.

And the holding in *Walker v. Boh*, *supra*, was approved in *Coale v. Campbell*, 58 Kan. 480, 49 Pac. 604, but was not applied be-

interest therein. In November, 1911, respondent was married to Geo. E. Goldfinch, and they are now husband and wife. While he was made a defendant in this action and is with his wife in possession of the property, he disclaims all interest therein. We therefore refer to her alone as the defendant and respondent. The trial court found, in substance, that no service of summons or process, either personally or by publication, was made in the tax foreclosure action upon T. B. Daly, the then record owner, or upon respondent, his former wife and joint owner, or upon any person whomsoever. The trial court not only found that the respondent was in the open and notorious possession

of the property at all times since the commencement of the tax foreclosure action, but also that she had made valuable and lasting improvements thereon at a cost to her of not less than \$900, and that she has paid all general taxes charged against the property for the years 1903 to 1911, inclusive, except the year 1906, for which year she tendered payment to the county treasurer, which tender was refused by the treasurer because some other person had previously paid the taxes for that year. Neither appellant nor any of his predecessors in interest, including Rosa D'Elia, were ever in possession of the property, nor did they ever seek to obtain possession

because of the intervention of another statute of limitations which had run against the tax deed and barred the action, making an attack on the validity of the deed unnecessary.

And in *Harris v. Edwards*, 32 Kan. 580, 4 Pac. 1044, the rule as to constructive possession under the Kansas statute, above quoted, was applied. The defendant was the holder of a later tax title, but he was in practically the same position as a grantee of the former owner.

In *Stump v. Burnett*, 67 Kan. 589, 73 Pac. 894, the rule was again recognized, but the former owner had taken actual possession after the expiration of the limitation period, and held it undisturbed for two years, and it was held that he could plead the illegality of the tax title in an action brought to dispossess him, but that he could get no affirmative relief, even in the same proceeding. This decision was based upon the theory that a statute of limitation is a defensive weapon, and never an offensive one, and that neither party could use it to enlarge his holdings.

Under the clause in the Constitution of Louisiana which provides that "no sale of property for taxes shall be set aside for any cause, except on proof of dual assessment, or of payment of the taxes for which the property was sold prior to the date of sale, unless the proceeding to annul is instituted within six months from service of notice of sale, which notice shall not be served until the time of redemption has expired, or within three years from the adoption of this Constitution as to sales already made, and within three years from the date of recordation of the tax deed, as to sales made hereafter, if no notice is given. The manner of notice and form of proceeding to quiet tax titles shall be provided by law," and legislation thereunder, those who buy property at tax sale not tangibly but only constructively in the possession of the tax debtor, and themselves obtain no other possession than the constructive possession which follows the tax title and its registry, are protected against attacks made by the tax debtor on any other grounds than those allowed by that provision, and unauthorized attacks cannot be made by way of defense to an action by the tax title holder to quiet

his title. *Ashley Co. v. Bradford*, 109 La. 641, 33 So. 634.

And the same is true where the tax title holder has actual physical possession all of the limitation period. *Canter v. Williams*, 107 La. 77, 31 So. 627.

In *Shawler v. Johnson*, 52 Iowa, 472, 3 N. W. 604, it was held that the former owner is barred by the five-year statute of limitations from attacking the validity of a tax deed not void upon its face as a defense in an action by the holder of the deed, who was in possession during the limitation period. The court said that the fact that the holder brings the action does not open the way for the former owner to assail the tax title in a manner that he could not do if he were plaintiff. The report does not disclose the wording of the statute. This holding was supported in *Bullis v. Marsh*, 56 Iowa, 747, 2 N. W. 578, 6 N. W. 177; and *Monk v. Corbin*, 58 Iowa, 503, 12 N. W. 571.

And in *Brunette v. Norber*, 130 Wis. 632, 110 N. W. 785, it was held that the holder of the patent title is denied the right after the limitation period to attack the validity of the tax deed as a defense in an action against him for trespass, where the plaintiff had been in possession all of the time, and had paid all of the taxes accruing subsequent to the sale, the statute providing: "No action shall be brought by the original owner for the recovery of lands purporting to be conveyed for the nonpayment of taxes by a deed void on its face after the expiration of five years from the date of the recording of the tax deed, in cases where the grantee in the tax deed shall have taken actual possession of such land within two years after such recording, and shall have actually and continuously maintained such possession to the end of such period of five years."

But where the land is unoccupied, but the tax title holder claims constructive possession, if his tax deed is void upon its face, he cannot, even under the stringent statute of Wisconsin, maintain an action against the patent title owner on the theory that the owner is barred from attacking his deed, for the reason that a void deed, although recorded, cannot start the statute of limitations to running. *Coleman v. Peshtigo Lumber Co.* 30 Fed. 321.

thereof until the commencement of this action in November, 1912.

Some contention is made by counsel for appellant that the evidence was not sufficient to support the findings of the trial court that there was no service of process in the tax foreclosure action and that respondent was in open and notorious possession of the property continuously since prior to the commencement of that action. We deem it sufficient to say that a careful review of the evidence convinces us that it was ample to call for the making of these findings.

The principal contention of counsel for appellant is that the tax deed has become conclusive against the claims of respondent, and that she has been thereby divested of all title to the property by virtue of the three-year statute of limitation against actions to set aside tax deeds. In view of the fact that the tax foreclosure judgment was rendered without jurisdiction because of absolute failure of process in that action, it is plain that the tax deed does not result in divesting respondent of her title to the property, unless the statute of limitation here invoked can be held to have rendered unavailable to respondent her defense resting upon want of jurisdiction of the court to render the tax foreclosure judgment. The statute invoked, being § 162, Rem. & Bal. Code, reads: "Actions to set aside or cancel the deed of any county treasurer, issued after and upon the sale of lands for general, state, county, or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed." This statute has been the subject of consideration by this court, and given full force and effect in the following cases, which are relied upon by counsel for appellant. *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780; *Anderson v. Spokane, P. & S. R. Co.* 57

Wash. 439, 107 Pac. 183; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522.

In each of those cases the original owner of the land was the plaintiff, seeking in effect to set aside a tax deed and recover the land held or claimed by the defendant under the tax deed. In each it was held that the cause of action there sought to be enforced was barred by this statute; but in none of them was it held or even suggested that this statute would bar the original owner, in possession at all times following the tax foreclosure, from defending his possession and title upon the ground of such foreclosure being void, when claim to the property is asserted by another under such foreclosure. In none of those cases was the effect of this statute upon the defense, which the original owner in possession might make involved. Our attention has not been called to any decision of this court, and we think there have been none, where any such question has been considered. We have held that a void tax deed may constitute such color of title as to become a basis for the running of the statute of limitations (*Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166); but not that such color of title, unaccompanied by possession, will by mere lapse of time divest the original owner of title to property he is in the actual possession and enjoyment of. This respondent did not commence this action "to set aside or cancel" the tax deed, nor "for the recovery of" the property in question. She was already in possession of the property and in the full enjoyment of all the rights in that regard which ownership and possession could possibly give her. Being in this situation, she had no occasion to do anything or take any steps looking to the protection of those rights until some one sought to invade them. All that she here seeks to invoke in the protection of her

In an action by the holder of a tax deed to quiet title in himself against one claiming prior title, the defendant is not denied the right to plead the invalidity of the tax title, under *Mills's Anno. Stat. (Colo.)* § 3904: "No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding," if the tax deed is void upon its face. *Dimpfel v. Beam*, 41 Colo. 25, 91 Pac. 1107; *Clark v. Huff*, 49 Colo. 197, 112 Pac. 542; *Foster v. Clark*, — Colo. App. —, 121 Pac. 130. But these cases are of practically no force upon the point here under annotation for the reason that they follow *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224, 47 Pac. 296, and *Gomer v. Chaffee*, 6 46 L.R.A. (N.S.)

Colo. 314, where it was held that, if the tax deed is void upon its face, the holder thereof is not protected by the statute in a suit against him to quiet title in the former owner.

Although the tax deed is not void on its face, but because of its failure to recite the jurisdictional requirements which go to the power of the treasurer to issue the deed, it is not *prima facie* evidence of title, therefore, it could not set in operation the Colorado short statute of limitations. (See statute quoted in *Dimpfel v. Beam*, supra.) Therefore the former owner as defendant in an ejectment suit was not denied the right to attack its validity. The court here makes no point of the fact that the former owner was defendant. *Sheesley v. Voorhees*, — Colo. App. —, 134 Pac. 1108. J. W. M.

rights is by way of pure defense. If the language of this statute should be given the construction claimed for it by counsel for appellant, we are unable to see how it could be held to be a valid exercise of legislative power in the light of the due process of law provisions of the Federal and state Constitution.

Judge Cooley, in his work on Constitutional Limitations, 7th ed. at page 522, after noticing the legislative power to pass statutes of limitation, observes: "All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law. Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession; but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims."

In *Groesbeck v. Seeley*, 13 Mich. 329, 342, Justice Campbell, speaking for the court, touching statutes of limitation and legislative power to make them effective against persons already in possession, said: "These laws do not purport to take away existing rights, although their operation may often have substantially that result. But they are designed to compel parties whose rights are unjustly withheld from them to vindicate their claims within some reasonable time. If a person who has been ousted of his possession or dominion desires to regain it, he knows that he must resort to those means which are furnished by the law, either by the peaceable act of a party himself or by legal prosecution. A limitation law simply requires him to proceed and enforce these rights within some reasonable time, on pain of being deemed to have abandoned them. Such laws can only operate on those who are not already in the enjoyment and dominion of their rights. A person who has a lawful right and is actually or constructively in possession can never be required to take active steps against opposing claims. The law does not compel any man who is unassailed to pay any attention to unlawful pretenses, which are not

asserted by possession or suit. When such a title is set up, he has a right to defend himself by jury, if the claim is one of common-law cognizance, or otherwise, if of a different nature. But to hold that, under any circumstances, a man can be deprived of a legal title without a hearing is impossible without destroying the entire foundations of constitutional protection to property. No one can be cut off by limitation until he has failed to prosecute the remedy limited; and no one can be compelled to prosecute when he is already in possession of all that he demands."

In *Baker v. Kelley*, 11 Minn. 480, 495, Gil. 358, Chief Justice Wilson, speaking for the court upon the same subject, said: "It is not necessary for a party in the enjoyment of his rights to institute any proceedings against an adverse claimant, and to require him to do so would be, in many cases, imposing a grievous and expensive burden. A law requiring a party to take such action is not, nor has it, any analogy to, a statute of limitation. Statutes of limitation only operate as an extinguishment of a remedy, and, of course, can have no application to a party who neither seeks nor needs a remedy."

In *Dingey v. Paxton*, 60 Miss. 1038, 1054, the court, speaking through Justice Cooper on the same subject, said: "Before the entry of the defendant upon the lands, the plaintiffs, by their tenant, were in actual occupancy of all the land which was susceptible of cultivation, and were in the constructive possession of the whole tract. The sale of the lands for the unpaid taxes of 1874 was insufficient, under well-settled principles, to divest their title. By a proceeding *in invitum* the state had attempted to acquire title under its laws as then existing and had failed. By a subsequent law it provides that, notwithstanding such failure, the shadow of title thus acquired shall become the actual title unless attacked within a certain time. It is the expiration of time without regard to possession which is to transfer title from the owner and vest it in the state, or its vendee or donee. The power of the legislature to prescribe within what reasonable time one having a mere right of action shall proceed is unquestionable; but there is a wide distinction between that legislation which requires one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought. The mere designation of such an act as an act of limitation does not make it such, for it is in its nature more than that. Its operation is first to divest

from the owner the constructive possession of his property, and to invest it in another, and in favor of the possession thus transferred to put in operation a statute of limitations for its ultimate and complete protection. A complete title to land, according to Blackstone, consists of *juris et sesinæ conjunctio*; the possession, the right of possession, and the right of property. One who is in the actual or constructive possession of his lands, and who has the right of possession and of property, needs no action to enforce his rights. He is already in the enjoyment of all that the law can give him, and cannot be disturbed in such enjoyment except by 'due course course of law.'

It is of interest to note that in these Minnesota and Mississippi cases the actions were brought by the original owners, who had evidently been in possession up to near the time of the bringing of their actions, to recover against the holders of the tax deeds, who had acquired possession in some manner evidently against the will of the original owners. These holdings were in effect that the statute did not operate in favor of the holder of the tax deed while the original owner was in actual possession of the land. The Mississippi case apparently goes to the extent of holding that a void tax deed will not draw to its holder the constructive possession of the land, even if the land is unoccupied. The supreme court of Iowa, in *Lewis v. Soule*, 52 Iowa, 13, 2 N. W. 401; *Monk v. Corbin*, 58 Iowa, 503, 12 N. W. 571, and cases there cited, holds that the statute of that state providing, "no action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded," gives a void tax deed the effect of drawing the constructive possession of unoccupied lands to the holder of such deed, but leaves the inference which is almost conclusively to be drawn from the language of its decisions that such constructive possession will not be drawn by the tax deed to its holder while the original owner is in actual possession of the land. The logic of all these decisions is that the statute will not run in favor of the holder of a tax deed while the land in question is in the actual possession of the original owner. This, of course, is in harmony with the view that he who is in possession and full enjoyment of his property is not required to protect his right to the property by instituting legal proceedings against another who merely claims such property, but takes no steps to recover it.

Turning now to decisions involving the right of a person in possession of property, 46 L.R.A.(N.S.)

who is assailed by a suit in which the plaintiff rests his right upon an instrument other than a tax deed, we find the holdings of the courts equally conclusive in respondent's favor.

In *Pinkham v. Pinkham*, 60 Neb. 600, 610, 83 N. W. 837, 841, where the defendant sought to defend his possession under a deed needing reformation, and by his answer sought to have it reformed, and the statute of limitations was invoked against such defense, Justice Holcomb, speaking for the court, said: "It is urged that the statute of limitations operates as a barrier to prevent the appellee from reforming the instrument under which he claims by correction of the alleged error. There are, we think, two substantial reasons why this plea cannot be made available; first, the appellee is in possession of the land under claim of title to the property; his right and title is assailed by appellants. He may, in such a case, rightfully present any defense, legal or equitable, to sustain his title to the property, irrespective of the running of the statute. When his right of possession is attacked, a cause of action accrues, by which he may plead and prove any equitable defense of which he may be possessed. As long as his title is undisputed, and he is in the peaceable possession of the property thereunder, the statute of limitations would not run, so as to prevent him when sued from setting up any equity he has in defense of his possession."

Responding to a petition for rehearing in this case, in 61 Neb. 336, 85 N. W. 285, Justice Sullivan, speaking for the court, used this vigorous expression: "The right to commence and prosecute an action may be lost by delay; but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never."

In *Robinson v. Glass*, 94 Ind. 211, 216, Judge Elliott, speaking to the question of a defense invoked against a mortgage, alleging fraud in its execution, said: "In the argument on the assignment of cross errors, it is contended that, as the mortgage was executed more than six years before the suit was instituted and the defense of fraud interposed, the rights of the appellants are barred by the statute of limitations. This position is untenable. Actions are barred, but defenses are not. A person who is sued upon a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defense interposed. We speak now of pure defenses, and not as to matters which may be relied

upon as forming a foundation for a counter-claim or cross complaint."

In *Mott v. Fiske*, 155 Ind. 597, 603, 58 N. E. 1053, 1055, involving a defense made against a deed upon which the plaintiff rested his claim, the defendant asserting it to have been executed as a mortgage, Judge Monks, speaking for the court, said: "Appellant nor anyone under whom she claims title has ever occupied said land, nor is it shown that they ever attempted to enforce any rights thereto under the deed from Work before the commencement of this action. Under such circumstances, whenever any attempt is made to enforce any rights under said deed, mere lapse of time will not bar the right to assert and show that the same is a mortgage."

In *Muse v. Yarborough*, 11 La. 521, 532, the court applied the maxim, *Quæ temporalia sunt ad agendum perpetua sunt ad excipiendum*, as applicable to the defense made by a defendant in possession. The translation of this maxim is given in 32 Cyc. 1279, as follows: "Things which afford a ground of action, if raised within a certain time, may be pleaded at any time, by way of exception."

The applicability of this principle under our law will be more readily understood by noting the fact that in Louisiana the word "exception" is a comprehensive term referring to defenses. *Garland's Revised Code of Practice* (La.) 3d ed. 1910, § 330; *Gayosa de Lemos v. Garcia*, 1 Mart. N. S. (1824) 324. The substance of the doctrine which we have been discussing is well summed up in the text of 25 Cyc. 1063, as follows: "Pure defenses are held not to be barred by the statute of limitations." Numerous authorities are there cited supporting and illustrating the applicability of this general rule.

Much of what we have said may seem more appropriate to the question of the constitutionality of statutes which assume to take away defenses which may be made by those in possession and enjoyment of their rights when assailed by others. But we think the authorities reviewed are equally applicable as showing that our legislature did not intend that the statute should ever be invoked to deprive one, in the possession and enjoyment of all he claims, from making any lawful defense he may have in the protection of such possession and enjoyment, regardless of the question of time which may have elapsed following the initiation of the right under which his assailant claims. We do not hold that the statute is unconstitutional, but only that it has no application to the defense which this respondent here invokes; 46 L.R.A. (N.S.)

she being in the possession and enjoyment of the property at all times prior to the commencement of the void foreclosure proceeding.

The judgment is affirmed.

Gose, Mount, and Fullerton, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CARNEGIE NATURAL GAS COMPANY v.

A. G. SWIGER et al., Plffs. in Err.

(— W. Va. —, 79 S. E. 3.)

Eminent domain — pipe line — constitutionality.

1. Chapter 74, Acts 1907 (Code Supp. 1909, chap. 42, §§ 18, 20), amending and re-enacting §§ 18 and 20 of chap. 42. Code 1906, and providing thereby for an alternative method of condemning land or easements by pipe line companies for transporting carbon oil or natural gas, is valid, and not violative either of § 30, art. 6, or §§ 9 and 10, art. 3, of the Constitution of this state, or of the 14th Amendment to the Federal Constitution.

Same — easement — description.

2. Such right of way or easement authorized when less than the fee is taken need not describe a definite width or depth, but must pursue a definite line, with courses and distances given, and have definite and fixed termini.

Headnotes by MILLER, J.

Note. — *Eminent domain: right to exercise power as affected by fact that principal benefit will be derived out of the state.*

Practically all the questions decided in *CARNEGIE NATURAL GAS CO. v. SWIGER*, except the particular one here under annotation, are covered in note to *Grafton v. St. Paul, M. & M. R. Co.* 22 L.R.A. (N.S.) 1, on judicial power over the right of eminent domain, and in notes to which reference is there made.

Only cases turning upon the question of benefits outside of the state in which the desired property is situated are here considered. All other objections to the right to exercise the power of eminent domain, such as that condemner is a foreign corporation, and that the use is not, under other circumstances, a public use, are assumed to be unavailable as a defense, hence cases involving only those and similar questions are excluded. The question of condemning land within a state for the use of the United States is not here considered.

But two classes of cases are here considered, i. e., those in which it is found that no benefit to the state in which the

Evidence — public use — sufficiency.

3. The evidence in this case sustains the finding and judgment of the court below as to the public use of the right of way or easement proposed to be taken.

Eminent domain — pipe line — protection of public.

4. Where, by a general law, such pipe line company is authorized to take such rights of way or easements for its public service, the right of the public therein, and the reasonableness of the charges for the service, though not written in any statute or ordinance, are sufficiently protected by general law to warrant the taking thereof for such public use.

Same — public need — extent of necessity.

5. Where such public service corporation is so authorized, and enters upon and assumes the duties of its public service, there is public need for rights of way and easements justifying the taking of private property therefor, and what is necessary is generally a matter within its discretion not controllable by the courts.

Same — restricted service — effect.

6. That but few persons are being served

property is located, or to inhabitants thereof, will accrue from the proposed use of the property, and those in which it is found that only part of the benefit will so accrue.

No benefit within state.

A vital distinction is made between direct and indirect benefits. *Grover Irrig. & Land Co. v. Lovella Ditch, Reservoir & Irrig. Co.*, *infra*, furnishes an excellent example of indirect benefits, and *Columbus Water Works Co. v. Long*, *infra*, furnishes one of direct benefits. The opposite holdings of the courts in the two cases, while in complete agreement as to principles, show the importance of the distinction.

The courts in the limited number of reported cases are unanimous upon the proposition that property cannot be condemned by virtue of the state's power of eminent domain, if no direct benefit from its proposed use is to accrue to the state in which it is located, or to at least a few inhabitants thereof.

In *Grover Irrig. & Land Co. v. Lovella Ditch, Reservoir, & Irrig. Co.* — *Wyo.* —, 131 Pac. 43, the court, in a well-reasoned opinion containing an exhaustive discussion of the principles underlying the question and the authorities supporting them, holds that property in one state cannot be taken under the power of eminent domain, if it appears that the entire benefit to be derived therefrom will accrue to the people of another state. The fact that the use to which the property was to be appropriated would develop the agricultural lands of a neighboring state, and thus indirectly benefit the people of the home state, was held to be insufficient to justify the exercise of the right.

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at the time such right of way or easement is proposed to be taken will not defeat the right of such company to take such right of way or easement, if the real purpose is to serve the public.

Trial — eminent domain — necessity of taking — question for court.

7. The question of the public need or benefit of such proposed right of way or easement is generally a question for the court, and not one of fact for jury trial

(May 27, 1913.)

ERROR to the Circuit Court for Harrison County to review a judgment in plaintiff's favor in a proceeding to condemn a right of way for a gas pipe line. Affirmed.

The facts are stated in the opinion.

Mr. Charles G. Coffman, for plaintiffs in error:

The title to the act embracing the sections permitting this taking works a concealment of the objects of the act.

Stewart v. Tennant, 52 W. Va. 572, 44 S. E. 223; *McNeeley v. South Penn Oil Co.* 52 W. Va. 641, 62 L.R.A. 562, 44 S. E. 508:

In *Columbus Water Works Co. v. Long*, *infra*, the court said: "It seems to be an admitted fact generally, that the power inheres in a state for domestic uses only, to be exercised for the benefit of its own people, and cannot be extended merely to promote the public uses of a foreign state;" but this statement is in the form of an admission rather than a holding. For the holding, see *infra*.

In *Washington Water Power Co. v. Waters*, *infra*, the court conceded that "condemnation could evidently not be had in this state for the purpose alone of serving a public use in another state."

Where land in one state is flooded by a dam which was built for milling purposes in another state, the owner of the dam cannot receive the benefit of a statute of the landowner's home state which provides a method of appraisal in the nature of condemnation proceedings, to take the place of actions at law in all cases of flooding lands for milling purposes, and the owner of the flooded lands may maintain an action for damages, for the reason that the public benefit derived from the use of the land does not accrue to inhabitants of the state. *Wooster v. Great Falls Mfg. Co.* 39 Me. 246. And the fact that the people of the state where the land is situated will receive an indirect benefit through the increased prosperity of the community where the mill is situated will not suffice to bring the case within the statute. *Salisbury Mills v. Forsaith*, 57 N. H. 124. These two cases are not strictly eminent domain cases, but they involve the same principles.

But where the use is to furnish a supply of water for the District of Columbia, the legislature of a state has power to authorize the exercise of the right of eminent domain,

1 Lewis's Sutherland, Stat. Constr. § 123; Beverly v. Waln, 57 N. J. L. 143, 30 Atl. 545; Cooley, Const. Lim. 7th ed. 205; State v. Steelman, 66 N. J. L. 518, 49 Atl. 978; 26 Am. & Eng. Enc. Law, 2d ed. 582.

The act is special, contrary to that portion of § 39 of art. VI. of the Constitution.

State ex rel. Courthouse & City Hall Comrs. v. Cooley, 56 Minn. 540, 58 N. W. 150; 1 Lewis's Sutherland, Stat. Constr. 353; Re Church, 92 N. Y. 1; Wheeler v. Philadelphia, 77 Pa. 338; Wallis v. Williams, 101 Tex. 395, 108 S. W. 153; Palcher v. United States, 11 Fed. 47; Sutherland, Stat. Constr. 149; Groves v. County Ct. 42 W. Va. 596, 26 S. E. 460; McEldowney v. Wyatt, 44 W. Va. 711, 45 L.R.A. 609, 30 S. E. 239.

It authorizes an interference with private property without due process of law.

Violett v. Alexandria, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Cooley, Const. Law, 241, 243, 244; Cooley, Const. Lim. 502; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Spencer v. Pt. Pleasant & O.

even though none of the water is used by the inhabitants of the state. Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550. However, this decision is not opposed to the doctrine enunciated in the decisions, *supra*, for it is based upon the theory that the home state participates in the enjoyment of property used by the United States. The real question involved, i. e., the power of a state to condemn property for the use of the United States, is not within the scope of the note.

Part of benefit within the state.

It will be seen by the cases, *infra*, that the relative amount of direct benefits accruing inside and outside, respectively, of the state, is not material.

Where part of the benefit will accrue directly to people of the state in which the property to be taken is located, the fact that part accrues to people of another state will not defeat the right to exercise the power of eminent domain. This proposition has been upheld,

—where the property taken was to be used to prevent the water supply of two cities in the home state and one in a neighboring state from being polluted. Columbus Water Works Co. v. Long, 121 Ala. 245, 25 So. 702. The court said: "While a state will take care to use this power for the benefit of its own people, it will not refuse to exercise it for such purpose because the inhabitants of a neighboring state may incidentally partake of the fruits of its exercise. Such refusal would violate the principles of a just public policy and the neighborly comity which should exist between states."

—where the use of the property would

River R. Co. 23 W. Va. 408; Lovett v. West Virginia Central Gas Co. 65 W. Va. 740, syl. 6, 24 L.R.A. (N.S.) 230, 65 S. E. 196; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Roanoke Gas Co. v. Roanoke, 38 Va. 828, 14 S. E. 665; Heninger v. Peery, 102 Va. 896, 47 S. E. 1013; Lewis v. Washington, 5 Gratt. 265; Varner v. Martin, 21 W. Va. 534; Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 812; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Public use of easement is not sufficiently shown.

Valley City Salt Co. v. Brown, 7 W. Va. 198, 5 Mor. Min. Rep. 397; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 812; Varner v. Martin, 21 W. Va. 534; Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; Fork Ridge Baptist Cemetery Asso. v. Redd, 33 W. Va. 263, 10 S. E. 405; Fallsburg Power & Mfg. Co. v. Alexander, 101

increase the power of condemnor's electric plant located within the state 4,750 horse power, and of its other plant located outside the state 13,500 horse power. The power developed at these plants, however, was not used wholly in the respective states, so that the proportion of service received by the people of the respective states may not be correctly represented by the figures, but it did appear that, by using both plants for service within the home state, there would have been sufficient power for that purpose alone without making the increase. Washington Water Power Co. v. Waters, 19 Idaho, 595, 115 Pac. 682. See quotation from this case, *supra*.

—where the condemned land was to be used as a reservoir to feed a canal which did not enter the state, but passed along the border and terminated at a port of the state, and could be used by the inhabitants of the state in their commerce with the neighboring state. Re Townsend, 39 N. Y. 171.

In Grover Irrig. & Land Co. v. Lovella Ditch, Reservoir & Irrig. Co. *supra*, this point is freely conceded, and, in support thereof, the court says that the right of the United States to condemn land within a state for the use of the former is "sustained upon the ground that property required for the purposes of the national government, being for the use of the people of all the states, is as well for the use of the people of that state where it is located," and in support of this proposition cites *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; but this subject is not within the scope of this note, hence no verification of that principle is here attempted.

J. W. M.

Va. 98. 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Charleston Natural Gas Co. v. Lowe, 52 W. Va. 602, 44 S. E. 410; Caretta R. Co. v. Virginia-Pocahontas Coal Co. 62 W. Va. 185, 57 S. E. 401.

When applicant is furnishing gas to persons outside of the state of West Virginia, it is not a public use, within the meaning of right of eminent domain.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Saunders v. Bluefield Waterworks & Improv. Co. 58 Fed. 135; Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; People ex rel. Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94; State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 120 Ind. 575, 6 L.R.A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778.

Messrs. Hall & Hall, for defendant in error:

The giving of the bond measures up to the constitutional requirement, "paid, or secured to be paid."

Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co. 11 Leigh, 42, 36 Am. Dec. 374; Wallace v. New Castle Northern R. Co. 138 Pa. 172, 22 Atl. 95; 10 Am. & Eng. Enc. Law, 2d ed. 1145, 1146; 15 Cyc. 780; Spencer v. Pt. Pleasant & O. River R. Co. 23 W. Va. 411; Jackson v. Big Sandy, E. L. & G. R. Co. 63 W. Va. 23, 129 Am. St. Rep. 955, 59 S. E. 740; Sisson v. Buena Vista County, 128 Iowa, 442, 70 L.R.A. 440, 104 N. W. 454; Commissioners' Ct. v. Street, 116 Ala. 28, 22 So. 629; Albany v. Gilbert, 144 Mo. 224, 46 S. W. 157; Lewis, Em. Dom.; Old Colony R. Co. v. Framingham Water Co. 153 Mass. 561, 13 L.R.A. 332, 27 N. E. 662.

In condemnation proceedings by a gas company to secure a right of way to a city in which the gas is to be sold, it is immaterial that plaintiff had not secured a franchise in the city, or that it sold all its gas to another company.

Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 36 L.R.A.(N.S.) 456, 109 S. W. 328.

Gas, when brought to the surface, is an article of commerce, and as such can be transported beyond the limits of the state.

Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; Lewis, Em. Dom. § 315; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 531, 50 L. ed. 583, 26 Sup. Ct. Rep. 301.

The statute provides for due process of law.

State v. Sponaugle, 45 W. Va. 415, 43 L.R.A. 727, 32 S. E. 283; People v. Quant. 12 How. Pr. 83; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 57 L.R.A. 607, 41 S. E. 521; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Brown v. New 46 L.R.A.(N.S.)

Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Re Ziebold, 23 Fed. 791, 4 Am. Crim. Rep. 116; Kansas City v. Duncan, 135 Mo. 571, 37 S. W. 513; Cox v. Gilmer, 88 Fed. 343; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 133 Ind. 635, 33 N. E. 432; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Jenkins v. Ballantyne, 8 Utah, 245, 16 L.R.A. 689, 30 Pac. 760; Gilchrist v. Schmidling, 12 Kan. 263; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Delaney v. Police Ct. 167 Mo. 667, 67 S. W. 589; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Irwin v. Pierro, 44 Minn. 490, 47 N. W. 154; Davis v. St. Lewis County, 65 Minn. 310, 33 L.R.A. 432, 60 Am. St. Rep. 475, 67 N. W. 997; Jones v. Yore, 142 Mo. 38, 43 S. W. 384; Daisy v. Skinner, 11 N. Y. Supp. 821; Branson v. Gee, 25 Or. 462, 24 L.R.A. 355, 36 Pac. 527; State, Singer Mfg. Co., Prosecutor, v. Heppenheimer, 54 N. J. L. 439, 24 Atl. 446; Savannah, F. & W. R. Co. v. Postal Teleg.-Cable Co. 115 Ga. 554, 42 S. E. 1; People v. Adirondack R. Co. 160 N. Y. 225, 54 N. E. 689; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 567, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; W. Va. Const. art. 3, § 9; Wallace v. New Castle Northern R. Co. 138 Pa. 168, 22 Atl. 95.

Miller, J., delivered the opinion of the court:

Petitioner elected to proceed pursuant to the alternative method prescribed by § 20, chap. 42, Code Supp. 1909, chapter 74, Acts 1907, to condemn an easement or right of way less than a fee for a natural gas pipe line through defendant's lands, according to a plan attached to the bond tendered defendant showing the route of its proposed pipe line through his lands.

Failing to agree with him as to the damages, and defendant refusing to accept the bond tendered him, petitioner, after five days' notice, presented the same to the judge of the circuit court in vacation, as prescribed by the statute, and also its petition praying among other things that said bond be approved. Whereupon defendant appeared and demurred to the petition, which being joined in by petitioner and argued by counsel, the court took time to consider, giving to petitioner, over objection by defendant, leave to file said bond and to make the same part of the record, but denying petitioner, until the further order of the court or judge, right of entry on the land.

On a later day, having considered the matters of law arising upon the prior proceedings, the judge was of opinion to ap-

prove the bond, unless within three days defendant should except to the form, amount, or surety, and file his exceptions with the clerk, and to that end continued the case to July 22, 1911, in chambers.

On the day to which the case was so adjourned, defendant again appeared, and tendered and asked leave to file certain objections in writing to the proceedings, also his objection to the amount and form of the bond, none to the surety, and also some nine special pleas in writing, and an additional paper entitled plea and further exceptions to the bond and approval thereof; and also made other motions not material, and which need not be considered.

At a later day the demurrer was overruled, defendant's pleas numbered 1, 2, and 3, and his so-called plea and further exceptions were filed, but pleas numbered 4 to 9, inclusive, were rejected, and issue was joined on the several pleas filed. Without passing on the exceptions to the bond, the court directed the testimony to be taken on the issues presented by the pleas, and on final hearing, on September 20, 1911, pronounced the judgment now complained of, finding that petitioner had the right to condemn the right of way or easement over defendant's lands for the purposes set forth in its petition, and finding the same sufficient in all particulars, approved the bond filed, and further found, ordered, and directed that petitioner had the right to, and might at any time, and immediately if necessary, enter upon said easement or right of way for the purpose of constructing its pipe line as proposed in its petition, to which rulings and judgment exceptions were taken and saved on the record.

The pleas rejected, so far as material, are covered by those filed, and there was no prejudicial error in rejecting those not filed. The issues presented by the demurrer and the several pleas and motions filed, and to which the evidence relates, will now be considered.

First, it is affirmed that said chapter 74, Acts 1907, amending and re-enacting §§ 18 and 20 of chapter 42, providing thereby for the alternative method of condemning land or easements by pipe line companies organized for transporting carbon oil or natural gas, is unconstitutional: (1) For infringing § 30, art. 6, of the Constitution (Code 1906, p. lx), providing that "no act hereafter passed shall embrace more than one object, and that shall be expressed in its title;" (2) for the infraction of § 39 of the same article (Code 1906, p. lxii), providing "and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case;" (3) because violative of the due pro-

cess provisions of § 10, art. 3 (Code 1906, p. li.), of our Constitution, and of the 14th Amendment to the Federal Constitution, and (4) because it authorizes the taking of private property for public use without just compensation paid or secured to be paid, contrary to § 9, art. 3 (Code 1906, p. l.), of our Constitution.

On the first proposition it is contended that the object of the act is concealed in the title, and falls within the condemnation of our case of *Stewart v. Tennant*, 52 W. Va. 559, 572, 44 S. E. 223. The title of the act is: "An Act to Amend and Re-enact Sections Eighteen and Twenty of Chapter Forty-two of the Code, Relating to Taking Land Without the Owner's Consent for Purposes of Public Utility." Before the adoption of our Code of 1868, and in a proceeding begun under Code Va. 1860, and before the statute so specifically provided, the right of a pipe line company organized for transporting carbon oil, to take land by condemnation, was upheld by this court. *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 382, 5 Mor. Min. Rep. 389. Prior to chapter 18, Acts 1881, our statute did not as therein enumerate the public uses for which private property might be taken or damaged. Among the purposes enumerated in § 2 of that act, is, "Fifth—For companies organized for the purpose of transporting carbon oil by means of pipes or otherwise." Pipe lines for transporting natural gas are not mentioned. So far as we know there were no pipe lines then existing in this state for transporting either oil or natural gas, except the *West Virginia Transportation Company*, plaintiff in the case just referred to. By chapter 7, Acts 1885, companies organized for transporting natural gas were included in said § 2, and the method of procedure prescribed for taking land for public utility was the same for all companies. The law so remained until the passage of the act of 1907, now in question. By § 18 of said chapter 42, as thus amended, pipe line companies were included along with railroad companies entitled to describe as to any or all of the land proposed to be taken an estate or interest therein less than a fee. And by the amendment of § 20 thereof, the alternative method of procedure for such pipe line companies was prescribed in the three paragraphs added thereto, and which paragraphs constitute the subject of the constitutional objections already alluded to. By the first of these paragraphs it is provided that, in addition to the other procedure, such company may at its election attempt to agree with the owner as to the damages, failing in which, it shall tender him a bond with sufficient surety to secure him

payment of the damages, to which bond a plan showing the route of the proposed pipe line shall be attached; and upon the acceptance of this bond the right of the applicant to enter upon the enjoyment of the easement shall be complete; if the owner refuse to accept the bond, it is provided that the same shall be presented to the circuit court or the judge thereof in vacation, after five days' written notice to the owner stating the time and place of such proposed presentation, and which shall state that, unless exceptions to the form, amount, or surety of the bond be filed within three days after presentation, said bond shall be approved by the court. The second of the added paragraphs provides that if no exception be filed thereto, the court shall approve the bond and direct the same, with the plan attached, to be filed for the benefit of both owner and applicant; but if exception be filed, the court is required to fix a day, not more than five days thereafter, for the hearing thereof, and may require evidence as to the sufficiency of the sureties and amount of the bond, and may require new surety, and a bond for a larger amount, or in a more satisfactory form; and upon the approval of the bond and filing thereof, the right of the applicant to enter as aforesaid shall be complete. The third of the added paragraphs provides: "Upon petition of either the property owner or the applicant, at any time after said bond shall have been presented and filed, five disinterested freeholders shall be appointed as in this chapter provided, to serve as commissioners to ascertain what will be a just compensation to the person entitled thereto for the easement so appropriated, and thereafter the proceedings shall be in accordance with the provisions of this chapter."

The question now recurs, Is the object of the act so concealed as to render it void for embracing more than one object in its title? We think not. The only object of the amendment of said § 18 was to classify pipe line companies along with railroads as entitled in certain cases to take "an estate or interest less than a fee." This amendment was certainly fairly covered by the title of the act. The only purpose of the amendment of § 20, evidently because the legislature thought it expedient and proper, was to provide a more speedy and summary remedy for obtaining possession of the easement than in other cases. We see nothing in this not fairly covered by the title of the act. It is certainly comprehended in the title of the act amendatory of the general law relating to the taking of land without the owners' consent for the purpose of public utility. The only change effected is in the method of procedure and in the form

of security, not in the essential rights of the owner of the land. His right of trial by jury on the question of damages, and to contest before the court the right to take the land, is fully preserved. In this case the court did not approve the bond or let the applicant into possession, until all issues on the pleas filed had been fully heard on the merits, a commendable practice, when, as in this case, the right to take and the public purpose of the taking have been challenged by the owner of the land. Besides, everything is covered into the general law. The act involved in *Stewart v. Tennant* was a special act; its title was: "An Act Concerning the Limitation of Actions in Certain Cases." As the court says in that case, an examination of the act shows its singleness of object, and that it is not constitutionally objectionable on that ground. The remaining question decided was whether that object was sufficiently expressed in the title, and it was held not to be so expressed. We need not repeat here the reasonings in that case differentiating it from a case like this, involving an act amendatory of a general law, covering the whole subject of taking private property for public utility. The generality of the title of the act involved in *Stewart v. Tennant* distinguishes it from this case, and renders inapt as well that case as other authorities cited and relied upon by the plaintiff in error, namely. 1 *Lewis's Sutherland*, Stat. Constr. § 123; *Beverly v. Waln*, 57 N. J. L. 143, 144, 30 Atl. 545; *Cooley*, Const. Lim. 7th ed. 205; *Henrico County v. McGruder*, 84 Va. 828, 832, 6 S. E. 232; *State v. Steelman*, 66 N. J. L. 518, 49 Atl. 978; 26 Am. & Eng. Enc. Law, 582. In the act here involved the sections of the general law so amended were inserted at large in the new act, in compliance with another provision of § 30, art. 6, of the Constitution. The cases decisive of the real question here presented are *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980, and *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278. In *Heath v. Johnson*, the act involved was entitled "An Act to Amend 'An Act to Amend and Re-enact Section Fifty-eight of Chapter Forty-five of the Code of West Virginia.'" That act was objected to as violative of article 6 of the Constitution. This court said in that case: "We do not think this objection to the law is sound. The provision cited seems to refer rather to original acts than to those which are only amendatory; but, supposing it to apply to the latter, when the amendment in its title points not only to the chapter which is to be amended, but to the very section, it seems to us to amount to a sufficient expression of the object of the law to

prevent any of the evils which the constitutional provision was intended to remedy." The first point of the syllabus in that case is: "When the title of an original act of the legislature sufficiently expresses its object in the manner required by the Constitution, an act amendatory thereof may, by its title, simply refer to the section of the original act which it is intended to amend, and this will be a sufficient compliance with § 30 of article 6 of the Constitution." *Roby v. Sheppard* is equally in point, as points 2 and 3 of the syllabus, and the reasons of the court, 42 W. Va. at pages 289-292, inclusive, will show. See also 12 Enc. Dig. Va. & W. Va. Rep. 777.

The next question is, Does the amending act of 1907 violate § 39, art. 6, of the Constitution, inhibiting special legislation where a general law would be proper? It seems almost a waste of time to reply to this proposition in view of what has been said on the first. It is contended, however, that, as the amendments affected only pipe line companies transporting oil and natural gas, their effect was to single out that class of corporations and legislate specially with reference to them, and to bring the act within the inhibition of the Constitution. To support this proposition, counsel cite and rely on *State ex rel. Courthouse & City Hall Comrs. v. Cooley*, 56 Minn. 540, 58 N. W. 150; 1 *Lewis's Sutherland, Stat. Constr.* 149, 353; *Re Church*, 92 N. Y. 1; *Wheeler v. Philadelphia*, 77 Pa. 338, 348; *Wallis v. Williams*, 101 Tex. 395, 108 S. W. 153; *Palcher v. United States* (C. C.) 11 Fed. 47; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Groves v. County Ct.* 42 W. Va. 596, 26 S. E. 460; *McEldowney v. Wyatt*, 44 W. Va. 711, 45 L.R.A. 609, 30 S. E. 239; *Violet v. Alexandria*, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; *Cooley, Const. Law*, 241, 243, 244; *Cooley, Const. Lim.* 502; *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663. We think these authorities quite inapt to support the proposition. All pipe line companies carrying oil and gas as a class are included in the provisions of the statute. The statute is but an amendment of the general law, which itself covers all classes of corporations given the right of eminent domain; none are excepted. The procedure for obtaining the land or easements thereon is the same, except that pipe line companies, if they so elect, may give the bond prescribed, and if accepted by the owner, or, if not, approved by the court, they may enter immediately. There was good reason in the mind of the legislature, no doubt, for this provision, to meet exigencies and conditions peculiar to that class of public serv-

ice corporations. Can it be rightfully said that such an amendment of the general law amounts to a segregation of individuals or corporations from a class to which they properly belong, so as to bring it within the constitutional mandate? We think not. An examination of the authorities cited will show, we think, that they relate to special statutes, applicable to particular persons, less than a class. There is no more reason for saying that the act in question is special legislation, because it provides for an alternative method of procedure for pipe line companies in § 20, than for saying that § 18, before the amendment, was special legislation, because, with respect to railroads, it provided that they might take an estate or interest therein less than a fee. The general law before the amendment put corporations given the power of eminent domain into several classes. Pipe line companies for carrying oil and gas were put into a class by themselves. The special provisions of the statute as amended, objected to, cover all corporations of this class. *State ex rel. Courthouse & City Hall Comrs. v. Cooley*, relied on, says: "A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons; . . . while a special law is one which relates and applies to particular members of a class." Substantially the same definition is given in some of the other authorities cited. In the California case a statute which prohibited baking on Sunday was held unconstitutional, because it picked out the baking business only, making it class legislation, when the law would have been as applicable to all other traders as to it. Our cases of *Groves v. County Ct.* and *McEldowney v. Wyatt* are equally inapt. The first says: "Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances." *McEldowney v. Wyatt* says: "A statute relating to persons or things as a class is general law; one relating to particular persons or things of a class is special." In our opinion the act involved is not special legislation.

Next, is the statute violative of the due process provisions of our Constitution and of the Federal Constitution? Clearly not. Notwithstanding the provision for giving bond to make entry on the land, the applicant is not permitted, without acceptance by the owner, or upon due notice to him and approval by a court having jurisdiction, to put a single foot upon the land sought to be taken; and if, as in this case, any question is made as to the right of the applicant to take, or the public purpose

for which he proposes to take the land, these questions will properly be tested by the court before approval of bond or right of entry become complete. Besides, would not injunction lie under the provisions of § 20, to protect the owner? Due process does not necessarily mean process of a court. "All that is essential is that 'in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this is provided for, there is that due process of law which is required.'" Brannon on the 14th Amendment, 467. The authorities cited by counsel for plaintiff in error are equally decisive of this proposition. Our decisions say: "Due process of law means, as used in said section, in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights, securing to every person a judicial trial before he can be deprived of life, liberty, or property." *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583; *Williams v. Freeland*, 19 W. Va. 599; *Griffie v. Halstead*, 19 W. Va. 602; *Peerce v. Adamson*, 20 W. Va. 57; *State v. Spon-angle*, 45 W. Va. 415, 43 L.R.A. 727, 32 S. E. 283. That the statute in question, by proper proceedings, fully protects the rights of the owner, not only appears from its provisions, but has complete demonstration in the present proceeding taken under it. Defendant has been permitted to make every defense and oppose every legal obstacle in the way which could possibly be afforded him. Why, therefore, should we dwell further on this proposition?

The next constitutional argument is based on § 9, art. 3, of our Constitution, against the taking of private property without just compensation paid, or secured to be paid. It is contended that the provision of § 20, relating to the giving of bond, does not satisfy the requirements of the Constitution, "paid, or secured to be paid." Certainly a bond, if good in form, sufficient in amount, and with sufficient surety, would satisfy the requirement "secured to be paid." But it is insisted that the land itself should be made the primary security, and title and the right reserved. This would not always furnish the best security for the liberal findings of commissioners and juries in such cases. The bond provided is to serve in case the owner and applicant are unable to agree. If the bond is deficient in form, amount, or surety, ample provision is made in the statute for correcting these defects. It is furthermore insisted that the bond should not be approved or entry made until the damages have been assessed by commissioners or jury. In the 46 L.R.A. (N.S.)

early Virginia case of *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh, 42, 36 Am. Dec. 374, a general statute passed at the session of 1836-37 gave similar rights to railroad companies to enter upon land before condemnation and assessment of damages, and providing for injunction against the owner from interference, except in certain cases. This statute was upheld by the Virginia court. This case is cited in *Spencer v. Pt. Pleasant & O. R. Co.* 23 W. Va. 406. Speaking of the Constitution and with reference to the statute there involved, providing that, after the damages should be assessed, the condemning railroad might be enjoined from the use of the right of way until the damages assessed should be fully paid, the court by judge Green says, 23 W. Va. at page 412: "Indeed, had the legislature gone still further and permitted a railroad company to take possession of the land it wanted to condemn, when it first instituted its proceedings to condemn the land, before even the appointment of commissioners, without paying anything to the owner, on simply giving a bond with approved security to pay the just compensation when ascertained, it would in so doing be complying with the words of our Constitution." True he adds: "But it does seem to me that it would be violating its spirit, if the spirit of this constitutional provision is correctly set forth by Chancellor Kent in the quotation which we have made from him, and I think that the real spirit of it is correctly stated by him." This expression is *obiter*. Chancellor Kent was apparently speaking of constitutional provisions limited to language like the first clause of our § 9, art. 3, providing that "private property shall not be taken or damaged for public use, without just compensation." But with reference to the taking of such property for the purpose of internal improvements, the language of the next provision is "until just compensation shall have been paid, or secured to be paid." The expression, "secured to be paid," must be construed according to the plain import of the words, unless a different meaning clearly appears from the context. A pipe line for transporting natural gas for the public use is an "internal improvement" within the meaning of our Constitution. *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* supra, 5 W. Va. page 388, 5 Mor. Min. Rep. 389. That a statute like the one in question here is not objectionable on constitutional grounds is clear from *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* supra. Judge Tucker (11 Leigh, at page 80), says: "It seemed to be considered by the counsel, that the condemnation must precede the execution of the work. This

is, I conceive, a misconception of the law. The company have a right to proceed with their work before condemnation; and, indeed, there is no absolute obligation on them to institute the process for assessing the damages to the land, since in case of their default the owner himself may do so. It is therefore clear that the work is not to be suspended until the damages are assessed and paid; and this is rendered more undeniable by the 13th section, which, in connection with the previous sections, provides that 'in the meantime' (that is, while the process of valuation or assessment is going on) 'no injunction shall be awarded to stay the proceedings of the company in the prosecution of their works, unless,' etc. It was not then necessary that the damages should have been assessed and paid before the company proceeded to the erection of their bridges." In *Old Colony R. Co. v. Framingham Water Co.* 153 Mass. 561, 13 L.R.A. 332, 27 N. E. 662, it was held that the provision for compensation for land taken by water companies, precisely the same as the public statute relating to railroad companies, except that the selectmen of the town were thereby made the tribunal to determine the sufficiency of the security instead of the county commissioners, was held to be sufficient, and not violative of the Constitution. That provision of the statute was that the water company might, "upon application by either party, require the company to give security to the selectmen of the town for payment of all damages that may be awarded to them; and if, upon petition of the owner, the security appears to the selectmen to have become insufficient, they shall require the giving of further security." The supreme court of Pennsylvania, in *Wallace v. New Castle Northern R. Co.* 138 Pa. 168, 22 Atl. 95, construing a statute from which the provisions of our act now under consideration were evidently taken, held that, after a bond had been taken with security approved, a bill in equity would not lie against a railroad company to restrain the completion of the railroad, on the ground that both the railroad company and sureties had become insolvent. And speaking of the term "security" in the Constitution of that state, that court says: "The only reasonable, and therefore the true, construction of the word 'secured' in the Constitution, is that it shall be made reasonably safe or sure that the owner of the property taken shall be able to collect the compensation for it, and the words 'sufficient sureties' in the act must be construed to mean such sureties as at the time they are taken make it reasonably certain that the owner of the property taken can collect from them 46 L.R.A. (N.S.)

a just compensation." According to these authorities, there can be no question that the bond provided for in the statute fully answers the requirement of the Constitution, "secured to be paid."

The next point of error urged is that the easement or right of way proposed is without width or depth or definite description. The plan attached to the bond shows the outside boundaries of defendant's land, and fixes the right of way or easement proposed to be taken through the same by reference to a distinct line of survey, with definite termini and definite and distinct courses and distances, so that there can be no doubt or controversy as to the true location of the line of the proposed right of way or easement. The petition filed by the applicant even more definitely describes this line, and alleges that the only pipe line which petitioner proposes to lay upon said route will be 6 inches in diameter, and will be used exclusively for the transportation of natural gas. The application we think conforms strictly to the letter as well as the spirit of the statute. The plan required by the statute is one "showing the route of the proposed pipe line over said land." The plan attached to the bond in this case does that. Can more be required? We think not. The petition says the pipes will be buried under the surface of the ground to such a depth as not to interfere with the use of the land for agricultural purposes. True, the application calls for no specific width, but the proposal is for a mere right of way or easement to bury a 6-inch pipe line upon defendant's land and maintain it there. When so buried, the surface will be subject to use and occupation by the owner, except in so far as such use and occupation may interfere with petitioner's right to install and maintain the pipe line in place. After installation all that a right of way or easement of this character would call for would be right of entry and of ingress and egress to keep the line in repair. Unless a definite width should be actually taken to the exclusion of the owner of the fee, which would be unduly burdensome on both applicant and owner, no definite width could be accurately described. But it is argued that without width and depth it will be impossible to determine the damages. We think there is no difficulty confronting commissioners or juries on this score. The character of the entry and of the use and occupation of land for an easement or right of way of this character is so well understood in the country these days that we think a jury would find little difficulty, certainly not more so than in other cases, in reaching a proper estimate of the damages: not only this, but the jury could and would

be enlightened by evidence on the question, and thereafter the owner of the right of way or easement would always be confined to a reasonable use, and liable to damages for abuse of his right. We think the statute clearly contemplates the taking of such a right of way or easement. Our case of *Crosier v. Brown*, 66 W. Va. 273, 25 L.R.A. (N.S.) 174, 66 E. E. 326, says in the first point of the syllabus, that "an easement of private way over land must have a particular definite line." That case related to a private way over another's land. It had no particular width or depth. In *Lovett v. West Virginia Central Gas Co.* 65 W. Va. 739, 24 L.R.A. (N.S.) 230, 65 S. E. 196, the gas company it seems had condemned strips 18 inches wide through two tracts of land, which, of course, might be done, but everyone knows that 18 inches would not be sufficient for ingress and egress in the work of laying and maintaining such a pipe line. The question which we have here, however, was not decided in that case. In *Cincinnati Gas Transp. Co. v. Wilson*, 70 W. Va. 157, 73 S. E. 306, the proposition was apparently the same as in this case, to take a mere right of way or easement less than a fee over defendant's land. The only question decided there which can have any application here was that in such cases the landowner is entitled to damages not alone for the estate or interest actually taken, but also damages to the residue, the fee in the whole tract, including therein the fee in that part of the tract covered by such right of way. We are of opinion to overrule this point of error.

The next point is that the public use of the proposed right of way or easement is not sufficiently shown to warrant the judgment complained of. This question is raised by the demurrer, by the pleas filed, as well as by some of those rejected. The cases relied upon in support of this proposition are: *Valley City Salt Co. v. Brown*, 7 W. Va. 198, 5 Mor. Min. Rep. 397; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Varner v. Martin*, 21 W. Va. 534; *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; *Fork Ridge Baptist Cemetery Asso. v. Reed*, 33 W. Va. 262, 10 S. E. 405; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *Caretta R. Co. v. Virginia-Pocahontas Coal Co.* 62 W. Va. 185, 57 S. E. 401. In substance it is said of them that they affirm the following propositions: (1) That the use which the public is to have of the property taken must be fixed and definite, and on terms and charges fixed

by law; (2) that such public use must be a substantial beneficial one, obviously needful for the public, which it cannot do without, except by suffering great loss or inconvenience; (3) that the necessity for condemnation must be apparent, and that the public need must be an imperative one. These propositions are drawn mainly from the language of Judge Green in *Varner v. Martin*, supra. That case involved the constitutionality of an act of the legislature giving right to take the land of another for a private way. The questions involved were rather legislative than judicial. The propositions were correctly applied in that case. True it is, however, that courts may generally inquire into the question whether the property proposed to be taken is for a public use, even though the condemner be of a class of persons or corporations authorized to take land for public use. The court below properly exercised this jurisdiction in this case. It permitted issues to be made up to try this question, and by finding and adjudging that the petitioner had the right to take the property by condemnation, it necessarily decided that the use to which the right of way or easement proposed to be taken was to be devoted was a public use, giving the right to take. We do not propose to enter upon any lengthy discussion or review of the prior decisions of the court.

On the first proposition, that the public use must be fixed and definite, and on terms and charges fixed by law, we observe first, that the legislature by general law has conferred upon pipe line companies organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. Pipe lines for transporting oil must carry oil, as railroads must carry passengers and freight, at reasonable rates, if such rates are not fixed by statute. Pipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves or by statute, or by contracts or ordinances of municipalities. Are not the rights of the public so fixed sufficiently definite to answer the requirements of the law? We think so. The rights of the people are thus protected in nearly every case where the public is served by public service corporations furnishing water, gas, electricity, or transportation. *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410, and *Pittsburg Hydro-Electric Co. v. Liston*, 70

W. Va. 83, 40 L.R.A.(N.S.) 602, 73 S. E. 86, recent decisions of this court, support these conclusions. *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715, 36 L.R.A.(N.S.) 456, 109 S. W. 328, as well as *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311, are likewise in point. So, also, are the cases of *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Munn v. Illinois*, 94 U. S. 133, 24 L. ed. 86.

On the question of the public necessity for the use of the property, covered by the last two propositions relied on, it may be said generally, that when a public service corporation is organized to serve the public, it assumes the duties and responsibilities incident to that service and imposed upon it by law. If such corporation be a pipe line company to transport or serve the public with gas, it must of necessity have land or rights of way from the source of supply to the places of consumption. It is unnecessary to argue at this day that natural gas for light, heat, and power is of great public utility, and if the public is served there is imperious demand for rights of way or easements in that service. Where a public service corporation has a public duty to perform, what is necessary in the way of easements and other means of performing this service is largely a matter within its discretion. It is so with railroad companies, and we see no reason why the same rule should not apply to pipe line companies transporting gas. When the legislature clothed this class of companies with the power of eminent domain, we must assume that it understood the nature of the public service to be performed, and determined that there was sufficient public necessity therefor. Want of general public necessity was urged in *Pittsburg Hydro-Electric Co. v. Liston*, supra, and the question was there met on the authority of *Lewis on Eminent Domain*, by the proposition that the question was not a judicial but a legislative one; that whether necessity for taking the land exists in favor of the condemnor is largely a matter for its own determination.

But it is argued that but few persons are or will be served in West Virginia by the proposed pipe line; that most of the gas is and will be transported into Pennsylvania; that the petitioner is a corporation under the laws of Pennsylvania, and that its principal business is to produce gas and transport it into that state, and that the sovereign right of eminent domain is properly limited to the service of the people of the state where the power is invoked. While the petitioner is a foreign corporation, it avers and proves its authority to do business in this state. Having obtained authority to do business here, § 30, chap. 54, 46 L.R.A.(N.S.)

Code 1906, confers upon it the same rights, powers, and privileges, and imposes upon it the same duties and liabilities, and subjects it to the same rules and regulations, as domestic corporations. *Floyd v. National Loan & Invest. Co.* 49 W. Va. 327, 54 L.R.A. 536, 87 Am. St. Rep. 805, 38 S. E. 653. Section 24, chapter 52, of the Code, provides that "such company shall, for the purpose of transporting natural gas, oils, and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state." The petition avers, and the evidence shows, that petitioner is serving many persons in this state with gas. True, but few at present are being served by the particular line in question, but it avers and proves its willingness to serve all persons applying, subject to its proper rules and regulations. It avers and proves that it has fixed reasonable prices and rates for such service. If the petitioner is serving the people of West Virginia with gas, and all who apply, as it avers and proves, it cannot be denied the right of eminent domain because it serves the people in another state into which its pipe lines go. There is not a particle of evidence in the case showing or tending to show that petitioner has ever neglected its duty toward the people of this state. That but few are shown to be taking gas from the particular line sought to be extended through defendant's land is of little consequence. The petitioner is seeking business. Practically the same objections were interposed to the rights of the petitioner in *Pittsburg Hydro-Electric Co. v. Liston*, and were met in the same way that we have met them here.

Lastly, it is urged that it was error to deny the defendant the right of trial by jury, on the question of the public need or benefit of the proposed pipe line. This the authorities hold is a judicial question, and not one of fact to be tried by a jury. *Pittsburg Hydro-Electric Co. v. Liston*, supra; *Sisson v. Buena Vista County*, 128 Iowa, 442, 70 L.R.A. 440, 104 N. W. 454.

The foregoing conclusions lead to an affirmation of the judgment, and this will be the mandate of the court.

MISSOURI SUPREME COURT.
(Division No. 1.)

PETER DE FORD, Appt.,

v.

ISAAH JOHNSON, Respt.

(— Mo. —, 158 S. W. 29.)

Husband and wife — alienation of affections — divorce — effect of statute.

1. A statute depriving the party against

whom a decree of divorce is granted of all rights and claims under and by virtue of the marriage does not deprive him of a right of action for alienation of his wife's affections before the decree was granted. Same — effect of decree.

2. A decree of divorce against a man does not deprive him of the right to damages against one who alienates the affections of his wife before the divorce is granted.

(May 31, 1913.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in defendant's favor in an action brought

Note. — Divorce or separation as affecting action for alienation of affections or criminal conversation.

As to conclusiveness of the decree of divorce as to the facts upon which the action for criminal conversation or alienation of affections is based, see note to *Luke v. Hill*, 38 L.R.A.(N.S.) 559, which covers the general question as to conclusiveness, as to third persons, of a decree of divorce, as to the facts adjudicated, as distinguished from the status established.

The present note assumes that the party bringing the action is one ordinarily entitled to maintain an action of the nature herein under discussion. (As to right of wife under modern married women's acts to sue for alienation of the affections of her husband, see note to *Nolin v. Pearson*, 4 L.R.A.(N.S.) 643.)

Aside from a few decisions in which the decree of divorce is held to be *res judicata* as to the issues raised in the alienation or criminal conversation cases, the general rule is that a divorce does not bar an action for alienation of affections or criminal conversation, but that evidence thereof may be admitted in the latter actions. Likewise it is the majority rule that articles of separation do not bar such an action.

Divorce—in general.

The following cases support the general rule that a decree of divorce does not bar an action for previous alienation of affections or criminal conversation or seduction: *Ash v. Prunier*, 44 C. C. A. 675, 105 Fed. 722 (seduction); *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731 (criminal conversation and alienation of affections); *Sackheim v. Miller*, 136 Ill. App. 132 (alienation of affections); *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99 (alienation of affections); *Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674 (alienation of affections); *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100 (criminal conversation); *Wales v. Miner*, 89 Ind. 118 (criminal conversation or seduction); *Wood v. Mathews*, 47 Iowa, 409 (criminal conversation); *Bergman v. Solomon*, 143 Ky. 581, 136 S. W. 1010 (alienation of affections); *Dickerman v. Graves*, 6 Cush. 308, 53 Am. 46 L.R.A.(N.S.)

to recover damages for alleged alienation of the affections of plaintiff's wife. Reversed.

The facts are stated in the opinion.

Messrs. Bird & Pope, for appellant:

A husband's right of action for alienation of affections is personal, and is not barred by a judgment of divorce.

Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658; *Wales v. Miner*, 89 Ind. 118; *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100; *Wood v. Mathews*, 47 Iowa, 409; *Pur-*

Dec. 41 (criminal conversation); *Mead v. Randall*, 111 Mich. 268, 69 N. W. 506 (alienation of affections and seduction); *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005 (alienation of affections); *Clow v. Chapman*, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328 (alienation of affections); *Sickler v. Mannix*, 68 Neb. 21, 93 N. W. 1018 (alienation of affections); *Ratcliff v. Wales*, 1 Hill, 63 (criminal conversation); *Simmons v. Simmons*, 21 Abb. N. C. 469, 4 N. Y. Supp. 221 (alienation of affections); *Hendrick v. Biggar*, 66 Misc. 576, 122 N. Y. Supp. 162, affirmed on condition of remission of damages in 151 App. Div. 522, 136 N. Y. Supp. 306 (alienation of affections); *Purdy v. Robinson*, 133 App. Div. 155, 117 N. Y. Supp. 295 (criminal conversation and alienation of affections); *Keen v. Keen*, 40 Or. 362, 10 L.R.A.(N.S.) 504, 90 Pac. 147, 14 Ann. Cas. 45 (alienation of affections); *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46 (alienation of affections); *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073 (criminal conversation). In *Beach v. Brown*, supra, in determining the right of a wife who had obtained a divorce to maintain an action for alienation of affections, the court discussed the effect of the divorce decree in the following interesting language: "But the action in this case was brought by the respondent after she had obtained a divorce from her husband, and it is therefore urged by appellant that, if she ever had the right to bring this action, it was lost when she sought and obtained a divorce; that all rights were settled by the decree of divorce; and cases from this court are cited to sustain that contention. But we do not think that the cases cited or the law bear upon this character of rights. It could not, in the very nature of things, have been contemplated in the divorce decree. It is a damage which is peculiar to the wife, which the husband, under no rule of right, could have any interest in; and it would be a harsh rule of law that, conceding that the wife had this right during coverture, would deprive her of the right when the wrongful acts of which she complains created the necessity for and caused the action for divorce. Of course the damages could not be calculated after the time when the decree of

dy v. Robinson, 133 App. Div. 155, 117 N. Y. Supp. 295; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Beach v. Brown, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46.

Section 2378, Mo. Rev. Stat. 1909, does not forfeit rights against third persons accruing during the existence of the marriage relation.

Kilburn v. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; Kinzey v. Kinzey, 115 Mo. 496, 20 L.R.A. 222, 22 S. W. 497; Saunders v. Saunders, 144 Mo. 482, 46 S. W. 428; Schluster v. Schuster, 93 Mo. 438, 6 S. W. 259; Bufe v. Bufe, 88 Mo.

App. 627; Wales v. Miner, 89 Ind. 118; State ex rel. Haines v. Parrish, 1 Ind. App. 441, 27 N. E. 652; Buttlar v. Buttlar, 67 N. J. Eq. 136, 56 Atl. 722; 2 Bishop, Marr. & Div. § 1623; Moss v. Fitch, 212 Mo. 484, 126 Am. St. Rep. 568, 111 S. W. 475; Ross v. Ross, 21 Or. 9, 26 Pac. 1007; Barrett v. Failing, 8 Sawy. 473, 3 Fed. 471.

No proof was made as to the effect of a divorce rendered in Idaho. The Missouri statute being penal, there is no presumption that there is a similar statute in Idaho.

St. Sure v. Lindsfelt, 82 Wis. 346, 19 L.R.A. 515, 33 Am. St. Rep. 50, 52 N. W. 308.

divorce was obtained." And in Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100, supra, it was said that after the discovery by the husband of his wife's infidelity it was not strange that he permitted her to obtain a divorce (obtained upon the ground of cruelty), and that he did not thereby waive or lose his right to redress for the injury done, as it would not be in the interest of good order and the public morals to permit the seducer of a wife to set up the divorce as a complete defense in such case.

So in Philpott v. Kirkpatrick, 171 Mich. 495, 137 N. W. 232, it was held that a husband was not estopped from maintaining a suit for alienation of his wife's affections by reason of having previously brought a divorce suit in which he complained of the present defendant's interference with his domestic relations, and in which he obtained a decree of divorce upon the ground of extreme cruelty, it being said that the respective positions of the plaintiff in the two suits were not so inconsistent as to work an estoppel. And in Modisett v. McPike, 74 Mo. 636, it was held that the fact that a wife obtained a divorce from her husband, based upon his misconduct, did not of itself constitute a defense to an action by him for alienation of her affections, if, notwithstanding the misconduct on the part of the plaintiff, his wife would not have sued him for divorce if it had not been for the acts, conduct, and influence of the defendant (in the alienation action), whereby he induced her to sue for divorce.

And it has been held that a decree of divorce obtained in one jurisdiction, which is invalid in another jurisdiction, does not bar an action for criminal conversation, brought in the latter jurisdiction. Berney v. Adriance, 157 App. Div. 628, 142 N. Y. Supp. 748; C. v. D. 8 Ont. L. Rep. 308, appeal dismissed in 12 Ont. L. Rep. 24.

—as evidence.

See also other note referred to at the beginning of the present note.

It is generally conceded that evidence of the fact that a divorce has been granted is admissible. This privilege has been granted upon various grounds, but the extent to which the record in the divorce proceeding may be introduced is a question 46 L.R.A. (N.S.)

upon which there is a considerable conflict of authority.

Thus, it has been held that evidence that a decree of divorce was obtained by the plaintiff after the doing of the acts complained of in the action for alienation of affections is admissible in the latter action for the purpose of showing the termination or dissolution of the marriage relation. Waldron v. Waldron, 45 Fed. 315; Waldson v. Larson, 90 C. C. A. 422, 164 Fed. 548.

And it has been held that the fact that a divorce has been granted may be shown for the purpose of negating any claim that there had been, up to the time of the divorce, a reconciliation between the plaintiff and his wife. Mead v. Randall, 111 Mich. 268, 69 N. W. 506.

And in the following cases it was held that the fact that a divorce was granted subsequent to the acts complained of in the alienation or criminal conversation action may be considered in mitigation of damages, for the reason that the plaintiff would not be entitled to recover any compensation for the loss of affection, services, society, etc., of his wife after she ceased to be his wife. Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731 (criminal conversation and alienation of affections); McNamara v. McAllister, 150 Iowa, 243, 34 L.R.A. (N.S.) 436, 130 N. W. 26, Ann. Cas. 1912 D, 463 (alienation of affections); Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010 (holding that the record of the divorce suit, showing withdrawal of the defense and admission of the charges of cruelty made by the wife, was admissible as tending to show that his feelings were not damaged to the extent alleged in his alienation of affections action); Purdy v. Robinson, 133 App. Div. 155, 117 N. Y. Supp. 295 (criminal conversation and alienation of affections).

So, in Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073, it was held that both the fact that a divorce had been granted and the ground upon which it was obtained formed legitimate evidence in an action for criminal conversation.

And in Hardwick v. Hardwick, 130 Iowa, 230, 106 N. W. 639, it was held that evidence that the plaintiff's husband had instituted a suit for divorce, and that it was subsequently dismissed, was properly admitted in evidence in the action for aliena-

If proof had been made of a penal statute of Idaho, such statute could not be made to act extraterritorially.

Stanley v. Wabash, St. L. & P. R. Co. 100 Mo. 435, 8 L.R.A. 549, 3 Intern. Com. Rep. 176, 13 S. W. 709; Clark v. Clark, 8 Cush. 385; Hernandez's Succession, 46 La. Ann. 962, 24 L.R.A. 831, 15 So. 461; 2 Bishop, Marr. & Div. § 1618; State v. Fenn, 47 Wash. 561, 17 L.R.A.(N.S.) 800, 92 Pac. 417; Smith v. Ross, 7 Mo. 463; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Proctor v. Proctor, 215 Ill. 275, 69 L.R.A. 673, 106 Am. St. Rep. 168, 74 N. E. 145, 2 Ann. Cas. 819; Hood v. Hood, 130 Ga. 610, 19 L.R.A.(N.S.) 193, 61 S. E. 471, 14 Ann. Cas. 359; Doerr v. Forsythe, 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055; Kline v. Kline, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825.

tion of affections, where, from statements by defendant, it was inferable that he had participated in the matter both of bringing the suit and its dismissal.

And in Sackheim v. Miller, 136 Ill. App. 132, the court held that both the bill of complaint and the decree in the divorce action, which was in favor of the wife of the plaintiff in the alienation action, were admissible in evidence in the latter action upon the ground that evidence sufficient to warrant the granting of a divorce would tend to prove that the love and affection of the plaintiff's wife were alienated by the plaintiff himself.

And the record of the divorce suit was held admissible in evidence in an action for alienation of affections in Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010, where the plaintiff in the latter action had withdrawn his answer and admitted the charges of cruelty made in the complaint in the divorce action, the court saying that such course tended to show that he was willing to get rid of his wife.

But in Sickler v. Mannix, 68 Neb. 21, 93 N. W. 1018, wherein it was contended that a divorce decree obtained by the husband upon the ground of extreme cruelty was admissible in evidence in favor of the defendant in an action brought by the divorced wife for alienation of her husband's affections, as tending to explain the reason why the husband refused to live with his wife, it was held that the divorce record was properly excluded, the then present defendant not having been a party to the divorce proceeding, the court saying that it is only where a judicial record contains an admission of one or the other of the parties to it that it is admissible in favor of a stranger, and that in the case under consideration the wife not only had not admitted the charges, but had denied and contested them. The court further said that the fact that the court found against her on the trial did not make the findings admissible in such a case.
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A judgment in one state, enforcing a penal statute of that state, cannot be made to carry the enforcement of that penalty to another state.

Re Ebbs, 160 N. C. 44, 19 L.R.A.(N.S.) 892, 63 S. E. 190, 17 Ann. Cas. 592; McGrew v. Mutual L. Ins. Co. 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Phillips v. Madrid, 83 Me. 205, 12 L.R.A. 862, 23 Am. St. Rep. 770, 32 Atl. 114; Van Storch v. Griffin, 71 Pa. 244; Garner v. Garner, 56 Md. 127; Ponsford v. Johnson, 2 Blatchf. 51, Fed. Cas. No. 11,266; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Bullock v. Bullock, 122 Mass. 3; 14 Cyc. 729; 2 Bishop, Marr. & Div. § 1620.

A judgment rendered on service by pub-

And in Waldron v. Waldron, 45 Fed. 315, where the action was by a wife for alienating the affections of her husband during a period preceding the time of the obtaining by her of a divorce, which, acting on the status of the parties, dissolved the marriage and left each free to remarry, it was held that neither allegations in the complaint in the divorce action nor evidence taken upon the trial of that action was admissible in evidence in the alienation action as against one who was not a party to the divorce action.

And in Mead v. Randall, 111 Mich. 268, 69 N. W. 506, it was held that the bill of complaint in the divorce proceeding, being an *ex parte* statement of the plaintiff, not himself a competent witness, was not admissible in an action for alienation of affections and seduction.

So, in Woldson v. Larson, 90 C. C. A. 422, 164 Fed. 548, it was held that a decree of divorce obtained since the occurrence of the tort complained of in an action for alienation of affections was admissible neither for the purpose of showing the ground on which the divorce was obtained nor as proof of the fact with which the defendant in the alienation action, who was not a party to the divorce proceeding, was charged.

Separation agreements.

As before stated, the general rule is that separation agreements do not bar either an action for alienation of affections or criminal conversation; but in some cases it has been held that no right of action exists where the consortium has been voluntarily relinquished, but it seems that this fact should be considered in mitigation of damages rather than as raising a bar to an action.

Thus, it has been held that a written agreement between a husband and wife, whereby the wife assumed to release her marital rights, and in which a separation

lication cannot affect property rights of the defendant in another state.

Moss v. Fitch, 212 Mo. 484, 126 Am. St. Rep. 568, 111 S. W. 475; *Anthony v. Rice*, 110 Mo. 227, 19 S. W. 423; *Hamill v. Talbott*, 72 Mo. App. 30, 81 Mo. App. 214; *Anderson v. Anderson*, 55 Mo. App. 272; *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. ed. 565, 570; *Hood v. Hood*, 130 Ga. 610, 19 L.R.A.(N.S.) 193, 61 S. E. 471, 14 Ann. Cas. 359; *Proctor v. Proctor*, 215 Ill. 275, 69 L.R.A. 673, 106 Am. St. Rep. 168, 74 N. E. 145, 2 Ann. Cas. 819; *McGuinness v. McGuinness*, 71 N. J. Eq. 1, 62 Atl. 937; *Doerr v. Forsythe*, 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055; *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47, 10 N. W. 825; 14 Cyc. 589; *Ellison v. Martin*, 53 Mo. 575; *Stallings v. Stallings*, 9 L.R.A.(N.S.) 593, note.

The Idaho decree does not purport to

and living apart were provided for, afforded no complete defense to an action for alienation of the husband's affections. *Betser v. Betser*, 87 Ill. App. 399, affirmed in 186 Ill. 537, 52 L.R.A. 630, 78 Am. St. Rep. 303, 58 N. E. 249; *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479; *Simmons v. Simmons*, 21 21 Abb. N. C. 469, 4 N. Y. Supp. 221; *Hendrick v. Biggar*, 66 Misc. 576, 122 N. Y. Supp. 162, affirmed on condition of remission of damages in 151 App. Div. 522, 136 N. Y. Supp. 306; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804.

And in *Silvernall v. Westerman*, 11 Luzerne, Leg. Reg. 5, where the defendant "separated" from his wife, it seems to have been assumed that the separation did not bar the bringing by him of an action of criminal conversation against her paramour. In this case the nature of the separation was not reported, but it seems to have been regarded in effect as a divorce.

And in *Jenkins v. Chism*, 25 Ky. L. Rep. 736, 76 S. W. 405, it was held that articles of separation under which the wife did not receive anything for her support did not bar her right of action against a third person for alienation of affections. The failure of the separation agreement to provide for the wife's support was assigned as the reason for so holding. But that the provision for support would not bar the action, but would merely affect the damages recoverable, see *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479, wherein it was held that a separation agreement made upon a valuable consideration, which released the husband from all obligations to support and maintain the wife, merely barred recovery of damages for loss of support in an action by her for alienation of affections.

And it seems to be the present law of England that a deed of separation does not bar an action for damages for alienation of affections or criminal conversation. See *Izard v. Izard*, L. R. 14 Prob. Div. 45, 58 L. J. Prob. N. S. 83, 60 L. T. N. S. 399, 37 Week. Rep. 496 (holding that such is the 46 L.R.A.(N.S.)

affect any of defendant's property rights. It only affected his matrimonial status.

Janney v. Spedden, 38 Mo. 395; *Hekking v. Pfaff*, 82 Fed. 403, 43 L.R.A. 618, 33 C. C. A. 328, 50 U. S. App. 484, 91 Fed. 60; *Rigney v. Rigney*, 127 N. Y. 408, 24 Am. St. Rep. 462, 28 N. E. 405.

If the Idaho decree had purported to affect any of defendant's rights, the courts of Missouri would not be bound to enforce that judgment.

Smith v. Ross, 7 Mo. 463; *Pennoyer v. Neff*, 95 U. S. 714, 729, 24 L. ed. 565, 571; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720.

Mr. Ben T. Hardin for respondent.

rule, especially where the defendant was the cause of the separation); *Evans v. Evans* [1899] P. 195, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60; *Chambers v. Caulfield*, 6 East, 245; and the opinion of the House of Lords as reported in L. R. 14 Prob. Div. 46, note. Earlier English cases seemingly adopted a different view. See *Weedon v. Timbrell*, 5 T. R. 357; *Malcomson v. Givins*, L. R. 14 Prob. Div. 45, note; and *Bartelot v. Hawker*, 1 Peake, N. P. Cas. 7. *Weadon v. Timbrell*, supra, was followed, but by a divided court, in *Patterson v. McGregor*, 28 U. C. Q. B. 280.

But where a criminal conversation takes place after a separation agreement which was voluntarily entered into has become effective, it has been held that the agreement is a complete bar to an action based upon the criminal conversation. *Fry v. Drestler*, 2 Yeates, 278. A distinction was drawn in this case between separation agreements voluntarily entered into and those to which the aggrieved party did not willingly consent, it being said that in the latter case the aggrieved party was not barred from bringing an action for criminal conversation, even though the offensive acts occurred after the separation. And in *Buckel v. Suss*, 28 Abb. N. C. 21, 18 N. Y. Supp. 719, affirmed on opinion below in 2 Misc. 571, 21 N. Y. Supp. 907, where the action was for enticing away plaintiff's husband and depriving her of his "comfort, society, consort, aid, and assistance," the damages recoverable for which are the loss of the "society, comfort, and assistance" of the husband, it was held that a separation agreement voluntarily entered into under sanction of the court barred the action, it being said that the legal separation renounced the elements upon which she must rely to sustain her action. But this case has been questioned,—see *Hendrick v. Biggar*, 66 Misc. 576, 122 N. Y. Supp. 162, affirmed on condition of remission of damages in 151 App. Div. 522, 136 N. Y. Supp. 306.

G. J. C.

Graves, J., delivered the opinion of the court:

December 28, 1906, the plaintiff sued the defendant in the circuit court of Jackson county for an alleged alienation of his wife's affections. Plaintiff recovered judgment for \$5,500, and upon defendant's appeal to the Kansas City court of appeals the judgment was reversed for error in an instruction. 152 Mo. App. 209, 133 S. W. 393. In the opinion of the Kansas City court of appeals it is stated that the answer was a general denial. The record before us shows that on October 1, 1908, the plaintiff filed an amended petition, asking for damages in the aggregate sum of \$25,000. Of these alleged damages \$15,000 is denominated actual and \$10,000 punitive. The court of appeals passed upon the case in January, 1911, and October 6, 1911, the defendant amended its answer in advance of the retrial nisi. The answer in this record has two strings to its bow. First we have a general denial. For a further defense the new answer thus speaks: "And for further answer to plaintiff's petition, this defendant says that during that time that Mary De Ford was the wife of the plaintiff, he was guilty of such cruel neglect and barbarous treatment of his said wife as to cause her to institute suit against him for divorce, and on the 26th day of May, 1909, Mary De Ford, the wife of the plaintiff, at their home in the city of Grangeville, in Idaho county, in the state of Idaho, instituted such suit in the district court of said county and state, against the plaintiff, Peter De Ford, for divorce, and afterward, to wit, on the 3d day of September, 1909, in said court, a decree of divorce was adjudged in favor of the said Mary De Ford and against the said Peter De Ford, the plaintiff herein, and he was adjudged the guilty party; and that by reason of said judgment and decree in said suit for divorce, the plaintiff has thereby forfeited all rights and claims under and by virtue of his marriage with the said Mary De Ford, and plaintiff is thereby barred from any claim or right of recovery in this action. Wherefore, having fully answered, this defendant asks to be discharged with its proper costs." Reply to this new answer was a general denial. The bill of exceptions filed is in abbreviated form, and was evidently so framed as to present a single issue. The bill of exceptions contains this recitation: "And said plaintiff introduced evidence tending to prove all the allegations of his petition filed in the above-entitled cause. And said defendant, as a part of the cross-examination of the plaintiff himself, offered in evidence a certified copy of original complaint, sum-

mons, alias summons, and judgment in the case of Mary E. De Ford, Plaintiff, v. Peter De Ford, Defendant, in the district court of Idaho county, state of Idaho. To the introduction of which complaint, summons, alias summons, and judgment in evidence, plaintiff objected as incompetent, irrelevant, and immaterial, and of no extraterritorial effect, and no defense to the prosecution of this action, and of no binding force upon him in this action in the state of Missouri. The court: Objection overruled. To which action, order, and ruling of the court counsel for plaintiff then and there duly excepted."

The bill of exceptions then contains a full transcript of all the proceedings in the Idaho court of this divorce proceeding, from the petition to the judgment. The petition in the divorce suit was filed May 26, 1909. Proof of service of summons in the divorce case thus reads:

State of Kansas, County of Wyandotte.

James R. Pollard, being duly sworn, says: That he is a citizen of the United States over the age of twenty-one years, and a resident of Kansas City, State of Missouri, and not a party to nor in anywise interested in the action mentioned in the annexed alias summons; that he personally served the within alias summons on the defendant named in said alias summons, Peter De Ford, by delivering to and leaving with said Peter De Ford, said defendant, personally at Kansas City, state of Kansas, on the 14th day of June, 1909, a copy of said alias summons, together with a copy of the complaint in the action named in the said alias summons attached to said copy of alias summons.

James R. Pollard.

Subscribed and sworn to before me this 15th day of June, 1909.

O. Q. Claffin,

Notary Public of the County of Wyandotte, State of Kansas. [Notarial Seal.]

The grounds for divorce, as stated in the petition, are: "That the said defendant for more than two years last past wilfully neglected to provide plaintiff with the common necessities of life, because of his idleness, profligacy, and dissipation. That on or about November, 1906, the defendant, disregarding the solemnity of his marriage vows, wilfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues so to wilfully and without cause desert and abandon the plaintiff, and to live separate and apart from her without sufficient cause or any reason, and against her will and without her consent."

The judgment, so far as material, reads: "Whereupon witnesses on the part of the plaintiff were duly sworn and examined, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and after deliberation thereon, and it appearing to the court that all material allegations of the complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility, and sufficiency, and it also appearing to said court that said defendant was duly served with summons, and all and singular the law and the premises being by the court here understood and fully considered, wherefore, it is here ordered, adjudged, and decreed, and this does order, adjudge, and decree that the marriage between the said plaintiff, Mary E. De Ford, and the said defendant, Peter De Ford, be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, free and absolutely released from the bonds of matrimony and all the obligations thereof."

On his cross-examination the plaintiff admitted that he was the Peter De Ford mentioned in the divorce proceeding, and further admitted that, "about five months after said decree of divorce was granted said Mary E. De Ford, his wife, he was married to one Elder Childers in Kansas City, Wyandotte county, Kansas, the same county in which said summons in the divorce case of said Mary E. De Ford was served upon him by James R. Pollard on June 14, 1909, and that the said second wife died thereafter on October 15, 1910."

The bill of exceptions, as duly signed and allowed by the trial judge, then further recites: "At the close of the evidence on the part of plaintiff, the defendant asks the court to give the following instruction, to wit: 'The court instructs the jury that under the pleadings and the evidence in this case the plaintiff is not entitled to recover, and your verdict must be for the defendant.' And said instruction in the nature of a demurrer to the evidence having been argued by counsel and considered by the court given, but solely and entirely for the reason as stated, held, and decided by the court at the time, that the right of the plaintiff to recover herein, as made by his evidence, was lost and destroyed by reason of the fact that since the plaintiff had commenced his said action herein his wife, Mary E. De Ford, had obtained said decree of divorce from him in the district court of Idaho county, state of Idaho, as shown by the said record of said divorce proceeding introduced in evidence, and in and by said decree of divorce said Peter De Ford had been adjudged the guilty party, and that

thereby he had forfeited his right to have and to further proceed with the cause of action sued for herein, to all of which finding, decision, and judgment, and each part thereof, plaintiff duly excepted. And thereupon the court gave and read said instructions to the jury, in the nature of a demurrer to the evidence, said plaintiff duly excepting, and thereupon plaintiff took an involuntary nonsuit herein, with leave to file a motion herein, to set the same aside, which the court granted." After an unsuccessful motion to set aside the nonsuit, the plaintiff brings the case here by appeal.

I. Much is said in the briefs as to whether a certain statute of Missouri should be considered as effective in this case. This statute is relied upon by the defendant. It is now § 2378, Rev. Stat. 1909, and so far as applicable reads: "In all cases of divorce from the bonds of matrimony, the guilty party shall forfeit all rights and claims under and by virtue of the marriage." Plaintiff urges that the statute is penal in character, and hence there is no presumption of a similar statute in Idaho, or, in other words, that we cannot, in absence of proof the Idaho law, presume that it is the same as the Missouri law. In the view we have of the case it is a waste of energy to discuss this question. For our discussion we shall proceed upon the theory that Idaho did have such a statute as our statute, § 2378, supra. That statute has no application to a case like the one at bar. Alienation of the wife's affections is a tortious act of some third person as against the rights of the husband. The right to sue is one which must arise whilst the marital relations exist, but it is not a right which grows out of the marital relation, and is not one of the forfeited rights mentioned in the statute. The "rights and claims" referred to in this statute are rights and claims, between husband and wife, which spring up by reason of the marriage, and the statute has no reference whatever to the tortious act of a third party during the existence of the marriage relation, which tortious act gives the husband a cause of action as against such third party. To put an A B C case, if a railway company cripple and injure the wife of A, so that he is deprived of her society and aid, is the right of action a right and claim "under and by virtue of the marriage?" We think not. Neither is the cause of action stated in this petition such a claim or right. Cases cited by learned counsel for the defendant are not in point. They discuss claims and rights which really grow out of the marriage contract and marriage relation. They do not discuss the rights of a husband for the tortious acts of a third

party occurring whilst the marriage relation exists. This statute has no bearing upon the case at bar. A reading of it should have been sufficient for the trial court.

II. By the petition the wrongful and tortious acts of the defendant are charged to have occurred in the years of 1905 and 1906. The divorce proceeding was in 1909. If the defendant violated the rights of the plaintiff, and if he wronged the plaintiff, such wrong was done whilst the marital relation existed. Plaintiff in the brief urges many reasons against the admission of the Idaho judgment and decree of divorce, but these we shall pass. We shall give to that judgment full credit, and permit it to have all the weight to which it is entitled. The question then arises, Does that judgment bar and foreclose the right of plaintiff in this action? To this question we answer, "No." The tort was complete before this divorce. That such an action is a tort and personal action belonging to the injured spouse is clearly shown by the case law. *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658; *Modisett v. McPike*, 74 Mo. 636; *Clow v. Chapman*, 125 Mo. loc. cit. 105, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328.

That a judgment for divorce, even at the husband's fault, is not a bar to an action of this kind, is clearly shown by the authorities. In *Michael v. Dunkle*, 84 Ind. loc. cit. 545, 33 Am. Rep. 100, it is said: "The evidence shows, or tends strongly to show, without conflict, that before the criminal intercourse occurred the appellee and wife had finally separated, that they did not afterwards live together, and that before the commencement of this action she obtained a decree of final divorce from him; and upon these facts it is insisted that the appellee was not entitled to recover. We think otherwise. The woman was still the appellee's wife, and notwithstanding the differences which had led to the separation, which it seems was caused by his cruelty, there might have been a reconciliation between them; and indeed there is evidence that the appellee was seeking to bring this about at the time when the offenses of the appellant were committed and discovered. After this discovery, it is not strange that the appellee permitted his wife, without resistance, to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done. It would not be in the interests of good order and the public morals to permit the seducer of a wife to set up a disagreement, or even a

separation, between her and the husband, as a complete defense to an action by the latter for the wrong."

In *Wales v. Miner*, 89 Ind. 118, the rule is well stated in the second syllabus thus: "That the plaintiff and his wife were divorced before the suit was begun is no defense to a suit for criminal conversation." In that case the wife got the divorce, and the suit was not brought until after the divorce had been granted.

In *Wood v. Mathews*, 47 Iowa, loc. cit. 411, that court upon this point says: "The evidence shows that after the injuries complained of, and before this action was brought, the plaintiff's wife procured a divorce from him. The court instructed that this constitutes no defense to an action for damages against the defendant for any injuries which he may have sustained prior to the time of procuring the divorce. Appellant complains of the giving of this instruction. In it there is no error. Actions of this kind, after a decree of divorce, were maintained in *Dickerman v. Graves*, 6 Cush. 308, 53 Am. Dec. 41, and in *Ratcliff v. Wales*, 1 Hill, 63."

In 21 Cyc. p. 1620, the rule, well supported by authority, is thus announced: "Where the wife's right to sue is recognized she may maintain her action, although she has subsequently obtained a divorce from her husband; and the husband may likewise recover for alienation of his wife's affections in a proper case, although she has obtained a divorce. A separation agreement between husband and wife is no defense to an action for alienating the husband's affections."

We are not without authority in this state. In *Modisett v. McPike*, 74 Mo. loc. cit. 646, this court said: "The fourth, fifth, and sixth instructions for plaintiff announce with special clearness and force the true doctrine applicable to the facts of the case, and all other cases when the same question arises. They declare the general doctrine that, although the jury may believe that plaintiff's wife obtained a divorce from him, and that she made plaintiff's misconduct ground for obtaining said divorce, yet, if the jury believe that, notwithstanding such misconduct on the part of the plaintiff, his wife would not have separated or remained apart from him, or sued him for a divorce, if it had not been for the acts, conduct, and influence of defendant toward her, and that defendant purposely and intentionally, by such acts, conduct, and influence, induced her to so separate or remain apart from plaintiff, or sue him for a divorce, then the fact that plaintiff's wife obtained such a divorce on account of plaintiff's misconduct does not, of itself, consti-

tute any defense to this suit. That doctrine is not the doctrine announced in the third and fourth instructions given for the defendant. They assert another and a different doctrine, and we think an erroneous one. In effect, they declare, as matter of law, that if the plaintiff was addicted to habitual drunkenness for the space of one year next before the separation of the plaintiff and his wife, or the institution of her said suit for a divorce against the plaintiff, the wife of plaintiff had a just cause for said separation and for the institution of said suit for a divorce, and that the verdict should be for the defendant regardless of whether the defendant, or anyone else, advised her to do so or not. The first proposition contained in the above instruction may be, and doubtless is, correct, but the second is by no means true. The wife may have a just cause for separation or divorce, but she may elect to abide by her situation, and remain with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife; and, if he voluntarily does so, he is amenable for the consequences." In the *McPike Case* there was a decree of divorce introduced in evidence which showed that the wife had procured the divorce on account of the fault of the husband. Our court declined to recognize such decree as a bar to plaintiff's action against the third party for the wrong occurring during the time of the marriage relation.

In *Clow v. Chapman*, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328, the suit for alienation was prosecuted by the wife after the marriage relation had been severed. This case also recognizes the doctrine that the action is one in tort, and not a right growing out of the marriage status.

The petition in this case charges that the plaintiff was forced to separate from his wife by reason of defendant's conduct. The bill of exceptions says that there was evidence tending to prove all the allegations of plaintiff's petition. As said by the Indiana court, *supra*, it is not strange that plaintiff made no defense to the action for divorce, grounded as it was, as indicated by the record in our statement set out. The decree of divorce was perhaps proper evidence. The plaintiff could not recover for defendant's conduct toward his wife after the divorce. Defendant was liable for all his tortious acts, if any, which occurred whilst the marriage relations existed, and the decree in divorce, even though obtained on the alleged fault of the husband, is no bar to plaintiff's action.

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The judgment will be reversed, and the cause remanded, to the end that it may be reinstated upon plaintiff's motion filed therein, and tried in accordance with the views herein expressed. It is so ordered.

All concur.

Petition for rehearing denied June 17, 1913.

OHIO SUPREME COURT.

WHITE OAK COAL COMPANY, Plff. in Err.,
v.

KATHARINE RIVOUX, Admr., etc., of
Paul Francis Rivoux, Deceased.

(— Ohio St. —, 102 N. E. 302.)

Master and servant — driver of automobile — liability of owner.

1. The owner of an automobile is not liable in an action for damages for in-

Headnotes by *NEWMAN, J.*

Note. — Making prima facie case of responsibility for negligence of driver of automobile by proof of defendant's ownership of car, or employment of driver.

As indicated in the title, the question under consideration is purely one of evidence. Various questions of substantive law to which it is closely related are annotated in notes referred to in the Index to L.R.A. Notes, under the title "Automobiles."

In the absence of allegations of proof that the defendant in an action to recover for an injury resulting from being run into by an automobile was the owner of the machine, there is clearly not even a presumption raised that the defendant is liable. *Cullen v. Thomas*, 150 App. Div. 475, 135 N. Y. Supp. 22.

Although there is some conflict upon the question, the better rule seems to be that adopted in *WHITE OAK COAL Co. v. RIVOUX*, to the effect that a prima facie case is not made out by showing that the defendant in an action to recover for an injury occasioned by an automobile was the owner of the machine. And this result is upheld by other courts.

Thus, in *Trombley v. Stevens-Duryea Co.* 206 Mass. 516, 92 N. E. 764, 2 N. C. C. A. 806, it was held that evidence connecting the defendant in an action to recover for an injury occasioned by an automobile with the ownership of the machine, by showing that the car was registered in his name, did not make out a prima facie case, but that the plaintiff must further introduce evidence of the defendant's responsibility for the driver's negligence. The court said: "The legislature might have said that whenever

juries to or death of a third person caused by the negligence of an employee in the operation of the automobile, unless it is proven that the employee at the time was engaged upon his employer's business and acting within the scope of his employment.

Evidence — injury by automobile — ownership and use.

2. The facts that the automobile was owned by the defendant, and that the same was negligently operated by an employee,

a registered automobile was operated on the public ways, the person, firm, or corporation named in the certificate should be liable *prima facie* to other travelers for accidents caused by its mismanagement. The statute, however, goes no further than to provide that, for the purposes of the issuance, transfer, and revocation of certificates, and the enforcement of the penal provisions of the act automobiles shall be identified by their register number, and their owner and owners ascertained from the certificate. The common law, therefore, controls, and there is no presumption from his mere physical possession, that the person operating the automobile was the servant or agent of the corporation. He may have hired or borrowed it, or wrongfully appropriated it to his own use, and in neither event would the defendant be charged with his misconduct."

And in *Sarver v. Mitchell*, 35 Pa. Super. Ct. 69, it was held in an action to recover for the death of a child which was run into by the defendant's automobile, that evidence showing his ownership of the machine was insufficient to establish that the person in charge of it was the owner's servant, or that he was engaged at the time of the accident in the owner's business.

And see also *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731, set out by the court in *WHITE OAK COAL CO. v. RIVOUX*.

The Washington court, however, has held in an action for an injury occasioned by an automobile, that evidence that the defendant owned the machine raises a presumption that the one who was driving it at the time was acting for the defendant. *Birch v. Abercrombie*, — Wash. —, — L.R.A. (N.S.) —, 133 Pac. 1020; *Purdy v. Sherman*, — Wash. —, 133 Pac. 440.

And this rule is approved in *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040, 2 N. C. C. A. 422.

And there is a *dictum* in *Hornstein v. Southern Boulevard R. Co.* 79 Misc. 34, 136 N. Y. Supp. 1080, that the driver of an automobile at the time an injury occurs is presumptively the owner's servant.

Where it not only appears that the defendant in an action to recover for damages done by an automobile was the owner of the machine, but also that it was in charge of his chauffeur at the time the injury occurred, it is held that such evidence raises a presumption that the chauffeur was engaged in the defendant's business and acting within the scope of his employment. *Long v. Nute*, 123 Mo. App. 204, 100 S. W. 511; *Shamp v. Lambert*, 142 Mo. App. 567, 121 46 L.R.A. (N.S.)

do not make a *prima facie* case of negligence against the owner, unless it appears that the employee was driving the automobile with authority, express or implied, of the owner.

Master and servant — automobile — bookkeeper.

3. A bookkeeper or cashier employed in the office of a company is not presumed, from that fact alone, to have the implied authority to use or operate an automobile

S. W. 770; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Christensen v. Christiansen*, — Tex. Civ. App. —, 155 S. W. 993; *Ludberg v. Barghoorn*, — Wash. —, 131 Pac. 1165; *Burger v. Taxicab Motor Co.* 66 Wash. 676, 120 Pac. 519.

The court in *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770, said: "These facts tended to prove the plaintiff received her injury through the negligence of defendant's servant while acting within the scope of his employment. And even though it does not appear that the chauffeur was present at the particular time and place in question by instruction from his master [the defendant], or perchance in the performance of his duties in conveying his master either to or from the Union station, it does appear that he was acting within the scope of his authority as defendant's chauffeur; that is to say, he was operating defendant's automobile, the very act for which he was employed. We believe this to be sufficient, *prima facie* at least, to shift the burden of proof upon the defendant, if the chauffeur was not acting for him at the time. The test for the *prima facie* responsibility of the master in such cases is not whether the particular service being performed was specially authorized, but it is whether the act which occasioned the injury was within the scope of the servant's authority in prosecuting the business for which he was employed by the master. If such is not the test, it ought to be sufficient for a *prima facie* showing; for how may the injured person prove more?"

In accord with the general rule in negligence cases, the burden of proof in an action to recover for an injury occasioned by an automobile is upon the plaintiff, to show that the chauffeur in charge of the machine at the time the damage was sustained was about the owner's business. *Long v. Nute*, 123 Mo. App. 204, 100 S. W. 511; *Cullen v. Thomas*, 150 App. Div. 475, 135 N. Y. Supp. 22; *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

And in *Neff v. Brandeis*, 91 Neb. 11, 39 L.R.A. (N.S.) 933, 135 N. W. 232, it was held that, in order to sustain an action for being run down by an automobile, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was, at the time of the accident, engaged in the master's business or pleasure, with the master's knowledge and direction.

J. T. W.

purchased and owned by the company for the use and purposes of a traveling salesman.

(May 6, 1913.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Superior Court in plaintiff's favor in an action brought to recover compensation for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Reversed.

Statement by Newman, J.:

This is an action to recover damages for the death of Paul Francis Rivoux, alleged to have been caused by the negligence of the White Oak Coal Company.

Rivoux, while standing near the curb on the sidewalk on the south side of Fourth street, west of and near Sycamore street, in the city of Cincinnati, was knocked down and injured by an automobile, and died as a result of the injuries. At the time the injuries were received the White Oak Coal Company was a corporation organized under the laws of the state of West Virginia, and authorized to do business in the state of Ohio. It maintained an office and coal yards in the city of Cincinnati, and this branch of the business was in charge of one William F. Smith, known as the general sales manager of the company.

The action was begun in the superior court of Cincinnati, and the administratrix of the decedent in her petition alleged that the automobile was owned by the White Oak Coal Company, and that at the time the injuries were received by the decedent it was operated by one Charles A. Tribbey, as its employee. She alleged that the company was negligent in allowing Tribbey, who it was alleged was incompetent, to operate the automobile; that the same was not properly constructed and equipped; that Tribbey negligently operated it, and at an improper rate of speed; and that he failed to keep the automobile at a proper distance from the curb and sidewalk, and failed to stop it before it struck decedent, and in her amendment to the petition claimed that the company was negligent also in failing to have the tires of the automobile so constructed, covered, and protected as to prevent the skidding or slipping of them.

Defendant admitted its corporate existence and authority to do business in Ohio, and denied each and every other allegation contained in the petition and amendment thereto.

The cause was submitted to a jury, and 46 L.R.A. (N.S.)

there was evidence introduced by plaintiff establishing the fact that Rivoux was knocked down and injured by the automobile; that he died from the injuries received; that plaintiff was the administratrix of decedent; that he left surviving him a widow and children, who would have received pecuniary benefit and assistance from him if he had lived; that the automobile in question was owned by the White Oak Coal Company, having been purchased by it for the use of a traveling salesman; that this salesman had entire charge of the storage in the garage and the repairs; that Tribbey was operating the car at the time of the accident; and that he was an employee of the company, being employed in the office as bookkeeper or general office clerk.

There was no direct evidence offered by plaintiff tending to prove that Tribbey, at the time he was operating the automobile, was using it for any purpose connected with the business of the company, or that he was using the same with the company's knowledge, permission, or consent. Plaintiff introduced evidence tending to show that Tribbey was negligent in the operation of the car in the particulars mentioned in the petition. At the close of plaintiff's evidence, a motion to arrest the cause from the jury, and to direct a verdict for the defendant, was made and overruled.

On behalf of defendant, William F. Smith, the general sales manager of the company, who had control and management of the Cincinnati branch, and who employed Tribbey, testified that he (Tribbey) was employed as bookkeeper and cashier; that his duties were to keep the books, take off balances, render bills, and take care of the office, and that his duties were absolutely in the office. On cross-examination, Smith admitted that, in his deposition given in the case, he stated that Tribbey had full charge of the office in his (Smith's) absence.

Samuel Dickson, the general manager of the company, testified that Tribbey was cashier and bookkeeper, and had no duties to perform outside of the office of the company.

Tribbey testified that he had intended to use the automobile in the afternoon of the day of the accident on personal business; that he was to drive to Norwood to confer with a man on personal business relating to a lodge of which he was a member; that on the morning of that day he had the automobile brought to the office of the company by an employee of the garage where it was kept; that he was driving the automobile for the purpose of ascertaining whether it needed any repairs be-

fore undertaking the trip in the afternoon,—the automobile having come in the day before from a several days' trip through Indiana,—and that, while driving for that purpose, the automobile skidded and ran into and injured Rivoux. Tribbey admitted that, without permission from the company, he had used the automobile on several occasions prior to this day—on Sundays and on evenings during the week after business hours—for his own pleasure, and not in connection with any business of the company. He admitted that, when the manager of the company was not in the office, and persons would call and ask for the manager in connection with matters he (Tribbey) felt able to handle, he had stated that he was assistant manager. It appears from the evidence that Smith was in the city on the day of the accident.

At the close of all the evidence in the case, counsel for the White Oak Coal Company renewed its motion to arrest the cause from the jury, and for a verdict in its favor, which motion was overruled. A verdict was rendered for plaintiff, a motion for a new trial was presented and overruled, and judgment rendered on the verdict. Error was prosecuted to the circuit court, and that court affirmed the judgment of the superior court.

This proceeding here is to reverse the judgments of the lower courts.

Messrs. Peck, Shaffer, & Peck for plaintiff in error.

Messrs. Horstman & Horstman, for defendant in error:

Defendant is liable for the injury.

Norris v. Kohler, 41 N. Y. 42; 1 Am. Neg. Cas. 324; 1 Shearm. & Redf. Neg. § 158; Edgeworth v. Wood, 58 N. J. L. 463, 33 Atl. 940; McCoun v. New York C. & H. R. Co. 66 Barb. 338; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1062; 1 Thomp. Neg. § 613; Schulte v. Holiday, 54 Mich. 73, 19 N. W. 752; Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161; Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; Hayes v. Wilkins, 194 Mass. 223, 9 L.R.A.(N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449; Shamp v. Lambert, 142 Mo. App. 567, 121 S. W. 770; Robards v. P. Bannon Sewer Pipe Co. 130 Ky. 380, 18 L.R.A.(N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429; Brennan v. Merchant & Co. 205 Pa. 258, 54 Atl. 891, 13 Am. Neg. Rep. 672; Kelton v. Fifer, 26 Pa. Super. Ct. 603; Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650; Rahn v. Singer Mfg. Co. 26 Fed. 912; Mulvehill v. Bates, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; 46 L.R.A.(N.S.)

Carl Corper Brewing & Malting Co. v. Huggins, 96 Ill. App. 144; Hershinger v. Pennsylvania R. Co. 25 Pa. Super. Ct. 147; Connor v. Pennsylvania R. Co. 24 Pa. Super. Ct. 244; Southern Ohio R. Co. v. Morey, 47 Ohio St. 211, 7 L.R.A. 701, 24 N. E. 269; Barnes v. Kirk Bros. Automobile Co. 13 Ohio C. C. N. S. 571.

Newman, J., delivered the opinion of the court:

The liability of the White Oak Coal Company is based upon the wrongful and negligent acts of its servant. The company, however, is not liable unless the acts complained of were committed while the servant was acting within the scope of his employment. This is the test, and the authorities agree upon this principle. Lima R. Co. v. Little, 67 Ohio St. 91, 65 N. E. 861, 13 Am. Neg. Rep. 424. The company, therefore, is not answerable in damages unless Tribbey, who was operating the automobile at the time of the accident, was acting for the company and in the prosecution of its business. It is averred in the petition that he was operating the automobile as an employee of the company. This was an essential and material averment. All the other material averments of the cause of action were concededly established. The sole claim of plaintiff in error is that Tribbey was not acting within the scope of his employment. It was incumbent upon the plaintiff below to establish, by a preponderance of the evidence, that he was acting within the scope of his employment.

Defendant in error does not question the rule we have announced as to the test of liability, but insists that the question whether or not Tribbey was acting within the scope of his employment was one of fact properly left to the determination of the jury, and that there was evidence tending to establish this fact. The circuit court, in affirming the judgment of the trial court, say: "The plaintiff below, having shown that the automobile was the property of the defendant, and that Tribbey, the driver, was in defendant's employ, the burden was then placed upon defendant to show that, at the time of the accident, Tribbey was acting outside the scope of his employment in a personal enterprise." Assuming that such a presumption did arise, the "burden," so called, would not require defendant to do more than introduce evidence sufficient to countervail this presumption; it was not required to overbalance or outweigh it. Klunk v. Hocking Valley R. Co. 74 Ohio St. 125, 77 N. E. 752, 20 Am. Neg. Rep. 176.

But did such a presumption arise from

the facts established by plaintiff below? The ownership of the automobile was established, and it was shown that Tribbey was operating the same at the time of the accident, and that he was an employee of the company. Is it to be inferred from these facts that Tribbey was acting within the scope of his employment? It was conceded that he was an employee, but was there any evidence offered by plaintiff tending to prove that he was an employee or servant employed in connection with the particular instrument which caused the death of the decedent? Not only was there no evidence in support of such a claim, but, on the contrary, it appears from the testimony of plaintiff's own witnesses that Tribbey was a cashier or bookkeeper in the office of the company, and that the care, storage, and repairs of the automobile were under the control of another employee, a traveling salesman, for whose sole use and purposes the same had been purchased. Further, there was no evidence offered on the part of plaintiff, tending to prove that Tribbey was operating the automobile, at the time of the accident, with the knowledge, consent, or authority of the company, or that he had ever so operated it.

In addition to the cases cited by defendant in error, we have examined and considered a number of other "automobile cases," and we find that in these cases, at the time of the accident, the automobile was in charge of a servant of the owner—a chauffeur in most instances—whose duty it was to operate the automobile, and who was rightly in the possession and use of the same with the consent, knowledge, and authority of the owner. In these cases the courts do hold that the establishment of these facts raises the presumption or inference that the person so in charge was acting within the scope of his employment, and it then becomes a question for the jury to determine, upon all the evidence in the case, whether or not this presumption has been overcome.

In the recently decided case of *Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006, decided February 25, 1913, to which our attention has been called by counsel for defendant in error since the submission of the case at bar, it was admitted that the defendant owned the automobile, and that, at the time of the accident, it was being operated by a chauffeur who was in the defendant's employ. It further appeared that there was evidence tending to show that the chauffeur was employed to drive the automobile for the defendant's family whenever they wanted to use it; that he slept in the house occupied by the defendant and his family, but took his meals at

another place, and had his laundry done at still another place; that both his laundry and meals were paid for by defendant as part of his wages; that he was allowed or suffered by the family, without objection, to use the automobile to go to his meals and to get his laundry as he found it convenient, and while going for his laundry in the automobile he ran into and injured the plaintiff. In that case, the trial court, at the close of all the evidence, directed a verdict for the defendant. The supreme court of Massachusetts held that there was error in this, and that whether the driver was acting within the scope of his employment at the time of the accident was a question for the jury. The case at bar presents an entirely different state of facts, and is clearly distinguishable from the *Reynolds* Case.

In *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057, the trial court charged that the fact that the automobile, at the time of the accident, was in the possession of and driven by the chauffeur, with the owner's permission, placed upon the owner the same degree of liability for the chauffeur's negligence, if any, as would have been imposed upon him if the chauffeur were then engaged in the personal business of the defendant. The reviewing court held that this charge was erroneous, and that a question of fact was presented upon the evidence, which was whether the chauffeur, at the time of the injuries complained of, was acting within the scope of his employment. But in that case it was established that the automobile, at the time of the accident, was being operated by the chauffeur with the knowledge and permission of the owner. In *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161, it appeared that the defendant was the owner of the automobile, and that the chauffeur who was operating it was in his employ. In *Cooper v. Knight*, — Tex. Civ. App. —, 147 S. W. 349, the operator of the automobile was employed by the defendant, and his duties were to go after and deliver automobiles, and at the time of the accident he was in the discharge of his duties. In *Riley v. Roach*, 168 Mich. 294, 37 L.R.A. (N.S.) 834, 134 N. W. 14, the automobile was in charge of the defendant's chauffeur. In *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770, defendant's automobile at the time of the accident was in charge of his chauffeur, who was operating the automobile,—the very act for which he was employed,—and the court say: "The test for the prima facie responsibility of the master in such cases is not whether the particular service being performed was specially authorized, but it is whether the act which

occasioned the injury was within the scope of the servant's authority in prosecuting the business for which he was employed by the master." In *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219, plaintiff's evidence disclosed the fact that the automobile belonged to the defendant, and that at the time of the accident it was being operated by his regular chauffeur. "Under such circumstances," the court say, "the burden was upon the defendant to show that the chauffeur was not acting within the scope of his employment, and upon the business for which he was employed by his master. The test is whether the act was done in the prosecution of the business in which the servant was employed to assist. If it was, the master is responsible. . . . The present case as made out by the evidence of the plaintiff was sufficient to warrant a recovery. Whether or not it was overcome by the testimony offered by the defendant was for the determination of the jury."

In the case at bar, while ownership in the defendant was established, yet there was no evidence tending to show that at the time of the accident the automobile was operated by a person employed or authorized to operate the same.

The facts in all the "automobile cases" to which reference has been made are easily distinguishable from the facts in the present case; and in the other cases cited by counsel for defendant in error it appears, not only that the vehicle which caused the damage was owned by the defendant, but also that at the time of the accident the same was driven by a person who was either regularly employed for that purpose, or who was driving the same with the consent and knowledge of the owner. *Hayes v. Wilkins*, 194 Mass. 223, 9 L.R.A.(N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449; *Schulte v. Holliday*, 54 Mich. 73, 19 N. W. 752; *Rahn v. Singer Mfg. Co.* (C. C.) 26 Fed. 912; *Kelton v. Fifer*, 26 Pa. Super. Ct. 603. The rule announced in these cases is therefore not applicable to the case at bar.

There are some authorities which go to the extent of holding that where the plaintiff has suffered injury from the negligent management of a vehicle, it is sufficient prima facie evidence that the negligence is imputable to defendant, when it is shown that he is the owner of the vehicle, without even proving affirmatively that the person in charge is the defendant's servant. This doctrine seems to meet with favor in a number of Pennsylvania cases, but in the case of *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731, in which 46 L.R.A.(N.S.)

recovery was sought against the owner of an automobile for injuries resulting to plaintiff, and where it was essential to a recovery that it be made to appear that the accident occurred while the person in charge of the automobile was using it in the course of his employment and on his master's business, and the only evidence as to that proposition was proof of ownership of the machine in the defendant, the court say: "Ownership of the machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion." In that case evidence was offered by the defendant tending to prove that, while the automobile was being operated by the chauffeur, the latter was not operating the same in any business of the master; and the court held that it was the duty of the trial court to direct a verdict for the defendant. Even in Pennsylvania, where such a rule seems to be adhered to, the presumption or inference is so slight that it is held to be the duty of the court to say whether such presumption has been overcome by the other circumstances in the case.

But this court is not in accord with the authorities which hold that a prima facie case of negligence is made against a defendant upon the mere showing that he was the owner of the negligently operated automobile. Such a rule would be unjust, and would work hardships. An automobile may be in the possession of one who wrongfully appropriates it to his own use, yet under that doctrine, if such person negligently operates it to the injury of a third person, a prima facie case of negligence would be imputed to the owner. Nor do we think that proof of the additional fact that the operator was an employee of the owner raises a presumption of negligence against him, unless it appears that the duties of the employee are in connection with the automobile, or that he was operating the same with the authority—express or implied—of the owner.

In the case at bar plaintiff wholly failed to show that the employee had any actual authority to operate the automobile at the time of the accident, and the fact that he was an employee employed in the capacity of bookkeeper would not raise the inference that here was an implied authority to operate an automobile purchased for another employee for his use and purposes, and in another department or branch of the business; and, there being no evidence in support of this essential averment of the petition, namely, that Tribbey was operating

the automobile as an employee, the motion of defendant for a directed verdict in its favor, at the close of plaintiff's evidence, should have been sustained.

Plaintiff's case was not strengthened by the evidence offered on the part of defendant. The general sales manager of the company, who employed Tribbey, testified that Tribbey's duties were absolutely in the office; that he was not authorized to use the automobile; and another officer of the company testified along the same lines. Tribbey related the circumstances under which he was using the automobile at the time of the accident. He testified that he was not using it in connection with any business of the company, or in the performance of any of his duties as an employee, that the company had no knowledge of the fact that he was using it, and that on other occasions—on evenings and on Sundays—when he had used it, it was for his own personal business or pleasure, and the use was without the knowledge or consent of the company.

The suggestion is made by defendant in error that, inasmuch as Tribbey at the time of the accident was driving the automobile for the purpose of ascertaining whether it needed repairs before he used it for his own personal business, and that such an inspection might result in a benefit to his employer, he therefore was acting in the interest of the company. There is not even an intimation that this bookkeeper had any authority to inspect this automobile, so that whatever was done by him was done voluntarily. In answer to such a claim, it is necessary only to call attention to the language of the court in *Lima R. Co. v. Little*, 67 Ohio St. 91, at page 101, 65 N. E. 861, 13 Am. Neg. Rep. 424: "A master has the right to select and choose his agents and to determine himself, and assign to the servants so selected, their respective duties, and no assumption by an employee of duties not assigned to him will bring those duties within the course or scope of his employment as defined by the master, and when an act is not within the scope of a servant's employment, it cannot be within either the express or implied authorization of the master."

For the reasons given, we conclude that defendant's motion, at the close of plaintiff's evidence, for a verdict, should have been sustained, and, this motion having been renewed at the close of all the evidence in the case, the judgments of the Circuit and Superior Courts are reversed. 46 L.R.A. (N.S.)

and judgment is here rendered for plaintiff in error.

Shauck, Ch. J., and Johnson, Donahue, Wanamaker, and Wilkin, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

HARRIS GOLDBERG, Appt.,
v.

ALBERT J. PARKER and Wife.

(87 Conn. 99, 87 Atl. 555.)

Principal and surety — when obligation of surety attaches.

1. For the purpose of determining the respective rights of one towards whom another has assumed a surety's obligation and the owner of property standing in the name of the surety and subsequently transferred to such owner, the rights of the creditor attached when the surety's obligation is assumed.

Estoppel — permitting property to stand in other's name.

2. A woman who permits her real estate to stand in the name of her husband for many years until he is accepted as a surety, to release an attachment of property of a corporation in which he is interested, upon the faith of the record title and his assertion of ownership of the property, is

Note. — Estoppel of one who permits title of real property to stand in another's name, to assert title as against the latter's creditors.

The earlier cases involving this question are collected in notes to *Breeze v. Brooks*, 22 L.R.A. 257, and *Blake v. Meadows*, 30 L.R.A. (N.S.) 1.

The effect of permitting an undelivered deed, wrongfully recorded by the grantee, to remain on record as estoppel of the grantor as against one who has purchased in reliance on the record, is treated in a note to *Alabama Coal & Coke Co. v. Gulf Coal & Coke Co.* 7 L.R.A. (N.S.) 712.

A married woman who voluntarily permits her husband to use her money as his own by investing it in property in his name, and thereby obtain credit on the faith of his ownership, is estopped from claiming such property to the detriment of his creditors. *Hobbs v. Frazier*, 61 Fla. 611, 55 So. 848.

In *Buchannon v. James*, 135 Ga. 392, 69 S. E. 543, it is held that a wife who conveys property to her husband without the approval of the superior court, which the statute requires to make such a conveyance valid, is not entitled to recover the proceeds of such property from a creditor of the husband, with notice, to whom the husband conveyed it with power of sale,

estopped to assert her title against the right of the creditor, although she was guilty of no fraud in the transaction.

(Roraback and Thayer, JJ., dissent.)

(June 13, 1913.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Fairfield County in defendants' favor in an action to foreclose a judgment lien on property standing in the name of Mrs. Parker for a debt of her husband. Reversed.

Statement by Wheeler, J.:

Mrs. Parker purchased, on April 12, 1890, a lot of land on Madison avenue, on May 5, 1891, a lot on Pacific street, and on January 8, 1892, a piece of land on Dewey street, all in the city of Bridgeport. The title was taken in the name of her husband, the defendant, who in the first two purchases gave back a purchase-money mortgage and note, and in the last assumed a mortgage thereon as part of the consideration.

On June 27, 1892, Mrs. Parker caused her husband to transfer the three pieces to one Wilson, in consideration of the transfer to him of another piece of property on Dewey street and the assumption of a mortgage on this property of \$1,500. On June 25, 1900, Mrs. Parker caused her husband to give a note for \$1,500, secured by mortgage on the Dewey street property. In June, 1906, Mrs.

Parker purchased a piece of land on North avenue in Bridgeport, and took title in the name of her husband, who assumed a mortgage of \$1,500 thereon, as part consideration. All of these conveyances were duly recorded.

Mrs. Parker paid for these several pieces of property with her own funds, and always exercised control, ownership, and proprietorship over them. She never intended to give these to her husband, but placed them in his name "because of her peculiar ideas that a husband should always appear as the head of the house." Both Mr. and Mrs. Parker always regarded all of this property as belonging absolutely to Mrs. Parker.

In October, 1900, Mrs. Parker loaned her husband \$1,000, and, with her knowledge and consent, he invested it in the Colonial Chemical Company, of which he was a stockholder. On February 7, 1910, the plaintiff herein brought an action against this company, and attached certain property. The plaintiff's attorney and the officer making the attachment ascertained that Mr. Parker was the owner of record of the property on Dewey street and North avenue, and, Mr. Parker having stated that he was the owner of this property, they accepted him as surety upon said officer's receipt for the return of the property attached, upon the faith of his ownership of record. Neither the plaintiff, his attorney, nor the officer had knowledge of any claim of Mrs. Parker upon the property. The

though she would have been entitled to have the deed to her husband, and from him to the creditor, canceled.

In *Kessler v. De Garmo*, — Iowa, —, 127 N. W. 988, it was held that a wife, with whose money her husband purchased land, taking title in himself though they regarded it as her property, who allowed him to hold himself out as owner, is estopped from claiming it as against certain of his creditors, and, as the relief was granted on the ground of estoppel, the rule that all creditors may share in the proceeds, upon a fraudulent conveyance being set aside, was not applicable.

In *Ford v. Blackshear Mfg. Co.* — Ga. —, 79 S. E. 576, it is held that if a wife, who has an equitable title to land to which a deed is taken in the name of her husband, permits him to hold the property and use it in his business for obtaining credit, and a third person, without notice, extends credit to him on the faith that the land is his, she is estopped from asserting title as against the lien of the judgment to which the creditor's claim has been reduced, though before rendition of the judgment the husband had conveyed the land to her in recognition of her equity.

In *Zehnder v. Stark*, 248 Mo. 39, 154 S. W. 92, it is held that a married woman whose husband purchased land in his name

with her money, who permitted title to remain in him for years without protest, during which time he contracted debts for the improvement of the land, to her knowledge, is estopped from claiming title as against such creditors, and they are entitled to equitable relief against a deed subsequently made by the husband to the wife.

In *Johnson County v. Taylor*, 87 Neb. 487, 127 N. W. 862, a wife was held estopped from claiming land as her separate property where she permitted her husband to hold the title thereto and the county accepted him as surety on a county depositary bond, on the strength of information given the county commissioners by the county clerk that he owned property in the county, though they were not informed as to what particular land he owned or its value.

But a married woman who has no knowledge that the title to land purchased with her funds was taken in the name of her husband, and who acted promptly when she discovered it, was not estopped from asserting her title against a creditor of the husband, whose claim arose without her knowledge and before she became aware that the title was not in her name. *Southern Bank v. Nichols*, 235 Mo. 401, 138 S. W. 881.

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plaintiff duly recovered judgment against the company, and execution upon the judgment was returned wholly unsatisfied. Thereafter the plaintiff recovered judgment against Mr. Parker on the receipt, and duly filed a judgment lien upon the land on Dewey street, and this action is brought to foreclose the lien. In February, 1910, Mrs. Parker learned that this company was in financial troubles and that her husband was interested in it. The failure of the company and the loss of the \$1,000 made her distrustful of her husband, and, apprehensive that he might engage in the future in some losing business enterprise and thereby jeopardize her real estate, and so she demanded of him its transfer to her. Mr. Parker, on March 18, 1910, through an intermediary, conveyed the property on Dewey street and North avenue to Mrs. Parker.

This was the consideration for the transfer, and not the payment of the \$1,000 loan to Mr. Parker by Mrs. Parker. Mrs. Parker, at the time of this transfer, did not know that her husband had signed the receipt, nor that he had creditors other than herself and these mortgagees, and, in demanding and accepting the transfer, she acted in good faith and without an intention to defraud. In fact, at the time of the transfer to Mrs. Parker, Mr. Parker owed no debts except the \$1,000, and had no visible property except said real estate, and the execution upon the judgment was returned wholly unsatisfied. The property on Dewey street is worth \$1,000 above the encumbrance, and since the transfer of Mrs. Parker has realized \$1,500 above the encumbrance upon the North avenue property.

Messrs. Frank L. Wilder and Henry Greenstein, for appellant:

A third person to whom a grantor is liable upon a contingent liability is a creditor within the meaning of the statute of fraudulent conveyances and at common law.

Washington v. Norwood, 128 Ala. 383, 30 So. 405; Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232; Hatfield v. Merod, 82 Ill. 113; Young v. Heermans, 66 N. Y. 374; Pashby v. Mandigo, 42 Mich. 172, 3 N. W. 927; 20 Cyc. 421; Allen v. Rundle, 50 Conn. 32, 47 Am. Rep. 599.

It is not necessary to show or to prove that the grantor was insolvent at the time of the alleged conveyance.

Botsford v. Beers, 11 Conn. 375; Quinnipiac Brewing Co. v. Fitzgibbons, 71 Conn. 80, 40 Atl. 913; Clarke v. Black, 78 Conn. 471, 62 Atl. 757.

Where the true owner of property holds 46 L.R.A. (N.S.)

out another or allows him to appear as the owner of or as having sufficient power and disposition over the property, and innocent third persons are thus led into dealing with such apparent owner or person having such power or disposition, they will be protected.

Sanford v. DeForest, 85 Conn. 694, 84 Atl. 111; Anderson v. Armstead, 69 Ill. 452; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; 16 Cyc. 774; Lawrence v. Guaranty Invest Co. 51 Kan. 222, 32 Pac. 816; Simson v. Bank of Commerce, 43 Hun, 156; Wright v. McCord, 113 Ga. 881, 39 S. E. 510; Morris v. Rogers, 104 Ga. 705, 30 S. E. 937; Esty v. Cummings, 80 Minn. 518, 83 N. W. 420; Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78.

Where the wife has permitted the title to her property to be in her husband's name, and a third person, on the strength of such title, acquired rights or became creditor of the husband, she will be estopped to deny that the property was his or held for her.

Stewart v. Mix, 30 La. Ann. 1036; City Nat. Bank v. Hamilton, 34 N. J. Eq. 159; Warner v. Watson, 35 Fla. 402, 17 So. 654; Kennedy v. Lee, 72 Ga. 39; Lowentrou v. Campbell, 130 Ill. 503, 22 N. E. 744; Hendershott v. Henry, 63 Iowa, 744, 19 N. W. 665; Iseminger v. Criswell, 98 Iowa, 382, 67 N. W. 289; Roy v. McPherson, 11 Neb. 197, 7 N. W. 873; Humes v. Scruggs, 94 U. S. 22, 24 L. ed. 51; Luers v. Brunjes, 34 N. J. Eq. 19; Beecher v. Wilson, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209.

Mr. John P. Gray, for appellees:

If the consideration is valuable, it becomes necessary to show fraud in order to set aside a transfer of this character.

Bigelow, Fraudulent Conveyances, Revised ed. 451; Arundell v. Phipps, 10 Ves. Jr. 139; Hume & W. Co. v. Condon, 44 W. Va. 553, 30 S. E. 56; Ex parte Mercer, L. R. 17 Q. B. Div. 290, 55 L. J. Q. B. N. S. 558, 54 L. T. N. S. 720; Clarke v. Black, 78 Conn. 467, 62 Atl. 757; Converse v. Hartley, 31 Conn. 372; Smyth v. Ripley, 33 Conn. 306; Lynch v. Beecher, 38 Conn. 490; Hitchcock v. Kiely, 41 Conn. 611; Trumbull v. Hewitt, 62 Conn. 448, 26 Atl. 350.

If a husband converts his wife's estate to his own use he may pay her back, notwithstanding that he has creditors.

Vincent v. State, 74 Ala. 274; Thompson v. Mills, 39 Ind. 528; McKamey v. Thorp, 61 Tex. 648; Dunham v. Bentley, 103 Iowa, 136, 72 N. W. 437.

Or he may reconvey the property to her under the same circumstances.

Tarsney v. Turner, 48 Fed. 818.

Property bought with the wife's separate estate, and standing in her husband's name, with no fraudulent intent, cannot be

reached by the husband's creditors, unless by estoppel.

20 Cyc. 375, 395; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363; *Talcott v. Wilcox*, 9 Conn. 134; *Wadsworth v. Marsh*, 9 Conn. 481; *Washband v. Washband*, 27 Conn. 424; *Knower v. Cadden Clothing Co.* 57 Conn. 202, 17 Atl. 580; *Sisson v. Roath*, 30 Conn. 15; *Feltz v. Walker*, 49 Conn. 93; *Fly v. Screeton*, 64 Ark. 184, 41 S. W. 764; *Huffman v. Leslie*, 23 Ky. L. Rep. 1981, 66 S. W. 822; *Utey v. Smith*, 24 Conn. 290, 63 Am. Dec. 163; *Tomlinson v. Roberts*, 25 Conn. 477, 68 Am. Dec. 367; *Norwalk ex rel. Fawcett v. Ireland*, 68 Conn. 2, 35 Atl. 804; *State v. Martin*, 77 Conn. 142, 58 Atl. 745.

The conveyance and the fraudulent intent must coexist. No intent arising after the day of the deed can be considered.

Allen v. Lyness, 81 Conn. 626, 71 Atl. 936; *Tibbals v. Jacobs*, 31 Conn. 428; 20 Cyc. 413; *Clark v. Johnson*, 5 Day. 373; *Gilligan v. Lord*, 51 Conn. 562; *Partelo v. Harris*, 26 Conn. 480; *Barrett v. French*, 1 Conn. 365, 6 Am. Dec. 241; *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88; *Beach v. Catlin*, 4 Day, 284, 4 Am. Dec. 221; *Mathews v. Converse*, 83 Conn. 511, 77 Atl. 961.

If the debtor holds the bare legal title to property for another, and has no valuable interest therein, it cannot be attacked by his creditors.

Jarvis v. Prentice, 19 Conn. 272.

Estoppel is not favored, because it tends to hide and shut out the truth.

16 Cyc. 722, 725; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Hubbard v. Norton*, 10 Conn. 422; *Smith v. Silliman*, 8 Conn. 116; *Warner Glove Co. v. Jennings*, 58 Conn. 74, 19 Atl. 239; *Townsend Sav. Bank v. Todd*, 47 Conn. 219; *Kinney v. Whiton*, 44 Conn. 270, 26 Am. Rep. 462; *Bradford v. Bradford*, 5 Conn. 132; *Clinton v. Haddam*, 50 Conn. 84; *Andrews v. Aetna L. Ins. Co.* 85 N. Y. 334.

All cases of estoppel show some definite act with knowledge on the part of the person sought to be estopped and in direct relation to the person seeking the estoppel.

Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550; *Roe v. Jerome*, 18 Conn. 138; *Middletown Bank v. Jerome*, 18 Conn. 443; *Noyes v. Ward*, 19 Conn. 250; *Preston v. Mann*, 25 Conn. 118; *Calhoun v. Richardson*, 30 Conn. 227; *West Winsted Sav. Bank & Bldg. Asso. v. Ford*, 27 Conn. 290, 71 Am. Dec. 66; *East Haddam Bank v. Shailor*, 20 Conn. 21; *Edwards v. Stonington Cemetery Asso.* 20 Conn. 467; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 451; *Swift v. Barnum*, 23 Conn. 523; *Cowles v. Bacon*, 46 L.R.A. (N.S.)

21 Conn. 467, 56 Am. Dec. 371; *Parker v. Crittenden*, 37 Conn. 152; *Winton v. Hart*, 39 Conn. 20; *Chapman v. Shepard*, 39 Conn. 413; *Bassett v. Bradley*, 48 Conn. 224; *Blake v. Baldwin*, 54 Conn. 8, 5 Atl. 299; *Danforth v. Adams*, 29 Conn. 107. *Ives v. North Canaan*, 33 Conn. 406; *Blake Crusher Co. v. New Haven*, 46 Conn. 473; *Farist's Appeal*, 39 Conn. 153; *Warner v. Middlesex Mut. Assur. Co.* 21 Conn. 450; *Norwalk ex rel. Fawcett v. Ireland*, 68 Conn. 1, 35 Atl. 804; *Wainwright v. Talcott*, 60 Conn. 52.

Silence alone or negligence alone will not create estoppel.

Robbins v. Wolcott, 28 Conn. 396; *Starkweather v. Goodman*, 48 Conn. 101, 40 Am. Rep. 152; *Cooke v. Orange*, 48 Conn. 412.

In order to take advantage of estoppel the person claiming it must have been without knowledge or means of knowledge of all the facts.

Bigelow, Estoppel, p. 608.

It is incumbent upon him to ascertain the truth.

Huntley v. Holt, 58 Conn. 445, 9 L.R.A. 111, 20 Atl. 469; *Farrel v. Derby*, 58 Conn. 234, 7 L.R.A. 776, 20 Atl. 460; *Lyon v. Champion*, 62 Conn. 77, 25 Atl. 392; *Weidemann v. Springfield Breweries Co.* 78 Conn. 660, 63 Atl. 162.

To be charged with estoppel, Mrs. Parker must have known of the relations between her husband and Goldberg, or at least that her husband was dealing with some class to which Goldberg belonged; namely, creditors of her husband.

Lewis v. Lewis, 76 Conn. 586, 57 Atl. 735; *Smith v. Smith*, 30 Conn. 111.

She must have actually or constructively intended Goldberg to act on her representations.

Bigelow, Estoppel, 612; 16 Cyc. 728, 730; *Whittemore v. Hamilton*, 51 Conn. 160; *Hull v. Hull*, 48 Conn. 257, 40 Am. Rep. 165; *Hartford v. Mechanics' Sav. Bank*, 79 Conn. 38, 63 Atl. 658; *Porter v. Orient Ins. Co.* 72 Conn. 519, 45 Atl. 7; *Canada's Appeal*, 47 Conn. 460.

Wheeler, J., delivered the opinion of the court:

For over twenty years Mrs. Parker permitted her real estate in Bridgeport to stand of record in her husband's name: mortgages thereon to be assumed by him, or made as part of the purchase price; conveyances thereof to be made, and mortgages to be placed thereon by him. As to all the world the public land records proclaimed him the owner. The plaintiff accepted him as a surety upon an officer's receipt, given in place of an attachment secured by the plaintiff upon certain property, in reliance

upon his ownership of this property as disclosed by the public records and as stated by him. In fact, his wife was the owner of this property. And the question at issue is whether the transfer to her of this property, made subsequent to the contingent liability incurred by her husband as a surety, and accepted by the plaintiff in reliance upon his ownership, as disclosed by the public records and declared by him, is superior to the plaintiff's right in the property.

The plaintiff claims that Mrs. Parker is estopped from setting up her claim of ownership ahead of his claim against the surety which he has reduced to judgment, and that, as against him, the transfers to her were, in law, constructively fraudulent. The foundation of this claim must rest upon the assertion that the plaintiff was, at the inception of the suretyship, a creditor of Mr. Parker.

The liability of Mr. Parker as a surety was contingent, though the receipt was absolute in terms. *Fowler v. Bishop*, 31 Conn. 562.

The relation of debtor and creditor between Mr. Parker and the plaintiff arose at the moment he became a surety. This liability was, in law, as assured as though the plaintiff had then sold Mr. Parker a bill of goods or loaned him a sum of money. Debt, in the sense in which it must here be regarded, denotes "any kind of a just demand."

We have held that one who holds an unliquidated claim against another is his creditor, under the foreign attachment statute. *New Haven Steam Saw-Mill Co. v. Fowler*, 28 Conn. 108. So far as we are aware, the authorities generally hold the person for the payment of whose debt another has become contingently liable to be a creditor. Thus in *Thompson v. Thompson*, 19 Me. 244, 251, where a bond with surety was given by a guardian to secure the ward against official neglect or misconduct, it was held that the relation of debtor and creditor arose at the time of the signing of the bond, and that the obligee or those whom the bond is designed to protect might impeach any conveyance made after its date, though prior to any breach of the bond. So it was held the holder of a promissory note was a creditor of the indorser or guarantor thereon, notwithstanding the liability of an indorser or guarantor was contingent, within the provisions of the statute avoiding all gifts made to defraud creditors. *Crocker v. Huntzicker*, 113 Wis. 181, 88 N. W. 232. So it was held a landlord was an existing creditor of his tenant as to rent to become due under the lease, and therefore a voluntary conveyance by 46 L.R.A.(N.S.)

the tenant might be set aside, and the property so conveyed subjected to the landlord's claim for rent falling due after the conveyance. *O'Brien v. Whigam*, 9 App. Div. 113, 41 N. Y. Supp. 40. In *Hanna v. Hurley*, 162 Mich. 601, 605, 127 N. W. 710, it was held that an obligee on a bond given for costs might have set aside a conveyance of stock, contrary to the bulk-sales act, though the liability of a surety was contingent at the time of sale. The court said: "It is urged by appellant that George D. Hanna's liability upon the bond could not be fixed until judgment upon appeal, and therefore that the obligee in the bond was not, at the time of the sale, one of his creditors. . . . It cannot be said that George D. Hanna's liability was not fixed at the moment he signed the bond. It was fixed in amount, though contingent upon the failure of his principal to prosecute his appeal and reverse or pay the judgment."

Most of the cases where the question of contingent liability arose are those between a surety and the principal obligees upon a bond or other instrument; or between an indorser or guarantor and maker, where the one contingently liable for the debt of another has paid it, and is seeking to recover of the principal of the bond or other instrument; or the maker or guarantor of the note or other instrument. Our investigation satisfies us that the law is well settled that the liability begins when the engagement of the surety, indorser, or guarantor begins. *Washington v. Norwood*, 128 Ala. 383, 389, 30 So. 405; *Hatfield v. Merod*, 82 Ill. 113; *Dudley v. Buckley*, 68 W. Va. 630, 70 S. E. 377; *Graeber v. Sides*, 151 N. C. 596, 66 S. E. 600; *Whitehouse v. Bolster*, 95 Me. 458, 460, 50 Atl. 240; *Fortune v. Cassidy*, 140 Ill. App. 580; *McLaughlin v. Bank of Potomac*, 7 How. 220, 12 L. ed. 675; *Van Wyck v. Seward*, 18 Wend. 375. The obligation of Mr. Parker, as surety, attached when he signed the receipt; the relation of debtor and creditor, between the surety and the plaintiff, arose at that time.

We are now to inquire whether the plaintiff creditor can cause to be set aside a conveyance by his debtor to the debtor's wife of real estate, of which the real ownership was in the wife, but the legal title to which had been placed in the husband, and so appeared of record for many years, and, in reliance upon the record title and the declaration of ownership by the husband, the plaintiff had extended to him credit. The defendant wife was without intent to wrong the plaintiff, and without knowledge that her husband owed the plaintiff or any one else. The plaintiff was equally innocent. Unless he can compel the appropriate

tion of this property to the payment of his debt he must lose it.

Mrs. Parker put it in the power of her husband to secure this credit on the faith of his ownership of her property. She caused the land records to declare that he owned this property. The plaintiff had the right to rely upon the title as it appeared of record. The act of the real owner in placing the record title of property in the name of another precludes her from denying his title as against one who has extended a credit in reliance upon the title which she has vested in the other. The right of the creditor arises from the act of the owner, and does not depend upon the actual title, but upon the apparent title. The true owner is barred from asserting her title against the creditor by her own act. It would be inequitable to permit the assertion of her right to the injury of the innocent creditor. She is estopped from maintaining her ownership, otherwise injustice would be done the creditor. Between the innocent owner and the innocent creditor the owner, whose act led to the wrong to the creditor, must suffer the loss.

The rule of equitable estoppel is as applicable to a married woman who has placed the title to her real estate in her husband, who has thereby obtained a credit, as though she had put the title in the name of a third party. *Galbraith v. Lunsford*, 87 Tenn. 89, 97, 1 L.R.A. 522, 9 S. W. 365; Pom. Eq. Jur. 3d ed. § 814.

The authorities so holding are numerous. "With the knowledge and assent of Mrs. Hauk, the title to this property stood of record, from November 9, 1889, until January 13, 1891, in the name of her husband. During this period he purchased from the complainants the goods for which their judgment was obtained. Upon the strength of his apparent ownership of such property he obtained credit; and it is neither just nor equitable that she should now, as against them, be permitted to assert that this property all the while belonged to her." *Hauk v. Van Ingen*, 97 Ill. App. 642, 650, affirmed in 196 Ill. 20, 63 N. E. 705; *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313, 51 N. E. 835; *Mertens v. Schlemme*, 68 N. J. Eq. 544, 550, 59 Atl. 808; *Warner v. Watson*, 35 Fla. 402, 421, 17 So. 654; *Lawrence v. Guaranty Invest. Co.* 51 Kan. 222, 32 Pac. 816; *McCormick Harvesting Mach. Co. v. Perkins*, 135 Iowa, 64, 68, 110 N. W. 15; 16 Cyc. 773, 775; 20 Cyc. 606; *Beach*, Eq. Jur. § 1103; note in 30 L.R.A. (N.S.) 3. The enforcement of this rule does not depend upon whether there was actual fraud, although this element is often present, but upon the inequity of the wife holding out to the world her husband's own-

ership, and then denying it, to the prejudice of one who has extended credit upon the faith of her act.

Of a reply purporting to set up an equitable estoppel we said: "It is claimed that these averments were not sufficient because no bad faith, wilful wrong, or gross carelessness is charged. No such charges were necessary. . . . It is not his intent so much as the result of his conduct, which determines his liability." *Canfield v. Gregory*, 66 Conn. 9, 17, 33 Atl. 536; *Galbraith v. Lunsford*, 87 Tenn. 89, 1 L.R.A. 522, 9 S. W. 365; Pom. Eq. Jur. 3d ed. §§ 803, 804, 814.

There are authorities which hold the wife's fraud the determinative element in the proof of her equitable estoppel, as, for instance, those of Texas and Missouri; but the great weight of authority is against this position and in accord with the doctrine we adopted in *Canfield v. Gregory*. Unless the circumstances be such as naturally to mislead another, one of the indispensable elements of an equitable estoppel is absent.

In an early case we thus stated the doctrine: "Therefore it has been holden that if the owner of goods voluntarily permit another to hold himself out to the world as being the true owner, and, for this purpose, intrust him with the exclusive possession or other indicia of title, under circumstances which would naturally tend to mislead, he shall be concluded by the sale of it to an innocent and mistaken purchaser." *Baldwin v. Porter*, 12 Conn. 473, 482.

In *Canfield v. Gregory*, 66 Conn. 9, 17, 33 Atl. 536, 537, we said: "It is true that it does not extend to acts or representations not naturally calculated to mislead, and on which others had no right to rely." *Pickard v. Sears*, 6 Ad. & El. 469, 2 Nev. & P. 488, 11 Eng. Rul. Cas. 78; *Laing v. Evans*, 64 Neb. 454, 459, 90 N. W. 246.

Were the circumstances naturally calculated to mislead the plaintiff into the belief that Mr. Parker was the owner, and did he have the right to rely upon this belief?

Mr. Parker was financially interested in the chemical company; he represented that he owned this property; the plaintiff looked up the public records, and ascertained that by them, for years, he had been the owner, and that he had, for over twenty years, owned property of record in Bridgeport, assumed mortgages upon purchases, and given mortgages upon purchases. The titles were such that the most conservative investor or institution would have accepted them and loaned upon their faith. These

circumstances were naturally calculated to mislead the plaintiff as they did.

The plaintiff did rely upon these titles of record, released his attachment against the chemical company, and in its stead accepted an officer's receipt with Mr. Parker as surety. It would be difficult to conceive of a stronger case of equitable estoppel. Any other holding would do violence to the faith which, time out of mind, we have given to our registry laws. With inflexible adherence we have made every title to land, so far as practicable, appear of record. We have held the record constructive notice to all the world of land titles. We have authorized reliance to be placed thereon. We have sustained contracts and conveyances made upon their faith. We cannot hold that a credit, extended in reliance upon the land records, must yield to the equitable owner of the title, without doing irreparable injury to the registry laws and going counter to our decisions.

The maintenance of our system of registry of titles is of the greatest public importance, and he who acts in reliance upon the record has behind him not only the natural equities of his position, but also the especial equity arising from the protection afforded everyone who trusts the record. *Rosenbluth v. De Forest & H. Co.* 85 Conn. 40, 47, 81 Atl. 955; *Beach v. Osborne*, 74 Conn. 405, 411, 50 Atl. 1019, 1118; *Ives v. Stone*, 51 Conn. 446, 456; *Wheeler v. Young*, 76 Conn. 44, 50, 55 Atl. 670.

The test is whether the act of the wife was naturally calculated to cause the plaintiff to extend credit to her husband. It is not, as has sometimes been suggested, whether the wife had reason to expect credit would be extended to her husband. If, however, this were the test, the facts found make it perfectly clear that she did have such reason to expect. Her purpose in placing the property in his name was "because of her peculiar ideas that a husband should always appear as the head of the house." This has but one meaning: She purposed giving him standing and financial responsibility in the community. The purpose was identical with that in *Kennedy v. Lee*, 72 Ga. 39, because the wife "thought it would look better" for him to hold the title to her real estate.

She is by law presumed to know that the titles of record, through all these years, would be constructive notice to all the world that her husband was their owner. She gave him by her act credit to either assume mortgages upon each of the several properties she permitted him to own, or to give mortgages thereon as part consideration for the purchase price, or to make

mortgages thereon after the purchase. His title of record gave him a credit by which he procured a mortgage on the very property on Dewey street upon which the plaintiff is seeking to foreclose his lien. She loaned him \$1,000, which he had, to her knowledge, lost in the company whose credit he was protecting by becoming its surety. Under these circumstances it could not be said that she could not reasonably anticipate that he might use the credit she had given him. The mere fact that she had never known that he had had any other creditors, and he, in fact, had had none, is of no consequence, and very far from a finding that she could not reasonably anticipate that he would use the credit given him by his apparent ownership.

The trial court relied for its decision upon the case of *Clarke v. Black*, 78 Conn. 467, 62 Atl. 757. There is a marked difference between that case and this. There the relation of debtor and creditor existed between the husband and wife, and was the consideration of the conveyance; in this case it is expressly found that this relation formed no part of the consideration of the transfer. In that case it did not appear that the creditor seeking to set aside the conveyance relied upon the husband's ownership or upon his title of record in extending him credit. And, further, the question of the wife's estoppel does not appear to have been raised. This case is governed by the principles involved in *Sanford v. DeForest*, 85 Conn. 694, 84 Atl. 111.

There is error; the judgment of the Court of Common Pleas is reversed, and the cause remanded, with instruction to render judgment for the plaintiff in accordance with this opinion.

Prentice, Ch. J., and Bennett, J., concur.

Roraback, J., dissenting:

The defendants in this action are husband and wife. Their marriage took place prior to 1890. The complaint alleges that the defendant Albert J. Parker was the owner of certain real estate located in Bridgeport; that on March 18, 1910, he pretended to convey his interest in the property to one John A. Spoffard; that on the same day Spoffard pretended to convey this property to the defendant Emma J. Parker, and that both of these transfers were fraudulent and without any consideration therefor, the same having been made in fraud of the creditor of the defendant Albert J. Parker, and to defraud the plaintiff, to whom the husband was then liable as surety upon an officer's receipt, and to avoid liability and payment of any judg-

ment based thereon. The answer admitted that the conveyances from the husband to Spoffard and from Spoffard to the wife were made, and denied the other allegations.

The real issues between the parties were whether these conveyances from one defendant to another through John A. Spoffard were fraudulent as against creditors, and without any consideration therefor. The trial court held that they were not, and the substantial reasons of appeal are that the court erred in reaching this conclusion.

A short time previous to 1890 Emma J. Parker came to Bridgeport from Nova Scotia, bringing with her some money, part of which had been given her by her own relatives, and the remainder of which she had earned. On the 12th day of April, 1890, she bought a lot on Madison avenue in Bridgeport, and had the deed recorded in the name of her husband. On May 5, 1891, she bought a lot on Pacific street in Bridgeport, and had the deed recorded in the name of her husband. On January 8, 1892, she bought a piece of property on Burr road, which is now called Dewey street, in said Bridgeport, and had the deed recorded in the name of her husband. In all these purchases mortgages were given back, and the notes and the deeds were signed by Albert J. Parker. The money used for the purchase price of all these pieces of property, over and above the amount for which they were mortgaged, was the money which Emma J. had brought with her from Nova Scotia. On June 27, 1892, she caused her husband to transfer the three pieces of property named above to one W. S. Wilson. In return Wilson conveyed to the husband another piece of property situated on Dewey street, which is the property involved in this suit.

The wife caused Albert J. to assume a mortgage of \$1,500 upon the Dewey street property mentioned in the last paragraph. On June 5, 1900, she caused her husband to give a mortgage and note for \$1,500 on the Dewey street property to one Mary L. Wheeler, of New Haven, Connecticut. In June, 1906, Mrs. Parker purchased a piece of property on North avenue in Bridgeport, and had the deed recorded in her husband's name, who assumed a mortgage of \$1,500 upon the same as a part of the consideration.

Mrs. Parker never intended to give her husband any of this property. She placed it in his name because of her peculiar ideas that a husband should always appear as the head of the house. Mrs. Parker always exercised control, ownership, and proprietorship over all this property. She talked with the owners of it; she arranged for the details of its purchase; she took her own

money from the bank and paid for it; she arranged for all the mortgages; she arranged for the insurance; she paid the taxes and interest on the mortgages; she made all arrangements for the different sales, and she took any money resulting from the sales, and placed it in the savings bank in her own name. Her husband never had anything whatever to do with any of this property, except as ordered by his wife.

For several years after coming to Bridgeport she worked in a corset factory, she did sewing at home, and she took boarders and lodgers. The money earned in this way she put into the savings bank in her own name, in small but regular deposits, covering the years from 1890 to 1911. This money and that which she brought with her from Nova Scotia is the money which was used to purchase all of the real estate hereinbefore mentioned.

The earnings of Albert J. during these years went to the support of his own household and for the payment of provisions consumed by boarders. They always regarded the property in dispute as belonging to Mrs. Parker. She had never known that her husband owed any money or had any creditors, and in fact he had none, nor did he have any at the time of the matters involved in this suit, unless it be the plaintiff in this case. Mrs. Parker frequently loaned money to her husband, and had always received satisfactory payment. In October, 1909, Mrs. Parker advanced to her husband \$1,000, which he, with her knowledge, invested in a corporation located in Bridgeport, and known as the Colonial Chemical Company. On February 7, 1910, the plaintiff brought an action against this company. On the same day the defendant Albert J., who was a stockholder in this corporation, signed as surety an officer's receipt for the return of the property specified therein, which had been attached in this action. On April 20, 1910, the justice court before which this action was brought rendered judgment therein against the company for \$87 and \$12.91 costs of suit. Execution upon this judgment was duly issued and returned wholly unsatisfied. The plaintiff thereafter brought suit against Parker upon his receipt, and recovered judgment against him on October 31, 1911, for \$100 damages and \$37.46 costs. This judgment is entirely unpaid, and an execution issued upon the same was returned unsatisfied. At the time of the signing of this receipt the attorney for Goldberg, together with the officer making the attachment, ascertained that Albert J. Parker had this property standing in his name on the Bridgeport land records. The receipt was accepted because he was the owner of record of this

real estate, and neither the plaintiff, his attorney, nor the officer had knowledge of any equitable claim of his wife.

In February, 1910, Mrs. Parker learned that the Colonial Chemical Company was in trouble. She knew that her husband was interested in this concern, and she immediately consulted her attorneys at law in Bridgeport. They advised that her husband, as a stockholder, could not be held personally liable for the debts of the corporation. The financial embarrassment of the corporation and the probable loss of the \$1,000 made her distrustful of the ability of her husband, and, being apprehensive lest he might engage in some future business enterprise of a losing nature and thereby jeopardize her interest in the real estate, she demanded that he transfer the legal title to her. He had offered to transfer it previously, but she had declined, saying it was not necessary. He complied with her demand, and on March 18, 1910, made the transfer, through an intermediary. At the time of the transfer Mrs. Parker did not know that her husband had signed the receipt, or that he owed any person except herself. There was no consideration for the transfer other than has been mentioned. The conveyance was asked for, given, and received, with no intention to defraud, but solely because both parties had always considered the wife as the real owner of the property, and because both parties believed that the wife was equitably entitled to receive a conveyance whenever she chose to do so.

This is an action to foreclose a judgment lien upon real estate to which Mrs. Parker, one of the defendants, holds title, and to set aside a transfer of the property upon the ground that her title was acquired by her without consideration, in fraud of her husband's creditors, and to prevent the plaintiff from collecting his judgment. The trial court has distinctly found that her title was not so acquired, and this finding is conclusive unless the subordinate facts show that this conclusion was incorrect.

The principles of some of our decisions applicable to the present case are to be found in the following cases: This court in the case of *Knower v. Cadden Clothing Co.* 57 Conn. 202, 221, 17 Atl. 580, said: "In all cases where the title of a vendee has been attacked because of the intent on the part of the vendor to defraud his creditors by the transfer," it should appear "that the vendee had actual knowledge of and participated in the fraud, that is, that he had an intent to commit a fraud, this to be proven as a fact." This principle was recognized in *Trumbull v. Hewitt*, 62 Conn.

448, 451, 26 Atl. 350. To the same effect, though more directly applicable to the present case, is the case of *Clarke v. Black*, 78 Conn. 467, 62 Atl. 757, where it appears that the defendant in 1886 allowed his wife to have \$3,500 to assist her in purchasing and keeping a boarding house, upon an informal understanding that when she acquired by such means, a sufficient sum to build a house, it should be turned over to the defendant as his property, and that the proceeds of the business not needed for this purpose should belong to her. At the end of ten years, with the avails of her business, she bought land and built a house thereon at the expense of \$6,000, and told the defendant she would convey the property to him, which she did three years later. This conveyance was made in good faith and with no intent to defraud anyone, although it left her without sufficient attachable property to satisfy the claim of her sole creditor. This court held that upon these facts the relation of debtor and creditor existed between the wife and her husband, and that such relation constituted, as a matter of law, a valuable consideration for her conveyance which prevented it from being treated as constructively fraudulent.

Other cases in this connection proceed upon the same theory. Thus in *Warner Glove Co. v. Jennings*, 58 Conn. 74, 82, 83, 19 Atl. 239, 240, it is stated: "A debtor on the eve of insolvency may prefer one or more of his creditors by payment of their claims, either in money or by the transfer to them of property, if such payment is made in good faith. In the absence of proceedings under the insolvent law, neither the knowledge of the creditor of his debtor's insolvency, nor the fact that such acts are calculated to place the property of the debtor beyond the reach of his creditors, can hinder them in the collection of their claims, will of themselves render such bona fide transactions void or fraudulent in law." See also *State v. Martin*, 77 Conn. 142, 144, 58 Atl. 745.

It does not appear that Parker was indebted when this conveyance was made to anyone other than the plaintiff. When this transfer was made to the wife she had no knowledge that her husband had signed the receipt, and did not know that he was indebted to anyone. The land in question was purchased with money belonging to Mrs. Parker. She never intended to give her husband either the money or the land; from motives that were not fraudulent she allowed the record title of the land to stand in her husband's name, but both of them regarded and treated it as belonging to the wife. The conveyance was of prop-

erty which in reality belonged to her, and which in justice and equity, it was his duty to convey to her upon request.

The plaintiff, when the transfer of the land in question was made, was not a purchaser within the recording acts. The liability of Parker was not absolute, but dependent upon an uncertain event. It was small in amount, the only one in existence, and was unknown to Mrs. Parker. There is nothing to show that the wife was implicated in a fraud. She did not have any good reason to know that Parker was using her property to obtain credit, nor did she connive with him to that end. While it appears that there was a good consideration for the conveyance to Mrs. Parker from her husband, yet, if that were not so, the entire indebtedness of the husband at the time of the conveyance was the contingent and insignificant amount of \$87. It does not appear that the husband was at the time either insolvent or in embarrassed circumstances, but it does appear that he was equitably bound to make the conveyance to his wife. Under such conditions the law would not say that the conveyance was void as to creditors, even if it were a voluntary one. *Salmon v. Bennett*, 1 Conn. 542, 543, 7 Am. Dec. 237.

These considerations are a sufficient answer to the claim urged by the plaintiff that the defendant Mrs. Parker is estopped from asserting that she is the owner of the property in question by reason of its transfer to her by Mr. Parker. But the appellant insists that Mrs. Parker allowed her husband to secure this credit on the faith of his ownership of her property; that she caused the land records to declare that he owned this property; that the plaintiff had the right to rely upon the title as it appeared of record; and that the act of the wife in placing the record title of property in the name of her husband precludes her from denying his title as against one who has extended a credit in reliance upon the title which she vested in him. In this state we have held to the rule that, in transactions concerning real estate, parties may rely upon the title to such property as disclosed by the land records, in so far, at least, as the title may be affected by anything required to be recorded. We are here, however, not concerned with a transaction touching real estate, but with a quite different matter affecting the extension of personal credit without security. It is obvious from the manner in which estoppel may be established that there can be no fixed and settled rules of universal application to regulate it. Whether acts or admissions shall operate by way of estoppel

in pais must depend upon the circumstances of the case.

Our own cases proceed upon this idea. In *Canfield v. Gregory*, 66 Conn. 9, 17, 33 Atl. 536, it is stated that "the modern estoppel *in pais* is of equitable origin, though of equal application in courts of law. It is much more than a rule of evidence. It establishes rights; it determines remedies. An equitable estoppel does not so much shut out the truth as let in the truth, and the whole truth. Its office is not to support some strict rule of law, but to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties."

In *West Winsted Sav. Bank & Bldg. Assn. v. Ford*, 27 Conn. 282, 290, 71 Am. Dec. 66, this court declared: "Estoppels *in pais* are founded in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence in the intercourse of men, if they were permitted to deny that which they have deliberately and solemnly asserted and received as true. But the mere acts, statements, or admissions of a party, when not performed or made under seal or of record, or in some of those acts to which peculiar authority is attached by law, were not at common law considered as estoppels, and had no other weight than that of evidence, more or less important, but which might be explained or rebutted. By the recent decisions of the courts in this country and in England, a much wider scope is given to the doctrine of estoppel *in pais*, and it is now held and established that wherever an act is done or a settlement made by a party which cannot be contravened or contradicted without fraud, or gross misconduct which is akin to it, on his part, and injury to others whose conduct has been influenced by the act or omission, or, as was said in *Middletown Bank v. Jerome*, 18 Conn. 449, where a person by his acts or his words intentionally induces another to believe in the truth of a fact, and thereby change his situation, or commit his interests, the character of an estoppel will attach to what would otherwise be a mere matter of evidence, and will become binding upon a party and decisive with a jury, even in opposition to proof of a contrary nature." *Whitaker v. Williams*, 20 Conn. 103; *Giddings v. Emerson*, 24 Conn. 547; *Taylor v. Ely*, 25 Conn. 250, 259; *Danforth v. Adams*, 29 Conn. 101, 111.

In *Bennet v. Strait*, 63 Iowa, 620, 19 N. W. 806, it was held that a wife would

not be estopped from asserting equitable title to her land as against creditors of her husband merely because title was taken in the name of her husband, and while thus held the debts were contracted. The court said that "the law of estoppel has no application from the mere fact of the husband's holding the title when the debt was contracted," and that money loaned on the faith of the apparent ownership of the land of the wife, held in the husband's name, will not prevent the wife from asserting title as against the creditor, where she did not know that her husband was engaged in any hazardous business or in any business transacted, in whose or in part, on credit, since the wife, by permitting the husband to hold the title to her land by recorded deed in his own name, will not, without other act or representation on her part, be estopped to deny the title as against a creditor who, without her knowledge, gave credit to the husband upon the faith of his ownership as it appeared of record. *De Berry v. Wheeler*, 128 Mo. 85, 49 Am. St. Rep. 538, 30 S. W. 338. The court in that case said it must be conceded that the wife, by permitting the record title to the land to remain in her husband's name, represented to the public that her husband was the owner of it. Yet in this alone no one could be defrauded. The fraud and consequent estoppel would only exist when she knew, or, from all the circumstances, ought to have known, that others relying upon what she permitted the record to tell them were dealing, or might deal, with the husband in such a manner as to cause them to alter their previous condition.

The case of *Marston v. Dresen*, 85 Wis. 530, 55 N. W. 896, touches upon the question before us. It appears that a wife intrusted her separate property to her husband to invest and manage in his own name, he to transfer it to her when she so desired. While it stood in his name he entered into business, and bought merchandise of persons who knew from the records that the property was in his name, and who relied upon his apparent ownership of it in giving him credit. It was conveyed by the husband to the wife while he was still solvent. In the opinion the court said that it not having been put in the husband's name for the purpose of giving him credit, and no representations having been made, and the wife not having known that credit was given him on the faith of such apparent title, she was not estopped to claim it as her own. See also *Biocchi v. Casey-Swasey Co.* 91 Tex. 259, 66 Am. St. Rep. 875, 42 S. W. 963, 966, 969; *Blake v. Meadows*, 46 L.R.A. (N.S.)

225 Mo. 1, 30 L.R.A. (N.S.) 1, 18, 123 S. W. 868.

In *Romeo v. Martucci*, 72 Conn. 504, 509, 510, 47 L.R.A. 601, 77 Am. St. Rep. 327, 45 Atl. 1, 3, this court said: "There is no question of fraud on the part of the owner; the good faith of his conduct is neither directly or indirectly impugned. The sole claim is that he has 'voluntarily permitted another to hold himself out to the world as being the true owner, and for this purpose intrusted him with the exclusive possession or other *indicia* of title, under circumstances which would naturally tend to mislead.' The cases where the real owner has been estopped by having clothed the possessor with *indicia* of title for such purposes and under such circumstances are many; but 'all these cases proceed upon the ground that the owner has deliberately assumed a false position, and a character inconsistent with that of owner, which, if changed, would result in fraud and damage.'" See also *Tracy v. Lincoln*, 145 Mass. 357, 14 N. E. 122; *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203; *Lincoln v. Gay*, 164 Mass. 537, 540, 49 Am. St. Rep. 480, 42 N. E. 95.

When Parker signed the officer's receipt in February, 1910 (which was the basis of this action), there was nothing upon the land records of the town of Bridgeport to show that this constituted any encumbrance upon Mrs. Parker's land. No lien, whatever, upon this property, could occur in consequence of Parker's contingent liability upon the officer's receipt without the concurrence of a number of uncertain events, to wit, a judgment against the Colonial Chemical Company, its failure and inability to pay the same, an action and judgment against Parker, and the filing of a judgment lien upon Mrs. Parker's property, which was not done until January, 1912. The record discloses that Mrs. Parker had obtained a conveyance of her property which was recorded in March, 1910, nearly two years before the plaintiff's lien appeared on record. It is the purpose of our system of registry that the apparent owner of record shall be considered as the true owner (so far as subsequent purchasers, without notice to the contrary, are concerned), notwithstanding any unrecorded previous liens or alienations. From the natural equity of Mrs. Parker, and also from the special equity arising from the protections afforded by the prior record of her title, it is manifest that the plaintiff should not receive any aid or support from our system and policy relating to the registry of title to real estate. He who avers an estoppel, either by pleading or evidence, must establish by proofs, positive or circumstantial,

every fact that essentially enters into the character of such a claim. It is to be considered that the doctrine of estoppel is an exception to the general rule for the prevention of fraud, and is not to be extended beyond the reasons on which it is founded. 1 Greenl. Ev. § 204; Com. v. Moltz, 10 Pa. 527, 51 Am. Dec. 499, 504. Instead of there being an affirmative finding in favor of the appellant upon the question of knowledge and the negligence of Mrs. Parker in allowing the title to her property to stand in her husband's name, the record shows to the contrary. She did not allow her property to stand in her husband's name that he might thereby obtain credit. It appears that she had no good reason to suspect that, by allowing the title to her property to stand in her husband's name, it would be used as the basis of a credit, or that money would be borrowed, or an obligation taken, upon the faith of it. Mr. Parker had never engaged in any business undertaking or commercial enterprise which required credit. For nearly twenty years the wife had always had the absolute control of the property herself; and she had, upon all occasions, let her business acquaintances know of it. The record does not disclose that Mrs. Parker had any knowledge, directly or indirectly, concerning the attitude which Goldberg had taken toward her property. Neither does it appear that there was any duty on her part to make inquiry in this direction. Under these circumstances, to hold that what was done by Mrs. Parker amounted to fraud or culpable negligence would be a misapplication of the principles on which estoppel *in pais* is based.

In my opinion the trial court did not err in rendering judgment for the defendants.

Thayer, J., concurs.

DISTRICT OF COLUMBIA COURT OF APPEALS.

LUCY D. W. MAYS, Appt.,

v.

NEW AMSTERDAM CASUALTY COMPANY.

(40 App. D. C. 249.)

Insurance — accident — statement as to rejection — meaning.

1. A printed statement in an applica-

tion for accident insurance making the applicant assert that no application made by him for insurance had been declined, and no accident, disease, or health policy had been canceled or renewal refused, does not include life policies, where the word "policy" is uniformly used elsewhere in the application as referring to accident or health policies.

Evidence — accident insurance — examining physician.

2. The calling, in an action on an accident insurance policy, of a physician who attended insured shortly after his injury, does not render admissible evidence of another physician who made an examination of him at a different time, where the statute prohibits the disclosure by a physician without consent of any information confidential in its nature, acquired in attending a patient in a professional capacity, and necessary to enable him to act in that capacity.

Insurance — statement of sound health — meaning.

3. A statement by an applicant for accident insurance, that he is in sound condition, cannot be said to be untrue as matter of law, unless he had an ailment of a character so well defined as appreciably to affect his health.

(April 7, 1913.)

A PPEAL by plaintiff from a judgment of the Supreme Court in defendant's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Mr. James R. Caton, with Messrs. John C. Gittings, J. Morrill Chamberlin, and Douglas S. Mackall, for appellant:

The question did not call for an answer as to other than accident or health insurance, so that the insured's failure, if there was such, to disclose that he had been declined for life insurance, did not constitute a breach of warranty.

Mutual Reserve L. Ins. Co. v. Dobler, 70 C. C. A. 134, 137 Fed. 550; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; Dineen v. General Acci. Ins. Co. 126 App. Div. 167, 110 N. Y. Supp. 344; Peterson v. Manhattan L. Ins. Co. 244 Ill. 329, 91 N. E. 466, 18 Ann. Cas. 96, reversing 115 Ill. App. 421; Mutual L. Ins. Co. v. Ford, — Tex. —, 130 S. W. 769; Miller v. Maryland Casualty Co. 113 C. C. A. 267, 193 Fed. 343; Wright v. Fraternities Health &

Note. — The subject of the character of insurance or company covered by a question in an application for life or accident insurance, as to other insurance, or as to previous rejection of application, is covered 46 L.R.A. (N.S.)

in the note to Wright v. Fraternities Health & Acci. Asso. 32 L.R.A. (N.S.) 461, and a search has disclosed no later cases passing upon the point.

Acci. Asso. 107 Me. 418, 32 L.R.A.(N.S.) 461, 78 Atl. 475; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; Metropolitan L. Ins. Co. v. Montreal Coal & Towing Co. 35 Can. S. C. 266; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 344, 10 Sup. Ct. Rep. 87; Frudential Ins. Co. v. Lear, 31 App. D. C. 184.

Messrs. F. D. McKenney, J. S. Flannery, and William Hitz, for appellee:

There was a breach of the warranty concerning former rejection for insurance.

New York L. Ins. Co. v. Fletcher, 117 U. S. 528, 29 L. ed. 937, 6 Sup. Ct. Rep. 837; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Hartford F. Ins. Co. v. Wilson, 187 U. S. 478, 47 L. ed. 265, 23 Sup. Ct. Rep. 189; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312.

There was a breach of the warranty concerning medical or surgical attention during the last five years.

Brady v. United L. Ins. Asso. 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727; Metropolitan L. Ins. Co. v. McLaugh, 49 N. J. L. 592, 60 Am. Rep. 661, 9 Atl. 766; West v. Metropolitan L. Ins. Co. 34 Wash. L. Rep. 640; Griffith v. Metropolitan L. Ins. Co. 36 App. D. C. 8; Hubbard v. Mutual Reserve Fund Life Asso. 40 C. C. A. 665, 100 Fed. 719; Jeffries v. Economical L. Ins. Co. 22 Wall. 54, 22 L. ed. 836; Aetna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401; Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 378, 23 L. ed. 611; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; Mitchell v. Potomac Ins. Co. 16 App. D. C. 262; Rodier v. Life Ins. Co. 32 App. D. C. 159; Healy v. Metropolitan L. Ins. Co. 37 App. D. C. 240; Hunt v. Fidelity & C. Co. 39 C. C. A. 496, 99 Fed. 245; American Credit Indemnity Co. v. Wood. 19 C. C. A. 264, 33 U. S. App. 583, 73 Fed. 81; Price v. Phoenix Mut. L. Ins. Co. 17 Minn. 497, Gil. 473, 10 Am. Rep. 166; Galbraith v. Arlington Mut. L. Ins. Co. 12 Bush, 29; Vose v. Eagle Life & Health Ins. Co. 6 Cush. 42; Lowell v. Middlesex Mut. F. Ins. Co. 8 Cush. 127; Batchelder v. Queen Ins. Co. 135 Mass. 449; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; London Assur. Co. v. Mansel, L. R. 11 Ch. Div. 363, 48 L. J. Ch. N. S. 331, 41 L. T. N. S. 225, 27 Week. Rep. 444. 46 L.R.A.(N.S.)

Robb, J., delivered the opinion of the court:

Appeal from a judgment upon a directed verdict for the defendant, New Amsterdam Casualty Company, in the supreme court of the District in an action upon an accident and disability policy of insurance issued by the defendant to George W. Mays, —the plaintiff herein, Lucy D. W. Mays, being his wife and the beneficiary under said policy.

In 1901 Mr. Mays, through Thomas A. Weeden, then agent for the Pacific Mutual Life Insurance Company, made an application for life insurance in that company, and, upon an examination indicating diabetes, his application was rejected. The Pacific Mutual also wrote accident and health insurance, and it is in evidence that a policy covering accidents only was issued by this company to Mr. Mays December 20, 1901. This policy was renewed annually until December 20, 1904, when it expired. On August 18, 1903, the company also issued to Mr. Mays a health insurance policy, which was thereafter annually renewed until Mr. Weeden gave up his agency with the Pacific Mutual and became the agent of the defendant company, when, owing to his friendly relations with Mr. Mays, he, according to his testimony, induced Mr. Mays "to change his accident policy in the Pacific Mutual to the defendant company," the date of the present policy being September 27, 1906. On January 7, 1910, Mr. Mays was accidentally injured by having his shin cut in attempting to board a street car, which injury resulted in his death on the 20th of that month. The policy was in force at the time of his death, all premiums having been paid regularly.

Indorsed on the policy and made a part thereof is a schedule of "Statements made by the assured." Under the terms of the policy these statements are made on acceptance thereof and warranted to be true. They are in printed form, the assured doing no more than to supply the information which it is their object to elicit from him. We here reproduce statements 10 to 14, inclusive:

"Statement 10. My income per week from the above occupation exceeds the gross amount of weekly indemnity under all policies carried by me, except as follows: \$135—\$145 per month.

"Statement 11. I have no accident, disease, or illness insurance issued by this or any other stock company, assessment, or fraternal association, except as follows: \$5,000 Aetna expires December.

"Statement 12. If, during the period of this policy, I take other accident, disease,

or illness insurance, providing weekly indemnity which together with that provided by this policy shall be in excess of my weekly earnings from the above occupation, I agree to report the same to this company.

"Statement 13. No application ever made by me for insurance has been declined, and no accident, disease, or illness policy issued to me has been cancelled or renewal refused, except as follows: No exceptions.

"Statement 14. I have never made claim nor received indemnity for any accident, disease, or illness, except as follows: \$125—Travellers Ins. Co. about 1890."

The court, being of the opinion that the failure of Mr. Mays to mention in statement 13 the rejection of his application for life insurance by the Pacific Mutual Life Insurance Company, in 1901, constituted such a false statement as to void the policy, directed a verdict for the defendant, the plaintiff reserving an exception. In approaching the consideration of the question whether Mr. Mays furnished the company all the information concerning prior insurance called for by its printed schedule, we must have in mind the humane and well established rule that "if the policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured." *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019. "The rule is," said the court in *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 40, 46 L. ed. 64, 73, 22 Sup. Ct. Rep. 10, "that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract." Where statements are printed by the company and submitted to the applicant for the purpose of eliciting from him all facts thought by the company to be material, those statements should be free from ambiguity. It would be a harsh and unjust rule, indeed, that would void a policy where under one interpretation of such a statement the response of the applicant was reasonable and proper, because under another interpretation his answer was not sufficiently comprehensive. Such statements should not require interpretation. Their language should be so direct and simple as to be easily understood, and not open to doubt or conjecture. Especially is this true in a policy where it is claimed that a misstatement, material or otherwise, is fatal to the validity of that policy. The authorities to which we will now refer fully sustain this view.

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Mutual Reserve L. Ins. Co. v. Dobler, 70 C. C. A. 134, 137 Fed. 550, was an action on a life insurance policy. One of the defenses was that the insured had not truthfully answered the question: "Have you any other assurance?" The application also contained the question: "Have you now any insurance on your life? If so, where, when taken, for what amounts, and what kinds of policies?" It appeared that at the time these questions were answered the applicant had one accident policy for \$5,000 and another for \$1,000, and it was contended that the failure to so state amounted to a breach of warranty. The company's agent knew of this accident insurance, and informed the insured that accident insurance was not called for by the question: "Have you any other assurance?" The circuit court of appeals said: "It seems to us reasonably clear that the first of these questions does not call for a disclosure of any insurance except that which is known as life insurance. In the ordinary understanding or usage, there is a well defined distinction between life insurance and accident insurance. . . . We think that the most that can be claimed in behalf of the plaintiff in error for the questions so propounded to the applicant was that they were so worded as to leave it uncertain whether they called for a disclosure of the accident insurance which he carried at that time. If the insurance company in its printed application employed ambiguous terms or words of doubtful import, it cannot complain if they were construed as they were by the appellant, or if the agent so advised him as to their meaning." The court ruled that the second question, while more comprehensive than the first, must be construed with the first, and that, when so construed, its evident purpose was to inquire whether the applicant had fully answered the previous question, and that its purport was, "Have you now answered as to all life insurance that you carry?"

In *Dineen v. General Acci. Ins. Co.* 126 App. Div. 167, 110 N. Y. Supp. 344, an action upon an accident and health insurance policy, the words, "no application ever made by me for insurance has ever been declined, and no accident or health policy issued to me has been canceled or renewal refused, except as herein stated," were interpreted by the appellate division of the supreme court. It will be observed that this language is almost identical with the wording of the statement which we are called upon to interpret in the present case. The court said: "There is no question in the application which specifically calls upon the plaintiff to disclose whether he has ever been rejected by a life insurance com-

pany. The general statement is made that no application for insurance has been declined. This statement follows the declaration that the applicant has no accident insurance, and precedes one in the same clause that no such policy has been canceled or renewal refused, and the plaintiff might well have inferred that the inquiries were directed solely to accident or health insurance. . . . An insurance company which is making every statement, whether material or otherwise, a warranty, must be held to a very strict rule when it is endeavoring to avoid payment on its insurance contract because of answers to inquiries or declarations which it has framed. They must be so plain or intelligible that any applicant can readily comprehend them. If any ambiguity exists, the construction will obtain most favorable to the insured (citing cases). The defendant might easily have extended its statements to include the rejection by a life insurance company, and then the warranty, if false, might have avoided the policy. It cannot, however, by an uncertain phrase dependent upon an interpretation favorable to itself, deprive the plaintiff of the benefit of a policy for which he has paid and honestly believed was in full force. Literally construed, if the plaintiff's application for a fire insurance policy had been declined, the policy in suit would be void from its inception."

In *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, it was held that certificates in the Knights of Pythias and the Royal Arcanum Mutual Aid Associations were not within the description "policy of life insurance in any other company." So, too, it has been held that there is such a difference between mutual aid associations and insurance companies, that statutory provisions affecting insurance companies do not embrace such associations, and this, notwithstanding one of the prominent characteristics of such associations is the obligation to pay a fixed sum as insurance upon the death of a member. *Dickinson v. Ancient Order*, U. W. 159 Pa. 258, 28 Atl. 293. Again, in *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 311, 33 L. ed. 341, 344, 10 Sup. Ct. Rep. 87, where the question was asked an applicant for life insurance whether he had "any other insurance on his life," it was held that the purport of the word "insurance" in the question was not "so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered."

Coming back to the policy here in issue, 46 L.R.A. (N.S.)

we find that under statement 10 the insured was required to state whether the weekly income received by him from his occupation exceeded the gross amount of weekly indemnity under all policies carried by him. Clearly "all policies," as used in this statement, did not include life insurance policies, for weekly indemnities are not paid under such policies. In other words, "all policies," as used in this statement, excluded life policies. Statement 11 also applies exclusively to accident, disease, and illness insurance. Statement 12 emphasizes and makes still more certain the character of information desired in the preceding statements, for there the applicant agrees, if during the life of the policy he takes out "other accident, disease, or illness insurance," etc., to report same to the company. In statement 13 the applicant represents that no application made by him for insurance has been declined, and no accident, disease or illness policy issued to him has been canceled or renewal refused. Statement 14 concerns indemnity received by the insured for any accident, disease, or illness. It thus appears that under no possible construction can any of said statements be said to relate to life insurance, unless it be the first clause of statement 13. But that clause does not stand alone, nor should the language of the statement be construed without reference to the context, since its phraseology is such as to raise a doubt as to its meaning. Having in mind the preceding statements, and the one following it, we think the assured was justified in assuming that he was not expected or required to state that he had been declined for life insurance. Indeed, the very language of the statement lends cogency to this view. The first clause requires the assured to certify that an application has not been declined, while the second clause goes a step farther and requires a declaration that no such policy, that is, "no accident, disease, or illness policy" issued to him "has been canceled or renewal refused." In other words, the first clause relates to an unsuccessful attempt to obtain accident, disease, or illness insurance, while the second relates to the cancellation or refusal to renew such insurance. We think the statement may be interpreted as though it read: "No application ever made by me for accident, disease, or illness insurance has been declined, and no policy issued to me for such insurance has been canceled or renewal refused." That this was the interpretation placed upon the statement by the company's own agent is very clear from his testimony in this case. He was asked whether, at the time he wrote this policy, he had forgotten that

Mr. Mays had once been rejected, and replied: "I can't say that I had forgotten. It was a different form of insurance. . . . The former was for life insurance, and this is for accident insurance, a different proposition. . . . It was a different form of insurance that he was applying for (the present application), and the questions I asked him were with reference to that portion of the application, and he answered them." The company's agent, who was presumably familiar with the scope of these questions, not understanding them to embrace life insurance, it is not strange that the assured adopted the same view. Moreover, the very company that declined to write a life policy for Mr. Mays, subsequently issued to him a health policy, which was several times renewed. This circumstance, the ambiguity of statement 13, and the interpretation apparently placed upon that statement by the agent of the defendant, tended to lead the assured to believe that his answer was sufficiently comprehensive. We conclude that if information concerning a prior rejection for life insurance was desired by the defendant, it should have framed its statement to that end.

The plaintiff produced as a witness a physician who attended Mr. Mays shortly after his injury. Subsequently, over the objection and exception of the plaintiff, a physician was permitted to testify for the defendant that he had treated Mr. Mays prior to his injury; that he was then suffering from boils about his neck and shoulders, and that an examination of his urine indicated diabetes. We think this was error. *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 253, 254, 28 L. ed. 708-710, 5 Sup. Ct. Rep. 119; *Prudential Ins. Co. v. Lear*, 31 App. D. C. 184; *Baltimore & O. R. Co. v. Morgan*, 35 App. D. C. 195. In the latter case, where, as here, it was alleged that the calling of a physician by the plaintiff amounted to a waiver of the right to object to the evidence of another physician who made an examination at a different time, Mr. Justice Van Orsdel, speaking for this court, said: "We understand the rule in relation to the admission of evidence of this character under statutes similar to ours, to be that waiver of the right can only be claimed where the party testifies to the result of a particular examination, in which case the opposing party may call the physician who made the examination to corroborate or deny the statements made by the party; or where two or more physicians in consultation examine into the physical condition of the party, when, if one of the physicians is called by such 46 L.R.A. (N.S.)

party to testify to the results of the examination, another physician present and taking part in the examination may be called by the opposing party to testify in relation thereto. But if the physician whose evidence is sought to be introduced by the opposing party made his examination at a different time from that testified to by the physician introduced, and the party has not testified to the results of such examination, the evidence is inadmissible."

Section 1073 of the Code [31 Stat. at L. 1358, chap. 854] prohibits the disclosure by a physician in this jurisdiction, without the consent of the person afflicted or his legal representatives, except in certain criminal cases, of "any information confidential in its nature, which he shall have acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Nothing can be much more confidential than an examination of a patient by a physician, and nothing can be much more necessary, in our view, to enable the physician to act intelligently. To hold that the nature of the particular illness, and not the relationship of physician and patient, is to determine the applicability of the provisions of § 1073, is practically to emasculate it, and set up a rule dependent upon the views of the particular judge who presides at the trial.

There was some evidence tending to show that Mr. Mays had received medical or surgical attention within the period of five years preceding the date of the policy in suit, and the defendant insists that this evidence established a breach of warranty, and hence justified the court in directing a verdict. Statement 17 in said schedule requires a declaration on the part of the applicant that he has not received medical or surgical attention during such period, but this statement must receive a reasonable interpretation. *Moulton v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466. In *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119, it was held that the question in an application for life insurance, whether the applicant had ever had the disease "of affection of the liver," meant an affection of that organ which amounted to disease, and did not refer to every instance of slight or accidental disorders or ailments affecting the liver which left no trace of injury to health, and were unattended by substantial injury, inconvenience, or prolonged suffering. So, too, in *Hubbard v. Mutual Reserve Fund Life Assn.* 40 C. C. A. 665, 100 Fed. 719, it was held that the word

"consulted," as used in a similar question, did not relate to the opinion of a physician concerning a slight and temporary indisposition leaving no impress upon the mind. In the present case, the testimony upon this point was conflicting. A physician testified for the defendant to the effect that he treated Mr. Mays "sometime between 1900 and 1905; probably in 1903." In cross-examination this witness fixed the time as "in 1901 or before 1901 and 1903; does not recall date." Plaintiff's testimony tended to show that Mr. Mays did not consult this physician at that time. It was therefore for the jury to determine, under proper instructions from the court, whether Mr. Mays's answer to statement 17 was a fair and true one, within the meaning of that statement.

To the further contention of the defendant that Mr. Mays was not "in sound condition, mentally and physically," within the meaning of statement 16, at the time the policy was issued to him, it is sufficient to say that, under the evidence, the question was for the jury to determine. *Healy v. Metropolitan L. Ins. Co.* 37 App. D. C. 240. The evidence for the plaintiff tended to show that the assured was in good health at that time and subsequently; that he did not miss a day from his work on account of illness. While the physical examination of the assured in 1901 for life insurance indicated diabetes, the evidence was conflicting as to how long that condition continued. A physician testifying for the defendant as to the condition of the assured at the time of the accident "was unable to tell with any degree of certainty length of time of existence of diabetic condition; would not tell whether it had commenced within last six months or weeks; could not say that on September 27, 1909 (the date of the last renewal of the policy) he had diabetes." Statement 16 does not require the assured to declare his belief that he has had no symptoms of disease, hence if he has no ailment amounting to disease,—that is, an ailment of a character so well defined as appreciably to affect his health,—it cannot be said that he is not in sound physical condition, within the popular meaning of that term. A different ruling would make possible the voiding of almost every similar policy issued. The ordinary person is not a medical expert, and, unless he suffers some pain or annoyance, is not usually conscious of bodily ills. Inasmuch as these policies are written without medical examination on the part of the company, it is apparent, we think, that the assured is not expected to do more than to state his honest belief that he is "in sound condi-

tion," physically; that is, that he is not suffering to an appreciable degree with any bodily ill. Of course, if he is affected to an appreciable degree with any physical ailment, he cannot honestly and truthfully state that he is in sound physical condition. If there is room for doubt, the jury should determine the question.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

DISTRICT OF COLUMBIA COURT OF APPEALS.

HIRAM C. McNEIL et al., Appts.,

v.

ROY S. GARY.

(40 App. D. C. 397.)

Covenant — restriction — right to enforce.

1. A purchaser of a lot in a tract of land opened for residence purposes, the deeds to each of which contain covenants as to the character of building to be placed on the lot, may enforce such covenant against the purchaser of another lot.

Same — breach — stable.

2. The erection on the river of a lot of a stable for use in a drayage, express, and plumbing business is a violation of a covenant in a deed of a city lot that not more than one dwelling house shall be erected on the lot, which shall cost not less than a specified amount, and not to be used for manufacturing, mechanical, or business purposes of any kind.

(Van Orsdel, J., dissents.)

(May 5, 1913.)

APPEAL by plaintiffs from a decree of the Supreme Court, dismissing a bill filed to enjoin violation of a restrictive covenant in a deed of real estate. Reversed.

The facts are stated in the opinion.

Messrs. C. C. Calhoun and J. Barrett Carter, for appellants:

Appellant had a right to maintain this suit.

1 *Tiffany*, Real Prop. 768; *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575; *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628; *Parker v. Nightingale*, 6 Allen, 341, 83 Am.

Note.—The question who may enforce restrictive covenants or agreements as to use of property is treated in the note to *Korn v. Campbell*, 37 L.R.A.(N.S.) 12. The subject of oral or implied building restrictions as to parcels retained by the grantor is treated in the note to *Sprague v. Kimball*, 45 L.R.A.(N.S.) 962.

Dec. 632; Peabody Heights Co. v. Willson, 82 Md. 186, 36 L.R.A. 393, 32 Atl. 386, 1077; Tallmadge v. East River Bank, 26 N. Y. 105; Walker v. Renner, 60 N. J. Eq. 493, 46 Atl. 626; Stewart v. Finkelstone, 206 Mass. 28, 28 L.R.A.(N.S.) 634, 138 Am. St. Rep. 370, 92 N. E. 37.

The stable was prohibited by the covenants.

Cholmondeley v. Clinton, 2 Jac. & W. 1, 22 Revised Rep. 84, 14 Eng. Rul. Cas. 578; Kitching v. Brown, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241; Wright v. Evans, 2 Abb. Pr. N. S. 308; Turner v. Evans, 2 El. & Bl. 512, 22 L. J. Q. B. N. S. 412, 17 Jur. 1073, 1 Week. Rep. 434; Parker v. Nightingale, 6 Allen, 341, 80 Am. Dec. 632; Schenck v. Campbell, 11 Abb. Pr. 292; Godfrey v. Hampton, 148 Mo. App. 157, 127 S. W. 626; Kraft v. Welch, 112 Iowa, 695, 84 N. W. 908; Hepburn v. Long, 146 App. Div. 527, 131 N. Y. Supp. 154; White v. Pollard, 52 Sol. Jo. 748.

The proposed use of the stable constitutes a nuisance.

Aldrich v. Howard, 7 R. I. 87, 80 Am. Dec. 636; Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347; Templeton v. Williams, 59 Or. 160, 35 L.R.A.(N.S.) 468, 116 Pac. 1062; Douglass v. Greenville, 92 S. C. 374, — L.R.A.(N.S.) —, 75 S. E. 687.

Messrs. J. H. Ralston, F. L. Siddons, and W. E. Richardson, for appellee:

Restrictive covenants in deeds of this nature are strictly construed as against the grantor.

Riverbank Improv. Co. v. Bancroft, 209 Mass. 217, 34 L.R.A.(N.S.) 730, 95 N. E. 216, Ann. Cas. 1912 B, 450; Evans v. Foss, 194 Mass. 513, 9 L.R.A.(N.S.) 1039, 80 N. E. 587, 11 Ann. Cas. 171; Hepburn v. Long, 146 App. Div. 527, 131 N. Y. Supp. 154; Hime v. Lovegrove, 11 Ont. L. Rep. 252.

The proposed use of the stable would not constitute a nuisance.

Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516; King v. Hamill, 97 Md. 103, 54 Atl. 625; Bonaparte v. Denmead, 108 Md. 174, 69 Atl. 697.

Robb, J., delivered the opinion of the court:

This is an appeal from a decree in the supreme court of the District, sustaining the demurrer to appellants' bill, and dismissing the same.

The facts, as they appear from the bill, are substantially as follows: B. Francis Saul and others became the owners of a part of a tract of land known as "Maple Grove" in the District of Columbia, which they caused to be subdivided into blocks and lots, and denominated the same "Saul's Addition to the city of Washington." On the 46 L.R.A.(N.S.)

16th day of April, 1908, they caused a plan of said subdivision to be duly recorded in the office of the surveyor of the District. Appellants Hiram C. and Sarah H. McNeil are joint owners of lot numbered 47 in said subdivision, which they purchased of the grantees of the original owners of said subdivision. The appellant Adam Steinmetz is the owner of lot 41 in said subdivision, which was conveyed to him on April 10, 1909, by said original owners. These two lots are improved by comfortable dwelling houses. The appellee Roy S. Gary, is the owner of lot 45 in said subdivision, which lot she purchased on October 14, 1909, from said original owners.

This subdivision is one of the most desirable in the District for residential purposes, and the great majority of the lots therein have been sold and are now used exclusively for such purposes, the houses costing from \$3,500 to more than \$20,000. Each deed from said original owners, B. Francis Saul and others, conveying a lot in said subdivision, contained the following covenants:

"And the party of the second part (the grantee) by accepting these presents and in consideration of the above grant, doth hereby covenant, promise, and agree, for herself (himself or themselves), her (his or their) heirs, executors, administrators, and assigns, to and with the said parties of the first part (the grantors), their heirs and assigns, as follows:

"First. That not more than one dwelling house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same.

"Second. That such building shall not cost less than \$3,500 to build, and shall not be used for manufacturing, mechanical, or business purposes of any kind whatsoever, but solely for dwelling purposes."

These covenants were to remain in force for a term of twenty years from January 1, 1906. The appellee, of course, had notice of these covenants, for not only were they inserted in her deed from Saul and others, but she was required, when she purchased her lot, to sign an agreement of similar import. On the front of appellee's lot is a dwelling house valued at not less than \$3,500, and there is being erected on the rear of her lot, and within 150 feet of the residence of one of the appellants, a one-story and loft frame stable about 34 feet long and 30 feet wide, containing five stalls for horses and a large space for wagons and carriages. This structure, when completed, is to be used in a drayage or express business and plumbing business now conducted by appellee or her husband. The bill avers that the operation of this stable, as well as its

proposed use, will constitute a violation of said covenants and agreement, and will be in violation of the general plan or scheme of improvement in said subdivision. It is also averred that the proposed use of said stable will constitute a nuisance.

In the view we take of the case, the averment that the proposed use of said stable will constitute a nuisance may be treated as surplusage. Since all deeds from Saul and others to lots in this subdivision contained the same restrictive covenants, it is apparent, we think, that those covenants were intended to inure, and did in fact inure, to the benefit of the several purchasers of said lots and subsequent owners thereof. As suggested in the bill, these restrictions were designed to carry out the general scheme of improvement of this subdivision. Each purchaser bought his lot with notice of this scheme, and, of course, with knowledge that every other purchaser would be influenced by it. In other words, the common understanding evidenced by the restrictive covenants induced each purchase. Under such circumstances, it is plain that one owner has a standing in equity to compel another to comply with the terms of his grant. "Equity enforces contracts and covenants in regard to property, entered into between prior grantors and grantees, in regard to the use of property, especially if common property or property descending from a common source, against subsequent owners effected with actual and constructive notice of such contracts or covenants." *Trudeau v. Field*, 69 Vt. 446, 450, 38 Atl. 162; *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575; *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628.

Coming to the merits, we proceed to determine whether the erection of this stable is prohibited by the restrictive covenants affecting this subdivision. It must be remembered that this is a proceeding in equity, where forms give way to substance, and where intent, gleaned from the language of the instrument and the circumstances surrounding the transaction, must govern. While doubts must be resolved in favor of natural rights and the free use of property, they must be founded on reason. Thus, in *Clement v. Putnam*, 68 Vt. 285, 35 Atl. 181, A owned a lot the surface of which was some 8 feet below the sidewalk, and conveyed the southerly end of this lot to B, covenanting never to erect any "structure or building" on the part of the lot not conveyed, within 4 feet of the portion conveyed. B erected a building on his lot, and subsequently A conveyed the balance of the lot to C, subject to the condition in B's deed. C thereupon erected a building within 4 feet of B's line, and was proposing to fill up the space between the two buildings

with earth to the level of the sidewalk. This was held not permissible. The court said: "The fair construction of the deed is, that from the lowest level to which it applies, the space shall be kept vacant, and not that it shall not be filled in a certain manner; and hence an earth filling may well be deemed a structure within the meaning of the deed. Any other construction would frustrate the manifest intention of the parties to the instrument. In *Brigham v. H. G. Mulock Co.* 74 N. J. Eq. 287, 70 Atl. 185, it was held that the erection of a double house under one roof constituted a violation of a covenant forbidding more than one building to be erected on one lot for dwelling purposes. See also: *St. Andrew's Lutheran Church's Appeal*, 67 Pa. 512; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Kraft v. Welch*, 112 Iowa, 695, 84 N. W. 908; *Rowland v. Miller*, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765, 11 Cyc. 1077, 1078.

It is admitted that the subdivision here involved is very desirable for residence purposes, and that all the lots that have been sold are now used exclusively for such purposes. Having these circumstances in mind, what is the reasonable construction to be placed upon the restrictive covenants before us? Each grantee of said original holders covenanted, first, that not more than one dwelling house would be erected on his lot, and that no apartment house or flat of any description would be erected; and, second, that such building should not cost less than \$3,500, and should not be used for manufacturing, mechanical, or business purposes of any kind, but solely for dwelling purposes. It is not disputed that had the appellee erected a bungalow on the back of her lot, and then attempted to devote that structure to any business purpose, or specifically to the purpose to which she now proposes to devote the structure she is now erecting, she would be subject to the restraining hand of the court; in other words, that her act would be in violation of said covenants. This, of course, inevitably follows from the language of the covenants, and, we think, as clearly demonstrates the weakness of appellee's position. Those who purchased lots in this subdivision were not so much concerned about the possibility that some dwelling house might be devoted to a business purpose, as they were that the subdivision should be exclusively devoted to dwelling purposes. To assume that such purchasers for a moment supposed that these covenants might be construed to mean that stores, moving picture shows, garages, and structures of like character, might be erected on those lots, if erected as such, is entirely to disregard the scheme under

which this subdivision was to be developed, and is to convict the purchasers of those lots of a lack of intelligence. In the first place, the provision that not more than one dwelling house shall be erected on a lot was intended to exclude the erection of other structures. This is made manifest by the second clause of the first covenant that no apartment nor flat shall be erected. The parties evidently feared that an apartment house or flat might be regarded as a dwelling house within the meaning of the preceding clause, and hence expressly excepted it from said class. The first restriction in the second covenant, that no such building—that is, no such dwelling house—shall cost less than \$3,500, emphasizes what was apparently in the minds of the parties, that this subdivision should be devoted to a good class of dwellings. The next clause prevents, in terms, the use of any dwelling house for manufacturing, mechanical or business purposes of any kind. It seems to us that no one purchasing one of these lots and accepting a deed containing these covenants could reasonably fail to understand that he could not do in one way what he was forbidden to do in another; in other words, that the provision that no more than one dwelling house should be erected on a lot, coupled with the provisions that it should cost not less than \$3,500, and not be used for any other purpose, meant that this subdivision should be devoted to dwelling, and not business, purposes. The result, and not the manner of achieving it, is material. Unless these covenants are to be given this construction, they become a mere jumble of words and their obvious intent is frustrated. We conclude, therefore, that the court erred in sustaining the demurrer.

The decree will be reversed, with costs, and the cause remanded for further proceedings.

Reversed and remanded.

Van Orsdel, J., dissenting:

I am unable to concur in the opinion and judgment of the court. Restrictions of this nature placed upon the use of real estate are to be strictly construed against the grantor, and liberally in favor of the grantee. Granting to defendant the strict construction of the covenant in the deed which the law accords to him, it amounts to nothing more than that he may only erect one dwelling house, of value not less than \$3,500, and he may not use the house for anything but dwelling purposes. With this, and the further limitation as to apartment houses and flats the restriction is complete.

It is averred in the bill that all purchas-

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ers of lots in said addition from the original owners thereof signed an agreement containing the following provision: "The purchaser, in accepting and signing this paper, agrees that not more than one dwelling house shall be erected on said lot; that no apartment house nor flats of any description shall be erected on same; that such dwelling shall cost not less than \$3,500 to build, and it shall not be used for manufacturing, mechanical, or business purposes of any kind; that it shall not be rented, leased, sold, transferred, or conveyed unto or in trust for any negro or colored person; that these covenants shall be effective and remain in force for the term of twenty (20) years from January 1, 1906, and no longer.

Reading the agreement in connection with the covenant in the deed, no other reasonable conclusion can be reached than that it was intended to make this addition a community of detached houses, not constructed in rows or solid blocks, as is too common in this city. The restriction cannot be extended to other buildings, without reading into it something manifestly not intended by the parties, and adopting a rule of construction the converse of that to which defendant is entitled. It will not do to hold that only the dwelling house described in the restriction may be erected on the lot, to the exclusion of all other buildings essential to the profitable and convenient use of the lot. It must be interpreted as excluding only other dwellings, flats, or apartments. In other words, the owner of a lot in this addition can erect any building on his lot consistent with the building regulations of the District, except flats, apartments, and more than one dwelling house. He is not limited in the use of his lot, as held by the court, merely to a dwelling house of the prescribed value, to the exclusion of any other buildings whatsoever. It has been held in *Riverbank Improv. Co. v. Bancroft*, 209 Mass. 217, 34 L.R.A.(N.S.) 730, 95 N. E. 216, Ann. Cas. 1912 B, 450, that a covenant in a deed providing that "no stable of any kind, private or otherwise, shall be erected or maintained on any portions of said land," will not prevent the erection of a garage. While the garage was prohibited upon another ground, on this point the court said: "Accordingly it must be held that the building is not a stable within the meaning of the restriction. And this is so even if, as argued by the plaintiffs, a garage is as objectionable as a stable." It has also been held that a covenant that not more than one house shall be erected on a lot did not prevent the erection of a stable on the rear of the lot. *Hime v. Lovegrove*, 11 Ont. L. Rep. 252.

The cases cited and quoted in the opinion

all apply the proper construction to covenants of this sort, read nothing into the restrictions not clearly expressed therein, and might well be cited as authority in support of my contention in this case. Likewise, all averments in the bill, relative to the general scheme in mind when the addition was laid out and the restriction made, are of no importance, since the covenant, being clear and unambiguous, must stand or fall upon its face.

The decree, for these reasons, should be affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

NATHANIEL GREEN, Appt.,
v.

UNITED STATES.

(40 App. D. C. 426.)

Criminal law — crime with death penalty — right to accept plea of guilty.

Where by statute the jury are authorized to inflict a death penalty for a crime which otherwise would be punishable by imprisonment, the court has no authority to receive a plea of guilty, and thereby withdraw the case from the jury.

(May 14, 1913.)

APPEAL by defendant from a judgment of the Supreme Court upon a verdict finding him guilty of rape, with death penalty. Affirmed.

The facts are stated in the opinion.

Messrs. George H. MacDonald and Benjamin L. Gaskins, for appellant:

The courts had no discretion to refuse to accept a plea tendered by the accused when charged with a felony, at common law.

2 Hale, P. C. 225; Staundford P. C. Lib. 2, chap. 51; 2 Hawk. P. C. chap. 31, § 1; 4 Hargrave St. Tr. 778, 779; Comyns's Dig. Indictment K; Burns's J. P. 365; Stephen's Dig. Crim. Law, § 279; Paley, Convictions, 1904 ed. 120; 1 Chitty, Crim. Law, 428; Hallinger v. Davis, 146 U. S. 318, 36 L. ed. 989, 13 Sup. Ct. Rep. 105; 1 Archbold, Crim. Pr. & Pl. Pomeroy's ed. 324; 1 Bishop, New Crim. Proc. 4th ed. 1895, § 795; Beale, Crim. Pl. & Pr. 57; 12 Cyc. 352; 4 Am. & Eng. Enc. Law, 773; State v. Almy, 67 N. H. 274, 22 L.R.A. 744, 28 Atl. 374; West v. Gammon, 39 C. C. A. 271, 98 Fed. 429; Opinion of Justices, 9 Allen, 585; Green v. Com. 12 Allen, 175; Com. v. Battis, 1 Mass.

Note. — As to right, upon plea of guilty, to sentence accused without intervention of jury, see note to *Ex parte Dawson*, 35 L.R.A.(N.S.) 1146.
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95; *State v. Johnson*, 21 Okla. 40, 22 L.R.A.(N.S.) 463, 96 Pac. 26; *Re Dawson*, 29 Idaho, 178, 35 L.R.A.(N.S.) 1146, 117 Pac. 696; *United States v. Dixon*, 1 Cranch, C. C. 414, Fed. Cas. No. 14,968.

Section 808 of the Code does not authorize the court to reject the plea of guilty.

2 Foster, Fed. Pr. 1343; *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; *Johnson v. United States*, 40 Wash. L. Rep. 486; *McCarthy v. McCarthy*, 20 App. D. C. 195; *United States v. Evans*, 30 App. D. C. 62; *Bandfield v. Bandfield*, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; *State v. Woodruff*, 68 N. J. L. 89, 52 Atl. 294; *Thompson v. Utah*, 170 U. S. 350, 42 L. ed. 1066, 18 Sup. Ct. Rep. 620; *West v. Gammon*, 39 C. C. A. 271, 98 Fed. 428; *Hallinger v. Davis*, 146 U. S. 318, 36 L. ed. 989, 13 Sup. Ct. Rep. 105; *State v. Hunter*, 43 La. Ann. 157, 8 So. 624; *Douglass v. State*, 3 Wis. 820; *Davis v. State*, 38 Wis. 487, 1 Am. Crim. Rep. 606; *State v. Cunningham*, 94 N. C. 824; *State v. Ford*, 30 La. Ann. 311.

It is not incumbent upon the courts to supply the omissions of penal legislation.

36 Cyc. 1113; *Com. v. Gouger*, 21 Pa. Super. Ct. 229; *Coe v. Lawrence*, 1 El. & Bl. 517, 22 L. J. Q. B. N. S. 140, 17 Jur. 1115, 1 Week. Rep. 146; *Monaghan v. State*, 66 Miss. 513, 4 L.R.A. 800, 6 So. 242; *Siegel v. People*, 106 Ill. 89; *Southwestern R. Co. v. Cohen*, 49 Ga. 627; *State v. Cleveland*, C. C. & St. L. R. Co. 157 Ind. 288, 61 N. E. 669; *Maxwell v. State*, 40 Md. 293; *Woodbury v. Berry*, 18 Ohio St. 456; *Rex v. Barham*, 8 Barn. & C. 104; *Green v. Wood*, 7 Q. B. 185; *London County Council v. Aylesbury Dairy Co.* [1898] 1 Q. B. 106, 67 L. J. Q. B. N. S. 24, 77 L. T. N. S. 440, 61 J. P. 759; *Stewart v. State*, 95 Miss. 627, 49 So. 615; *Yerger v. State*, 91 Miss. 802, 45 So. 849; *State v. Leo*, 108 La. 496, 32 So. 447, 15 Am. Crim. Rep. 272; *State v. Finch*, 37 Minn. 433, 34 N. W. 905; *Smith v. State*, 65 Md. 215, 7 Atl. 50; *Hobbs v. McLean*, 117 U. S. 579, 29 L. ed. 945, 6 Sup. Ct. Rep. 870.

By pleading guilty the appellant was not only placed in jeopardy, but was convicted, and is entitled to plead a former conviction.

Boswell v. State, 111 Ind. 47, 11 N. E. 788; *Shepherd v. People*, 25 N. Y. 420; *Com. v. Goddard*, 13 Mass. 455; *People v. Woods*, 84 Cal. 441, 23 Pac. 1119; 1 Bishop, New Crim. Law, 1892 ed. § 1049-2.

Mr. Clarence R. Wilson, for United States:

The plea was properly rejected.

Territory v. Miller, 4 Dak. 173, 29 N. W. 7; *United States v. Cella*, 37 App. D. C. 423; *Wartner v. State*, 102 Ind. 51, 1 N. E.

65, 5 Am. Crim. Rep. 178; *Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124, 5 Am. Crim. Rep. 273.

Mr. J. M. Proctor also for the United States.

Van Orsdel, J., delivered the opinion of the court:

Appellant Nathaniel Green, defendant below, was indicted for the crime of rape in the supreme court of the District of Columbia. On arraignment, defendant pleaded guilty, which plea was refused by the court, and he was tried by a jury as upon a plea of not guilty. The jury returned a verdict of guilty, with the death penalty. The court accordingly sentenced the defendant to be executed. Exception was taken to the refusal of the court to accept a plea of guilty, which is the only question presented for review.

Section 808 of the District Code [31 Stat. at L. 1322, chap. 854] provides: "Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not less than five nor more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by hanging: provided further, That if the jury fail to agree as to the punishment, the verdict of guilty shall be received, and the punishment shall be imprisonment as provided in this section."

Much has been said at bar and in an exceptionally able brief by counsel for defendant of the right of a defendant to plead guilty in a capital case when there is no statutory provision to the contrary, and thus avoid an issue for trial by jury. It is unnecessary to determine whether a defendant, in the absence of a law to the contrary, has the right to enter a plea of guilty in a criminal proceeding. Where the statute permits the plea of guilty, and such a plea is accepted and entered by the court in a criminal case, it is the highest kind of conviction of which the case admits. In that instance, there is nothing left for the court but to award judgment. In this case, however, we are confronted by a statutory provision which we think in effect forbids the acceptance of a plea of guilty for the crime of rape in this District. Section 808, supra, specifically provides that "in any case of rape" the jury may impose the death penalty. As further evidence of the intention of Congress that all such cases shall be tried to a jury, the second proviso imposes the smaller punishment upon a verdict of guilty where the jury are unable to agree 46 L.R.A. (N.S.)

as to the imposition of the death penalty. The statute, in other words, admits of one of three different verdicts,—guilty, without assessment of the death penalty, in which case the court imposes a sentence of imprisonment in his discretion of from five to thirty years; guilty, with the death penalty, when the court must pass judgment of death by hanging; and guilty with division of opinion in the jury as to the imposition of the death penalty, in which case the court shall pass judgment as in the first instance; but in all cases the court must have the verdict of the jury upon which to base its judgment.

In Indiana, where the statute in capital cases prescribes the punishment of death or imprisonment, in the discretion of the jury, it has been held that a defendant in a capital case must be tried by jury, and if a plea of guilty is entered, a jury must still try the issues to determine the degree of punishment. *Wartner v. State*, 102 Ind. 51, 1 N. E. 65, 5 Am. Crim. Rep. 178. The difference between the Indiana statute and the one under consideration is that there the whole question of punishment is left to the jury, while here the question of punishment is with the court, except in such cases as the jury may assess the death penalty. It logically follows that to determine those cases, each case must, of necessity, be submitted to a jury. The court is therefore without power to accept a plea of guilty upon an indictment charging rape in this District.

Statutes depriving a defendant of the right to plead guilty, where the alternative punishment of death or imprisonment is left to the discretion of the jury, are upheld upon the theory that he cannot be prejudiced, in that the constitutional safeguard of a trial by jury is accorded him. Under the present statute, however, when defendant was deprived of the right to plead guilty, it became possible, as it does in all cases of rape in this District, for the jury to impose the death penalty, whereas could he have pleaded guilty, the court could have imposed only the punishment of imprisonment. The imposition of this limitation upon a person charged with crime is within the power of Congress, and deprives a defendant of no constitutional right. If a plea of guilty may be accepted under the present statute, it places it within the power of defendants, in just such cases as the jury would be likely to assess the higher punishment, to escape such punishment by entering a plea of guilty, thereby nullifying the whole intent of Congress.

The absurdities to which the contention of counsel for defendant would lead are well expressed in the opinion of the learned trial

judge, as follows: "The contention of the defendant is that there was no issue to be submitted to the jury, inasmuch as his plea admitted his guilt; that hence there could be no verdict and consequently no addition of the death penalty. His construction of the statute is that the legislature said to him, 'If you will plead guilty, you shall be imprisoned only; if you plead not guilty and are found guilty by the jury, you may be hanged;' that, faced with this alternative, he plead guilty and is entitled to the milder punishment. Is that a construction that can properly and legally be placed upon the statute? Is it legitimate to suppose that the legislature has put a penalty upon pleading not guilty? Would a legislature have a constitutional right to penalize an accused person for pleading not guilty? Suppose the legislature should say, 'The punishment of this crime shall be imprisonment only, if the accused will confess his guilt in open court, but if he will not confess, and insists upon the government proving its case against him, then, in case he is convicted, he shall be hanged.' Would such an act be constitutional? Could any court in such circumstances ever have any assurance that a plea of guilty was a voluntary plea? If a judge should say to the accused, 'If you will plead guilty, I will give you a lighter sentence than I shall give you if you plead not guilty, and are convicted,' what would be the result? Any sentence passed upon a plea of guilty thus obtained would be set aside. Can we then suppose that the legislature intended to do such a thing? Nobody doubts the right and power of the legislature to require the guilt of the accused to be ascertained by the verdict of a jury, even if he pleads guilty. The only question is whether it has exercised that power in the case of this statute. If we say that it has not,—if we hold that it has offered the accused a reward for pleading guilty, or threatened him with severer punishment if he shall require the case to be proved against him,—then we must hold that the provision is unconstitutional and void as violating the clause of the Federal Constitution in the 6th Article of Amendment, which guarantees that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.' For how can one be said to be left in the free enjoyment of a jury trial when the statute subjects him to a severer punishment on being found guilty by a jury than when he is adjudged guilty on his own plea?"

The judgment is affirmed.

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FLORIDA SUPREME COURT.

CITY OF GAINESVILLE, Appt.,

v.

GAINESVILLE GAS & ELECTRIC POWER COMPANY.

(— Fla. —, 62 So. 919.)

Mandamus — to compel performance of public service.

1. The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public.

Electricity — duty to furnish.

2. A corporation engaged in furnishing electricity to a municipality or its inhabitants and using public streets or exercising other franchises or privileges in doing so is thereby performing services of a public nature, within the meaning of the Constitution and laws of this state, and such a corporation is subject to lawful governmental regulations to enforce its duties to the public it undertakes to serve.

Public service — compulsory performance — necessity of contract.

3. An express contract is not essential to establish reciprocal rights between a public service company and the public it undertakes to serve. Such rights arise by implication of law.

Same — duty to render.

4. Where a public utility company uses franchises and assumes the duty imposed by law to render a reasonably adequate service during the time its rights and duty may lawfully continue, such duty may be enforced by appropriate legal procedure, where no adequate excuse for nonperformance is appropriately shown.

Same — confiscatory governmental regulations — effect.

5. Allegations that governmental regulations are in effect confiscatory and unduly arbitrary and burdensome to a public service company do not justify the company in arbitrarily discontinuing the public service, for the company has adequate remedies by due course of law to protect itself against the enforcement of illegal governmental regulations.

Headnotes by WHITFIELD, J.

Note. — Right of electric supply company, in absence of contract, to discontinue service generally.

As indicated in the title, this note does not include the question of the right of an electric supply company to discontinue its service to particular individuals as distinguished from the public generally or the business as a whole.

GAINESVILLE v. GAINESVILLE GAS & ELECTRIC POWER Co. seems to be the only case which has passed squarely upon the exact question thus presented, but a similar question has arisen in connection with

Same — compensation — equal protection of laws.

6. While it is the duty of a public service company to observe all lawful municipal regulations, the company has a right to a reasonable compensation for the public service it renders and to the equal protection of the laws in every department of the government.

Same — illegal regulation — effect.

7. Illegal municipal regulations are not binding; but persons and corporations cannot be permitted to arbitrarily assume to remedy an alleged wrong by refusing to render a public service voluntarily undertaken.

Party — compelling public service.

8. The municipality is a proper party in proceedings to require a public service company to continue the performance of its public service in a reasonably adequate manner for the benefit of the city and its inhabitants.

(May 20, 1913.)

A PPEAL by complainant from an order of the Circuit Court for Alachua County dissolving a temporary injunction which had been granted to restrain defendant from discontinuing its business as a public service corporation. Reversed.

The facts are stated in the opinion.

Mr. Robert E. Davis, for appellant:

A public service corporation cannot discontinue the service which it undertook.

Gibbs v. Consolidated Gas Co. 130 U. S. 396-411, 32 L. ed. 979-985, 9 Sup. Ct. Rep. 553; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; Freeman v. Macon Gaslight & Water Co. 126 Ga. 843, 7 L.R.A.(N.S.) 917, 56 S. E. 61;

public service corporations organized for the purpose of supplying commodities other than electricity. Among these is the question of the right of a municipality, in the absence of contract, to restrain a natural gas company from discontinuing the business of supplying gas, which arose in East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332. In the note appended to the L.R.A. report of this case will be found a discussion of the principles applied therein. In connection with this case, as well as GAINESVILLE v. GAINESVILLE GAS & ELECTRIC POWER Co., the language used by the supreme judicial court of Massachusetts in the recent case of Atty. Gen. ex rel. Corporation Comrs. v. Haverhill Gaslight Co. — Mass. —, 101 N. E. 1061, is of interest. In the latter case a gas company had obtained a franchise from the state, and the action was brought to restrain a sale of its franchise and property so that it would 46 L.R.A.(N.S.)

Sammons v. Kearney Power & Irrig. Co. 77 Neb. 580, 8 L.R.A.(N.S.) 404, 110 N. W. 308; Tacoma Hotel Co. v. Tacoma Light & Water Co. 3 Wash. 316, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; Rushville v. Rushville Natural Gas Co. 132 Ind. 575, 15 L.R.A. 321, 28 N. E. 853; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 2 L.R.A. 639, 34 N. E. 818; Coy v. Indianapolis Gas Co. — Ind. —, 46 N. E. 17; 3 Dill. Mun. Corp. 5th ed. §§ 1297, 1298; Washington v. Washington Water Co. 70 N. J. Eq. 254, 62 Atl. 390; Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410; McEntee v. Kingston Water Co. 165 N. Y. 27, 58 N. E. 785; Gallagher v. Equitable Gaslight Co. 141 Cal. 699, 75 Pac. 329; Gordon & Ferguson v. Doran, 100 Minn. 343, 8 L.R.A.(N.S.) 1049, 111 N. W. 272; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 60 L.R.A. 822, 66 N. E. 436; Vanderberg v. Kansas City Missouri Gas Co. 126 Mo. App. 600, 105 S. W. 17; State ex rel. Ferguson v. Birmingham Waterworks Co. 164 Ala. 586, 27 L.R.A.(N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951; Vicksburg Water-Works Co. v. Yazoo & M. Valley R. Co. 96 Miss. 807, 51 So. 915; Mugge v. Tampa Waterworks Co. 52 Fla. 371, 6 L.R.A.(N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81; Re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; Graves v. Key City Gas Co. 83 Iowa, 714, 50 N. W. 283; Horsky v. Helena Consol. Water Co. 13 Mont. 229, 33 Pac. 689; Whiteman v. Fayette Fuel-Gas Co. 139 Pa. 492, 20 Atl. 1062; Wood v. Auburn, 87 Me. 287, 39 L.R.A. 376, 32 Atl. 906; Bailly v. Fayette Gas-Fuel Co. 193 Pa. 175, 44 Atl. 251; Ta-

not deprive itself of its facilities for doing business; and the court in holding that it could not so deprive itself of its facilities for continuing to fulfil its duty to the public, without legislative authority, said: "A public service corporation by accepting the rights and privileges conferred by its act of incorporation, and by entering into the enjoyment of its franchises, undertakes to perform all the public duties required of it. It cannot surrender its franchises, nor disable itself from the performance of its public functions, without the consent of the legislature."

Another question analogous to that involved in the GAINESVILLE CASE is the right of a street railway to discontinue a line, in the absence of statutory or contractual provision to the contrary. This is treated in the note to Stiles v. Citizens' Electric Street R. Co. 19 L.R.A.(N.S.) 865.

G. J. C.

coma Hotel Co. v. Tacoma Light & Water Co. 3 Wash. 316, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; Brown v. Frankfort, 10 Ky. L. Rep. 462, 9 S. W. 384, 702.

Relief may also be had against a violation of duty by general public service corporations, such as gas, water, and telephone companies, when the right of the individual complainant will be affected thereby.

6 Pom. Eq. Jur. § 633, pp. 1061, 1062; Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 60 L.R.A. 822, 66 N. E. 436; Taylor v. Salmon, 4 Myl. & C. 141.

The proper and usual mode of relief against an alleged unconstitutional rate fixed by the legislature or a commission or municipal council is by a bill in equity asserting the unreasonableness of the rate and its conflict with the Constitution of the United States and also of the state, if such be the fact.

3 Dill. Mun. Corp. 5th ed. § 1328; 5 Enc. Pl. & Pr. p. 632; Sanford v. Cloud, 17 Fla. 557.

Messrs. T. W. Fielding and W. S. Broome, for appellee:

Complainant must show that it has a right that has been violated, before it can obtain an injunction.

22 Cyc. 749; Pensacola & G. R. Co. v. Spratt, 12 Fla. 26, 91 Am. Dec. 747.

If it appears from complainant's own statement of its case that it will not be entitled to the permanent relief sought, or that its right to such relief will depend upon a contingency not yet determined, no preliminary injunction should issue.

22 Cyc. 754; 10 Enc. Pl. & Pr. 994; Durham v. Edwards, 50 Fla. 495, 38 So. 926; Godwin v. Phifer, 51 Fla. 441, 41 So. 597; Johnson v. McKinnon, 45 Fla. 388, 34 So. 272; Stockton v. National Bank, 45 Fla. 590, 34 So. 897; Pinney v. Pinney, 46 Fla. 559, 35 So. 95; Herrin v. Brown, 44 Fla. 782, 103 Am. St. Rep. 182, 33 So. 522. Defendant has the right to require compliance with reasonable rules and regulations, and to demand pay or security for its lights, before it is bound to furnish lights or current.

14 Am. & Eng. Enc. Law, 2d ed. 930; 10 Am. & Eng. Enc. Law, 2d ed. 869; Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; Williams v. Mutual Gas Co. 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236.

Courts interfere with great reluctance with the free use and enjoyment of property by an owner or occupant, and will only interfere where it is clearly made out that the use and enjoyment is injurious to the rights of others.

46 L.R.A. (N.S.)

Shivery v. Streeper, 24 Fla. 103, 3 So. 865; McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Paterson Gaslight Co. v. Brady, 27 N. J. L. 245, 72 Am. Dec. 360.

Whitfield, J., delivered the opinion of the court:

The city of Gainesville obtained an injunction restraining the Gas & Electric Company "from closing down or discontinuing its public service business" of furnishing electricity to the city and its inhabitants. A demurrer to the bill of complaint was interposed. This appeal is from an order "that the injunction be and the same is dissolved, with the right of the complainant to amend the bill in ten days from this date, or the bill may be dismissed without prejudice to such other action as the complainant may be advised is proper." The question to be determined is whether there was error in dissolving the injunction.

The bill of complaint alleges, in effect: That the municipality has all the usual powers of cities in this state, and is authorized "to provide for the lighting of the streets of said city, and to provide for the lighting of the said city by gas and other illuminating material, and to do and perform all such other acts as shall seem necessary and best adapted to the improvement and general interest of said city, or as shall be necessary for the health, convenience, and safety of its citizens." That a charter was granted by the state to the defendant as a corporation, authorizing the corporation to exist for 99 years, and, among other things, to engage in the business of manufacturing, generating, and selling electric current for lighting and power purposes; such business to be engaged in in the city of Gainesville. That thereafter the company erected "and constructed within the corporate limits of said city of Gainesville an electric lighting and power plant, and by and with the permission of said city aforesaid, erected and constructed its poles and wire for the distribution of electric current over and along a large number of the streets of said city, and from that date until the present time has been continuously engaged in the manufacture and sale of electricity for illuminating and power purposes. That during all that time and to this date the said Gainesville Gas & Electric Power Company have been continuously furnishing electricity to said city for the lighting of the streets, public places, and public buildings of said city, and are now furnishing electricity therefor; and that during all of said time it has furnished electricity to the inhabitants of said city who desired to procure the same,

and who paid therefor, and that complied with the rules and regulations of such company; and that continuously from the time when said Gainesville Gas & Electric Power Company began the manufacture, generation, and sale of such electricity it has sought to increase the number of consumers of its products among the inhabitants of said city, and to induce them to abandon other systems and methods of illumination, and to become consumers of its electric products; and that at the present time there are about six hundred sixty (660) dwellings, stores, and other buildings within said city which are supplied by it with electricity as the only means of illumination. That, in addition thereto, said Gainesville Gas & Electric Power Company have been furnishing and selling electric motors for the furnishing of power for the operation of manufacturing plants and ginneries, and has equipped and supplied it its motors to cotton gins in said town which it is estimated will gin during the coming season in the aggregate about 1,000 bales of cotton.

"That there is also located in said city the University of the State of Florida, a state institution of learning, which now consists of two dormitories with the aggregate of one hundred fifty-six (156) bedrooms, four academic buildings completed and in use, two others that will shortly be completed and ready for use, at which university there will be in the coming scholastic year, beginning with the month of September, an attendance of from three hundred fifty to four hundred students from about forty-four counties of this state. That in some of the academic buildings electricity is a necessity for the operation of machinery and appliances used in the course of study pursued therein, and in all thereof it is the sole and only means of illumination. That the said Gainesville Gas & Electric Power Company has been supplying said University of Florida with electricity for illumination and power purposes since the location and construction thereof within said city, and that all the buildings thereon have been constructed solely for the use of electricity for the illumination thereof, and that the said Gainesville Gas & Electric Power Company has been receiving from said university between two hundred and two hundred and fifty dollars per month in payment for the electric current it has furnished therefor." That said company is the only "person, firm, or corporation in the said city of Gainesville engaged in the manufacture, generation, and sale of electricity. That it has acquired and holds a valuable easement from said city in the permission granted it to use and in the use of the streets of said city wherein it has

erected its poles and placed its wires for the purpose of conveying and by means of which it conveys its electric current, and that as a corporation authorized by the state of Florida to engage in the business of supplying a public utility it is the duty of said Gainesville Gas & Electric Power Company to continue to supply electric current as aforesaid to said city and those of its inhabitants who are consumers thereof, and that it is without power or authority to cease and discontinue such service to the said city, or such of its inhabitants who are consumers thereof, and that said city of Gainesville will be without ability to light the streets, or to properly protect the lives and property of its inhabitants. That such of its inhabitants who are consumers of electric current will be without adequate means for the illumination of their homes and places of business. That the producers of cotton who rely upon the ginning thereof by the ginneries located in said city will be obliged to haul their products for long distances to reach other ginneries, and that the operation of the university of the state, the giving of its course of study, and the opportunity properly to pursue the same, will be greatly impaired and retarded in the event the said Gainesville Gas & Electric Power Company shall cease the manufacture and sale of electricity as it has announced its intention so to do, and that neither the said city of Gainesville, nor the other consumers of electricity among its inhabitants as aforesaid, can be adequately compensated in damages in the event of the wrongful discontinuance of the manufacture and sale of electricity by the said Gainesville Gas & Electric Power Company, and that your orator is without adequate remedy at law in the premises." "That the company has published its intention to discontinue the public service it has undertaken to perform."

The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public. *State ex rel. Ellis v. Tampa Waterworks Co.* 57 Fla. 533, text 539, 22 L.R.A. (N.S.) 680, 48 So. 639.

A corporation engaged in furnishing electricity to a municipality or its inhabitants, and using public streets or exercising other franchises or privileges in doing so, is thereby performing services of a public nature, within the meaning of the Constitution and laws of this state; and such a corporation is subject to lawful governmental regulations to enforce its duties to the public it undertakes to serve. Such a corporation is manifestly a "public service" or "public utility" corporation, and is subject to the rules of law applicable to corporations or

companies engaged in performing or rendering service of a public nature. See 1 Wyman, Pub. Ser. Cor. § 113.

As the gas and electric company had received and accepted from the state a corporate charter authorizing it to engage in the business of manufacturing, generating, and selling electric current for lighting and power purposes to the municipality and its inhabitants, and had, by and with the permission of the city, constructed its plant, using the streets of the city for its poles and wire by means of which the public service of furnishing electric current to the city and its inhabitants for lighting and power purposes was performed, for which the company was entitled under the Constitution and laws of this state to receive a reasonable compensation in return for service rendered, the company assumed the duty imposed by implication of law to render a reasonably adequate service during the time its rights and duty may lawfully continue, and such duty may be enforced where no adequate excuse for nonperformance is appropriately shown. See *Zanesville Gaslight Co. v. Zanesville*, 47 Ohio St. 35, 23 N. E. 60. An express contract is not essential to establish reciprocal rights between a public service company and the public it undertakes to serve. Such rights arise by implication of law. See *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 650, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 Ann. Cas. 359.

The defense undertaken to be shown when the injunction was dissolved is in substance that the ordinances passed by the city regulating the company's service and compensation are in effect confiscatory and unduly arbitrary, and burdensome to the company. This is not a sufficient reason for a discontinuance of the public service. While it is the duty of the company to observe all lawful municipal regulations, the company has a right to receive a reasonable compensation for the public service it renders to the city and its inhabitants, and to the equal protection of the laws in every department of the government. If the regulations imposed by the city are in law and in fact illegal for any reason, the company has its complete and adequate remedy by appropriate proceedings; but the company, being engaged in rendering a public service, must continue to do so in a reasonably adequate manner until relieved of its duty by due process of law. Illegal municipal regulations are not binding; but persons and corporations cannot be permitted to arbitrarily assume to remedy an alleged wrong by refusing to render a public service voluntarily undertaken. The service to the public must be performed, and 46 L.R.A.(N.S.)

the law will, upon proper proceedings, enforce the right to reasonable compensation for service rendered. An ordinary action at law would not afford an adequate remedy to the public. Under the liberal rules of procedure recognized in this state, the company may, by cross bill or other appropriate steps, secure a determination and enforcement of its right to reasonable compensation and to equal protection of the laws.

The municipality is a proper party in proceedings to require the public service company to continue the performance of its public service in a reasonably adequate manner for the benefit of the city and its inhabitants. Since it clearly appears that the company is actually enjoying franchises and has undertaken to render public service, it is not essential that the particular terms and limitations under which the service is being rendered should be alleged in proceedings to enforce a continuance of the public service actually engaged in; there being nothing to indicate that the rights of the company had expired or had been lawfully surrendered or forfeited, but inferences of a continuing right and duty being fairly deducible from the proceedings.

While the public service must be performed in a reasonably adequate manner, unlawful regulations as to rates should not be enforced. The court may, on a proper showing, enjoin illegal regulations of the rates to be charged; the duty of the company being to render the service undertaken, and its right being to charge a reasonable compensation for service rendered.

The decree dissolving the injunction is reversed, and the cause is remanded, with directions to retain the bill of complaint for the purposes of appropriate injunction orders, with leave to the defendant company, by cross bill or other procedure, to test the validity of the municipal regulations of which it complains.

Shackleford, Ch. J., and Taylor, Cockrell, and Hocker, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, Plff. in Err.,

v.

FRANK STARR.

(— C. C. A. —, 206 Fed. 157.)

Master and servant — supplying borrowed ladders — liability for accident.

1. A telephone company which furnishes ladders to men engaged in installing wires

in a city is responsible for the condition of those borrowed by the men by direction of its foreman when its own supply gives out. Same — ladder — simple appliance.

2. Ladders of more than ordinary length furnished by a telephone company for the use of its employees who are engaged in installing wires in a city are not simple appliances within the rule which relieves the master from responsibility for the condition of such appliances.

Same — absence of inspection — effect.

3. A master who furnishes to an employee, without inspection, a ladder of unusual length for use in the employment, is responsible for injury to the employee through the breaking of the ladder because of a defect which reasonable inspection would have disclosed.

Trial — jury — assumption of risk.

4. The jury must determine whether or not the defect in a ladder furnished an employee for use in his employment, which caused an injury to the employee, was so obvious that the employee assumed the risk.

(July 7, 1913.)

ERROR to the District Court of the United States for the Northern Division of the Western District of Washington to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert, Circuit Judge, and Wolverton and Dietrich, District Judges.

Messrs. Pillsbury, Madison, & Sutro and Hughes, McMicken, Dovell, & Ramsey, for plaintiff in error:

The two pieces of ladder were secured by McCartney and Filer. These men, as well as Smith, the so-called foreman, were fellow servants of the plaintiff below.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Ryan v. Smith, 29 C. C. A. 427, 56 U. S. App. 604, 85 Fed. 758; Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.

The distinction is well recognized between those cases where the master undertakes to furnish the appliances and those where the servants secure them for themselves.

Shearm. & Redf. Neg. § 195; Burns v. Sennett, 99 Cal. 363, 33 Pac. 918, 13 Am. Neg. Cas. 486; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51

Am. St. Rep. 604, 31 Atl. 619, 16 Am. Neg. Cas. 673.

Under the adjudicated cases, recovery is not permitted because of an accident occasioned by the use of as simple an appliance as a ladder.

McMillan v. Minetto Shade Cloth Co. 134 App. Div. 28, 117 N. Y. Supp. 1082; Hart v. Clinton, 115 App. Div. 761, 100 N. Y. Supp. 1092; Smith v. Green Fuel Economizer Co. 123 App. Div. 672, 108 N. Y. Supp. 45; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; American Car & Foundry Co. v. Nachand, 47 Ind. App. 204, 93 N. E. 1083; Cole v. Spokane Gas & Fuel Co. 66 Wash. 393, 119 Pac. 831; St. Louis & S. F. R. Co. v. Mayne, — Mo. —, 42 L.R.A. (N.S.) 645, 127 Pac. 476; Rahm v. Chicago, R. I. & P. R. Co. 129 Mo. App. 679, 108 S. W. 572; Gulf, C. & S. F. R. Co. v. Larkin, 93 Tex. 225, 1 L.R.A. (N.S.) 944, 82 S. W. 1026; Rogers v. Galveston City R. Co. 76 Tex. 502, 13 S. W. 541; Longpre v. Big Blackfoot Mill. Co. 38 Mont. 99, 99 Pac. 131; Higgins v. Southern P. Co. 26 Utah, 164, 72 Pac. 690, 14 Am. Neg. Rep. 476; Patnode v. Harter, 20 Nev. 303, 21 Pac. 679; Meyer v. Ladewig, 130 Wis. 566, 13 L.R.A. (N.S.) 684, 110 N. W. 419; Mattson v. Minnesota & N. W. R. Co. 98 Minn. 296, 108 N. W. 517; Lynn v. Glucose Sugar Ref. Co. 128 Iowa, 501, 104 N. W. 577; Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497; Corcoran v. Milwaukee Gaslight Co. 81 Wis. 191, 51 N. W. 328; Tompkins v. Marine Engine & Mach. Co. 70 N. J. L. 330, 58 Atl. 393, 16 Am. Neg. Rep. 518; Westinghouse Electric & Mfg. Co. v. Heimlich, 62 C. C. A. 92, 127 Fed. 92; Gowen v. Harley, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 975; Borden v. Daisy Roller Mill Co. 98 Wis. 407, 67 Am. St. Rep. 816, 74 N. W. 91; Sheridan v. Gorham Mfg. Co. 28 R. I. 256, 13 L.R.A. (N.S.) 687, 66 Atl. 576; Soderburg v. Wells, 57 Wash. 281; 106 Pac. 751; Deaton v. Abrams, 60 Wash. 1, — L.R.A. (N.S.) —, 110 Pac. 615; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Cole v. Spokane Gas & Fuel Co. 66 Wash. 393, 119 Pac. 831; McGrath v. Walsh, 4 N. Y. Supp. 705; Henggler v. Cohn, 68 N. J. L. 240, 52 Atl. 280; Jenney Electric Light & P. Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; McGill v. Cleveland & S. W. Traction Co. 79 Ohio St. 203, 19 L.R.A. (N.S.) 793, 86 N. E. 989, 128 Am. St. Rep. 705.

The plaintiff below assumed the risk of the frailty of the ladder, and was guilty of contributory negligence in using it as he did.

Flaherty v. The Truro, 31 Fed. 158.

Note. — As to liability of master for injury from defect in simple tool, see note to Parker v. W. C. Wood Lumber Co. 40 L.R.A. (N.S.) 832.
46 L.R.A. (N.S.)

Messrs. O. A. Reynolds, Harry Balinger, and Charles T. Hutson, for defendant in error:

Where the master undertakes to furnish the tools and appliances, he is bound to use reasonable care to see that such appliances are reasonably safe for the use intended.

4 Thomp. Neg. §§ 3791, 3792, 3949, 3950; Flanigan v. Guggenheim Smelting Co. 63 N. J. L. 647, 44 Atl. 762, 7 Am. Neg. Rep. 113; DeMaries v. Jameson, 98 Minn. 453, 108 N. W. 830, 20 Am. Neg. Rep. 604; 1 Labatt, Mast. & S. §§ 171, 172; Ralph v. American Bridge Co. 30 Wash. 500, 70 Pac. 1098.

The master is under an affirmative duty to his servant to make a reasonable, diligent, and skilful inspection, and to resort to reasonable tests to see that any scaffold, ladder, etc., upon which he requires his servant to work shall bear the weight to which he subjects it.

4 Thomp. Neg. § 3947; 1 Labatt, Mast. & S. § 407, 1136; Ohio & P. Milk Co. v. Fehl, 109 C. C. A. 640, 187 Fed. 702; American Smelting & Ref. Co. v. McGee, 84 C. C. A. 573, 167 Fed. 69; Chicago, K. & W. R. Co. v. Blevins, 46 Kan. 370, 26 Pac. 687; Williams v. Garbutt Lumber Co. 132 Ga. 221, 64 S. E. 65; Jones v. Pacific Mills, 176 Mass. 354, 57 N. E. 663. 8 Am. Neg. Rep. 63; Flanigan v. Guggenheim Smelting Co. 63 N. J. L. 647, 44 Atl. 762, 7 Am. Neg. Rep. 113; Ritt v. True Tag Paint Co. 108 Tenn. 646, 69 S. W. 324; Flood v. Western U. Teleg. Co. 39 N. Y. S. R. 674, 15 N. Y. Supp. 400; Twombly v. Consolidated Electric Light Co. 98 Me. 353, 64 L.R.A. 551, 57 Atl. 85, 15 Am. Neg. Rep. 563; Standard Oil Co. v. Bowker, 141 Ind. 12, 40 N. E. 128.

Wolverton, District Judge, delivered the opinion of the court:

The defendant in error, who was plaintiff below, while engaged in cleating a cable through which were carried telephone wires to the side wall of a building in Seattle, Washington, fell from near the top of a ladder to the pavement below, a distance of from 20 to 25 feet, and was severely injured. Starr was in the employ of the Pacific Telephone & Telegraph Company at the time, to perform the service in which he was then engaged. The immediate cause of the accident was a defective round in the ladder, being the second from the top, which gave way. The round consisted of a board from 2½ to 3 inches in width by about three-quarters of an inch in thickness, which was sawed across the grain. With the weight of Starr upon it, it split out with the grain diagonally across the piece. For the injury thus sustained Starr sues to recover dam-

ages. The action is based upon the negligence of the company in furnishing the plaintiff with a defective and unsafe ladder upon which to perform his work, and in failing to properly inspect such ladder, or to exercise reasonable care and precaution in the selection of the same for plaintiff's use. For the particular work in hand a long extension ladder had been brought from the company's supply, and, finding that other ladders were needed, at the direction of George E. Smith, the foreman, two short ladders were picked up in the vicinity, one by Filer and another by McCartney, two men also working with plaintiff, there being six men working at the time. It being made known to Smith that another long ladder was needed, he directed the men to splice the two short ladders picked up by Filer and McCartney. This was done by Starr, the plaintiff, and McCartney, and no defect developed in the splicing. The ladders were spliced the day before the accident occurred.

The following is in effect a brief *résumé* of the testimony so far as deemed pertinent for application of the proper legal principles which control the case:

George E. Smith, who was foreman of the gang that was at work at the time for the defendant company, testified that a majority of the ladders was supplied by the telephone company; that as a general thing he got the ladders, that is, when they were telephone ladders; that it was not always possible to get a sufficient number of ladders from the telephone company, and in that emergency if he (Smith) was around he always told the men to borrow them,—to get them. As respects the ladder in controversy, he further says that it consisted of two pieces; that he knew where the top piece came from,—it was borrowed by Filer a couple of days before the accident; that Filer used the top piece for a while in putting up terminal boxes for connecting wires with the cable, these boxes being from 7 to 8 feet from the ground, and the ladder about 6 feet long; that the ladder was weatherbeaten, the sides being dressed and the boards or crosspieces rough, and the whole ladder was of fir. He further testified that crossgrained sticks are not usually used for rounds of ladders; that he was at the place of the accident substantially every day, and saw the ladders in use during the time before the accident; that he had a conversation with the men, in the presence of Starr, concerning the ladders; that they wanted a longer ladder to get up on the building with, and he told them to splice the two short ladders together and use them; that he did not observe any crossgrained round in the shorter ladder of the two, such

condition not being apparent, and he did not think it would be apparent without a special inspection of the round; that he made no inspection of either of the ladders. On cross-examination he further testified that whenever the men were stringing a cable he was always right there.

Thomas McCartney testified that he was working with Starr at the time; that the extension ladder was furnished by the company; that it was the understanding that the company should furnish the ladder; that it did not always provide a sufficient number of ladders for the use of the men, and when the company failed in that respect the men "used to have to rustle around the alleys and get them;" that this was done by the order of the foreman; that he thought Filer borrowed the short ladder, that being the topmost piece of the spliced ladder, and he (the witness) borrowed the longer piece; that the rounds were nailed to the side pieces of the ladder, not notched in; that he did not observe any crossgrained rounds in the ladder,—they were not apparent to a person with ordinary use of the ladder,—and that the use of a crossgrained piece would not be safe; that the men asked the foreman for some ladders to do the work; that the foreman replied that the men would have to rustle for them, and then, after the ladders were procured, he directed them to be spliced.

R. D. McMellon testified that George Smith was the foreman in charge at the time; that the company was supposed to furnish ladders, though it did not always furnish them; that when the job required a large number of ladders the foreman directed the men to borrow them, and this they did; he heard Smith tell two of the boys to splice the two ladders together; that the ladder in question was unpainted and roughly finished; that he examined the rung of the ladder at the time, and it was broken,—that is, split "kind of crossways," and the larger piece was hanging down,—that was after the accident; that the condition of the board before the accident would have been observable if one had made a close inspection of it.

On cross-examination he testified:

Q. Now, how close an inspection would it have required to see that this rung which broke was crossgrained?

A. Well, I imagine it would have taken a careful examination of it before the accident.

Q. How do you mean; how careful?

A. Well, if a man got right down and probably examined the wood real carefully and close he could have noticed it.

Q. Suppose Smith had examined it to de-

termine whether it was crossgrained or not, what would he have had to have done; would he have had to scrape the timber?

A. I think not.

Q. He wouldn't had to have done that!

A. No.

Q. Would he have had to use a magnifying glass?

A. I wouldn't judge he would have.

Q. You mean to say Smith could have seen it with his naked eye, if he had just taken the ladder in his hand and looked at it?

A. I think he could, yes; if he had looked at it closely.

Q. How long would it have taken him to do that?

A. I shouldn't judge it would have taken very long.

Q. Could he have done it in an instant?

A. No; I think not.

Q. He wouldn't have had to cut into the grain, or anything of that kind?

A. It wouldn't have taken him very long to examine the one rung.

Q. He wouldn't have had to scrape the timber, or cut into it at all?

A. I think not. I don't know. He might have.

Other witnesses—Werner and Dalton—testified along the same line.

The plaintiff testified that he noticed Filer working on the ladder, and that he didn't examine it in particular.

He was asked:

Did such observation as you gave to the ladders, or either of them, disclose any danger about them?

A. No, sir; I thought they was perfectly safe.

And in other respects he testified in like manner as the foregoing witnesses. He also said that Smith, the foreman, could not have told the rung was crossgrained by just glancing at it: "If he had got right down close, and been looking for a crossgrain, he would have found it."

He was asked:

Now, explain that; you think he could have told—you think Smith could have told—so as to have kept you off the ladder, if he had gotten down close to it, and looked at it closer?

A. He could; yes. The same as one of those others were crossgrained and he didn't know it.

The only witness called by the defendant was Filer, who testified in effect that he borrowed the short ladder, and that he considered it rather frail.

At the close of the testimony the defend-

ant moved the court to direct a verdict in its favor, which was denied. Judgment was for plaintiff, and the telephone company prosecutes a writ of error.

It is first contended by counsel for the company that the rule which imposes liability upon an employer who furnishes unsafe appliances has no application here, because the company did not furnish the appliance, but the same was selected by the plaintiff and his fellow servants.

We cannot agree with counsel in this statement as to who furnished the ladders. The strong tendency, if not the great weight of the testimony, is to the effect that the company was to furnish the ladders with which the men were to do their work in adjusting the cable. It was only when the company failed to furnish the requisite number of ladders from its supply that the men were required to get them elsewhere in the vicinity for their use; and this they did generally at the direction of the foreman. The very ladders which were conjoined were procured from the neighborhood by the direction of the foreman, and the splicing was done also at his direction; he designating what ladders should be joined. True, the company did not furnish these specific ladders out of its stock; but it did direct, through its foreman, how they should be procured, and, when procured, it directed their use and the specific manner in which they should be used. In such a case it is far from accurate to say that the company did not furnish the ladders. In legal effect just the contrary is true, for it did furnish them through the direction of the foreman how to obtain them. The situation is no different than if the foreman himself had gone out and got the ladders and turned them over to the men and directed them to use them. The act was the act of the company, for the men's employment and their engagement in the work contemplated that the company should furnish the ladders. The men did not engage to furnish any such tools, instrumentalities, or conveniences. This is a sufficient answer to the contention, without the citation of authorities; it being mainly one of fact. To say the least, the evidence was more than ample to carry the case to the jury upon the hypothesis that the company, and not the men, was to furnish the ladders, and upon the further proposition that the company did in fact furnish the ladders in use by the men, and upon which Starr was working at the time of his fall.

Counsel next insist that a ladder is a simple appliance,—that is, of a class with the ordinary carpenter's or mechanic's tools,—and that accidents occasioned by the use of such simple appliances are not action-

able. Many authorities are cited in support of this proposition, but their application is not apparent, when the nature of the work in which these men were engaged and the kind of ladders required for their service are taken into account. The company was engaged in constructing a telephone system, or a part of it, throughout the city of Seattle, which required the stretching of wires, and cables carrying wires, by adjusting them upon poles and buildings where convenient at a considerable height from the ground. This required the use of ladders not of the ordinary kind, such as stepladders and short contrivances used about the house or by mechanics about their general work, but ladders of more than the ordinary length, and extension ladders calculated to reach high positions, which could be used with safety by men doing that character of work. These are the kind of appliances, and not the simple or ordinary kind, that the company was supposed to furnish for the use of the men engaged in the particular work in hand. And it was the attempt to supply a long ladder, one of unusual length, that led to the accident complained of. So it is not apparent that the doctrine sought to be invoked has application here.

But let us consider the subject from another direction. The master is charged with the duty of observing reasonable care and precaution in furnishing to his employees reasonably safe tools and implements with which to do their work. The duty is not absolute to provide reasonably safe tools and implements, for he is not an insurer on that score, but to exercise reasonable care and forethought in providing such tools and implements as are reasonably suitable and safe for the work. When he has done this, he has discharged his bounden duty to his servants and employees. This duty imposes upon the master the responsibility of inspecting these instrumentalities to determine their safety, and here again he may be excused for a failure to discover defects, if he has been reasonably careful and diligent in making the inspection; but he is not to be excused in failure to make any inspection at all. If a tool or appliance is defective, and the defect is discoverable upon a careful scrutiny and examination, such as a reasonably prudent and careful man would make under like circumstances, the master would be at fault in furnishing such a tool or appliance to his workmen, and his failure to inspect could not help him. It would injure him, rather, as he would be guilty of a neglect of duty. If, however, the defect was latent in character, and not ordinarily discoverable by reasonable inspection, then he could

not be held accountable. The duty to make the inspection, however, would remain, though, if the defect was of that character that a reasonable inspection would not disclose it, there could, of course, be no liability for failing to inspect.

The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation. He assumes none that may arise from latent defects in appliances not apparent from casual observation, which appliances it is the duty of the master to furnish, and to exercise reasonable care with reference to their selection.

The common tools doctrine is but an adjunct of the doctrine of the assumption of risk. If the tools are so simple that their mechanism, structure, and defects, if they have any, are as obvious to the workman as to the master, then and upon this account he assumes the risks attending the use of them. As is said in *Vanderpool v. Partidge*, 79 Neb. 165, 13 L.R.A. (N.S.) 668, 112 N. W. 318: "The reason for the rule [the common tools rule] is that any defect in such simple tools or appliances would be as obvious to the servant as to the master."

But the rule can have no application where the appliance is of such character as that it cannot be classified as a simple tool or implement in mechanical use. In such a case the ordinary rule applies that the workman assumes such risks only as are open and obvious while pursuing his work, and he assumes no risks that are not apparent to the senses in that way. It is not incumbent upon him to make an inspection to determine the safety of implements and appliances furnished him in the course of his employment by the master. That is the duty of the master, not of the workman.

These principles are discussed and applied in the following cases of more or less analogy to the present: *Ohio & P. Milk Co. v. Fehl*, 109 C. C. A. 640, 187 Fed. 792; *Williams v. Garbutt Lumber Co.* 132 Ga. 221, 64 S. E. 65; *Jones v. Pacific Mills*, 176 Mass. 354, 57 N. E. 663, 8 Am. Neg. Rep. 63; *Flood v. Western U. Teleg. Co.* 61 Hun, 619, 39 N. Y. S. R. 674, 15 N. Y. Supp. 400; *Twombly v. Consolidated Electric Light Co.* 98 Me. 353, 64 L.R.A. 551, 57 Atl. 85, 15 Am. Neg. Rep. 563.

The conclusion of the court in the latter case is peculiarly applicable here. It is as follows: "And we think it was fairly open to the jury to find that the defective condition of the round might have been discovered had it been suitably inspected; not, perhaps, by such an inspection as would naturally be given to it by the workman 46 L.R.A. (N.S.)

upon it, whose duty it was to work, not to inspect, and who might lawfully rely upon the presumption that the master had performed its duty, but by such an inspection on the part of the master as reasonably would be necessary to make sure that an appliance upon which the servant was to risk his life or limb every time he used it was reasonably safe."

These considerations lead to the conclusion that the real question was one of assumption of risk on the part of Starr in the use of this ladder, and that the evidence adduced developed a cause proper to be submitted to the jury, and not one for the court to determine as matter of law.

Likewise the question whether the plaintiff was guilty of contributory negligence under the evidence was one for the jury, and not for the court.

Lastly, it is insisted that plaintiff failed to prove his cause of action. What has been said already is sufficient to indicate that the proofs offered were quite sufficient upon which to submit the cause to the jury.

Affirmed.

MARYLAND COURT OF APPEALS.

HENRY F. WALTERS et al., Appts.,

v.

BALTIMORE & OHIO RAILROAD COMPANY et al.

(120 Md. 644, 88 Atl. 47.)

Evidence — general issue — altering street grade — admissibility of ordinance.

1. An ordinance authorizing the construction of a bridge approach in a public street is admissible under the general issue in an action to hold the municipality and the railroad company constructing the bridge liable for injuries thereby caused to the property of an abutting owner.

Highway — change of grade — taking property — joint liability.

2. A municipal corporation and a railroad company which jointly undertake to elevate the grade of a street so as to abolish a grade crossing of the railroad track are both liable in case the improvement is a

Note. — As to an abutter's right to compensation for railroads in street, see note to *Rasch v. Nassua Electric R. Co.* 36 L.R.A. (N.S.) 673, and subdivision IX. thereof, as to recovery where railroad changes the grade of streets; see also subdivision IV. of that note.

See also note to *Shrader v. Cleveland, C. C. & St. L. R. Co.* 26 L.R.A. (N.S.) 226, as to the liability of railroad company to abutting owner for damages from change of grade of highway necessary to carry it across the track.

taking of the property rights of abutting owners.

Eminent domain — construction of bridge approach — cutting off access — right to compensation.

3. The construction of a bridge approach in a public street for the purpose of abolishing a grade crossing of railroad tracks, in such a manner as to cut off the access of an abutting owner from the lower portion of his building to the street, and to shut off the light and air therefrom, is a taking within the meaning of a constitutional provision requiring compensation to be made for property taken for public use.

Appeal — joint defendant — establishing individual liability.

4. Upon the direction of a verdict in favor of both defendants in an action against a city and a railroad company for damages to abutting property by the construction of an approach to abolish a grade crossing of the railroad tracks, the appellate court, in reversing the judgment, cannot place the entire liability on one defendant — the exclusion of the other.

Contract — as to liability for injury to property — effect on owner.

5. An abutting property owner whose property is injured by the construction of a bridge approach to carry a street over a railroad is not bound by the provisions of a municipal ordinance attempting to fix the liability for injuries as between the municipality and the railroad company, so as to prevent his recovery against both.

(May 8, 1913.)

APPEAL by plaintiffs from a judgment of the Baltimore City Court in defendants' favor in an action brought to recover damages for injuries to plaintiffs' property through the change of the grade of a highway. Reversed.

The facts are stated in the opinion.

Messrs. Edward L. Ward and Edward M. Hammond, for appellants:

Governmental agencies are liable for private property actually taken by them, and by taking is meant an entry upon and an appropriation thereof.

Baltimore v. Merryman, 86 Md. 592, 39 Atl. 98; Guest v. Church Hill, 90 Md. 693, 45 Atl. 882; Cumberland v. Willison, 50 Md. 138, 33 Am. Rep. 304.

If the erection of this bridge was for the benefit of the Baltimore & Ohio Railroad Company primarily, instead of for the benefit of the city, then the Baltimore & Ohio Railroad is liable to the appellants for damages to their property.

O'Brien v. Baltimore Belt R. Co. 74 Md. 374, 13 L.R.A. 126, 22 Atl. 141; Lake Roland Elev. R. Co. v. Frick, 86 Md. 259, 37 Atl. 650; Lake Roland Elev. R. Co. v. Webster, 81 Md. 535, 32 Atl. 186; Lake Roland Elev. R. Co. v. Hibernian Soc. 83 Md. 420, 34 Atl. 1017; Webb v. Baltimore & O. R. Co. 114 Md. 216, 79 Atl. 193; State v. Burkett, 119 Md. 609, 87 Atl. 514; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; McQuillin, Mun. Corp. § 1325.

If the Hamburg street bridge has been so located as to inevitably cause injury to the appellants because it is constructed at a place totally unsuited for it, and because it is calculated to occasion injury like the one complained of, then the mayor and city council of Baltimore and the Baltimore & Ohio Railroad Company are liable.

DeLauder v. Baltimore County, 94 Md. 8, 50 Atl. 427; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 377, 20 L.R.A. 126, 26 Atl. 510; Northern C. R. Co. v. United R. & Electric Co. 105 Md. 358, 66 Atl. 444; Hodges v. Baltimore Union Pass. R. Co. 58 Md. 622; Webb v. Baltimore & O. R. Co. 114 Md. 216, 79 Atl. 193; Garrett v. Lake Roland Elev. R. Co. 79 Md. 287, 24 L.R.A. 396, 29 Atl. 830; Talbot v. New York & H. R. Co. 151 N. Y. 155, 45 N. E. 382.

Messrs. S. S. Field and B. H. McKindle, for appellees Mayor, etc., of Baltimore:

When a remedy is given by statute, where no liability existed before, the party must pursue the remedy given by the statute.

4 Dill. Mun. Corp. § 1681.

The Baltimore & Ohio is liable to the plaintiff for the damage actually caused to his property by its act.

Gardiner v. Boston & W. R. Corp. 9 Cush. 1; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; Burritt v. New Haven, 42 Conn. 174; McNulta v. Ralston, 5 Ohio C. C. 330, 3 Ohio C. D. 163; Muhler v. New York & H. R. Co. 197 U. S. 569, 49 L. ed. 877, 25 Sup. Ct. Rep. 522; Kirns v. New York & H. R. Co. 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667; Baltimore & P. R. Co. v. Reaney, 42 Md. 117; Northern C. R. Co. v. Baltimore, 46 Md. 425; O'Brien v. Baltimore Belt R. Co. 74 Md. 374, 13 L.R.A. 126, 22 Atl. 141; Lake Roland Elev. R. Co. v. Webster, 81 Md. 529, 32 Atl. 186; Townsend v. Epstein, 93 Md. 550, 52 L.R.A. 409, 86 Am. St. Rep. 441, 49 Atl. 620; Eyley v. Allegany County, 49 Md. 258, 33 Am. Rep. 249; Van Witsen v. Gutman, 79 Md. 405, 24 L.R.A. 403, 29 Atl. 608; Fletcher v. Auburn & S. R. Co. 25 Wend. 464; Barnett v. Johnson, 15 N. J. Eq. 481; Peddicord v. Baltimore, C. & E. M. Pass. R. Co. 34 Md. 463.

The common-law duty rested upon the railroad company to provide a crossing of this highway at its own expense.

Leopard v. Chesapeake & O. Canal Co. 1

Gill, 222; Northern C. R. Co. v. Baltimore, 46 Md. 425; Eyler v. Allegany County, 49 Md. 269, 33 Am. Rep. 249; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; Burritt v. New Haven, 42 Conn. 174; State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; 3 Elliott, Railroads, §§ 1107-1110; People ex rel. Denver v. Union P. R. Co. 20 Colo. 186, 37 Pac. 610; State ex rel. Munice v. Lake Erie & W. R. Co. 83 Fed. 284; Cook v. Boston & L. R. Corp. 133 Mass. 185; 2 Elliott, Roads & Streets, § 1011; 33 Cyc. 270, 271; Gardiner v. Boston & W. R. Corp. 9 Cush. 1.

The city is not liable, merely because it passed the ordinance authorizing the Baltimore & Ohio to do the work.

4 Dill. Mun. Corp. 5th ed. § 1681.

Mr. Duncan K. Brent, also for appellees.

Stockbridge, J., delivered the opinion of the court:

In 1905 an ordinance was passed by the mayor and city council of Baltimore creating a commission to confer with representatives of the Baltimore & Ohio Railroad Company for the general purpose of abolishing numerous grade crossings of highways of the city in South Baltimore by the tracks of the Baltimore & Ohio Railroad. The object to be accomplished was one of mutual benefit to the public at large and to the railroad company. Numerous conferences appear to have been held between the members of this commission and persons representing the railroad, and the results of these conferences were embodied in an ordinance of the mayor and city council of Baltimore, No. 387, approved on the 16th day of August, 1909. The ordinance was usually long, and dealt with a number of distinct subjects. The preamble recited that "it has become imperative that certain crossings at the grade of the Baltimore & Ohio Railroad in South Baltimore should be abolished, and . . . in connection with the abolishing of said grade crossings, the Baltimore & Ohio Railroad Company desires to make certain improvements to and relocations of its lines of railroad in and near the city of Baltimore." The ordinance then proceeds to grant the consent of the mayor and city council to the construction of the lines of railroad so desired, in accordance with the terms embodied in the ordinance, provided the obligations imposed upon the railroad company should be assented to by that company, and the work executed in accordance with it. By § 2, Hamburg street, Lee street, Cross street, and Stockholm street were named as being streets where bridges

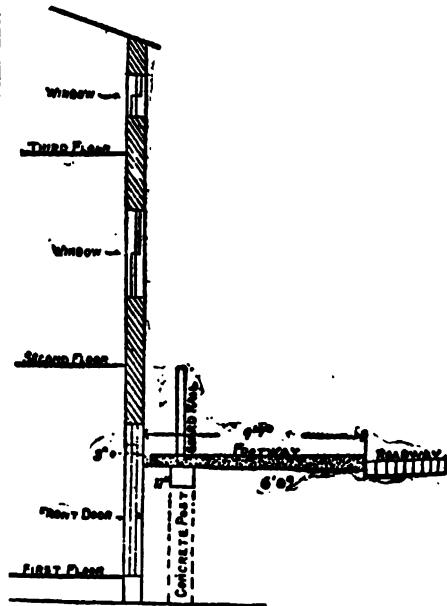
were to be constructed so as to carry the city traffic above the grade of the railroad tracks; all the cost of the work to be met as provided in the ordinance, and the physical work done under the supervision of and subject to the approval of the city engineer. In § 7, parts of thirty-eight streets were named to be closed by the city to public traffic, which was, upon the completion of all the work, to be concentrated upon the four streets named in § 2, and carried on those streets above the grade of the railroad tracks. In § 3, detailed provision was made as to the construction of the bridge upon Hamburg street, which was to be constructed at the expense of the railroad company, and to have an elevation at the point where the bridge proper began of 32.60 feet; later on in the same section it was provided that "the approaches to said bridges shall be constructed upon a location to be fixed and provided by the city of Baltimore at its own cost, and said city shall make all changes in the established street grades which may be necessary for the construction of said bridges and approaches, and bear all expense of widening or changing any streets and acquiring any land, easements, and rights necessary for the construction of said approaches." The cost of building these approaches and paving them was to be met by the Baltimore & Ohio Railroad, and after construction the city was required by the ordinance to maintain all the approaches to said bridges and the paving and sidewalks upon said approaches. By § 3½, provision was made for what is said to be a change and reestablishment of grade of parts of Hamburg street, the intent of which was to make provision for a gradient approach to the bridge at the east building line of Howard street. It did not, however, propose to extend this gradient for the entire width of the street, or the entire width of the space between the curbs, but provided for its construction from a point 37 feet north of the south building line of Hamburg street, thus leaving the northern part of the street, both sidewalk and roadway, at the same level as it had theretofore existed, but the south portion of said street was to rise by an incline from the east curb line of Sharp street to an elevation of 32.60 feet at the east building line of Howard street. This approach was to have a roadway 25 feet in width, and a sidewalk 10 feet in width, thus bringing it almost in contact with buildings erected upon the building line on the south side of Hamburg street. The effect of such construction was, according to the amount of the elevation of the approach at any particular point, to seriously interfere

with, or practically shut off, all access to buildings having a front on the south side of Hamburg street between Sharp and Howard streets. It inevitably also inflicted serious damage upon the light and air, certainly so far as the first floor was concerned, of all of such buildings, and accordingly there was inserted in the ordinance, as § 18, the following: "Section 18. And be it further ordained that, in order to provide absolutely and in all events for compensation for the damages that will be sustained by the owners of property injuriously affected by the changes in grade herein provided for under § 3½, the mayor and city council of Baltimore hereby obligate itself to urge the legislature of Maryland, at its next session, in January, 1910, to pass an act authorizing the mayor and city council of Baltimore to compensate said property owners for the damage actually sustained by them by reason of such changes in grade, and, conditioned upon the passage of such act, the mayor and city council of Baltimore guarantee to each such owner compensation for the damages so sustained."

In order to comply with the provisions of this section, there was presented to and passed by the general assembly of 1910, chap. 621, as follows: "Section 1. Be it enacted by the general assembly of Maryland that the mayor and city council of Baltimore be and it is hereby authorized and empowered to authorize and direct the commissioners for opening streets under such system of procedure, including reasonable notice to the property holders and the right of appeal by either the property holders or the mayor and city council of Baltimore to the Baltimore city court and the court of appeals of Maryland, as it may prescribe, to ascertain and award to the owners of property in the city of Baltimore injuriously affected by the changes in grade provided for by § 3½ of ordinance No. 387 of the mayor and city council of Baltimore, approved August 16, 1909, and commonly known as the 'Grade Crossing Ordinance,' such damages, if any, as they may find to have been actually sustained by and directly caused to said property by reason of such changes in grade, and at the same time to assess against the same such benefits as they may find to have accrued to said owner by reason thereof: Provided, however, that nothing in this act contained shall be construed as imposing any duty or obligation upon the mayor and city council of Baltimore, except in the event that said property holders are judicially declared to be disentitled to recover such compensation or damages from the Baltimore & Ohio Railroad Company; and provided further

that in the event of the exercise at any time by the mayor and city council of Baltimore of the authority hereby conferred, then nothing in this act contained shall be construed as depriving the mayor and city council of Baltimore of any right it may lawfully have to demand, enforce, and receive reimbursement from the Baltimore & Ohio Railroad Company to the full extent of any compensation it may make, or damage it may pay, in the premises."

These preliminary legal steps having been taken, the actual construction of the bridge and the necessary approaches was carried out in conformity therewith, with the following result, so far as these plaintiffs were concerned: Henry Walters and Annie D. Walters were the owners of a lot on the south side of Hamburg street, at the corner of Plum alley, about midway between Sharp and Howard streets. For the construction of the eastern approach in front of their premises, a bow window which projected slightly beyond the building line of the street was removed, thus leaving a large opening in the front wall of their building; in front of the doorway, and distant 12 inches from it, was placed a large concrete pillar, one of the numerous similar supports for the foot and roadway, and the footway passed the front door and first floor windows, with an intervening space of but 3 inches, between 4 and 5 feet above the level of the first floor of the premises. The relation of the abutment and the improvements of the plaintiffs' lot will be best understood from the accompanying diagram:



The effect of this structure was to effectually bar all ingress to and egress from the premises, unless by means of a ladder from the second floor window to the newly constructed footway. The light and air was shut off from the first floor of the premises, thereby rendering that portion of the dwelling damp and uninhabitable. To recover for the damages thus inflicted the present suit has been brought by the owners against the mayor and city council of Baltimore and the Baltimore & Ohio Railroad Company. Both of the defendants admit the damage, but each insists that the other is liable. At the trial of the case in the Baltimore city court, the court granted instructions directing a verdict for both of the defendants, upon the theory apparently that what had been done amounted, so far as the city was concerned, merely to a change of grade, and that a change of grade by a municipal corporation of one of its highways is *damnum absque injuria*, for which it cannot be compelled to make compensation to an abutting owner; and that, as to the defendant the Baltimore & Ohio Railroad, the act done was not only with the consent, but by the authority, of the municipal corporation, approved by the legislature, and therefore there had been no invasion of the plaintiffs' rights by the railroad company for which it was required to make compensation.

There are one or two minor questions of pleading raised by the record, upon which it is not necessary to pass at this point, since they are all involved in the larger question raised by the granting of the prayers of the two defendants.

The first exception was to the admission by the trial court in evidence of the ordinance No. 387, approved August 16, 1909, and which was offered in evidence by the railroad company. This ordinance had been set up by the pleas as a special defense. demurrers to which had been filed and sustained. The exact ground upon which they were so sustained does not appear from the record. It may have been because of the fact that the matters thus specially pleading amounted to the general issue. The suit was in the nature of an action of trespass for the damage caused by such trespass. If the act which was complained of was one done by lawful authority, then the party doing it had not committed a trespass, and the plea of *non cul.* was amply sufficient, and the evidence so objected to was therefore admissible as tending to sustain the general issue plea which had been filed, and the ruling of the lower court in admitting the ordinance in evidence was entirely correct.

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The declaration, as originally filed, alleged that the abutment or approach had been "erected and constructed upon and against the improvements and the lot of ground owned by the plaintiffs;" that is, that there had been an actual physical invasion of their property. Upon the conclusion of the evidence the declaration was amended by the striking out of this language. By the second count of the amended declaration, however, it was alleged "that the plaintiffs have been deprived of the use, enjoyment, and possession of the said lot of ground and the improvements thereon, and deprived of the use and enjoyment of said Hamburg street and the south sidewalk thereof." That there has been any physical invasion of the land of the plaintiff in this case is not claimed.

The real question is whether the structure erected, and which is the occasion of this suit, is such an invasion of the rights of the plaintiff as to amount to a taking of their property within the meaning of the Constitution, or whether the injury amounts merely to a consequential damage, for which there may or may not be a right of action. If it was the former, then the act was one which even the municipal corporation had no right to do without making due compensation, and amounted to a tort for the commission of which the city was liable to the plaintiffs for the damage inflicted on them, whether the actual work was done by the city or by its authority. That is to say, if the invasion of the rights of the plaintiffs amounted to a taking, as regards these plaintiffs, both the city and the railroad company were tortfeasors, and both liable for the injury done.

If the city was liable, it could not evade its liability by delegating to another the doing of the tortious act. The ordinance by which the city gave to the railroad company the right to build apparently recognized this when, in § 18, it assumed an obligation on the part of the mayor and city council, to urge the passage of an act by the legislature authorizing the mayor and city council to compensate abutting property owners for the damage sustained by them, and conditionally guarantying them such compensation. There is some apparent conflict in the authorities with regard to whether acts such as are here complained of amount to an invasion or taking, or are merely in the nature of consequential damages.

This is the result in part of special statutes in different states. No fairer statement can be made than that in the case of *Story v. New York Elev. R. Co.* 90 N. Y. 146, 43 Am. Rep. 146, where it is said

that, "while the legislature may regulate the uses of the street as a street, it has . . . no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized."

This suggests as the first pertinent inquiry the question, What are the rights of an abutting owner in a street? Primarily, of course, comes the right to its use as a thoroughfare in common with all others, and for any infringement upon this which he suffers in common with all other members of the community he has no right of action. *Lake Roland Elev. R. Co. v. Webster*, 81 Md. 535, 32 Atl. 186.

And, even when he suffers some additional inconvenience, as where there is a change of grade of the streets made by the municipal corporation, as a result of which he is more or less inconvenienced, he is still without any remedy as against the municipal corporation; damage of this character being regarded as *damnum absque injuria*. *Peddicord's Case*, 34 Md. 463; *Green v. City & Suburban R. Co.* 78 Md. 304, 44 Am. St. Rep. 288, 28 Atl. 626. It is upon this familiar principle that the city claims exemption from liability in the present case; and, if there is nothing more than a change in the grade of Hamburg street, the position is sound.

But the owners of lots abutting upon public streets have easements or rights in the street which are valuable, and are in addition to those which they have with the general public. This is recognized in our statute law, which confers upon the city of Baltimore the power for laying out and closing up streets by providing for compensation to such owners upon the closing of an adjacent street.

So, in *Van Witsen v. Gutman*, 79 Md. 405, 24 L.R.A. 403, 29 Atl. 608, where an alley was attempted to be closed, thus taking from other abutting owners their means of ingress to and egress from their property through the alley to the public street, it was held that the right was a valuable one, and could not be taken for public use without compensation, and *a fortiori* not for private use. And in *Townsend v. Epstein*, 93 Md. 537, 52 L.R.A. 409, 86 Am. St. Rep. 441, 49 Atl. 629, the same rule was followed where the interference was with regard to light and air.

In the case of *De Lauder v. Baltimore County*, 94 Md. 1, 50 Atl. 427, the county commissioners had reconstructed a county

road, and in so doing elevated it some 5 feet at a point where a private right of way of the plaintiff connected with the highway, and for the protection of passing traffic placed a guard rail along the side of the reconstructed road. After reviewing many of the prior decisions, including most of those already referred to, Judge Pearce, speaking for this court, said: "The injury inflicted upon Mrs. De Lauder is not the rendering the use of her right of way inconvenient or expensive, but it is the destruction of its use, and its destruction is a taking in as just a sense as the appropriation of a gravel bank for the repair of a public road would be a taking."

And the same doctrine has been distinctly recognized in numerous other cases, both in Maryland and elsewhere. Thus, in *Webb v. Baltimore & O. R. Co.* 114 Md. 216, 79 Atl. 193, it was said: "The primary purpose" of a street, "and the obligation of the municipal authorities [is] to preserve the beneficial enjoyment of the streets by the abutting landowners as a constituent part of the general public." Again, in *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 377, 20 L.R.A. 126, 26 Atl. 515: "The control of the city over the streets is attended with the duty of preserving them for their legitimate purposes." The mayor and city council cannot divest themselves of this trust. In the case of *Reining v. New York, L. & W. R. Co.* 128 N. Y. 157, 14 L.R.A. 133, 28 N. E. 640, it was declared that owners of lots abutting on city streets were entitled to the benefit of the street for access, and cannot be deprived thereof without compensation. In this case a solid embankment had been built along a street in Buffalo, and in consonance with the doctrine stated it was said: "The public cannot justly demand such an appropriation of a street by a municipality in aid of a railroad enterprise." In *Vanderlip v. Grand Rapids*, 73 Mich. 522, 3 L.R.A. 247, 16 Am. St. Rep. 597, 41 N. W. 677, a street was being regraded and raised about 30 feet, practically burying the dwelling of the plaintiff, and the city sought to evade liability for the damage caused by reason of its right to regrade. The work was being done by the city itself, but its act was held to be a taking of the property, one which would be arrested by injunction until due compensation had been made. The rule was again emphasized in *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 108, 14 L.R.A. 381, 29 N. E. 95, where it was held that an abutting owner cannot be deprived of the street affording him access to his premises, unless there is left for his use and enjoyment other suitable means of access, or just compensation is paid him

for the deprivation of the same. In *Haynes v. Thomas*, 7 Ind. 43, and *Lackland v. North Missouri R. Co.* 31 Mo. 187, the principle is very concisely given that "the right" of an "abutting" owner to the use of a street "is as much property as the lot itself, and the legislature has as little power to take away one as the other."

In § 1325 of 3 McQuillin on Municipal Corporations, that author deals with the subject of the right of access to a street by an abutting owner, and says: This right also "includes a certain convenience in the use of his property with respect to the rest of the world, such as the opportunity for a man's customers to come to his place of business without reasonable hindrance or interruption. . . . This . . . is held to be a proprietary right, an easement in the street attached to the estate or ownership of property abutting on a street or alley, and property which cannot be appropriated to the use of the public without compensation."

In view of the authorities to which reference has been made in part, and the injury to the property of the plaintiffs being such as already indicated, it follows that, the construction of the abutment or approach complained of in this case amounting to a taking of property of the plaintiffs which neither the mayor and city council could do or authorize to be done without making just compensation therefor to the owner, that so far as the present plaintiffs were concerned, both defendants were joint tortfeasors, and therefore both liable to the plaintiffs, and the rulings of the court below on the prayers withdrawing the case from the jury erroneous.

In the oral arguments and the briefs of the defendants in this case, it was virtually conceded that the plaintiffs had been damaged, but the contention was that what had been done did not amount to a taking, as there had been no physical invasion of the plaintiffs' lot, and the damage which had been suffered was consequential in character. As already indicated, this court cannot agree with that view. But it was further urged that, by reason of the ordinance, the liability was not a joint one, and that by its decision this court should place the entire liability upon one or the other of the defendants, and absolve the other. This it is impossible to do in the present case, for a number of reasons. The defendants were sued jointly, and the verdict as rendered was a joint verdict as to both defendants. If now it was erroneous as to either, it is necessary to reverse the entire judgment and remand the case. *East Baltimore Lumber Co. v. K'Nesett Israel Aushe S'Phard Congregation*, 100 Md. 689, 46 L.R.A.(N.S.)

62 Atl. 575; *Richardson v. Kent County*, — Md. —, 87 Atl. 747, decided April 8, 1913. As already pointed out, as to these plaintiffs both of the defendants were tortfeasors, and therefore these plaintiffs are entitled to recover against either or both. The plaintiffs were no parties to the ordinance, if it is to be regarded in the light of a contract, and cannot therefore be limited in their right of recovery to only one of the two joint tortfeasors. What may be the respective liabilities of the city and the railroad company *inter sese*, resulting from any undertakings or agreements between them, is a matter in which these plaintiffs have no concern, and which it is not necessary now to decide.

This is not a case such as arose in *Gardiner v. Boston & W. R. Corp.* 9 Cush. 1, where the railroad alone was sued, there having been an agreement made between the company and the city of Boston for the raising of Tremont street to avoid a grade crossing, and the railroad was held to be primarily liable for damages occasioned thereby. In the present case both the city and the company are parties defendant; both are liable to the plaintiffs, whatever may be their respective liability as to each other, as the result of the passage of the ordinance and the subsequent act of the legislature.

Judgment reversed, and case remanded for a new trial; costs to be paid by the appellees.

NEBRASKA SUPREME COURT.

JOHN MILLIGAN et al.

v.

WILSON McLAUGHLIN

and

CLARENCE BROTHER McLAUGHLIN,
Intervener, Appt.

(— Neb. —, 142 N. W. 675.)

Adoption — venue — wrong county — consent — effect.

While, under the provisions of § 800 of the Code of Civil Procedure, a person

Headnote by LETTON, J.

Note. — Enforceability of contract to give child share of estate in consideration of the surrender of the child to promisor, as affected by noncompliance with the statute prescribing mode of adoption.

This note is supplemental to the note to *Chehak v. Battles*, 8 L.R.A.(N.S.) 1130.

As to the validity of adoption without consent of the natural parents, see note to *Allison v. Bryan*, 30 L.R.A.(N.S.) 146.

As to the right of parties to adoption

desiring to adopt a child should file the petition for adoption in the county of his residence, and the county court of another county should refuse to receive and file the same, yet, the statute being enacted for the benefit of the child, in a case where the facts are that all the interested parties appeared before the county court of another county, and agreed on the one side to relinquish the child, and consented to its adoption on condition that it should have the full rights of heirship as if born in wedlock, and on the other to adopt and make it an heir, and the child is surrendered to the custody of, and remains in the family of, the adopting parent until the death of that parent, which occurred while the child was of tender years, the collateral heirs of the deceased adopting parent are estopped to deny the validity of the adoption proceedings and that the child is entitled to inherit.

(June 26, 1913.)

APPEAL by intervener from a judgment of the District Court for Logan County in favor of plaintiffs in an action for partition of certain real estate. Reversed. The facts are stated in the opinion.

proceedings, or their privies, to attack decree of adoption, see note to Phillips v. Chase, 30 L.R.A.(N.S.) 159.

As shown in the note referred to in 8 L.R.A.(N.S.), and by the later cases on the question, although an attempted adoption is invalid for failure to follow the statutory requirements, it may still be given force and effect as a contract by virtue of which the infant may assert a valid claim to the interest in the estate of the proposed adopting parents to which he would have been entitled had the proceeding been effective. Anderson v. Blakesly, — Iowa, —, 136 N. W. 210, following Chehak v. Battles, 8 L.R.A.(N.S.) 1130, an Iowa case. And to same effect see MILLIGAN v. McLAUGHLIN, citing the note in 8 L.R.A.(N.S.) 1130.

And ineffective adoption proceedings in themselves, or when accompanied by a sufficiently definite promise to leave all or a certain part of the adopting parents' property to the adopted children upon the death of the parents, may amount to a contract which, although made for the children by a third person, when fully performed by the children, may be enforced against the heirs of the adopting parents. Hood v. McGehee, 189 Fed. 205, affirmed in 117 C. C. A. 664, 199 Fed. 989.

Where a verbal contract of adoption is reduced to writing, and the same is embodied in a petition to the county court for the adoption of the infant, and according to this agreement the petitioner undertakes, in consideration of receiving the infant, to rear, educate, nurture, and adopt him, and treat him as if he were his own child, the infant to receive the adopting parent's property as if he were the heir 46 L.R.A.(N.S.)

Messrs. Wilcox & Halligan and J. G. Mothersead, for appellant:

County courts have jurisdiction of adoption proceedings, and the statute providing that the petition shall be filed in the county where the person desiring to adopt resides should be construed as directory only.

Ferguson v. Herr, 64 Neb. 659, 90 N. W. 625, 94 N. W. 542; Wolf's Appeal, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760; Glos v. Sankey, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628.

It was not necessary for Wilson McLaughlin to join with his wife in filing the petition for adoption.

Bland v. Gollaher, — Tenn. —, 48 S. W. 320; Re McKeag, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039.

The contract of adoption should be specifically enforced.

Kofka v. Rosicky, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; Pemberton v. Pemberton, 76 Neb. 689, 107 N. W. 996; Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764; Hespin v. Wendeln, 85 Neb. 172, 122 N. W. 852; Van Tine v. Van Tine, — N. J. Eq. —, 1 L.R.A. 155, 15 Atl.

of his body, and born in lawful wedlock, the agreement will be specifically enforced in equity although the adoption proceeding was never prosecuted to a final order, where, however, the child fully performed on his part. Starnes v. Hatcher, 121 Tenn. 330, 117 S. W. 219.

Although the statutory requirements necessary to a legal adoption are not performed, but the adopting parents take the child to their home and thereafter care for and treat her as their child, and rear her in the belief that she is their child, equity will decree an adoption and its resultant rights, since to do otherwise would result in palpable injustice. Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522.

Where the child enters the adopting parents' household as their child, and she, her parents, and the adopting parents, upon sufficient grounds, think and believe that she has been adopted, and thence forward for nearly twenty-four years she is so recognized, equity will specifically enforce a contract of adoption, although not completed by an actual adoption. Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007.

Although no order of adoption is made, and the child is not legally adopted, yet, where she was received in the family under an agreement by her father, who was the sole surviving parent, by which he transferred the right to her custody, control, and services, and the consideration named for the transfer was a covenant to adopt the child, and to support, educate, and maintain her, equity will specifically enforce the contract after full performance by the child, to the extent, at least, of securing to the child the share of the adopting parents' property to which she was entitled under

249; *Starnes v. Hatcher*, 121 Tenn. 330, 117 S. W. 219; *Chehak v. Battles*, 133 Iowa, 107, 8 L.R.A.(N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140; *Winne v. Winne*, 106 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Hood v. McGehee*, 189 Fed. 205; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Wright v. Wright*, 99 Mich. 170, 23 L.R.A. 196, 58 N. W. 54.

Mr. Warren Pratt, for appellees:

The order of adoption is invalid unless the record affirmatively shows that the person adopting resides in the county where the proceedings were had.

Ex parte Clark, 87 Cal. 638, 25 Pac. 967; *Monk v. McDaniel*, 120 Ga. 480, 47 S. E. 931; *Aldrich v. Steen*, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311.

Void adoption proceedings are insufficient to constitute a valid contract for heirship.

Albring v. Ward, 137 Mich. 352, 100 N. W. 610; *Bowins v. English*, 138 Mich. 178, 101 N. W. 204; *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 273; *Lamb v. Morrow*, 140 Iowa, 89, 18 L.R.A.(N.S.) 226, 117 N. W. 1120; *Burnes v. Burnes*, 132 Fed. 490; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907; *Wallace v. Rappleye*, 103 Ill. 258.

Mr. W. T. Wilcox also for appellees.

Letton, J., delivered the opinion of the court:

This was an action in partition. A question of title arose in the case, the solution of which depends upon whether or not certain proceedings seeking to adopt Clarence Brother McLaughlin in the county court of Custer county were valid and effectual, or, if ineffectual, whether there was a contract of adoption which will be specifically enforced.

The record shows that on October 3, 1906, Mary McLaughlin filed a petition in the county court of Custer county, setting forth that "she resides in Logan county,

Nebraska," and that Brother McLaughlin "is a minor male child under the age of fourteen years, to wit, of the age of two years on the 23d day of April next; that they do hereby declare that they (and each of us) do freely and voluntarily adopt said child as their own, upon the terms and conditions following, to wit: They intend hereby to make it an heir of themselves, with the right to inherit from them the same as it might do if it was their own child; and that they do hereby bestow upon said minor child equal rights, privileges, and immunities of children born to us (or either of us) in lawful wedlock." The prayer was in the usual form. The petition was signed and sworn to by Mary McLaughlin alone. On the same day Martin McLaughlin and Eva McLaughlin, the parents of the child, filed their signed relinquishment and consent to the adoption, setting forth therein that they and the child reside in Custer county, Nebraska; that they are the parents of the child; "that Mary E. McLaughlin, residing at Arnold, in the county of Logan, state of Nebraska, desire (s) to adopt said child," "granting to said minor child . . . full heirship, with all the rights of a child born in lawful wedlock;" and relinquished their right to the custody of the child and right to its services "to the end that said child shall be fully adopted by the said Mary E. McLaughlin, upon the terms and conditions above set out: and we hereby fully consent to such adoption. And each party waives the issuance and service of notice, and asks that the cause be immediately heard and determined."

The record of the county court recites that on the same day the matter came on for hearing, "the said petitioners and the said minor child being present in court in person. And also Martin McLaughlin and Eva McLaughlin, parents of said minor child, whose consent is filed." The court

the agreement. *Middleworth v. Ordway*, 191 N. Y. 404, 84 N. E. 291.

So, where in consideration of a woman who was the mother of an illegitimate child marrying him, the man agrees to adopt the child, and the marriage is performed and the parties live together for many years as husband and wife, during which the child lives with them as their child and is treated by them as such, the agreement will be specifically enforced to the extent of permitting the child to inherit from the husband, although the agreement was never carried out by a valid adoption. *Martin v. Martin*, 250 Mo. 539, 157 S. W. 575.

And an oral agreement to adopt a child and leave her a designated share of his property may be specifically enforced where, for eighteen years, the child, in reliance 46 L.R.A.(N.S.)

thereon, lived with the promisor, and rendered him valuable services, although it is impossible to establish a valid adoption. *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764.

Where there is no agreement to leave the infant a share in the adopted parents' estate on his death, separate from and independent of the adoption, but the purpose of the parties is merely to effect the adoption, there being no agreement as to property other than that implied by the adoption, if the adoption does not have the effect of conferring upon the child the right of inheritance to the property of the adopting parents in a foreign state, equity will not imply or enforce such an agreement for the benefit of the child. *Hood v. McGehee*, 189 Fed. 205, affirmed in 117 C. C. A. 664, 199 Fed. 989.

A. G. S.

then finds that the statements of the petition are true, that Mary McLaughlin is a proper and suitable person to adopt the child, and that it is for the best interest of the child that it should be so adopted. A decree was then entered in conformity with these findings.

Mary McLaughlin was the wife of Wilson McLaughlin. She died intestate in Logan county on the 11th day of March, 1908, leaving no children born of her body. The family home of Wilson and Mary McLaughlin was, at all times material to this controversy, in Logan county, and they never lived in Custer county. Martin, the father of the child, at this time was living in Logan county, and working for his brother Wilson McLaughlin. Eva McLaughlin, his wife, the mother of the child, was a resident of Custer county, and the child was with his mother. All the parties interested were present in court at the hearing. It is also shown that Wilson McLaughlin consented to the adoption, paid for making out the papers, intended to sign and offered to sign the petition for adoption while before the court, but that his counsel said it was unnecessary for him to do so. After these proceedings the child was taken to the home in Logan county, and lived in the family until the death of Mary McLaughlin, and to the time of the trial of this case in district court.

In this action brothers and sisters of Mary McLaughlin are claiming the land as her heirs. The guardian *ad litem* of Clarence Brother McLaughlin intervened and filed a petition claiming an interest in the land for him as the adopted son of Mary McLaughlin. He also set up a contract for his adoption and to make him her heir, and asked that if the court found the adoption proceedings were invalid, such contract should be specifically enforced, and the boy decreed to have the same interest in the property as if he had been the natural heir of Mary McLaughlin. The district court held that the adoption proceedings were void, and that the county court of Custer county was without jurisdiction. It also refused to specifically enforce the alleged contract, and quieted the title of plaintiffs.

The provisions of the Code affecting the determination of the questions presented are § 798: "A married man, not lawfully separated from his wife, cannot adopt a minor child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent: Provided the husband or wife, not consenting, is capable of giving such consent." § 800: "Any person or persons, desiring to adopt a minor child, shall file in the county court of the county where

the person desiring to adopt said child resides a petition stating that he freely and voluntarily adopts said minor child, which petition shall be signed and sworn to by the person so desiring to adopt. Said petition may state the terms and conditions on which said adoption is desired to be made."

The plaintiffs contend that the adoption proceedings are void for the reasons: (1) That no formal consent of Wilson McLaughlin was given to the adoption of the child by his wife; (2) that Mrs. McLaughlin was not a resident of Custer county.

Appellant urges that the consent of Wilson McLaughlin is sufficiently shown by the record and by facts in evidence; and that the appearance of the adopting parents with all the other interested parties was sufficient to confer jurisdiction upon the county court of Custer county. Appellant also contends that the provision of the statute conferring jurisdiction upon the county court where the person desiring to adopt the child resides is directory only. He argues that though an ordinary civil action must be brought in the county in which the defendant resides or may be summoned, if he enters a voluntary appearance in an action brought in another county, the court of that county would acquire jurisdiction; and further, that, in any event, Mary McLaughlin was at least a temporary resident of Custer county, and this is all that is required. He further has pleaded a full performance, on the part of the surrendering parents and the child, of the contract of adoption and to make the child the heir of Mary McLaughlin, and maintains that the collateral heirs may not deny the validity of the adoption proceedings or the right of the child to take as an heir.

An examination of cases in other states shows that there are two classes of decisions upon such questions; one based upon the view that, since statutes of adoption were unknown at common law, the powers conferred upon probate or county courts are of such a limited and special nature that all proceedings must be strictly construed, no presumptions will be indulged in, that nothing can be shown outside of the record to supply omissions therein, and that the statutory requirements must be strictly followed in all respects in order to confer jurisdiction. The other class, while adhering to the view that statutory requirements as to jurisdiction must be complied with, take a more liberal view, and hold that in the exercise of the jurisdiction conferred upon them in adoption proceedings, they are courts of general jurisdiction in that regard, and the same presumption with re-

spect to the regularity of their proceedings applies as in other courts.

Under the doctrine announced by this court in *Ferguson v. Herr*, 64 Neb. 659, 90 N. W. 625, 94 N. W. 542, the latter principle of construction has been adopted in this state, and the decree of a probate court in adoption proceedings "has all the force and effect of a judgment, being subject to collateral attack only for want of jurisdiction."

No written consent to the adoption of the child by his wife was signed by Wilson McLaughlin, but he was present in court at the hearing of the petition, and made no attempt to oppose or contest the granting of the same. The statute does not require the consent of the husband to be in writing. Considering the whole record, the petition, the recital of the proceedings, the findings, and the decree, and construing them together in connection with the presumptions of regularity, we think it is sufficiently established that the consent of the husband was granted at the time of the adoption proceedings. *Re McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039; *Bland v. Gollaher*, — Tenn. —, 48 S. W. 320.

Were the proceedings absolutely void and subject to attack by anyone for the reason that Custer county was not the county in which the petitioner resided? One of the leading cases on this question is *Wolf's Appeal*, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760. The Pennsylvania statute of adoption is similar to that of Nebraska in the respect that the petition must be presented to a court "in the county where he or she 'may be resident.'"

A petition was filed by a person who alleged he was a resident of California, and "is now a temporary resident of the county in which the proceedings were had." Upon the objection that the court acquired no jurisdiction, it was held that the word "resident" included both a permanent and a temporary resident, and that the petition was sufficient to confer jurisdiction. As we shall see later, the proceedings were also upheld on other grounds. See also *Van Matre v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 126, 36 N. E. 628, involving the validity of the same adoption proceedings.

In other states, however, adhering to the strict-construction rule, residence in the county is held to be a jurisdictional fact. The question is discussed at length in a monographic note to *Van Matre v. Sankey*, in 39 Am. St. Rep. 210. The absurdity of applying the rule of strict construction to a code which expressly provides that the common-law rule of strict construction shall not apply to its provisions, is pointed out, 46 L.R.A. (N.S.)

and it is said: "The statutes frequently require the child to be adopted, and the persons adopting it, or both, to be residents of the county where the proceeding takes place. It is doubtful whether the want of such residence, as a matter of fact, is such an irregularity as to avoid the proceedings. So far as the order or other writing is concerned, any statement therein from which it can be reasonably inferred that the parties are residents of the county is sufficient, and if the adopting parent should falsely state himself to be a resident, both he and his personal representative will be estopped from controverting the statement for the purpose of annulling the adoption. *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; *People ex rel. Burns v. Bloedel* (Super. Buff.) 42 N. Y. S. R. 453, 16 N. Y. Supp. 837; *Abney v. De Loach*, 84 Ala. 393, 4 So. 757." In the same note (39 Am. St. Rep. 219) we find the following on the question of estoppel: "If a person resorts to a court for the purpose of obtaining, and does there obtain, a decree or judgment, though it is void as against his adversary, yet if the latter accepts and acts upon it, he at whose instance it is obtained is estopped from asserting its invalidity for the purpose of seeking some advantage to himself, or of subjecting the innocent party to some loss or punishment. . . . If the adopting parent conducts such proceedings, and procures an order or agreement of adoption, and takes the child into his family, where it assumes the place and duties of his child, we think the courts will not permit him to subsequently urge that his proceedings were void. Nor, indeed, up to the present time has any adopting parent ever undertaken to do so, but in several cases, after his death, persons connected with him by ties of consanguinity have tried to claim his estate, and incidentally to assert that the order of adoption procured and respected by him was void."

It seems apparent that the object of the statute, permitting a person desiring to adopt a child to present his petition to the county court of his residence, is primarily for the benefit of the child, so that if, in after years, his right to inherit should be questioned, he would be furnished a record within the county of his adoptive parents' residence, to which he might readily refer to ascertain his status and what his rights of heirship by adoption were. The evil to be guarded against was apparently the contingency of an adoption being made in one county, the residence of the adopting parents of the child being in another state or county perhaps hundreds or thousands of

miles removed. In such case, if the adopted child were ignorant of the facts, he might be deprived of his lawful inheritance for want of the record evidence necessary to substantiate his claim. Taking this view of the statute, we think it was not designed to be used as a sword to cut down the rights of the child, but its intention was beneficent, and its purpose was to protect him against other claimants by furnishing him accessible proof of his adoption. In this case, all the parties appeared before the county court of Custer county: the parents relinquished the child; and Mrs. McLaughlin adopted it as her heir in as solemn a manner as she could do so. She took the care and custody of the child: took it to her home in Logan county and treated and considered it as her own until the time of her death. During her lifetime she made no attempt to repudiate the obligation which she had entered into, but ratified and confirmed the contract of adoption. The surrendering parents performed to the full extent on their part, and are interposing no objections to the adoption proceedings and no claim to the child. We think no court would, under the facts before us, have permitted Mrs. McLaughlin, during her lifetime, to deny that the child in her possession had been adopted and had the rights of a lawful heir, and her collateral heirs are equally estopped. As was said in Wolf's Appeal, supra: "They are not here in the interest nor on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption proceedings, and therefore have no standing in court, or they are privies in blood or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim." It is also said in the opinion that many cases were cited where decrees had been set aside for or in the interest of the adopted child, but none were cited where such decrees were revoked, where the revocation would be against the innocent child. See also *Re Williams*, and *Re McKeag*, supra. Even if the county court of Custer county had not acquired jurisdiction, we think the facts proved as to what occurred at the time all parties met in the county court are sufficient to justify a holding that the child is entitled to the specific performance of the agreement to make him the heir of Mary McLaughlin, under the rules laid down in *Kofka v. Rosicky*, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; *Pemberton v. Pemberton*, 76 Neb. 669, 107 N. W. 996; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *Wispin v. Wendeln*, 85 Neb. 172, 122 N. W. 852; *Johnson v. Riseberg*, 90 Neb. 217, 133 N. W. 183. The same 46 L.R.A. (N.S.)

view is taken in Iowa and in some other states. Note to *Chehak v. Battles*, 8 L.R.A. (N.S.) 1130, and cases cited in note.

Controversies over the validity of adoption proceedings are not infrequent. It is to be regretted that where the statutes are so plain, the requirements so simple, and the consequences may be so momentous, more care is not exercised by the county courts, and more attention paid to detail by counsel. Though we are of the opinion that the county court of another county than that in which the adopting parents reside should refuse to receive and file a petition for adoption, under the facts in this case, we are of opinion that the collateral heirs of Mrs. McLaughlin are estopped to deny the validity of the adoption proceedings; that the proceedings taken on the day of the hearing, the relinquishment upon conditions, and the delivery of the child, together with the other facts in evidence, constituted a completed contract for adoption and heirship, and that the intervenor is entitled to inherit as the heir of Mary McLaughlin.

The judgment of the District Court is therefore reversed.

Barnes, Fawcett, and Hamer, JJ., not sitting.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

FIRST NATIONAL BANK OF ANA-MOOSE, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(— C. C. A. —, 206 Fed. 374.)

Criminal law — statute — persons affected.

1. A penal statute which creates a new crime and prescribes a punishment for it must clearly state the persons and acts denounced.

Headnotes by SANBORN, Circuit Judge.

Note. — *Intoxicating liquor: criminal liability of collector of draft attached to bill of lading of liquor.*

The position taken in *FIRST NAT. BANK v. UNITED STATES* is supported by *Danciger v. Stone*, 188 Fed. 510, apparently the only other case in point, where the court, in answer to a contention that certain liquor dealers were not entitled to the protection of the interstate commerce clause, because upon interstate shipments they forwarded sight drafts on the consignees with bills of lading attached, to local banks at the point of consignment, held that the premise of the contention was unfounded.

A person who, or an act which, is not, by the expressed terms or plain meaning of the law, clearly within the class of persons or within the class of acts it denounces, will not sustain a conviction under it.

Statute — construction — general following particular words.

2. The rule that, where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated, is especially applicable to statutes defining crimes and regulating their punishment.

Same — construction by executive.

3. It is an established rule of the national courts that the contemporaneous construction given to an act of Congress by the executive officers charged with its enforcement, though not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that their interpretation was erroneous.

Intoxicating liquor — collection of draft — penalty.

4. The collection by a bank of a sight draft for the purchase price of liquor transported in interstate commerce, and the delivery to the consignee of a bill of lading attached to the draft, the possession of which bill was necessary to enable the consignee to obtain a delivery of the liquor, does not subject the bank to a fine under § 239 of the Penal Code (act March 4, 1909, chap. 321, 35 Stat. at L. 1136, U. S. Comp. Stat. Supp. 1911, p. 1662).

(Trieber, District Judge, dissents.)

(June 13, 1913.)

ERROR to the District Court of the United States for the District of North Dakota to review a judgment convicting defendant of collecting a draft attached to a bill of lading for intoxicating liquors in violation of statute. Reversed.

The facts are stated in the opinion.

for the reason that the banks did not, in collecting the drafts and delivering the bills of lading to the consignee, violate the statute under consideration.

The opinion in the *FIRST NAT. BANK CASE* sufficiently refers to the remarks of Judges Smith and Hough in *United States Exp. Co. v. Friedman*, 112 C. C. 219, 191 Fed. 673, and *United States v. 87 Barrels*, 180 Fed. 215.

It may be of interest to note that it has been held that a statute limiting the transporting or carrying of intoxicating liquors by any express or railway company, or any common carrier, or person, or anyone as the agent or employee thereof, only applies to common carriers and those engaged 46 L.R.A. (N.S.)

Argued before Sanborn, Circuit Judge, and William H. Munger and Trieber, District Judges.

Messrs. George R. Robbins and George A. Bangs, for plaintiff in error:

In construing penal statutes, it is the province of the legislative department to prescribe punishment for forbidden acts; the court has no power to impose a punishment not prescribed by the legislature, and it is always safe and wise to impose no punishment until the court can say that the legislature has in fact, as well as in intent, prescribed the same.

United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. ed. 37, 42; *H. Hackfeld & Co. v. United States*, 197 U. S. 442, 450, 49 L. ed. 826, 829, 25 Sup. Ct. Rep. 456; *Sarlls v. United States*, 152 U. S. 570, 575, 38 L. ed. 556, 558, 14 Sup. Ct. Rep. 720; 2 *Lewis's Sutherland, Stat. Constr.* 520; 23 *Am. & Eng. Enc. Law*, 2d ed. 658; *State v. Finch*, 37 Minn. 433, 34 N. W. 904; *State v. Walsh*, 43 Minn. 444, 45 N. W. 721; *United States v. Corbett*, 215 U. S. 233, 242, 54 L. ed. 173, 175, 30 Sup. Ct. Rep. 81.

Contemporaneous legislative, administrative, or executive interpretation is entitled to great weight with the court, and in many cases when undisturbed for a period of years is held controlling.

1 *Kent, Com.* 485; *Cooley, Const. Lim.* 6th ed. 81; 2 *Lewis's Sutherland, Stat. Constr.* 472-476; *Stuart v. Laird*, 1 Cranch. 299, 309, 2 L. ed. 115, 118; *Martin v. Hunter*, 1 Wheat. 351, 4 L. ed. 109; *McCulloch v. Maryland*, 4 Wheat. 316, 401, 4 L. ed. 579, 600; *Cohen v. Virginia*, 6 Wheat. 264, 399, 418, 420, 5 L. ed. 257, 290, 294, 295; *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. ed. 603, 604; *United States v. Pugh*, 99 U. S. 265, 25 L. ed. 322; *Ames v. Kansas*, 111 U. S. 449, 469, 28 L. ed. 482, 490, 4 Sup. Ct. Rep. 437; *The Laura (Pollock v. Bridgeport S. B. Co.)* 114 U. S. 411, 416, 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881; *Pennoyer v. McConnaughy*, 140 U. S. 1, 23,

in the carrying business. *State v. Wignall*, 150 Iowa. 650, 34 L.R.A. (N.S.) 507, 128 N. W. 935. And that, on the other hand, in *State v. Decker*, 172 Ind. 614, 89 N. E. 316, it was held that a statute making it unlawful "for any railroad, or any common carrier or agent thereof, or any drayman, or other person or persons, corporation or firm, to ship," etc., intoxicating liquors under false or fictitious names, applied to any and all individuals, although not engaged in the business of a common carrier.

As to the effect of attaching draft to bill of lading, upon the question of the place or time of sale, see the note to *Hamilton v. Joseph Schlitz Brewing Co.* 2 L.R.A. (N.S.) 1078.

B. B. B.

35 L. ed. 363, 370, 11 Sup. Ct. Rep. 699; Marshall Field & Co. v. Clark, 143 U. S. 649, 691, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495; Butte City Water Co. v. Baker, 196 U. S. 119, 127, 49 L. ed. 409, 412, 25 Sup. Ct. Rep. 211; Rogers v. Goodwin, 2 Mass. 475; Portland Bank v. Apthorp, 12 Mass. 252; Com. v. Parker, 2 Pick. 550; People ex rel. Badger v. Loewenthal, 93 Ill. 191; Essex Co. v. Pacific Mills, 14 Allen, 389; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People ex rel. Lynch v. La Salle County, 100 Ill. 495; Easton v. Pickersgill, 55 N. Y. 310; Re Washington Street Asylum R. Co. 115 N. Y. 442, 22 N. E. 356; People ex rel. Hughes v. May, 3 Mich. 598; Johnson v. Ballou, 28 Mich. 397; Atty. Gen. v. Preston, 56 Mich. 177, 22 N. W. 261; Dean v. Borchsenius, 30 Wis. 236; Scanlon v. Childs, 33 Wis. 663; Ferris v. Coover, 11 Cal. 170; Lick v. Faulkner, 25 Cal. 405; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; State Tax Comrs. v. Holiday, 150 Ind. 216, 42 L.R.A. 286, 49 N. E. 14; State ex rel. Horne v. Holcomb, 46 Neb. 88, 64 N. W. 437; Fullington v. Williams, 98 Ga. 807, 27 S. E. 183; Auditor v. Cain, 22 Ky. L. Rep. 1888, 61 S. E. 1016.

Messrs. Joseph S. Graydon and Lawrence Maxwell also for plaintiff in error.

Mr. Charles E. Littlefield, for the United States:

Congress expressed itself so that the court is not required to defeat its express purpose by an artificial construction of the language used.

United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19; National Bank v. Ripley, 161 Mo. 132, 61 S. W. 587; Gillock v. People, 171 Ill. 307, 49 N. E. 712; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788; State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Woodworth v. State, 26 Ohio St. 196; Foster v. Blount, 18 Ala. 687; United States v. Union Supply Co. 215 U. S. 55, 54 L. ed. 88, 30 Sup. Ct. Rep. 15.

The acting "as such agent for said brewing company," in order to "complete the sale and delivery of said case of beer to said Meyers," constitutes acts "in connection with the transportation," etc., in interstate commerce of the beer in question.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 495, 52 L. ed. 307, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; 46 L.R.A. (N.S.)

Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724; 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733.

The matter of the collection of the purchase price by the carrier is not a duty resting upon the carrier at common law, and one that the seller of intoxicating liquors can require it to perform.

Danciger v. Wells, F. & Co. 154 Fed. 379.

Mr. Edward Engerud also for the United States.

Mr. William W. Watts, *amicus curiæ*:

The bank is not connected with the actual transportation and delivery of the shipment, within the meaning of the statute.

The construction placed upon § 239 by the lower court makes that section prohibit the bank from engaging in the exercise of its right of property in the collection of drafts in interstate commerce.

If it can be avoided, such construction should not be resorted to.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 501, 52 L. ed. 310, 28 Sup. Ct. Rep. 141; Standard Oil Co. v. United States, 221 U. S. 1, 104, 55 L. ed. 619, 662, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; American Exp. Co. v. Kentucky, 206 U. S. 141, 51 L. ed. 994, 27 Sup. Ct. Rep. 609.

Where the carrier engages in the actual transportation and delivery in a bona fide carrying and delivery of the goods, as distinguished from the conniving carriage and delivery of the goods, his old rights are in no way restricted.

Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Jones v. United States, 24 L.R.A. (N.S.) 143, 95 C. C. A. 213, 170 Fed. 1; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; United States v. Adams Exp. Co. 119 Fed. 240; United States v. Orene Parker Co. 121 Fed. 597; Com. v. Russell, 11 Ky. L. Rep. 576; United States v. American Tobacco Co. 221 U. S. 179, 55 L. ed. 693, 31 Sup. Ct. Rep. 632.

While Congress may regulate the instrumentalities in interstate commerce, it cannot, by an act, directed to the carriers, indirectly prohibit legitimate interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1-15, 6 L. ed. 23-27; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 347, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 353, 32 Sup. Ct. Rep. 189; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L.

ed. 972, 29 Sup. Ct. Rep. 633; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *License Cases*, 5 How. 504, 12 L. ed. 256.

Congress has only such power with respect to commerce, as is not limited or restricted by the other provisions of the Constitution.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501; *Lottery Case (Champion v. Ames)* 188 U. S. 358, 47 L. ed. 502, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; *Adair v. United States*, 208 U. S. 161, 167, 52 L. ed. 436, 439, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. ed. 394, 408; *United States v. 43 Gallons of Whiskey (United States v. Lariviere)* 93 U. S. 188, 194, 23 L. ed. 846, 847; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; *Kansas v. Colorado*, 206 U. S. 91, 51 L. ed. 972, 27 Sup. Ct. Rep. 655; *Keller v. United States*, 213 U. S. 148, 53 L. ed. 741, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

If Congress exceeds its power, it is the duty of the court to say its act is not the law of the land.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. ed. 496, 501.

In whatever language a statute may be framed, its purpose must be determined by its effect.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

Sanborn, Circuit Judge, delivered the opinion of the court:

The First National Bank of Anamoose complains that it was convicted and fined under § 239 of the Penal Code [35 Stat. at L. 1136, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1662] upon these conceded facts: One Meyers, a resident of Anamoose, in North Dakota, ordered a case of beer of the Hamm Brewing Company, a corporation of 46 L.R.A. (N.S.)

Minnesota. The brewing company accepted the order at St. Paul, shipped the beer thence to Anamoose via the "Soo" Railway Company, and received a bill of lading from that company under an agreement that the company would not deliver the beer to Meyers until he presented the bill of lading to its agent at Anamoose. The brewing company then attached a sight draft on Meyers for the purchase price of the beer to the bill of lading, and sent them to the bank at Anamoose, which agreed with the vendor to collect the draft from Meyers, and to deliver the bill of lading to him so as to enable him to receive the shipment of beer from the railroad company, and thereby to complete the sale and delivery of the beer. Section 239 of the Penal Code reads in this way: "Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to, but subject to, the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to, but subject to, the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to, but subject to, the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars."

Counsel for the bank contend that the facts of the case did not bring it, or its act, within any of the classes of persons or acts which this statute subjects to fine for collecting the price of liquor. The attorneys for the government, on the other hand, insist that the statute subjects to punishment all persons and all corporations that collect the purchase price of liquor transported in interstate commerce, or that act as agents of vendor or vendee in the buying or selling thereof; and this interpretation of the law was sustained in an elaborate opinion by the learned judge below, which may be found in 190 Fed. 336.

The statute, however, does not read, as it seems as though it naturally would have read if such had been the intention of Congress, that every person who, in connection with the transportation thereof in interstate commerce, should collect the purchase

price of interstate liquor, or who should act as the agent of the buyer or seller for the purpose of buying, selling, or completing the sale thereof, should be fined thereunder. By the terms it contains it does not embrace within its denunciation all persons, but expressly limits its condemnation to "any railroad company, express company, or other common carrier, or other person" who, in connection with the interstate transportation, collects or acts as agent. And, if the contention of counsel for the government were to prevail, the words "railroad company, express company, or other common carrier, or other," in the law, would become futile, and the statute would be made to read "any person who," etc., in violation of the maxim that "all the words of a law must have effect, rather than that part should perish by construction." *St. Louis v. Lane*, 110 Mo. 254, 258, 19 S. W. 533; *Knox County v. Morton*, 15 C. C. A. 671, 675, 32 U. S. App. 513, 68 Fed. 787, 790; *Wrightman v. Boone County*, 31 C. C. A. 570, 572, 60 U. S. App. 100, 88 Fed. 435, 437; *Robert J. Boyd Paving & Contracting Co. v. Ward* 28 C. C. A. 667, 674, 55 U. S. App. 730, 85 Fed. 27, 34.

The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not, by the expressed terms of the law, clearly within the class of persons, or within the class of acts, it denounces, will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions, or by the expunging of some of its words by the judiciary. *Ex post facto* construction is as vicious as *ex post facto* legislation. "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." "The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. 46 L.R.A. (N.S.)

ed. 37, 42; *United States v. 99 Diamonds*, 2 L.R.A. (N.S.) 185, 72 C. C. A. 9, 12, 130 Fed. 961, 964, and cases there cited.

The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden signification reached by the reflection and ingenious reasoning of unusually strong and acute minds. And unless at the time this bank was charged with the violation of this statute, this act of Congress clearly expressed to a man of ordinary ability and intelligence the meaning that the collection by a bank of a sight draft for the purchase price of liquor that had been transported in interstate commerce, and the delivery to the purchaser of the bill of lading therefor attached to the draft, subjected that bank to the fine which the statute prescribed, the defendant below ought not to be, and must not be, punished by this fine. We confess that the first reading of this law did not suggest to our minds that a bank which made such a collection would thereby subject itself to the punishment specified in the act. It is evident that the law failed to suggest such a thought to the mind of Judge Smith, who, in writing the opinion of this court in *United States Exp. Co. v. Friedman*, 112 C. C. A. 219, 181 Fed. 673, 681, spoke of this § 239 as prohibiting "common carriers from collecting the purchase price of liquors on interstate shipments, or from in any way acting as agent of the buyer or seller of such liquors, except in the transportation and delivery of the same, under a penalty of a fine of not over \$5,000," or of Judge Hough, who, in his opinion in *United States v. 87 Barrels*, (D. C.) 180 Fed. 215, 216, said: "Section 239 renders it criminal for any common carrier transporting or delivering liquor after interstate or international transportation, to 'collect the purchase price or any part thereof,' or 'in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same.'"

In January, 1910, Judge Campbell, of the eastern district of Oklahoma, in a considered opinion, decided that such a collection by a bank did not subject it to the fine imposed by this law. *Danciger v. Stone* (C. C.) 188 Fed. 510, 512. The Secretary of the Treasury and the Attorney General of the United States, the heads of the executive departments of the government to which the enforcement of this law was intrusted, were of the same opinion. The Attorney General, speaking of the statute, said: "The act does not apply to banks collecting drafts with bill of lading at-

tached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. The collection of a draft for the purchase price of a commodity in that manner is the usual and ordinary method of carrying on business, and is not connected with the transportation of the property, within the meaning of the statute under consideration." 29 Ops. Atty. Gen. 58, 62.

Indeed, although this statute was enacted on March 4, 1909, no one except the United States attorney for North Dakota seems to have discovered that it was intended to subject banks collecting such drafts to punishment by fine, until the opinion of the court below to that effect was formed and expressed in June, 1911. The act for which this bank has been convicted and fined was done on March 15, 1911. If the concession were made that it was the intention of the Congress to include banks among those liable to fines for such acts as that committed by the defendant below, how, in view of these opinions of judges and executive officers, can the conclusion that this intention was not clearly expressed by the statute be escaped? It is only when a penal statute clearly and plainly subjects parties and acts to its denunciation that they may be lawfully punished thereunder. If it is doubtful whether or not it includes them, they ought to be, and must be, exempt from criminal prosecution thereunder. And it is the intention expressed in the statute, and that alone, to which courts may give effect. They may not assume or presume purposes and intentions that the terms used in the statute do not indicate, and then by construction practically enact or expunge provisions, to accomplish such supposed intentions. *United States v. 99 Diamonds*, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 12, 139 Fed. 961, 964. Conceding that by study, reflection, and ingenious reasoning, unusually acute and able minds may discover and convince themselves of a construction of this statute and an intention of its makers which would include this bank and the collection of the draft with which it is charged in its denunciation, still it is certain that that construction and intention are so curious and recondite that the staff failed to express them to the minds of the Secretary of the Treasury, of the Attorney General, and of Judge Campbell, after a careful study of the law for the purpose of its official interpretation. It fails to manifest such a meaning and intention to our minds, and we cannot hold that it so clearly or plainly expressed them to bankers and persons unlearned in the law 46 L.R.A.(N.S.)

that they may be lawfully condemned thereunder.

And in our opinion the reason why the Secretary, the Attorney General, Judge Campbell, and the defendant below failed to find in this statute any intention of the Congress, or any expression of any intention, to condemn the collection by banks of sight drafts for liquor transported in interstate commerce and the delivery of bills of lading therefor to consignees to enable them to obtain possession of the liquor, is that they did not exist. The history of the times and of the proceedings in Congress which led up to the enactment of this statute has convinced that the mischief at which it was leveled was not the collection of sight drafts by banks or ordinary collectors for the purchase price of liquors, although bills of lading were attached thereto and delivered upon the collection, and that it was the collection by carriers or their agents, of the purchase price for c. o. d. shipments of liquor into prohibition states, whereby they became virtually the agents of the liquor dealers in selling their liquors. This mischief existed only in the states wherein the manufacture and sale of liquor was prohibited, for it was only in those states that such c. o. d. shipments evaded the spirit of the state laws. The collection by banks of sight drafts and the delivery of bills of lading attached thereto was, and long had been, a common and universal method of collection of the purchase price of liquors and other articles throughout the entire nation. This is a general law applicable in every state of the Union, and it is incredible that the Congress intended, without mentioning or referring to it in the statute, to strike down this method of collection for the sale of liquors transported in interstate commerce in all the states, in the large majority of which the manufacture and sale of intoxicating liquors were not prohibited.

To our minds, the natural and manifest meaning of the declaration in this law, that "any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation," etc., shall collect the purchase price, or act as the agent of the buyer or seller, shall be fined, excludes banks, ordinary collectors, and all persons who are not members of the general class of carriers. This interpretation finds support in the fact that the contrary construction expunges the words "railroad company, express company, or other common carrier, or any other," and makes the statute read "any person who," etc.; and in the rule which is especially applicable to statutes defining crimes and regulating their punishment,

that where general words follow the enumeration of particular classes of persons or acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated. Thus, where a statute imposed a forfeiture for forbidden acts, of the goods of any "owner, importer, consignee, agent, or other person," it was held that the words "other person" did not include a stranger to the goods, but was limited to "someone of the same general class as those described by the words with which it is associated." *United States v. 1150½ Pounds of Celluloid*, 27 C. C. A. 231, 237, 240, 54 U. S. App. 273, 82 Fed. 627, 633, 636; 36 Cyc. 1119, 1120; 2 *Lewis's Sutherland, Stat. Constr.* 2d ed. § 442; *United States v. Bevans*, 3 Wheat. 336, 390, 4 L. ed. 404, 417; *Moore v. American Transp. Co.* 24 How. 1, 35, 36, 16 L. ed. 674, 680; *United States v. Chase*, 135 U. S. 255, 258, 259, 34 L. ed. 117-119, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649. It is well said at page 1120, 36 Cyc., that "the particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like,' and to include only others of like kind or character."

This is the interpretation of this act of Congress which was given to it by the Secretary of the Treasury and by the Attorney General, who were charged with the duty of executing it, and it is an established rule of the national courts that the contemporaneous construction given to an act of Congress by those charged with its execution, though not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that their construction was wrong. *Edward v. Darby*, 12 Wheat. 206, 210, 6 L. ed. 603, 604; *United States v. Moore*, 95 U. S. 760, 763, 24 L. ed. 588, 589; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. ed. 389, 396, 9 Sup. Ct. Rep. 446; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *United States v. Hill*, 120 U. S. 169, 182, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510; *Baker v. Swigart*, 118 C. C. A. 313, 199 Fed. 865, 873; *United States v. Miller (C. C.)* 187 Fed. 369, 370; *United States v. Newport News Shipbldg. & Dry Dock Co.* 101 C. C. A. 514, 524, 178 Fed. 194, 204.

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Because the reasons in support of the construction given to § 239 of the Penal Code by the Secretary and the Attorney General are in our opinion more cogent and persuasive than those against it; because it is not clear that their interpretation was erroneous, but it seems to us to give to this act of Congress its true meaning; because the bank and the act for which it has been fined are not specified in the statute, nor included within the classes of persons or acts denounced by it, nor within other classes of their kind; and because the statute is a new law creating a new offense and prescribing its punishment, and it fails plainly or clearly to express any denunciation of the collection by a bank or any other collector of its class, of a sight draft for the purchase price of liquor transported in interstate commerce and the delivery of a bill of lading attached to the draft to the consignee, to enable him to get possession of the liquor,—our minds have been forced to the conclusion that the acts charged against the bank in the second count of the indictment in this case, upon which it was convicted, constituted no offense, and that the judgment below must be reversed, with directions to the court below to discharge the bank.

Triebler, District Judge, dissenting:

After giving the questions involved the most diligent consideration, I find myself unable to concur in the conclusions reached by the majority, as, in my opinion, they are in conflict with the letter as well as the spirit of the statute. In view of the far-reaching effect of this decision, which substantially nullifies the provisions of this act of Congress by opening the doors to the introduction of liquors in localities where the sale thereof is prohibited by law, and permits the collection of the purchase money at the time and place of delivery, I deem it my duty to state briefly my reasons for the dissent.

The history of the entire liquor legislation, as affected by the interstate commerce clause of the national Constitution, the mischief existing and sought to be remedied by this act, are fully set out in the opinion of the learned trial judge in this case (190 Fed. 336) and therefore need not be restated.

I concur with the majority opinion that "A penal statute which creates a new crime and prescribes its punishment for it must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons and within the class of acts it denounces, will not sustain a conviction under it."

But it is equally well settled that penal laws are not to be construed so strictly as to defeat the obvious intention of the legislature. *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; *United States v. Corbett*, 215 U. S. 233, 242, 54 L. ed. 173, 175, 30 Sup. Ct. Rep. 81; *United States v. Union Supply Co.* 215 U. S. 50, 55, 54 L. ed. 87, 88, 30 Sup. Ct. Rep. 15. And this rule specially applies when the statute is enacted for the public good, and to suppress a public wrong. *Taylor v. United States*, 3 How. 197, 210, 11 L. ed. 559, 564; *United States v. Stowell*, 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244; *Johnson v. Southern P. Co.* 196 U. S. 1, 10, 49 L. ed. 363, 368, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

In my opinion the statute clearly includes not only all common carriers and their employees, but "any other person" who, "in connection with the transportation of intoxicating liquors in interstate commerce, shall collect the purchase price thereof before, on, or after delivery, from the consignee or from any other person," regardless of the fact that he is not an employee of the carrier. It is a well known fact that shipments of all kinds of merchandise, cotton, grain, lumber, raw material, as well as manufactured articles, which are sold for cash upon delivery, are shipped by the method employed in this case, *i. e.*, either naming no specific consignee, but requiring the delivery to be made to the order of the shipper, or that the bill of lading specifically requires its production and surrender by the consignee before the property can be delivered. In such cases a draft is usually drawn for the purchase money and the bill of lading attached thereto, to be delivered upon payment of the draft. The effect of such shipments differs in nowise from those usually referred to as *c. o. d.*, as the purchaser can in neither event obtain the goods shipped without first paying the purchase price. It is to be noted that the statute itself does not use the expression "*c. o. d.*," and draws no such distinction as stated in the opinion of the majority. For that matter, such shipments are frequently spoken of as *c. o. d.* shipments. *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 446, 48 L. ed. 254, 256, 24 Sup. Ct. Rep. 151. As liquor shipments made in this manner to prohibition localities from other states practically nullified the prohibition laws of those states, as had been determined by the Supreme Court in a number of cases (*American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633), efforts were made to induce Congress to enact some legis-

lation which would prevent violations of the prohibition laws of the states by these methods. To accomplish this object, a number of bills were introduced; but, as the act now involved is the Senate bill prepared by the committee to whom all Senate bills on that subject had been referred, it is only necessary to refer to the Senate proceedings seeking to accomplish this object. Among these bills was one known as the "Bacon bill," and the part of that bill which refers to the subject now in controversy was § 2 of that bill. That part of it bearing on this subject is worded as follows: "That whenever any spirituous, intoxicating, and malt liquors of any kind shall be or become a part of a foreign or interstate commerce, it shall be unlawful for any railroad company, express company, or other carrier, or any officer, employee, or agent thereof, engaged in or in connection with the transportation of such liquors of any kind from one state or territory or district into another state or territory or district," etc.

The "Brantley bill," although it had been introduced in the House, was before the subcommittee which finally drafted the bill as enacted, and which is known as the "Knox bill," provided "that any railroad company, express company, or other common carrier, or other person who shall, in connection with the transportation of spirituous, vinous, malt, and intoxicating liquors of all kinds from one state or territory into another state or territory, collect on, before, or after delivery from the consignee or other person the purchase price or any part thereof of such liquors, or who shall in any manner act as the agent of the consignor or seller of such liquors, for the purpose of selling or completing the sale thereof," etc.

The subcommittee had a number of public hearings on these bills, and finally adopted the bill which is now § 239 of the Penal Code, practically adopting the language used in the Brantley bill.

It would be unreasonable to presume that the members of that subcommittee, composed of some of the ablest lawyers of the Senate, were not familiar with the practice of collecting for the goods by draft with bill of lading attached, as hereinbefore set forth, so general in the commerce of the country, and that that practice was, in effect, a *c. o. d.* shipment, as had been held several years before in *Norfolk & W. R. Co. v. Sims*, *supra*; and if the intention of this act was to make the bill effective, it was just as important to prohibit such shipments as those made *c. o. d.* with directions to the carrier to collect the purchase price before delivery. But, even assuming that the subcommittee was not fa-

miliar with that custom, their attention was expressly called to it by a letter from Robert Norris, secretary of the Kansas State Temperance Union, which was filed with the committee, and appears on page 113 of the committee's report. In that letter Mr. Norris says: "Intoxicating liquors are shipped into Kansas under interstate commerce just as though there were no prohibitory laws in the state. The money is either sent with the order or is collected by some agency in the state. A sight draft is usually sent to the bank, and the bank collects the money for the liquor house. The express companies no longer handle c. o. d. liquors but send them express charges prepaid, and a sight draft to the bank. . . . Since the express companies refuse to handle the c. o. d. liquors, there is not much complaint of shipping in fictitious names, but express agents that are inclined to violate the law have a means of handling bills of lading and collecting for liquors where the express charges are prepaid that is very hard to detect. Agents have informed me in various parts of the state that they have been offered by liquor houses a commission of 50 cents to \$1.50 for handling the liquors through the express office, and oftentimes this temptation to make money causes them to yield, and they deliver it to any parties who will pay the charges that may be against the person to whom it is sent. . . . Of all phases of the prohibitory law this interstate commerce feature is the hardest to control, even to keep it within the bounds of interstate commerce law. The keeper of a 'blind tiger,' or a 'bootlegger,' or a druggist who may violate the provisions of his permit, are very easily caught as compared with the persons who overreach the bounds of the law in the shipment of liquor."

If the construction placed upon this statute by the majority opinion is correct, then nothing has been accomplished by the enactment of this statute, for the brewer or liquor dealer can make a large number of shipments to his agent or the person who is willing to engage in the sale of liquors or beer, some in boxes containing dozens of bottles, others in jugs or single bottles, taking separate bills of lading for each, attach a separate draft for the purchase price of each package of the liquor or beer covered by each bill of lading, all drawn on one person who, after having paid the drafts, would receive these bills of lading and deliver them with an order to the carrier indorsed thereon to any person who would purchase the quantity covered by any one bill of lading, and thus the mischief which the statute clearly intended to remedy can be continued without fear of being punished, 46 L.R.A. (N.S.)

for he could justly claim that he is not "a person connected with any railroad company, express company, or other common carrier."

It is true, as stated by the majority of this court, that courts "may not assume or presume purposes and intentions that the terms used in the statute do not indicate, and then by construction practically enact or expunge provisions to accomplish such supposed intentions." But, on the other hand, it is equally true that it is the duty of the courts to give effect to every word found in the statute. *Bend v. Hoyt*, 13 Pet 263, 10 L. ed. 154; *Lawrence v. Allen*, 7 How. 785, 12 L. ed. 914; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782; *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391. As stated by Judge Sanborn, delivering the opinion of this court in *Stevens v. Nave-McCord Mercantile Co.* 80 C. C. A. 25, 29, 150 Fed. 71, 75:

"Cardinal rules for the construction of a statute are that the intention of the legislative body which enacted it should be ascertained and given effect, if possible, regardless of technical rules of construction and the dry words of the enactment; that that intention must be deduced not from a part but from the entire law; that the object which the enacting body sought to attain and the evils which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention; that the statute must be given a rational, sensible construction; and that, if this be consonant with its terms, it must have an interpretation which will advance the remedy and repress the wrong."

The effect of the majority opinion is to practically eliminate the words "any other person," unless Lord Tenterden's rule of *ejusdem generis*, which is invoked by the plaintiff in error, governs the construction of this statute. In my opinion it does not. *United States v. Meacall*, 215 U. S. 26, 32, 54 L. ed. 77, 79, 30 Sup. Ct. Rep. 19, is directly in point on this proposition. In that case the statute under which the prosecution was had provided "that if any owner, importer, consignee, agent, or other persons shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoices," etc.

The defendant, who had been indicted for a violation of this statute, was neither the owner, importer, consignee, or their agent, but was an assistant weigher of the United States in the customs service at the port of New York, and engaged in the performance of his duties as such assistant weigher when the fraud was perpetrated on the government. Lord Tenterden's rule was in-

voked on behalf of the defendant, and the claim set up that the general term "other person," should be read as referring to someone similar to those named, whereas the defendant was not an owner, importer, consignee, or agent, or of like class with either; he was not making or attempting to make an entry. The circuit court sustained this contention, but, upon writ of error, the Supreme Court reversed this ruling, and held that the words "other person" included all persons, although having a different relation to the importation than the owner, consignee, or agent. Mr. Justice Brewer, who delivered the unanimous opinion of the court, said: "Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the term 'other person' was a meaningless addition. Now the defendant was a person other than the owner, importer, consignee, or agent, by whose act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose, and the intent of Congress in the legislation is the ultimate matter to be determined."

The court, in discussing the effect of Lord Tenterden's rule, cited and adopted the rule laid down in *National Bank v. Ripley*, 161 Mo. 126, 61 S. W. 587: "But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule; it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose must be gathered from the whole instrument. . . . Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give to the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

There are many other cases in which the words "any other" were similarly construed. *Reg. v. Payne*, L. R. 1 C. C. 27, where the statute made it a felony to facilitate the escape of a prisoner by conveying to the prison "any mask, dress, or other disguise, or any letter, or any other article or thing," it was held to include a crowbar. In *Hil-*

ton's Appeal, 116 Pa. 358, 9 Atl. 342, the statute authorized every lessee of any colliery, mining land, manufactory, or other premises to mortgage his lease or term, and it was held that the statute was not restricted to leases of the same or like nature as colliery, mining, or manufactory leases. In *Grissell v. Housatonic R. Co.* 54 Conn. 467, 1 Am. St. Rep. 138, 9 Atl. 137, the statute made railways liable for fires to buildings or other property, and it was held that the words "or other property" should not be confined to subjects *ejusdem generis*. To the same effect are *Harlow v. Tufts*, 4 Cush. 453; *Phoenix Cotton Mfg. Co. v. Hazen*, 118 Mass. 350; *Archer v. People's Sav. Bank*, 88 Ala. 254, 7 So. 53; *Holcomb v. Van Zyl*, — Mich. —, 44 L.R.A. (N.S.) 607, 140 N. W. 521; and this is especially true if the particular words, as is the case in this statute, exhaust a whole genus, in which case the general words must refer to some larger genus. *Fenwick v. Schmaltz*, L. R. 3 C. P. 315, 37 L. J. C. P. N. S. 78 18 L. T. N. S. 27, 16 Week. Rep. 481.

Applying this rule, it is clear to my mind that the intention of Congress was to cover such a transaction as is involved in the instant case. If the construction placed upon that act by the majority is correct, and that was the intention of Congress, it would have adopted the language found in § 2 of the "Bacon bill," which did not use the words "or any other person," but in lieu thereof used the words "or any officer, employee, or agent thereof," clearly indicating that the law was intended to apply only to the carriers, their officers, employees, and agents.

The majority also lay stress upon the construction placed upon this statute by the Secretary of the Treasury and the Attorney General. While it is true that the contemporaneous construction given to an act of Congress by those charged with its execution is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that the construction was wrong, such interpretation is not controlling, and is never conclusive upon the courts. *Hemmer v. United States*, 204 Fed. 905, decided by this court on April 25, 1913, where Judge Sanborn, delivering the opinion of the court, said: "A decision of a question of law by the officers of the Land Department, or by any officer of any other executive department, is never conclusive upon the courts. . . . And it is the function and duty of the officers of the judicial department of a government, which they may not lawfully renounce, to exercise their own independent judgments, guided only by the established legal principles and the recognized canons of interpretation, in the construction of its stat-

utes, and to adjudge their just and true interpretation, even though the officers of an executive department have construed them otherwise." A large number of authorities are cited by the learned judge to sustain that conclusion.

It must not be overlooked that these departmental officers, including the Attorney General, determine these questions in most instances, and did in this, without the assistance of argument from lawyers or other persons learned in the law. How much aid is derived from such arguments and briefs is well known to every judge on the bench. There can be no better illustration of this than the fact that frequently the judges of the Supreme Court call for rearguments in order to assist them in reaching a correct determination of important principles of law. And it has been well said that "a strong bar makes a strong bench."

Neither in *United States Exp. Co. v. Friedman*, 112 C. C. A. 219, 191 Fed. 673, nor in *United States v. 87 Barrels*, (D. C.) 180 Fed. 215, was this question before the court, and what was there said was clearly *obiter* so far as it affects the principle now in issue.

The act is also attacked as being unconstitutional, for it is alleged that the courts have uniformly held that liquors are an article of commerce, and the effect of this act is to deprive the owners of their property in violation of the 5th Amendment to the Constitution of the United States. But the statute does not prohibit commerce in liquors; it only regulates the transportation thereof. *United States ex rel. Atty. Gen. v. Delaware & H. R. Co.* 213 U. S. 366, 410, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527, goes much further than is necessary to sustain this act.

In view of the decisions of the Supreme Court in the *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 358, 47 L. ed. 492, 502, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 58, 55 L. ed. 364, 368, 31 Sup. Ct. Rep. 364; and *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, it is no longer open to contention that the powers of Congress in matters of interstate commerce have the quality of police regulations. As stated in *Hoke v. United States*, after reviewing the former decisions of the court: "The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over 'transportation among the several states,' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary

but convenient to its exercise, and the means may have the quality of police regulations."

That under the police power every government has the right to regulate or prohibit the manufacture and sale of liquors is no longer open to controversy. *License Cases*, 5 How. 504, 576, 12 L. ed. 256, 288; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Foster v. Kansas*, 112 U. S. 201, 206, 28 L. ed. 629, 697, 5 Sup. Ct. Rep. 8, 97; *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. ed. 346, 348, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Mugler v. Kansas*, 123 U. S. 623, 668, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273.

In my opinion the judgment of the court below was right, and should be affirmed.

OKLAHOMA COURT OF CRIMINAL APPEALS.

THOMAS MONAGHAN, Plff. in Err.,
v.

STATE OF OKLAHOMA.

(— Okla. —, 134 Pac. 77.)

Continuance — discretion.

1. The granting or refusal of a continuance in a criminal case is largely a matter of discretion of the trial court, and this court will not reverse the trial court on the question of a matter which rests in the sound discretion of the court, unless it is shown that there has been an abuse of discretion.

Robbery — what constitutes.

2. To constitute "robbery," as distinguished from "larceny from the person"

Headnotes by DOYLE, J.

Note. — What force is sufficient to constitute robbery.

I. Actual force.

a. Generally, 1150.

b. Snatching.

1. Where there is resistance, 1150.

2. Where there is no resistance, 1150.

3. When property is attached to the person so as to afford resistance, 1151.

c. When the taking is without the knowledge of the person robbed, 1151.

II. Constructive force.

a. Demand with overwhelming numbers or demonstrations of force, 1151.

b. Threats of prosecution, 1153.

III. Force employed as a means of escape or to prevent a recapture of property taken without force, 1153.

IV. Decisions under special statutes, 1153.

there must be force, violence, or intimidation in the taking. Therefore, where there is no evidence tending to show that the defendant obtained or retained the personal property alleged to have been taken by force and violence or by putting in fear, the crime is grand larceny, and not robbery, and a verdict of guilty of robbery in the first degree is contrary to law and the evidence.

Same — snatching property.

3. Merely snatching the property from the person of another, without violence or putting in fear, is not robbery, except where there is some injury or violence to the person of the owner, or where the property snatched is so attached to the person or clothes of the owner as to afford resistance.

The earlier cases considering the question under annotation will be found in a note to *Jones v. Com.* 57 L.R.A. 432. As in that note, cases where the question of the sufficiency of the force is not decided, except by the fact that convictions of robbery were had, are excluded.

The decisions collected herein are in accord with the decisions in their respective jurisdictions found in the earlier note, except as to Georgia cases involving the snatching of property from another without his knowledge, as noted *infra*, VI.

I. Actual force.

a. Generally.

To constitute robbery, there must be actual violence, or such demonstration or threats as will create a reasonable apprehension of bodily injury if the victim resists. *State v. Donohue*, — N. J. —, 50 Atl. 12.

The degree of force is immaterial so long as it is sufficient to compel one to part with his property. *State v. Parsons*, 44 Wash. 299, 7 L.R.A.(N.S.) 566, 120 Am. St. Rep. 1003, 87 Pac. 349, 12 Ann. Cas. 61.

The element of force is present where one is knocked down by two men who come up from behind, and his pocketbook is squeezed out of his hand. *People v. Ortega*, 7 Cal. App. 480, 94 Pac. 869.

And in *Story v. State*, — Ga. App. —, 77 S. E. 914, it was held to be robbery by force, and not by intimidation, where the evidence showed that without warning accused simultaneously grabbed prosecuting witness's money and struck him a blow on the head, and attempted to run.

b. Snatching.

1. Where there is resistance.

Where accused, who was endeavoring stealthily to take money from prosecutor's pocket, was caught by the latter while his hand was in the pocket, and a struggle ensued, accused endeavoring to get the money and prosecutor to prevent him, and the money was finally taken violently by inflicting physical injuries, the offense was 46 L.R.A.(N.S.)

Same — force and violence.

4. The force and violence which is essential to the crime of robbery must be concomitant with the taking of property from the person of another.

Trial — questions of law and fact.

5. The jury are bound to take the law from the court, and questions of fact are to be decided by the jury. The charge of the court must not invade the province of the jury, and should not extend beyond a plain statement of the law applicable to the case. Philosophic disquisition on the "presumption of innocence" or dissertation upon the nature of evidence, should always be omitted.

(August 14, 1913.)

robbery, and not larceny from the person. (*Carter v. State*, 3 Ga. App. 477, 60 S. E. 216. The court distinguished the case at bar from *Fanning v. State*, 66 Ga. 167, 4 Am. Crim. Rep. 561 (cited in the earlier note), stating that in the latter case the force used to keep possession of the property was after accused had surreptitiously taken it from the prosecutor's pocket.

And the offense was robbery where accused threw one hand around prosecuting witness, who was vomiting and in a measure helpless, and thrust his other hand into his pocket and jerked out his pocketbook, the prosecutor protesting, but, because of the fit of vomiting, being unable to prevent the act. *Williams v. State*, 51 Tex. Crim. Rep. 361, 123 Am. St. Rep. 884, 102 S. W. 1134.

And also where a tray of rings was grabbed from the counter and the thief was pursued through the store, the struggle to escape at the door was concomitant with the taking, and the offense was robbery. *Tiller v. State*, 32 Ohio C. C. 704. The court stated that the taking of the property from the prosecuting witness, or from his presence and under his control, was not effected until these various acts of violence were completed, for the reason that accused did not succeed in his attempt to possess himself of the property until after all these facts of violence occurred.

2. Where there is no resistance.

In *State v. Paisley*, 36 Mont. 237, 92 Pac. 566, it was said that if the force used was only such as was necessary to take the property from the person of another without resistance, it was not sufficient to constitute robbery, as otherwise there would be no distinction between robbery and larceny from the person.

The Kentucky cases are in harmony with the earlier decisions in that jurisdiction in considering the fact of snatching evidence of force, and so snatching and running away with a bill, from one who was holding it in his hand to have it changed into small money, was held robbery, in *Stockton v. Com.* 125 Ky. 268, 101 S. W. 298.

And the offense was robbery where a re-

ERROR to the District Court for Craig County to review a judgment convicting defendant of robbery. Reversed.

The facts are stated in the opinion.

Mr. O. L. Rider for plaintiff in error.

Mr. C. J. Davenport, Assistant Attorney General, with Messrs. Charles West, Attorney General, and Smith C. Matson, Assistant Attorney General, for the State:

Where the evidence is not before the court, a judgment will not be reversed on account of instructions given by the trial court, if, upon any supposable state of facts, the instructions would be proper.

Rasberry v. State, 4 Okla. Crim. Rep.

quest of 10 cents with which to buy beer was made of prosecutor, and upon his taking money out of his pocket accused suddenly snatched and wrenched it from him and fled. Brown v. Com. 135 Ky. 635, 135 Am. St. Rep. 471, 117 S. W. 281, 21 Ann. Cas. 672.

3. When property is attached to the person so as to afford resistance.

If the article is so attached to the person or clothes as to create resistance, however slight, the taking is robbery. And so force sufficient to jerk a stud loose from the shirt was held to warrant a conviction of robbery. People v. Campbell, 234 Ill. 391, 123 Am. St. Rep. 107, 84 N. E. 1035, 14 Ann. Cas. 186.

And also where a watch attached to prosecutor's clothing by a chain was snatched with sufficient force to break the chain. Perry v. Com. 27 Ky. L. Rep. 512, 85 S. W. 732.

And where the force used in snatching a purse which was attached to a chain wound around the owner's finger was sufficient to break the chain and injure the finger. Smith v. State, 117 Ga. 320, 97 Am. St. Rep. 165, 43 S. E. 736.

But the cutting of a rope which held a jug to the horn of a saddle, and carrying it away, was held in Bowlin v. State, 72 Ark. 530, 81 S. W. 838, not to constitute robbery. The court cited as authority Routt v. State, 61 Ark. 594, 34 S. W. 262, cited in the earlier note, which was a case of snatching money from another's hand. Though the court seems to think the case at bar was analogous to the case followed, it would seem rather to be more analogous to cases involving the snatching of property attached to the person, and therefore to amount to robbery.

c. When the taking is without knowledge of the person robbed.

Stealthily putting one's hand in the pocket of another and pulling out his pocket-book before the latter is aware of what is being done is not robbery. Pihb v. Com. 33 Fv. L. Ren. 726, 112 S. W. 401; Jones 46 L.R.A.(N.S.)

614, 103 Pac. 865, 112 Pac. 759; Lee v. State, 7 Okla. 565, 54 Pac. 792.

Doyle, J., delivered the opinion of the court:

This appeal is prosecuted from a conviction had in the district court of Craig county, in which the defendant was found guilty of robbery in the first degree, and sentenced to imprisonment at hard labor in the penitentiary at McAlester for a term of ten years. The judgment and sentence was rendered and entered on the 17th day of June, 1912. The appeal was perfected by filing in this court December 11, 1912, a petition in error with case made

v. Com. 115 Ky. 592, 103 Am. St. Rep. 340, 74 S. W. 263, 14 Am. Crim. Rep. 580.

And where one merely filches money from the pocket on another who is drunk, the mere force necessary to remove the property is not all the force required by the statute to constitute robbery. Ramirez v. Territory, 9 Ariz. 177, 80 Pac. 391.

And in People v. Ryan, 239 Ill. 410, 81 N. E. 170, it was held that the offense is not robbery where the evidence tends to prove the removal of a stud by stealth and adroitness only.

In Dawson v. Com. 25 Ky. L. Rep. 5, 74 S. W. 701, it was held not to be robbery where the accused stealthily placed her hand in prosecutor's pocket and took therefrom some money. Nor did the fact that accused drew a pistol when the loss of the money was learned and prosecutor demanded its return make the act of taking robbery.

But in King v. Com. 25 Ky. L. Rep. 713, 76 S. W. 341, where the evidence was that prosecutor heard the accused call him, but he refused to stop, and had taken but a step or two when he felt her hand hit his pocket: that when she put her hand in his pocket she pulled him around and nearly pulled him off his feet, and then pulled her hand out and had his pocketbook, the court said that the trial court properly submitted to the jury the question as to whether it was taken by violence and putting prosecutor in fear, and refused to disturb the verdict of guilty of robbery.

II. Constructive force.

a. Demand with overwhelming numbers or demonstrations of force.

In Com. v. Titworth, 30 Ky. L. Rep. 402, 98 S. W. 1029, it was said that robbery may be committed by putting one in fear without using actual force or violence, but there must be upon the part of the wrongdoer such an attempt of intimidation, such threats of violence, demonstration or offer of force, toward the person deprived of his property, for the purpose of securing its surrender, as would reasonably be calculated to put the latter in

attached. The attorney general has filed a motion to strike the case made, and consider this appeal on the transcript of the record, because said case made was not served on the county attorney within the time allowed by the trial court. The record shows that at the time of entering judgment the court extended the time for making and serving case made sixty days, and thereafter, on the 27th day of July, granted an additional extension of sixty days, and thereafter, on the 17th day of October, granted an additional extension of sixty days, and that the case made was served on the county attorney on the 21st day of November, and was settled and signed on the 7th day of December. The certificate of the trial judge recites: "I

do hereby certify that the within and foregoing case made, and the amendments thereto, have been served in due time, and the same duly submitted to me for settlement and signing, as required by law." Thus it appears that the orders extending the time for making and serving the case made were in addition to the statutory time of thirty days, as provided by § 6951, Snyder's Stats. The motion to strike is therefore overruled.

The information charged, in substance, that on or about the 19th day of December, 1911, the said Thomas Monaghan did wilfully, unlawfully, and feloniously, with force and violence, take from the person of one J. E. Armstrong, and against his will, personal property, to wit, \$2.50, and

fear, and cause him to part with his property.

And so pointing a pistol at one, and requiring him to hold up his hands while confederates go through his pockets and take therefrom personal property, is taking by force and fear. *State v. Sanders*, 14 N. D. 203, 103 N. W. 419.

And in *Harris v. State*, 55 Tex. Crim. Rep. 469, 117 S. W. 830, it was said that a demand by one who held a gun pointed at another, that the latter hand over his money, complied with, would be robbery.

And robbery was held to have been committed,

—where accused took a revolver out of his pocket in a saloon, made the bystanders hold up their hands and told them that if anyone turned around he would blow his head off, went up to the bar and told prosecuting witness, who was behind the bar, to give him the money in the cash register, and to be quick about it, and, after it was handed to him, fled. *People v. Howard*, 3 Cal. App. 36, 84 Pac. 462;

—where accused walked up behind one who was assisting the banker in a gambling game, stooped down with his right hand on his pistol, which was in his pocket, and while in this position picked up the money with his left hand, and upon rising pulled out his pistol, cocked it, and said, "If you want any of this, come and get it," at the same time holding the pistol toward the banker, and stepping backward. *Reyes v. State*, — Tex. Crim. Rep. —, 102 S. W. 1156. The court said: "These acts are incidents too close together for a finespun theory that he was not put in fear of his life, or that there was no assault. We believe these facts show both an assault upon

[the banker] and fear on his part;"

—where the evidence showed that prosecutor avokey to find the accused with his (prosecutor's) trousers in one hand and a razor in the other hand; that he took the trousers away from the accused, but gave them up when accused demanded that he turn over his "stuff," at the same time threatening and menacing him with the razor, and that accused rifled the pockets

of the money. *People v. Stevens*, 141 Cal. 488, 75 Pac. 62. The court said that it may very well be that the taking of the trousers down from the headboard while the owner slept constituted but larceny; but the owner recaptured them with the money in them, and was thereafter induced against his will, by means of force and fear, to yield up to the accused the possession of the trousers with the "stuff" in them that accused was after, and that the latter act was beyond question a robbery;

—where one was held up and put in fear of his life by having a gun pointed at him and being told to put up his hands and drop certain property, which he was forced to do, and the party with the gun took charge of the property. *Brown v. State*, 61 Tex. Crim. Rep. 334, 136 S. W. 265.

And in *State v. Luhano*, 31 Nev. 278, 102 Pac. 260, it was held that the elements of force and intimidation were sufficiently established to justify a verdict of robbery where one of the accused stood in front of prosecuting witness holding a knife in a threatening manner and telling him to keep still, and the other accused reached into his pocket and took therefrom a sack of gold.

And, also, in *Keys v. State*, 60 Tex. Crim. Rep. 279, 131 S. W. 1068, where the evidence was that accused ordered the prosecutor to hold up his hands, and he did so through fear of his life, and accused then went through his pockets.

And in *Tones v. State*, 48 Tex. Crim. Rep. 363, 1 L.R.A.(N.S.) 1024, 122 Am. St. Rep. 759, 88 S. W. 217, 13 Ann. Cas. 455, where the evidence was that two officers arrested prosecutor, and after taking him to jail, without his consenting to be searched, they rudely backed him against the wall and held his hands up while one of them thrust his hand into his pocket and extracted his money, part of which was appropriated, it was held that there was sufficient force to constitute robbery. The court stated that a prisoner is powerless and knows it, and is aware that the least effort to foil the officer will call for greater force and violence, and acquiescence under

one railroad passenger ticket from Vinita, Oklahoma, to Boonville, Missouri, of the value of \$6.50, said personal property then and there being in the possession of said J. E. Armstrong, with the intent on the part of him, the said Thomas Monaghan, to then and there rob the said J. E. Armstrong.

The testimony in the case was substantially as follows:

J. E. Armstrong, the complaining witness, testified that he lived in Cooper county, Missouri, and came to Vinita on the Katy Flyer on the 19th day of December, and while waiting at the depot to take the 4 o'clock train to Blue Jacket, he was talking to several fellows there, and was drinking "right smartly." That he went to sleep and caught the defendant trying

to steal something from him, and a short time after that he was in the closet with his clothes unloosed, and while he was unbuttoning his suspenders, the defendant "socked" his hand into his pocket, and said: "God damn you; give me that pocketbook,"—and he got the pocketbook and got away from him. That he had too much whisky to defend himself, or he could not have got away so easy. That he followed him a little piece, and saw two fellows starting after him, and he hallooed to them: "Arrest him! He robbed me,"—and they caught him. That there was a \$5 bill and a little change and a ticket from Vinita, to Boonville, Missouri, in the pocketbook. That he did not consent to the defendant's taking his pocketbook

the circumstances is undoubtedly superinduced by his surroundings.

b. Threats of prosecution.

In *State v. Parson*, 44 Wash. 299, 7 L.R.A.(N.S.) 566, 120 Am. St. Rep. 1003, 87 Pac. 349, 12 Ann. Cas. 61, it was held that there was a sufficient use of force and putting in fear, within the statutory definition of robbery, where one approached an intoxicated person and pretended to arrest him, and, after compelling him to go away, searched him and took his valuables from him, no resistance being made because prosecutor believed such one to be an officer, and that he would be locked up if he resisted.

III. Force employed as a means of escape or to prevent a recapture of property taken without force.

After money has been stealthily removed from the pocket of another, the force used to prevent its recapture or to effect an escape does not relate back, so as to constitute the original taking a robbery. *Colbey v. State*, 46 Fla. 112, 110 Am. St. Rep. 87, 35 So. 189; *Jones v. Com.* 115 Ky. 592, 103 Am. St. Rep. 340, 74 S. W. 263, 14 Am. Crim. Rep. 580.

And as there was no force in the taking, it was held in *Grant v. State*, 125 Ga. 259, 54 S. E. 191, that the taking was not robbery by force, but by intimidation, where accused went into a pawn shop, asked to be shown revolvers, selected one, loaded it, and, pointing it at the clerk, demanded him to stand back, and, upon the latter getting under the counter, backed out of the store carrying away the revolver.

IV. Decisions under special statutes.

Under the Texas Penal Code, art. 857, which provides that if any person, by threatening to do some illegal act injurious to the character, person, or property of another, shall fraudulently induce the person so threatened to deliver to him any property, with the intent to appropriate 46 L.R.A.(N.S.)

it to his own use, he shall be guilty of robbery, it was said in *Burnsides v. State*, 51 Tex. Crim. Rep. 399, 102 S. W. 108, that the offense would be made out where the indictment charges that one falsely impersonated an officer, and falsely charged another with committing an offense and threatened to put him in jail, and thereby induced such other to pay over a sum of money. But in this case the conviction was reversed, as there was evidence that accused in good faith believed that he had a right to make the arrest, and the prosecuting witness was actually committing an offense, and so, though the accused's subsequent accepting of money for his release might be an offense, it was not robbery.

In *Doyle v. State*, 77 Ga. 516, cited in the earlier note, the court said that, in view of the fact that almost every community is infested with gangs of thieves whose only vocation seems to be to entrap unsuspecting persons in the exhibition of their money, or throw them off their guard and snatch money or other valuables from their person, it wished to call the attention of the general assembly to the matter and unanimously recommended that such offense be made robbery and punished as that crime is punished. This suggestion was carried out by the amendment of the Penal Code, § 151 (Acts 1903, p. 43), so as to read: "Robbery is . . . the sudden snatching, taking, or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof." In construing this statute, the court in *Williams v. State*, 9 Ga. App. 170, 70 S. E. 890, said that formerly violence of some kind was essential to the offense of robbery, but that under this act, in order to prove a case of robbery by suddenly taking or carrying away the property of another without his consent, it is necessary to show only that the person robbed was conscious that something was being taken from him, and that for any reason he was unable to prevent it; that the only difference between robbery of this class and larceny

That they put him in jail, but released him the next morning. On cross-examination he stated that he was drinking when he arrived at Vinita; that he had a little square grip with a quart of whisky, a jar of honey, and some cakes in it, and he had a bottle of whisky in his pocket; that he gave the defendant and one or two others a drink of whisky in the toilet room; that he did not know how many drinks he gave the defendant; that he also visited some negro joints across the track near the depot; that when they drank his whisky the fellow with the defendant wanted him to give him a dollar to get some more whisky, and he told him he did not have any money.

J. W. May testified that he saw the defendant running from Armstrong, and followed him with a fellow named Pyatt, who caught him about 300 yards from the depot; that Pyatt let him go, and said, "I seen him throw something out of his pocket as he came around that corner;" that witness then took Monaghan to jail.

Jake Smith testified that he was present when the sheriff arrested the defendant, and heard them say that a man was robbed, and went to see if he could find anything, and found a pocketbook with a ticket in it to Boonville; that a fellow named Pyatt gave him directions where to look.

Charles A. Davidson testified that he saw witness Armstrong near the depot so drunk he could hardly stand; he hallooed that he had been robbed, "Catch him," and a man that he did not know caught the defendant and threw him down; that the defendant had a knife in his hand, and he ran over and took the knife away from him.

Lee R. Mitchell, clerk of the district

from the person is that in the latter case property is abstracted without the knowledge of the possessor; but if the possessor becomes conscious, even in the taking that his property is being taken from him, and the knowledge is obtained before the taking is complete, it is robbery. And, so in that case it was held that as there was evidence that prosecuting witness was conscious that something was being taken from his pocket before, or at least at the same time that, an outcry was made that his money was taken from him, the jury were authorized to find that his money was suddenly taken away from him without his consent, but with his knowledge, and that the offense was robbery, and not larceny from the person or secret theft.

And in Hickey v. State, 125 Ga. 145, 53 S. E. 1026, a conviction under this act was sustained where the facts were almost identical.

And also in Pride v. State, 125 Ga. 750, 54 S. E. 698, the court said that "the sudden snatching from the victim with his

court of Craig county, over the defendant's objection, was permitted to identify a subpoena issued to the sheriff of Muskogee county, commanding W. B. Pyatt to appear as a witness for the state in the case on trial, together with the signed order of the court for W. B. Pyatt to appear, and the return of the sheriff of Muskogee county showing that said W. B. Pyatt was not found in said county.

C. Caldwell, county attorney, of Craig county, testified that the W. B. Pyatt named in said subpoena is the man referred to as Pyatt by the witness who testified, and, over the defendant's objection, was permitted to state that on Monday last "I finally got in communication with Mr. Pyatt, or someone answering to the name of W. B. Pyatt, in Muskogee, and endeavored to get him here as a witness." Thereupon the defendant moved that the statement be withdrawn from the consideration of the jury. The motion was overruled: the court saying to the jury that "This testimony is only permitted and will only be considered by the jury as showing or tending to show what effort the county attorney made to get this witness. That's the sole purpose of this particular testimony, and you will consider it for no other. The defendant may have an exception."

H. E. Ridenhour, sheriff, testified that when he arrested the defendant, he had one dollar in silver and three half dollars.

On behalf of the defendant, G. A. Whitney testified that he was with the defendant in the waiting room of the depot, and the complaining witness Armstrong invited them to go in the toilet and have a drink with him; and they went with him, he had

knowledge is violence in the sense of this word as used in the amending act. In other words, the general assembly has enlarged the meaning of the words 'open force and violence,' as used in the section of the Penal Code, so that the crime of robbery may now be committed by force exerted directly upon the person robbed, or by suddenly snatching the property from the person, where no other force is used than is necessary for the thief to obtain possession of the property."

But in Morris v. State, 125 Ga. 36, 53 S. E. 564, it was held that the evidence was insufficient to warrant a conviction under this act, where the prosecutor's purse was taken from his pocket without his knowledge and without resort to any violence in the taking, the court stating that the offense proved, if any, was that of larceny from the person, the distinction between this and the preceding cases being the fact that the property was taken without the owner's knowledge.

J. H. B.

a 4-ounce bottle of whisky, and they drank it up. Armstrong then said: "I would buy some more, but I have only got 15 cents." That he had a little telescope, and they opened it up, and it had a little can of something and big black bottle. That they had been in there about twenty minutes when witness left. That he saw the defendant have \$2 or \$3 in his hand at a drug store just before they went to the depot.

The defendant, as a witness on his own behalf, testified that he went to the depot with Whitney, and they went into the smoke room and sat down. Armstrong was talking to a couple of negroes, and then commenced a conversation with Whitney. They got up and went into the closet, and Armstrong produced a bottle of whisky, and they drank it. Armstrong said he wanted to eat a little, and that he had a lunch in his grip, and asked us to open it for him, and we found a bottle of whisky and a little jar of jam and some cakes. That Armstrong commenced eating the cakes, and witness said to Whitney, "I am going to get that bottle of whisky." That Whitney left, and he then slipped the bottle of whisky into his shirt, and a man named Bowen came in, and Armstrong pulled another bottle of whisky out of his pocket and they all drank. That he then went out and hid the bottle of whisky that he had taken from the grip under the depot, and then went back to the closet. As he went in Bowen came out, and Armstrong followed him out, saying he had been robbed, and he ran because he thought he meant that he was robbed of his whisky. That a fellow named Pyatt caught him and knocked him down, and he took his knife out and made him turn him loose. That Davidson came and took the knife away from him, and he started across the street, and the sheriff arrested him. He denied taking the pocketbook or anything else except the bottle of whisky.

It is contended, first, that the court erred in denying the motion for continuance made when the case was called for trial. His affidavit contained all the formal allegations required by law, and is in part as follows: "That the defendant on the 20th day of May, 1912, caused subpoena to be issued for Ed Bowen, who lives at Bartlesville, on which subpoena was indorsed an order of the court commanding attendance of said witness; that the return of the sheriff of Washington county this day filed is 'not found in my county;' that the said Ed Bowen, if present, would testify that at the time of the alleged robbery the said Armstrong and this defendant and the said Bowen were at the Missouri, Kansas, & 46 L.R.A. (N.S.)

Texas depot, in Vinita; that this defendant and Bowen and the said Armstrong were in the toilet drinking, and no robbery occurred during said time; that this defendant left said toilet, and that the said Bowen and said Armstrong remained therein; that about fifteen minutes later this defendant returned, and just as this defendant was entering the said toilet room, said Bowen left the same, and was immediately followed by said Armstrong; that said witness, if present, would also testify that the said Armstrong told him he had no money, and would have to borrow some from W. H. Kornegay in order to get to Blue Jacket, and that this defendant prior to going to said depot had money amounting to about \$2.50; that the facts set forth are true, and that he cannot prove them by any other witness; that if he is granted a continuance, we can secure the testimony of said Bowen by the next term of this court, and that the said Bowen is not absent by the advice, procurement, or consent of affiant." No rule is more fully established than that this court will not reverse a judgment of the trial court upon the ground that it refused to grant a continuance, unless it appears that such court has manifestly abused its discretion in refusing it. We think the affidavit does not disclose such diligence on the part of defendant to procure the attendance of this witness as made it the duty of the court to grant the continuance.

The principal question presented is the sufficiency of the evidence to sustain the verdict and judgment. It is not pretended that the prosecuting witness was put in any fear of injury to his person, and there was no evidence conducing to show that the defendant obtained or retained possession of the pocketbook by force and violence.

Section 2364 (Rev. Laws) of our Penal Code defines robbery as follows: "Robbery is a wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear."

Section 2365 provides: "To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery."

Section 2366 provides: "When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial."

Section 2655 defines grand larceny as follows: "Grand larceny is larceny committed in either of the following cases:

First. When the property taken is of value exceeding \$20. Second. When such property, although not of value exceeding \$20 in value, is taken from the person of another."

The larcenous taking of property from the person of another constitutes grand larceny, except when the taking is accomplished by either force or by putting in fear; it is then robbery. Says Bishop: "Every robbery requires either actual violence inflicted on the person robbed, or such demonstrations or threats as under the circumstances create in him reasonable apprehension of bodily injury." 2 Bishop, New Crim. Law, ¶ 116. Says Wharton: "The snatching a thing is not considered a taking by force, but if there be a struggle to keep it, or any violence or disruption, the taking is robbery, the reason of the distinction being that, in the former case we can infer neither fear nor the intention violently to take in face of resisting force. If putting in fear be proved, the offense is robbery. And so where the thing is torn from the person, as an earring from the ear." 1 Wharton, Crim. Law, § 854. "The violence or intimidation in robbery must precede or be contemporaneous with the taking of the property. The violence which constitutes an essential element of the crime of robbery must be actual, personal violence, but the degree of force used is immaterial, except under statutes which provide for a punishment varying with the violence which accompanies the taking. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance. The mere snatching of an article from the person of another, without violence or putting in fear, is not robbery, except where there is some injury or violence to the person of the owner, or where the property snatched is so attached to the person or clothes of the owner as to afford resistance." 34 Cyc. 1799, and cases cited.

The prosecuting witness was the only person to testify to the circumstances attending the taking of the pocketbook. He admitted that he was helplessly drunk at the time, and his examination discloses the fact that he only knew that his pocketbook was taken against his will. His testimony also shows that he was not only violating the prohibition law of the state, but also the Federal law prohibiting the introduction of whisky into the Indian country. The subsequent struggle of the defendant with other persons in attempting to escape cannot be considered to determine whether the taking was forceful or furtive. It would seem, and we would suggest, that al-

ways in a case of this character, where the line of demarcation between offenses, as in this case, has a very narrow margin, the safe practice, where the proof may be uncertain, is to charge the lesser offense. Upon a careful review it is our opinion that the evidence did not show either force or fear in the taking of the property in question, and that the crime charged was not proved.

The charge of the court contains twenty-one instructions, and submitted only the issue of robbery in the first degree. The rules of law applicable to a case of this character are simple and plain, and the practice of encumbering the record with so many useless instructions is a vicious one, and ought not to be encouraged.

The instruction on the presumption of innocence concludes with the following disquisition: "But the court charges you that the presumption of innocence is not evidence, and does not partake of the nature of evidence, and that it remains with the defendant only until it is overcome by competent evidence which convinces your minds of his guilt beyond a reasonable doubt." The defendant's counsel contends that by this statement "the court completely destroys the presumption of innocence." Our Procedure Criminal provides, § 5875 (Rev. Laws): "A defendant in a criminal action is presumed to be innocent until the contrary is proved; and, in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." The "presumption of innocence is founded upon the first principles of justice; it is the same presumption of law which obtained in behalf of the accused at common law. It is a principle so just, and so undoubted and universal, as to stand upon the recognition of all the times wherever the common law is respected. Our statute provides, as a rule of law, the state's burden of proof beyond a reasonable doubt, and the presumption of innocence will therefore sustain the burden of evidence until the defendant is proven guilty by the evidence beyond a reasonable doubt. While the presumption of innocence is not evidence in the true sense, it may in a sense be called "an instrument of proof" or something "in the nature of evidence," in that it determines from whom evidence shall come, and it should continue to have its logical weight in the case, not only during the taking of the testimony, but during the deliberations of the jury until they have arrived at a verdict. The defendant is entitled in every instance to an instruction on the presumption of his innocence, and that the state must prove the charge against him beyond a reasonable

doubt. The jury are bound to take the law from the court, and questions of fact are to be decided by the jury. The charge of the court must not invade the province of the jury, and should not extend beyond a plain statement of the law applicable to the case. Philosophic disquisition on the presumption of innocence or dissertation upon the nature of evidence should always be omitted. We think that the jury could be easily confused and misled by the qualifying statement in said instruction, "that the presumption of innocence is not evidence, and does not partake of the nature of evidence." Ordinarily they would understand the court to mean that the presumption of innocence amounts to nothing, and that they should only consider any inference of the fact of innocence that may arise upon the evidence. In other words, that they should not consider that the defendant was presumed to be innocent. It may also be construed as a comment upon the weight of evidence. The law requires the court, not only to abstain from positive expression as to the weight of the evidence, but to avoid even the appearance of an intimation as to the facts, and to so guard the language of its charge to the jury, which is the law of the case, that no inference, however remote or obscure, may be drawn by the jury as to the weight of the evidence. It is our opinion that the exception to the instruction was well taken.

In view of the fact that the judgment must be reversed for the errors already indicated, we deem it unnecessary to enter into a discussion of the other questions raised.

For the reasons indicated the judgment appealed from is reversed. The warden of the penitentiary is directed to deliver the defendant to the sheriff of Craig county, who will hold him in custody until he shall be discharged therefrom, or as otherwise ordered according to law.

Armstrong, P. J., and Furman, J.,
concur.

UTAH SUPREME COURT.

CARRIE BROWN, Appt.,

v.

SARAH M. JOHNSON, Respnt.

(— Utah, —, 134 Pac. 590.)

Usury — bonus taken by agent — effect.

1. A principal who does not authorize or ratify the act of his agent in receiving a bonus beyond legal interest for lending his money, or knowingly receive or retain any of the fruits of the illegal transaction, 46 L.R.A.(N.S.)

is not subject to the penalties of the statute against usury.

Same — monthly interest — effect.

2. A note is not usurious because it provides for interest at a certain rate per month, if such rate is merely one twelfth of the yearly rate allowed by statute.

Evidence — of agent — negotiation of loan — usury.

3. Upon the question of usury in a loan, evidence of the agent of the borrower, who secured the loan, as to the transactions attending it, is admissible.

Same — services of agent — admissibility.

4. Upon the question of usury because of a bonus taken by the lender's agent, who claims that the bonus was for services performed by him for the borrower, evidence of the performance of such services is admissible.

(May 8, 1913.)

A PPEAL by plaintiff from a judgment of the District Court for Salt Lake County in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Mr. Allen T. Sanford, for appellant:

The lender must himself be guilty of the wrong.

Brainard v. Prouty, 66 Minn. 343, 69 N. W. 3; Webb, Usury, § 417; Yellow Medicine County Bank v. Cook, 61 Minn. 452, 63 N. W. 1093; Wood v. Babbitt, 149 Fed. 818; Conover v. Van Mater, 18 N. J. Eq. 481; Berdan v. School Dist. 47 N. J. Eq. 8, 21 Atl. 40; Short v. Post, 58 N. J. Eq. 130, 42 Atl. 569.

A person leaving money with an agent to loan does not authorize the agent to

Note. — Commissions charged by lender's agent as usury.

This note supplements the note to France v. Monro, 19 L.R.A.(N.S.) 391, where the earlier cases are collected.

In Griswold v. Dugane, 148 Iowa, 504, 127 N. W. 664, the court declared that it was clear that if the person who negotiated the loan acted as agent for the lender, any commission to him, in addition to the legal rate of interest, would render the loan usurious. This is probably upon the assumption that the facts were known to the lender, though it is not expressly so stated.

The mere fact that the lender's agent exacts a commission from the borrower, in addition to legal interest, does not render the transaction usurious as to the lender, in the absence of proof that he knew of such exaction. Silverman v. Katz, 120 N. Y. Supp. 790.

Where, however, the principal is charged with knowledge of the charges made, he is bound by the acts of the agent. Thus, in Schwarz v. Sweitzer, 202 N. Y. 8, 94 N. E.

exact usurious interest, and the money so left cannot be forfeited unless the principal has guilty knowledge.

Webb, Usury, § 93; Estevez v. Purdy, 66 N. Y. 446; Boylston v. Bain, 90 Ill. 285; Clark, Contr. pp. 403, 404; Greenfield v. Monaghan, 85 Iowa, 211, 52 N. W. 193; Call v. Palmer, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. Rep. 301; Dagnall v. Wigley, 11 East, 43; Solarte v. Melville, 7 Barn. & C. 430, 1 Mann. & R. 19, 6 L. J. K. B. 68; Barretto v. Snowden, 5 Wend. 181; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Bell v. Day, 32 N. Y. 165; Conover v. Van Mater, 18 N. J. Eq. 486; Rogers v. Buckingham, 33 Conn. 81; Gokey v. Knapp, 44 Iowa, 32; Wyllis v. Ault, 46 Iowa, 46; Brigham v. Myers, 51 Iowa, 397, 1 N. W. 613, 33 Am. Rep. 140; Cox v. Massachusetts Mut. L. Ins. Co. 113 Ill. 382; McLean v. Camak, 97 Ga. 804, 25 S. E. 494; Commonwealth Title Ins. & T. Co. v. Dakko, 89 Minn. 386, 94 N. W. 1088; Babcock v. Murray, 69 Minn. 199, 71 N. W. 913; Gantzer v. Schmeltz, 203 Ill. 560, 69 N. E. 584; Short v. Pullen, 63 Ark. 385, 38 S. W. 1113; Sherwood v. Swift, 64 Ark. 662, 43 S. W. 507; Rogers v. Buckingham, 33 Conn. 81; Muir v. Newark Sav. Inst. 16 N. J. Eq. 537; Telford v. Garrells, 31 Ill. App. 441; Stein v. Swensen, 44 Minn. 218, 46 N. W. 360; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Baxter v. Buck, 10 Vt. 548.

1090, affirming 134 App. Div. 939, 118 N. Y. Supp. 1140, it was held that a loan made by a son as agent for his mother for \$960, the son retaining \$160 as a bonus, of which fact the mother was informed, was held to be usurious; it appearing that the mother afterward collected interest on the loan, and that neither the borrower nor her broker, who effected the loan, knew that the son retained the bonus.

So, in American Mortg. Co. v. Woodward, 83 S. C. 521, 65 S. E. 739, it is held that the receipt of excessive and unreasonable commissions by the agent of the lender, with the knowledge, actual or constructive, of the principal, renders the transaction usurious, if such commissions and the interest added exceed the lawful rates.

And, in Robertson v. Merwin, 154 App. Div. 723, 139 N. Y. Supp. 726, the court concedes that a charge by an agent, without the knowledge or ratification of the principal, cannot be made the basis of a usury defense against the principal, but holds that, where one of three joint owners of a fund charged a sum in making a loan from that fund sufficient to amount to usury, and took security in the name of one of the other parties, which was in accordance with their practice generally in making loans from the fund, he was acting as a principal for the benefit of all three in a 46 L.R.A.(N.S.)

Mr. A. A. Duncan, for respondent:

The amount retained by Mr. Lochwitz in excess of legal interest was solely as compensation for the loan or forbearance of the money involved in this action.

Floyer v. Edwards, Cowp. pt. 1, p. 112.

The principal is chargeable with the usury of the agent when either (1) the agency is general, or (2) the agent's services are gratuitous, and he receives his compensation from the borrower.

Hare v. Winterer, 64 Neb. 551, 90 N. W. 544; Olmsted v. New England Mortg. Secur. Co. 11 Neb. 487, 9 N. W. 650; Horkan v. Nesbitt, 58 Minn. 487, 60 N. W. 132; Sherwood v. Roundtree, 32 Fed. 113; Hall v. Maudlin, 58 Minn. 137, 49 Am. St. Rep. 492, 59 N. W. 985; Ridgway v. Davenport, 37 Wash. 134, 79 Pac. 606; Lewis v. Willoughby, 43 Minn. 307, 45 N. W. 439; Algur v. Gardner, 54 N. Y. 360; Robinson v. Blaker, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845; Newport Nat. Bank v. Tweed, 4 Houst. (Del.) 225; Austin v. Harrington, 28 Vt. 130; Tankealy v. Bell, — Tenn. —, 37 S. W. 1018; McFarland v. Carr, 16 Wis. 266; Western Storage & Warehouse Co. v. Glasner, 169 Mo. 38, 68 S. W. 917; Hare v. Hooper, 56 Neb. 480, 76 N. W. 1055; France v. Munro, 138 Iowa, 1, 19 L.R.A.(N.S.) 391, 115 N. W. 577; Payne v. Henderson, 106 Ky. 135, 50 S. W. 34; Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; Dayton v. Dearholt, 85 Wis. 151, 55 N. W.

point enterprise, and the defense of usury was available.

When the taking of usury is made a criminal offense, the agent of the lender will be liable to prosecution if he charges a commission in excess of the legal rate of interest. Thus, in Owens v. State, 63 Fla. 26, 58 So. 125, which was a criminal prosecution under a statute providing that "any person, association of persons, firm or corporation, or the agent, officer, or other representative of any person, association of persons, firm, or corporation lending money in this state, who shall wilfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to 25 per centum per annum upon the principal sum loaned, by any contract, contrivance, or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees, or otherwise," shall be guilty of misdemeanor, the court sustained the conviction of an agent of an investment company who charged a commission made on a loan, in addition to the full legal interest, though the agent maintained his own offices, and no part of the commission went to the investment company.

R. L. S.

147; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Brown v. Archer*, 62 Mo. App. 287; *Clarke v. Havard*, 111 Ga. 242, 51 L.R.A. 499, 36 S. E. 837; *Thompson v. Ingram*, 51 Ark. 546, 11 S. W. 881; *Whalley v. American Freehold Land-Mortg. Co.* 20 C. C. A. 306, 42 U. S. App. 90, 74 Fed. 73; *Banks v. Flint*, 54 Ark. 40, 10 L.R.A. 459, 14 S. W. 769, 16 S. W. 477; *Bank of Newport v. Cook*, 46 Am. St. Rep. 138, note; *Bliss v. Sherrill*, 24 App. Div. 280, 49 N. Y. Supp. 561; *Tankesly v. Bell*, — Tenn. —, 37 S. W. 1018; *Braine v. Rossowog*, 13 App. Div. 249, 42 N. Y. Supp. 1098.

Frick, J., delivered the opinion of the court:

This was an action to recover upon a promissory note given for \$350. The only defense interposed is usury. A trial to the court resulted in findings and judgment for defendant and the plaintiff appeals.

The interest specified in the note did not exceed the rate permitted by our statute, and hence the defendant undertook to prove usury by parol evidence. We have carefully gone over and examined all of the evidence that was produced at the trial, and which was certified up by the trial court in appellant's bill of exceptions. The material evidence produced by both parties is substantially as follows: Some time in 1910 Mrs. Mansfield, the mother of respondent, applied to one Adolph Lochwitz to obtain a loan of \$250 or \$300, which she said she needed immediately to pay certain materialmen for material which they had furnished and were furnishing for a new dwelling house she was then building. In this connection she testified that she went to Mr. Lochwitz and asked him for the money, and after telling him that she could secure its payment by a chattel mortgage upon her daughter's (respondent's) property he said that he would see what he could do for her by way of obtaining the money, and that he advised her that she needed at least \$350; that within a day or two thereafter she saw him again, and he told her that he could let her have the money, but that she would have to pay \$50 for it for ninety days; that pursuant to this arrangement she, at his request, went to the office of Mr. Sanford, an attorney at law, to have the necessary papers drawn to evidence the loan and there to obtain the money; that she met Mr. Sanford and Mr. Lochwitz at the office of the former, and he prepared the papers and she signed them by signing her daughter's name, by herself, as attorney in fact; that after the papers were signed Mr. Sanford counted out \$300, plac-

ing the same in three separate parcels, and also counted out an additional \$50 and placed it in a separate parcel and shoved the whole amount across the office desk toward her; that she was about to take the money when Mr. Lochwitz said that the interest and expenses for drawing the papers should be deducted from the amount. After this the witness's memory is not clear with respect to just how the transaction terminated. Mr. Sanford, however, testified that he obtained the \$350 from his stenographer, with whom Mr. Lochwitz had left it, and that he counted all of it and shoved it across the desk to Mrs. Mansfield, when Mr. Lochwitz spoke up and said that the interest called for in the note, to wit, 1 per cent a month, should be taken out of the amount, and further that one half of the expenses for drawing the papers should also be deducted therefrom. He accordingly asked Mr. Sanford what the expenses were, and was informed that they would be \$5. Mr. Sanford then sought to take the amount of the interest, namely, \$10.50, and his expenses, \$5, out of the \$350, but could not do so because he could not make the change correctly. Mr. Lochwitz then paid Mr. Sanford the portion of the expenses Mrs. Mansfield was to pay and immediately left the office to go with her to the bank where she wanted to deposit the money so that she could check against it, where she said she would repay him her share of the expenses. As to what happened at the bank, the witnesses are greatly at variance, but, in view of the conclusions reached, the precise nature of the transaction there is not material. Mrs. Mansfield, however, asserts that Mr. Lochwitz took the whole \$50 for interest, while he insists that all he took was \$10.50 and one half of the expenses, and that Mrs. Mansfield gave him \$37 as compensation for his efforts in obtaining the money in question and to further assist her to obtain a loan upon her house she was then building. He says that this came about in this way: When Mrs. Mansfield asked him for the money in question he asked her what means she had to repay the loan if made; that she said she wanted to secure \$1,200 by mortgaging her house, and if she could do so she could repay the loan from him out of that. After considering her wants as detailed by her, he told her that she had better make a loan of \$1,600, and that in consideration of the \$50 she offered to pay him he would assist her to obtain the loan from some real estate men with whom he was acquainted. She disputes the latter statement and insists that the \$50 was asked as a compensation for the use of the mon-

ey in question. The evidence is without contradiction that the money in question belonged to the appellant, who is a niece of Mr. Lochwitz, and at the time the loan was made lived and still lives in San Francisco; that some time prior to the transaction in question she had lived at Price, Utah, and from there came to Salt Lake City for surgical treatment; that after she was operated upon and was about to leave Salt Lake City for San Francisco she had more money than she needed and she gave \$400 to her uncle, Mr. Lochwitz, telling him to use it or do with it as he thought best, and when she needed it he could, upon request, return it to her. Mr. Lochwitz states that after he had tried in vain for a number of days to obtain the money for Mrs. Mansfield, and after she had offered him \$50 as compensation to obtain it, he finally let her have \$350 of the \$400 aforesaid and took a chattel mortgage as security; that his niece had no knowledge whatever that he was about to make or that he had made the loan, until afterwards, when he advised her of the fact and asked her to execute a power of attorney to him so that he might do everything that might be required of him in collecting the money; that she did not know anything about the arrangements between him and Mrs. Mansfield respecting the interest, commission, or bonus (whatever it may be called), and never obtained any part or share of the same; that no arrangement or understanding of any kind was ever had or talked of between him and his niece about the making of this or any other loan, or about his services in case he made a loan, and that his niece furnished the entire \$350. Respondent introduced the aforesaid power of attorney in evidence, which is dated and was executed some time after the note in question was made and delivered. It is not necessary to detail the evidence further.

The only findings of fact made by the court, except the formal ones, are as follows: "That the said note and mortgage were made and delivered to the plaintiff upon an agreement between the plaintiff and defendant that the defendant should pay to plaintiff, and that the plaintiff should take, receive, reserve, and secure to herself for the loan of the principal sum therein mentioned, a greater sum than at the rate of 12 per centum per annum upon said principal sum, to wit, at the rate of 1 per cent per month from date of said note, as provided therein, and in addition thereto the sum of \$34; and, in addition to the said interest so reserved by the said note at the rate of 1 per cent per month from date thereof until paid, the defendant

at the time of the execution and delivery thereof paid to the plaintiff, and the plaintiff took and received in pursuance of said agreement, the said further sum of \$34 as additional interest or compensation for the loan of the said principal sum."

Upon the foregoing findings the court made conclusions of law and entered judgment in favor of respondent, in which the note and chattel mortgage were canceled and appellant was adjudged to pay the costs of the action. Appellant complains that the findings aforesaid are not sustained by the evidence, and that the court's conclusions of law and judgment are contrary to law.

We think it requires no extended, if any, argument to show that in view of the evidence to which we have referred the so-called findings of fact are merely a blending of conclusions of fact and conclusions of law interspersed with some ultimate facts. The finding that an agreement was entered into "between the plaintiff and defendant" is, in view of the evidence, a conclusion of law pure and simple, since the evidence is without dispute that Mr. Lochwitz acted as agent for and on behalf of the appellant, and that Mrs. Mansfield acted as such for and on behalf of the respondent. In view, therefore, that the transaction was effected through the agents of both parties, and since appellant contended at the trial and now contends that she did not enter into a corrupt and usurious agreement, knew nothing about it, and neither received any of the fruits thereof nor ratified the transaction, the court should have specifically found the facts with regard to those matters and should have made his conclusions of law from the facts found.

There is not the slightest evidence in this record from which any inference can legitimately be deduced that the appellant authorized her uncle to enter into a usurious contract, unless such inference is permissible from the mere fact that she left the money with him under the conditions hereinbefore detailed and from the execution of the power of attorney to him after the loan was made. Nor is there any evidence of ratification, nor that she knowingly received or retained any of the fruits of the illegal transaction, nor that she received anything forbidden by law. We think the great weight of authority is to the effect that the facts in this case are clearly insufficient to justify the inference above referred to. We shall refer to some of the cases upon this point further on in this opinion.

The court, however, also found that the note in question upon its face provided for

a higher rate of interest than is permitted by our statute in that it calls for interest at the rate of 1 per cent a month while the statute permits interest at a rate "not to exceed 12 per cent per annum." If this were so, the finding is useless, since the note speaks for itself. The finding is, however, a mere conclusion of law, but whether it is called a conclusion or a finding of fact it cannot be sustained, because there is no evidence whatever to support it. Nor does the language of the note support it if it be assumed to be a mere legal conclusion. This is easily demonstrable. The statute permits any rate of interest not exceeding 12 per cent per annum. This means a period of twelve months, no more no less. One per cent a month is precisely 12 per cent per annum, and this is especially so where the loan is for less than a whole year. If the interest reserved in the note in question be calculated, we find that upon the \$350 it amounts to \$3.50 a month and for twelve months to \$42. Interest at the rate of 12 per cent per annum would amount to \$42 for a year on \$350, and to \$3.50 for each month, and for three months to \$10.50, just the amount reserved in the note. If it were true that the note on its face called for a usurious rate, then we cannot see how the appellant could escape the consequences of a usurious contract, and the judgment would be correct regardless of the findings of fact, and there would have been no need of an extended opinion in this case. We are, however, clearly of the opinion that the note upon its face called for legal interest merely, and hence the usury must be established, if established at all, from facts *aliunde*. The question, therefore, is, Does the evidence in this case establish usury in the sense that it vitiates the note under our statute as between appellant and respondent? While the courts with regard to when a principal is bound by the acts of an agent in entering into usurious contracts or transactions are seemingly not in harmony, yet from a careful examination of the cases it will be found that their divergent views are more apparent than real.

In *Boylston v. Bain*, 90 Ill. 285, the supreme court of Illinois states the law upon the subject thus: "If the plaintiff did not authorize his agent to charge a higher rate of interest than is given by the statute, and if he had no knowledge that a higher rate was charged, and did not receive the interest paid in excess of that allowed by statute, as stated in the instruction, we perceive no ground upon which the defense of usury could be rested. An unlawful and corrupt intent is the very essence of a usurious transaction, and how the plaintiff could be charged with an intent to violate

the law if he had no knowledge that a usurious rate of interest was charged, and never received the illegal interest, as declared in the instruction, it is difficult to understand."

The supreme court of Iowa in *Greenfield v. Monaghan*, 85 Iowa, 211, 52 N. W. 193, in the headnote, lays down the following rule: "Where an agent for a person lending money upon a promissory note charged the borrower a rate of interest in excess of that allowed by law, retaining the difference between the rate charged and the legal rate for his own use, held, that the loan was not usurious unless the charge of illegal interest was authorized or ratified by the principal, and that upon such issue the burden of proof was upon the party charging usury."

In *Call v. Palmer*, 116 U. S. 102, 29 L. ed. 561, 6 Sup. Ct. Rep. 303, the Supreme Court of the United States, after reviewing the Iowa cases in connection with a number of others, says: "These decisions seem to be founded on plain principles of justice and right. For when two persons, the agent and the borrower, conspire together and for their own purposes violate the law, how can punishment for their acts be justly imposed on the innocent third party, the lender?"

What have we in this case except a secret arrangement between Mrs. Mansfield and Mr. Lochwitz, the former being anxious to obtain the money and the latter desirous of receiving the bonus or a commission (call it what you will) from her out of the money loaned without the knowledge or consent of appellant, whose money was loaned? Why should she be made to suffer for their acts from which each expected some benefits, while she could obtain none except the interest allowed by law?

The editor in a footnote to the case of *Bank of Newport v. Cook*, 46 Am. St. Rep. 197, after reviewing many of the cases, states the substance of the decisions in the following language: "If the person to whom a commission or bonus is paid is an agent of the lender, the question whether such payment can be taken into consideration in determining whether the transaction is usurious depends upon whether or not the lender is to profit, directly or indirectly, by the transaction. If he does not know that a commission has been, or is agreed to be, paid, and has no notice of such facts as impose upon him the duty of inquiry, and he does not knowingly receive any benefit from the commission or bonus, he certainly has no usurious intent, and, having neither usurious intent nor a usurious profit, the cases agree that he is not to be sub-

jected to the penalties of usury." Many cases are cited as supporting the foregoing statement of the editor.

Without making further excerpts from the decisions, we refer to the following cases, all of which are in harmony with the cases referred to and in which many others are cited: *Estevez v. Purdy*, 66 N. Y. 446; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Rogers v. Buckingham*, 33 Conn. 81; *Franzen v. Hammond*, 136 Wis. 239, 19 L.R.A.(N.S.) 399, 128 Am. St. Rep. 1079, 116 N. W. 169; *Silverman v. Katz* (Sup.) 120 N. Y. Supp. 790.

In the case of *Rogers v. Buckingham*, *supra*, the transaction there involved, like the one in this case was the only one that had been entered into by the agent for the principal; and the court held that a single transaction by an agent, where no arrangement existed between the principal and such agent with regard to the compensation he should receive or the rate he should reserve, was insufficient to authorize an inference or presumption of fact that the agent was authorized to exact usury. That case is frequently cited and approved by the courts upon the question of establishing authority upon the part of the agent to bind the principal upon a usurious contract made by the agent. It has, however, also been frequently held that, where an agent enters into a usurious contract with a borrower, the lender, under certain circumstances, may be bound by the acts of the agent, although the former did not know of nor directly authorize the particular transaction. The rule in this respect is perhaps as well stated by the supreme court of Minnesota as it is anywhere in the headnote to the opinion in the case of *Hall v. Maudlin*, 58 Minn. 137, 49 Am. St. Rep. 492, 59 N. W. 985, which we quote: "Where a money lender intrusts the entire management of his business to a general agent, with unlimited authority to conduct it according to his own discretion, and with the understanding that he shall obtain the compensation for his services as agent from the borrowers, in the form of bonus or commission, if the agent exacts from a borrower a bonus or commission which, together with the interest reserved in the contract, amounts to more than the maximum rate of interest allowed by law, the transaction is usurious." The following cases clearly support the rule as there stated: *Robinson v. Blaker*, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845; *Payne v. Henderson*, 106 Ky. 135, 50 S. W. 34; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; *Clarke v. Havard*, 111 Ga. 242, 46 L.R.A.(N.S.)

51 L.R.A. 499, 36 S. E. 837; *Whaley v. American Freehold Land-Mortg. Co.* 20 C. C. A. 306, 42 U. S. App. 90, 74 Fed. 73. See also cases cited in the footnote to *Bank of Newport v. Cook*, 46 Am. St. Rep. 198, 199.

In addition to the cases just cited there are a few in which the principal's liability is extended to all acts which were within the apparent scope of the agent's authority. All that the courts in those cases seemed to inquire into was whether the agent had the authority to make the loan, and, if he had, the principal was held bound by the agent's acts, although the agent transcended the express directions of his principal. To this effect is an early case from Nebraska which is referred to by Mr. Justice Sullivan in *Hare v. Winterer*, 64 Neb. 551, 90 N. W. 544. In the latter case it is, however, expressly stated that it was not necessary to go, and that the court did not go, to that extent in a later case. The later Nebraska case may therefore be classed as belonging to the second group of cases cited above. Another case which perhaps goes to the extent of the early Nebraska case is *Austin v. Harrington*, 28 Vt. 130.

It is also claimed by respondent that the case of *Algur v. Gardner*, 54 N. Y. 360, supports the doctrine laid down in the Vermont case. It will be observed that the case of *Estevez v. Purdy*, 66 N. Y. 446, to which we have referred, and which is a later New York case, squarely lays down the doctrine of the Illinois case which we have quoted from. Moreover, the reasoning in the opinion in 54 N. Y. is not satisfactory, and we have not found the case cited nor followed by any of the later New York or other cases, while the case in 66 N. Y. has frequently been cited and followed.

There is still another case decided by the supreme court of Missouri, *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S. W. 917. The decision in that case is, however, squarely based upon a local statute, and is therefore not controlling here. There may be a few more sporadic cases which follow the rule laid down by the Vermont court, but we have not found them. We desire to add in this connection that, when all of the cases from which we have quoted, and the others to which we have referred, except the ones from Nebraska, Vermont, and Missouri, and possibly the one in 54 N. Y., are carefully examined and analyzed, it will be found that all of them support the doctrine laid down by the supreme court of Illinois in the case of *Boylston v. Rain*, 90 Ill. 285. We are also of the opinion that the doctrine as there laid down is the correct one.

The question of whether the agent had authority to enter into a contract in violation of law should not be limited to the mere formal inquiry of whether he had the express or implied authority to lend the principal's money. While that question, as a matter of course, is always an element and lies at the very threshold of the inquiry where the authority of the agent is involved, yet, where the transaction involves the violation of a statute, the inquiry should go farther, and it should be ascertained whether the agent had the authority to enter into the contract which is alleged to be in violation of law. To establish such authority it need not be shown that the principal expressly conferred it, but it may be shown in the same manner as it usually is shown by proving the facts and circumstances from which the authority may legally be inferred or implied. And in this regard, if it be shown that there was an understanding, express or implied, between the agent and the principal whereby the former should look to the borrower for a commission or bonus as compensation, or if he has made loans for his principal in which such a course was pursued and the principal knew of it, or approved of it, or if there are any other facts or circumstances from which authority may be clearly implied, it may be found to exist. In the case at bar, as we have seen, there is nothing from which authority may be deduced except the naked fact that the uncle of appellant was authorized to exercise his best judgment in making use of the \$400 she had left with him. Assuming that all that Mrs. Mansfield claims is true, still the question remains, What authority has the court to declare appellant's money forfeited to the respondent? Certainly our statute does not require that under such conditions the latter's money should be forfeited to the borrower.

The statute says "whenever it shall satisfactorily appear by the admission of the party or by proof that any bond, bill, etc., has been taken or received in violation of the provisions" [Utah Comp. Laws 1907, § 1241 X 8] of the statute, then, and not otherwise, shall the lender forfeit the whole sum expressed in the contract to the borrower. We held in *Culmer Paint & Glass Co. v. Gleason*, — Utah, —, 130 Pac. 66, that when the plea of usury is interposed and forfeitures are involved, and "especially such as have the effect of taking property from one and giving it to another [the forfeiture] should be enforced only when the proof is clear and convincing, if not beyond a reasonable doubt." We think that this is what is contemplated by the language of the statute which is, when it 46 L.R.A.(N.S.)

shall satisfactorily appear by the admission of the party or by proof that the provisions thereof have been violated, a forfeiture, etc., shall be declared by the court. If this means anything, it means that the proof showing a violation of the statute should be clear and convincing. The proof, in order to be satisfactory, can be no less than this.

Entirely apart, however, from the terms of our statute, the overwhelming weight of authority is clearly to the effect that the burden of proof is upon him who alleges usury, and that he must establish it by at least clear and convincing evidence, and not merely by a preponderance thereof. *Webb, Usury*, § 417; *Yellow Medicine County Bank v. Cook*, 61 Minn. 452, 63 N. W. 1093; *Wood v. Babbitt* (C. C.) 149 Fed. 818; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Short v. Post*, 58 N. J. Eq. 130, 42 Atl. 563. The evidence as it now stands is therefore clearly within the rule laid down in *Yellow Medicine County Bank v. Cook*, supra, and is insufficient to support the conclusions of law and judgment.

Appellant further contends that the court erred in overruling her motion to strike the testimony of Mrs. Mansfield. This contention is not tenable. While Mrs. Mansfield's testimony, standing alone, was clearly insufficient to make out a case as against the appellant, yet the testimony was properly received by the court. There is a further assignment that the court erred in admitting and excluding certain evidence.

We have carefully gone over the court's rulings in that regard, and we do not find any error in that regard excepting in one particular in connection with the claim advanced by appellant; namely, Mr. Lochwitz claimed that he was to receive the \$50 as compensation for obtaining a loan upon Mrs. Mansfield's house and lot and for what he had done in looking up persons who had money to lend before the loan in question was made, and in connection with the claim he attempted to prove that he had in fact assisted Mrs. Mansfield, and he offered to show just what he had done in that respect. The court ruled that he could prove the agreement between himself and Mrs. Mansfield, but also ruled that he could not show what he had done after the loan in question was made. Where usury is attempted to be proved by parol evidence or otherwise, it is always proper for either party to go into the whole transaction for the purpose of disclosing all of the circumstances relating thereto. The evidence offered by appellant, while somewhat remote was nevertheless proper in view of the claim made by Mr. Lochwitz. The question was one of weight, and not of rele-

vancy. The only objection was that it was not material. It clearly was material, and, as we have seen, was otherwise proper. If this were the only error, we should not reverse the judgment, because it appears from the record that most of the offer to which we have referred was nevertheless before the court, as upon cross-examination Mr. Lochwitz was permitted to state about all of the facts in that regard. We have only mentioned the matter as a guide to the court in case a retrial of the case is had.

For the reasons stated, the judgment is reversed, the case is remanded to the District Court, with directions to grant a new trial and to proceed with the case in accordance with this opinion. Appellant to recover costs.

McCarty, Ch. J., and Straup, J., concur.

UTAH SUPREME COURT.

T. D. SIMPSON

v.

DENVER & RIO GRANDE RAILROAD COMPANY.

(— Utah, —, 134 Pac. 883.)

Pleading — complaint — issuance of pay check — negligence or estoppel.

1. One cashing a railroad pay check which was delivered by the railroad company to an impostor cannot, in an action to recover the amount from the railroad company, succeed upon the theory of negligence or estoppel on its part, unless he alleged such grounds in his complaint.

Bills and notes — pay check — issuance to impostor — forged indorsement — liability of holder.

2. A railroad company which by mistake issues to impostors pay checks belonging to employees is not liable to pay them to one who cashes them upon the forged indorsement of the impostors, without negligence or conduct amounting to an estoppel on its part.

(June 27, 1913.)

CROSS APPEALS from a judgment of the District Court for Salt Lake County in plaintiff's favor for a part only of the re-

Note. — The question who must bear the loss when a check or bill is issued or indorsed to an impostor is treated in the notes to *Land Title & T. Co. v. Northwestern Nat. Bank*, 50 L.R.A. 75; *Harmon v. Old Detroit Nat. Bank*, 17 L.R.A.(N.S.) 514; and *McHenry v. Old Citizens' Nat. Bank*, 38 L.R.A.(N.S.) 1111. And see later case, *Goodfellow v. First Nat. Bank*, 44 L.R.A.(N.S.) 580. 46 L.R.A.(N.S.)

lief demanded in an action brought to recover upon certain pay checks issued by defendant which had been cashed by plaintiff. Reversed on defendant's appeal.

The facts are stated in the opinion.

Messrs. Van Cott, Allison, & Riter, for defendant:

In order to pass title to the checks in question, the impostors had to forge the signatures of the payees.

Forgery can pass no title to a negotiable instrument.

Warren v. Smith, 35 Utah, 455, 136 Am. St. Rep. 1071, 100 Pac. 1069; *Graves v. American Exch. Bank*, 17 N. Y. 205; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; *Rolling v. El Paso & S. W. R. Co.* — Tex. Civ. App. —, 127 S. W. 302; *Tolman v. American Nat. Bank*, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; *Roberts v. Tucker*, 16 Q. B. 560, 3 Eng. Rul. Cas. 681; *Lieber v. Fourth Nat Bank*, 137 Mo. App. 158, 117 S. W. 672; *First Nat. Bank v. Farmers' & M. Bank*, 56 Neb. 149, 76 N. W. 430; *Kohn v. Watkins*, 26 Kan. 691, 40 Am. Rep. 336; *Beattie v. National Bank*, 174 Ill. 571, 43 L.R.A. 645, 66 Am. St. Rep. 318, 51 N. E. 602; *Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648; *Shipman v. Bank of State*, 126 N. Y. 319, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371.

The case is distinguishable from cases where it is held that loss must fall on the drawer of a check delivered to a party bearing a fictitious or assumed name, who is, however, the actual party intended by the drawer as payee.

Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; *United States v. National Exch. Bank*, 45 Fed. 163; *Crippen v. American Nat. Bank*, 51 Mo. App. 508; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608; *Land Title & T. Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420; *Heavy v. Commercial Nat. Bank*, 27 Utah. 222, 101 Am. St. Rep. 966, 75 Pac. 727; *First Nat. Bank v. American Exch. Nat. Bank*, 170 N. Y. 88, 62 N. E. 1089; *McHenry v. Old Citizens' Nat. Bank*, 85 Ohio St. 203, 38 L.R.A.(N.S.) 1111, 97 N. E. 395; *Central Nat. Bank v. National Metropolitan Bank*, 31 App. D. C. 391, 17 L.R.A.(N.S.) 520.

The pay checks indicated on their face

that they were drawn in favor of defendant's employees.

It was therefore plaintiff's duty, before cashing them, to make sure they were properly indorsed by such employees.

Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N. Y. Supp. 1017.

Messrs. Zane, Stringfellow, and Whitaker, for plaintiff:

The drawer of a check having permitted by mistake the checks to come into the hands of an impostor, and thereafter be indorsed to a bona fide holder, is liable to the bona fide holder for the payment of the same.

United States v. National Exch. Bank, 45 Fed. 163; Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; Crippen v. American Nat. Bank, 51 Mo. App. 508; Meridian Nat. Bank v. Friest Nat. Bank, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608; Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; American Exch. Bank v. City Bank, 5 N. Y. Leg. Obs. 18; Smith v. Mechanics' & T. Bank, 6 La. Ann. 610; Maloney v. Clark, 6 Kan. 83; Levy v. Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; E. S. Karoly Electrical Constr. Co. v. Globe Sav. Bank, 64 Ill. App. 225; First Nat. Bank v. Farmers' & M. Bank, 56 Neb. 149, 76 N. W. 430; Famous Shoe & Clothing Co. v. Crosswhite, 124 Mo. 34, 26 L.R.A. 568, 46 Am. St. Rep. 424, 27 S. W. 397; Fiore v. Ladd, 22 Or. 202, 29 Pac. 435; Forbes v. Eepy, 21 Ohio St. 474.

Straup, J., delivered the opinion of the court:

The facts are undisputed. The case was presented on an agreed statement. The substance of it is: The defendant operated a railroad and had in its employ several thousand employees, who were paid on the 10th of each month for services rendered the previous month. At the end of each month it prepared a pay roll, containing the names of the employees, their occupation, places employed, number of days worked, and the amount due. Pay checks were then prepared in which the date, the name of the employee, and the amount due were stated. The paymaster, with the pay car, the pay rolls, and checks traveled his district from place to place, and delivered the checks to the employees, who passed through the car to receive them. In October, 1911, the defendant had in its employ two firemen, E. C. Fields and C. B. Rings, who worked on its road between Salt Lake City and Helper, Utah. At the end of that month it owed Fields for services \$93.49; Rings \$109.75. Their names were on the pay roll, and pay

checks made out to each. The one to Fields is:

The Denver & Rio Grande Railroad Co.
Roll No. 1540. No. 4.

Denver, Colo., November 10, 1911.

The treasurer of the Denver & Rio Grande Railroad Co. will pay to the order of C. E. Fields \$93.49, ninety-three and 49/100 dollars for services rendered during the month of October, 1911, when countersigned by Freeman Sumner, paymaster.

J. W. Gilluly, Treasurer.

F. Sumner, Paymaster.

No. C368899.

The other to Rings is the same, except the substitution of his name, the number and the amount due him, \$109.75. On November 10, 1911, the pay car in charge of the paymaster was at Salt Lake City from 7 o'clock in the morning until 2 o'clock in the afternoon. From repeated deliveries of pay checks the paymaster became personally acquainted with a large number of the employees. Fields and Rings, however, had been in the defendant's employ only since August, 1911. While the paymaster had delivered them two pay checks before, in September and October, still, owing to the large number of employees paid off each month, between 3,500 and 4,000, he was unable to remember and identify all of them, and did not remember or know Fields or Rings. On November 10, 1911, between the hours stated, between 1,700 and 1,900 employees at Salt Lake City passed through the pay car for their checks, practically a continuous procession or line. As they approached the paymaster they announced their names, the pay roll was examined, the check selected and delivered to the employee, and the date of delivery stamped on the pay roll opposite his name. Between the hours stated two unknown men, impostors, entered the pay car at different times. One of them, preceded and followed by employees, as he approached the paymaster called out the name of E. C. Fields. The paymaster looked at him, but did not in fact know whether he was or was not Fields, but believing that he was, and seeing the name of Fields on the pay roll, selected the check which had been made out for Fields, and delivered it to the impostor representing himself to be Fields. The other impostor, representing himself to be Rings, in like manner obtained the Rings' check.

The plaintiff formerly was in the employ of the defendant at Salt Lake City, and had a general acquaintance with its employees at that place; but at and prior to the time in question he was engaged in the saloon business at Salt Lake City, and had been in the habit of cashing at their face value a

large number of the employees' checks. The impostors in the afternoon of the day they obtained the checks presented them to the plaintiff, and asked him to cash them. They were strangers to him. He asked them if they were the parties named in the checks, and was told by them that they were. They wholly unidentified indorsed them. The one holding the Fields' check indorsed it, "E. C. Fiels," the other, "C. B. Rings." The plaintiff paid them the face value of the checks, in ignorance of the fraud practised on the defendant and of the forgeries of the indorsements. That night the real E. C. Fields, and the next day the real C. B. Rings, presented themselves to the defendant for their pay checks. It learning of the fraud practised on it and of the mistake made in delivering the checks to the wrong persons, paid Fields and Rings the full amount of their wages. The plaintiff indorsed the checks the impostors had indorsed to him, and deposited them to his credit with his bank. In due course they were presented to the defendant's treasurer, who refused to honor and pay them. The bank canceled the credit, and the plaintiff brought this action against the defendant on two counts, one on the Fields' check, the other on the Rings' check. The court gave plaintiff judgment on the Rings' check, the defendant on the Fields'. This, because of the difference in the indorsements; the Fields' check being indorsed by the impostor, "Fiels," not "Fields."

Both the plaintiff and the defendant appeal. There is no claim of bad faith on the part of either. The plaintiff has alleged no negligence nor any estoppel on the part of the defendant. He claims neither in his brief; he did, in a way, claim both in oral argument. His claim, however, can be no broader than his complaint. Nor does the agreed statement contain facts upon which an estoppel may be founded, or from which negligence may be inferred.

The case is thus presented within a very narrow compass. It is, Can the plaintiff a holder under the forged indorsements of the pay checks, treated by both parties as negotiable instruments, compel the defendant, who is both the drawer and the drawee, to pay him the checks, without allegations and proof of negligence or an estoppel on the part of the defendant? That the persons who presented the checks to the plaintiff were impostors, had no right or authority to receive, present, indorse, or transfer them, and that their indorsements were clear forgeries, are conceded propositions; and without allegations and proof of negligence, or an estoppel on the part of the defendant, we think the plaintiff is not entitled to prevail on either count. *Tolman v. American* 46 L.R.A. (N.S.)

Nat. Bank, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480; *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 17 L.R.A. (N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; *Rolling v. El Paso & S. W. R. Co.* — Tex. Civ. App. —, 127 S. W. 302; *Lieber v. Fourth Nat. Bank*, 137 Mo. App. 158, 117 S. W. 672; *First Nat. Bank v. Farmers' & M. Bank*, 56 Neb. 149, 76 N. W. 430; *Kohn v. Watkins*, 26 Kan. 691, 40 Am. Rep. 336; *Beattie v. National Bank*, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602; *Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371.

The plaintiff, in support of his contention that the defendant, "having permitted the checks by mistake to come into the hands of the impostors," who wrongfully received them, and without authority and by forgery indorsed them "to a bona fide holder, is liable to such holder for the payment of the same,"—cites: *United States v. National Exch. Bank (C. C.)* 45 Fed. 163; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; *Crippen v. American Nat. Bank*, 51 Mo. App. 508; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608; *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; *Maloney v. Clark*, 6 Kan. 83; *E. S. Karoly Electrical Constr. Co. v. Globe Sav. Bank*, 64 Ill. App. 225; *Famous Shoe & Clothing Co. v. Crosswhite*, 124 Mo. 34, 26 L.R.A. 568, 46 Am. St. Rep. 424, 27 S. W. 397; *Fiore v. Ladd*, 22 Or. 202, 29 Pac. 435, and *McHenry v. Old Citizens' Nat. Bank*, 85 Ohio St. 203, 36 L.R.A. (N.S.) 1111, 97 N. E. 395. We think the cases are not applicable, for the principal reason that in nearly all of them the person to whom the check or instrument was delivered was the very person whom the drawer intended should present and indorse it, and receive the money evidenced by it, or with whom the transaction was had with respect to which the check was given, or where recovery was permitted on the ground of negligence or an estoppel. These elements are not here present. Deliveries were here made of the checks with the intent and purpose that the persons and payees named in the checks, and no other, except upon their valid indorsements, should present them and receive the money evidenced by them. The checks on their face were payable to the order of E. C. Fields and C. B. Rings, and in themselves plainly directed that payment would be made only to them, or to their indorsees, and to no other. Plaintiff knew that. That is what the checks themselves told him. The impostors came to him with-

out title. Plaintiff's title rests absolutely upon their forgeries of the indorsements.

It is well settled that a forged indorsement does not pass title to commercial paper negotiable only by indorsement. *Warren v. Smith*, 35 Utah, 455, 136 Am. St. Rep. 1071, 100 Pac. 1069. To that effect also is our statute. Section 1575, Comp. Laws 1907, provides: "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority." And as plaintiff has no other claim of title it follows he cannot prevail.

That part of the judgment which is in the defendant's favor is therefore affirmed; that in favor of the plaintiff reversed. The case is remanded for a new trial. Costs to the defendant.

McCarthy, Ch. J., and Frick, J., concur.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF ANNA MARIA HELENA
(Countess de Noailles), Deceased.

COMMONWEALTH OF PENNSYLVANIA,
Appt.

(236 Pa. 213, 84 Atl. 665.)

**Tax — collateral inheritance — trust
for nonresident.**

Personal property placed by a nonresident with trustees within a state for invest-

ment, under a trust which might have been terminated at any time, and does not name ultimate beneficiaries, retains its situs at his domicile, and where he dies without descendants, it is not subject to a collateral inheritance tax at the domicile of the trustees.

(April 29, 1912.)

APPEAL by the Commonwealth from a decree of the Orphans' Court for Philadelphia County disallowing its claim to a collateral inheritance tax on a personal fund of decedent in the hands of trustees. Affirmed.

The facts are stated in the opinion.

Mr. J. Lee Patton, for appellant:

The situs of intangible personal property held by resident trustees for nonresident *cestui qui trustent* is in that state where the trustee in whom is vested the legal title and ownership, is domiciled.

Guthrie v. Pittsburgh C. & St. L. R. Co. 158 Pa. 433, 27 Atl. 1052; *Price v. Hunter*, 21 W. N. C. 306; *West Chester School Dist. v. Darlington*, 38 Pa. 157; *Carlisle v. Marshall*, 36 Pa. 397; *Orcutt's Appeal*, 97 Pa. 179; *Com. v. Kuhn*, 2 Pa. Co. Ct. 248.

The commonwealth is entitled to the tax in the present proceeding.

Small's Appeal, 151 Pa. 1, 25 Atl. 23, 28; *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205; *Singer v. Guarantee Trust & S. D. Co.* 24 Pa. Super. Ct. 270; 24 Am. & Eng. Enc. Law, 457, et seq.

Messrs. Maurice Bower Saul and John G. Johnson, for appellee:

Countess de Noailles died December 5th, 1908, domiciled in France, and the situs of her personal property, whether actually situated in France or in America, by operation of law, was in France, the place of her domicile.

Minor, Conf. L. 1901, p. 270.

Note. — Succession tax: physical presence or absence of personal property, or evidence thereof, as affecting liability to tax.

I. Personal property of nonresident's estate physically present within the taxing jurisdiction.

- a. In general, 1168.
- b. Tangible personal property, 1172.
- c. Securities within state for investment, 1172.
- d. Securities within state for other purposes, 1173.
- e. Bank deposits, 1175.
- f. Property held subject to trust, 1176.
- g. Interest of one decedent in estate of another, 1177.
- h. Miscellaneous, 1178.

II. Personal property of resident's estate physically absent from taxing jurisdiction, 1179.

46 L.R.A. (N.S.)

Scope.

This note is confined strictly to the question whether the physical presence within the taxing jurisdiction of personal property, or the evidences thereof, belonging to the estate of a nonresident decedent, will subject it to a succession tax; and the converse question whether the exaction of such a tax in respect of personal property of a decedent who was domiciled within the taxing jurisdiction is prevented by the physical absence of such property, or the evidences thereof. It therefore does not deal with questions in relation to exemptions of particular property, the deduction of indebtedness, or generally matters affecting the amount of, or mode of computing, the tax, or the means of enforcing the payment of the same, whether those questions relate to property within or without the jurisdiction. A more specific statement of

The commonwealth cannot tax personalty of a nonresident.

Orcutt's Appeal, 97 Pa. 179; William-son's Estate, 153 Pa. 508, 26 Atl. 246; Coleman's Estate, 159 Pa. 231, 28 Atl. 137; Re Handley, 181 Pa. 339, 37 Atl. 587; Vanuxem's Estate, 212 Pa. 315, 1 L.R.A. (N.S.) 400, 61 Atl. 876; Dalrymple's Estate, 215 Pa. 367, 64 Atl. 554; Lamberton's Estate, 40 Pa. Super. Ct. 548; Shoenberger's Estate, 221 Pa. 112, 19 L.R.A. (N.S.) 290, 128 Am. St. Rep. 737, 70 Atl. 579; Lines's Estate, 155 Pa. 378, 26 Atl. 728.

Brown, J., delivered the opinion of the court:

The domicile of the decedent at the time of her death was in France. She was a

widow and left no lineal descendant. She owned real estate in this state which was appraised at \$17,500, and, as there was no conversion of it into personalty by the terms of her will, its liability to collateral inheritance tax was conceded. In 1853 she placed a certain fund in the hands of trustees in the city of Philadelphia, and when she died it was held by their successors. Seven eighths of it represented accumulations, and the whole of it consisted of bonds, mortgages, and obligations of individuals and corporations. From the disallowance of the commonwealth's claim to collateral inheritance tax on this personal fund, it has appealed.

The deed of trust executed by the decedent does not seem to have been before

points excluded will be found under the main divisions of the note.

It should be borne in mind that this note only purports to cover the case law on the question involved, and does not, except incidentally and occasionally, undertake to note changes in the statutes except as they are passed upon by the adjudicated cases. The fact that the doctrine established by a line of cases under a particular form of statute is abrogated so far as the jurisdiction in which they were rendered is concerned by subsequent changes in the statute does not, of course militate against their value as legal precedents, in other jurisdictions whose statutes are similar in form to that under which they were decided. It may be observed, however, that recently a tendency is observable to adopt by legislative action, a more consistent principle in laying these taxes, and thus avoid the double taxation inevitably resulting from the application of diverse principles in determining the property in respect of which the tax is to be paid.

I. Personal property of nonresident's estate physically present within the taxing jurisdiction.

a. In general.

There are a number of questions in relation to the liability to a succession or inheritance tax in respect of personal property belonging to the estate of a nonresident decedent that are not within the scope of this note, for the reason that they do not depend solely upon the effect of the presence within the taxing jurisdiction of the personal property in question, or the evidences thereof. Such, for example, is the question whether an indebtedness to the estate of a nonresident is subject to the succession or inheritance tax law of a particular jurisdiction because the debtor is a resident, or a corporation, of that jurisdiction (on that point, see note in 4 L.R.A. (N.S.) 953), or because it is secured by a lien upon real property situated in that jurisdiction (on that point, see notes in 9 L.R.A. (N.S.) 1104, and 35 L.R.A. (N.S.) 784). 46 L.R.A. (N.S.)

So, whether the fact that a corporation in which a nonresident holds stock is a domestic corporation will render the stock liable to the payment of the debt, irrespective of the place where the certificates are held, is not within the scope of the present note. (On that point see notes in 19 L.R.A. (N.S.) 887 and 25 L.R.A. (N.S.) 384). Questions, otherwise within the scope of the present note, that arise in connection with the exercise of a power of appointment, are also excluded, as they are treated in the note on that general subject in 33 L.R.A. (N.S.) 236, 239.

The question whether property out of the state is to be included in fixing exemptions under the inheritance tax law is considered in the note in 39 L.R.A. (N.S.) 1024.

As to liability of insurance policy issued by a domestic corporation upon the life of a nonresident to a local transfer tax, see note to Re Gordon, 10 L.R.A. (N.S.) 1089.

As to effect of apportioning property of nonresident decedent within the state to payment of debt or legacies which are exempt or subject to a reduced rate, see note in 18 L.R.A. (N.S.) 946.

While, with a few exceptions, it is generally held or assumed, both as a matter of constitutional law and statutory construction, unless the terms of the statute forbid, that a state or country within which the decedent was domiciled at the time of his death may exact a succession tax in respect of his personal property (not otherwise exempt) although such property or the evidence thereof is physically present in another jurisdiction (see *infra*, II.), the converse of that principle, namely, that the tax should not be exacted in respect of personal property within the jurisdiction, belonging to the estate of a nonresident, is not generally accepted in this country, unless the terms of the statute require it.

Upon the other hand, it is very generally held in this country, unless the terms of the statute forbid, that a succession or inheritance tax is payable in respect of the personal property belonging to the estate of

the court below, and we are ignorant of its terms and provisions. It does appear, however—apparently by admission—that she could have terminated the trust at any time and taken possession of all the trustees held for her. Aside from mere compensation for their services, they had no beneficial interest in the fund, even though the legal title to the securities may have been in their names. During all the nearly sixty years' duration of this passive trust, the decedent was the real owner of the securities, and she died as such owner, while domiciled in a foreign country. Up to the time of her death everything held by the trustees was at her absolute disposal and constituted part of her personal estate. At the time of her death, what was the situs

of this fund? If it was in France, which was her home, it is not taxable here. The earnest contention of the learned counsel for the commonwealth is that its situs was here. As just stated, we do not have the benefit of any light which the deed of trust might throw upon this question, and, with the admitted right of the decedent to absolutely control the fund at all times, was it, at the time of her death, within the rule or maxim, *Mobilia sequuntur personam*? We are of opinion that it was.

While as a general rule the situs of personal property follows the owner, some species of personality may, for particular purposes, have a situs distinct from the legal one. This was recognized in *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28, because the prop-

a nonresident decedent, where such property, or the evidence thereof, is physically present within the taxing state; at least, if not there for a mere temporary presence (the cases cited are subsequently set out in detail). *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699 (But see *infra* as to limitation of this doctrine in Connecticut); *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Re Stanton*, 142 Mich. 491, 105 N. W. 1122; *State ex rel. Floyd v. District Ct.* 41 Mont. 357, 109 Pac. 438; *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759; *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *Re Houdayer*, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718; *Re Zefita*, 167 N. Y. 280, 60 N. E. 598; *Re Blackstone*, 69 App. Div. 127, 74 N. Y. Supp. 508, affirmed in 171 N. Y. 682, 64 N. E. 1118; *Re Clinch*, 99 App. Div. 298, 90 N. Y. Supp. 923, affirmed in 180 N. Y. 300, 73 N. E. 35; *Re Daly*, 100 App. Div. 373, 91 N. Y. Supp. 858, affirmed without opinion in 182 N. Y. 524, 74 N. E. 1116; *Re Tiffany*, 143 App. Div. 327, 128 N. Y. Supp. 106, affirmed in 202 N. Y. 550, 95 N. E. 1140; *Re Burr*, 16 Misc. 89, 38 N. Y. Supp. 811; *Re Gibbs*, 60 Misc. 645, 113 N. Y. Supp. 939; *Re Clark*, 9 N. Y. Supp. 444; *Re Myers*, 129 N. Y. Supp. 194; *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51; *Com. v. Smith*, 5 Pa. 142; *Small's Estate*, 151 Pa. 1, 25 Atl. 23; *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205; *Singer v. Guarantee Trust & S. D. Co.* 24 Pa. Super. Ct. 270; *Weaver's Estate*, 4 Pa. Dist. R. 260; *Com. v. Brenner*, 2 Legal Gaz. 413.

In other words, unless the terms of the statute forbid, the courts in this country generally pursue the course expressly declared by the court in *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715, and ignore the maxim *Mobilia sequuntur personam* so far as it is an obstacle, and leave it unchanged so far as it is an aid, to the imposition of the 46 L.R.A. (N.S.)

tax. Though this inevitably leads to double taxation, it is not constitutionally objectionable on that account. (See notes in 15 L.R.A. (N.S.) 150, and 15 L.R.A. (N.S.) 142.)

In this connection it may be observed that by an amendment of the inheritance tax law in 1911 [3 N. Y. Laws 1911, chap. 372, § 11], New York appears to have abandoned the plan of laying the tax according to inconsistent and mutually antagonistic principles, and to have adopted in place thereof the maxim *Mobilia sequuntur personam* as the criterion of liability in respect of intangible personal property, and actual situs as the criterion in respect of tangible personal property.

The discussion of the amended statute, however, is not within the scope of the present note, as it does not appear to have been passed upon by the New York courts, at least as regards any question now under consideration. In a Kansas case (*State ex rel. Dawson v. Davis*, 88 Kan. 849, 129 Pac. 1197), however, where the effect of the New York amended statute became involved because of the reciprocity feature of the Kansas statute, it was assumed that, under the amended statute, upon the death of a resident of New York, a tax is imposed upon all his intangible property, wherever located, and upon such of his tangible property as is situated in New York, but none in respect of his tangible property outside of that state; that upon the death of a nonresident of New York, owning property there, a tax is exacted only in respect of such of it as is tangible.

Recurring to cases where the terms of the statute did not forbid the application of diverse and inconsistent principles in determining the property in respect of which the tax is payable:

In *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82, the court declared that in the absence of constitutional prohibition, the state has authority to regulate by law the devolution and the distribution of an intestate's property situated within the jurisdiction of the state, and

erty of the limited partnership in this state, in which the foreign decedent held stock, "was largely made up of lands, merchandise, flour, grain, and other personal property which had a visible and tangible existence and an actual situs in this state." Great reliance seems to be placed on this case as an authority sustaining the claim of the commonwealth for collateral inheritance tax on the bonds, mortgages, and obligations which were held here for the Countess de Noailles; but, in relying upon it, counsel seems to overlook what was further said by Mr. Justice Sterrett: "As a general rule, intangible personal property of a nonresident, such as bonds, mortgages, and other choses in action, is governed, as to its situs, by the fiction of law above

noticed, and hence such property is not subject to collateral inheritance taxation under our laws, because it is not 'situated within this state.'" *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205, is also pressed upon us as a controlling authority for the commonwealth; and it is proper that we should show it is not. We have heretofore said of it that it was decided upon its own peculiar facts and is not to be stretched. *Shoenberger's Estate*, 221 Pa. 112, 19 L.R.A. (N.S.) 290, 128 Am. St. Rep. 737, 70 Atl. 579. One of the two reasons given by the court below in *Lewis's Estate* for holding that it was liable to collateral inheritance tax here was that, as the executor and legatees had requested and consented that a complete administration and distri-

personal property situated elsewhere, but owned by a resident, and to prescribe who shall and who shall not be capable of taking it.

And so the words "being in this state in the statute imposing a collateral inheritance tax upon 'all assets . . . of every kind, passing from any person who may die seised and possessed thereof, being in this state,'" refer to the property, and not to the person; and property actually within the state, although for other purposes it may be treated as constructively elsewhere, because of the owner's nonresidence, is subject to the tax. *Ibid*.

In *State ex rel. Floyd v. District Ct.* 41 Mont. 357, 109 Pac. 438, it was held that the tax was payable in respect of the personal property in Montana, notwithstanding that the property was not to be distributed in Montana, but was to be turned over to foreign representatives for distribution at the domicile of the decedent.

In some instances, either because of the terms of the particular statute, or upon considerations of policy, it has been held that the tax is laid exclusively according to the principle of actual situs, to the exclusion of the principle of domicile, and in this view, of course, the personal property of a nonresident if actually within the jurisdiction is subject to the tax; at least, if not present for a merely temporary purpose.

This was the view taken of the Pennsylvania statute at the time of the decision in *Com. v. Smith*, 5 Pa. 142, holding that a legacy in a will of a person domiciled in a foreign country was subject to the tax so far as it was payable out of personal property in Pennsylvania. This statute was subsequently amended so as to cover property without the jurisdiction belonging to one domiciled within the jurisdiction, but the provision covering the property within the jurisdiction belonging to a nonresident was not changed.

And so in *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51, holding that personal property in North Carolina belonging to the estate of a nonresident was subject to the 46 L.R.A. (N.S.)

tax under the North Carolina statute providing that a tax shall be levied and collected upon the value of all personal property or goods bequeathed or distributed to the class of persons named, the court took the position that the tax was laid according to the principle of actual situs, and not according to the fiction that the situs follows the domicile.

Because of ambiguities in the language of the New York act of 1885, it was held that no tax was exacted thereby in respect of property passing by will or intestacy from a nonresident of the state. *Re Enston (People v. Sherwood)* 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87.

But by the act of 1887, the earlier act was amended so as to subject to the tax "all property which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same, while a resident of this state, or, if such decedent was not a resident at the time of death, which property, or any part thereof, shall be within this state." The amendment removed any question as to the liability to pay the tax in respect of personal property within the state belonging to a nonresident testator,—except that arising from the omission about to be referred to: but the statute, as amended, was still ambiguous in respect of property within the state belonging to the estate of a nonresident intestate. However, in *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759, the court construed the amended act to apply to personal property within the state belonging to a nonresident decedent, whether he died testate or intestate. (But see *infra*, II., as to 1911 amendment of New York statute.)

Even after the act of 1887, and before the omission was cured by the act of 1892, the surrogate had no jurisdiction to impose the tax in respect of the personal property of a nonresident unless he owned real estate within the state. And it was held in *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881, affirmed in 154 N. Y. 746, 49 N. E. 1096, where the decedent, a nonresident, died after the act of 1887, but before the act of 1892, and the executors had removed

bution of the whole estate comprehended in the account should be had in Luzerne county, under Pennsylvania laws, by a Pennsylvania court, and not, as is usual in mere ancillary accounting, transmitted to a foreign forum, they could not have the benefit of this departure from the general rule without taking that benefit with its burdens. It was for this reason that the decree was affirmed.

The first reason given by the court below was not sustainable, as clearly appears from what was decided in *Lines's Estate*, 155 Pa. 378, 26 Atl. 728. *Lines* died in the city of Easton, and had been domiciled there for thirty years before his death. In 1887 he executed and delivered to the Union Trust Company, a New York corporation

doing business there, a deed of trust, which included 118 mortgage bonds, of \$1,000 each, issued by a Missouri railroad company, and 281 shares of the capital stock of a New Jersey corporation doing business there. These securities were delivered to the trustee, and, on the books of the two corporations, were transferred to "the Union Trust Company of New York, in trust for Jesse Lines and others." According to the provisions of the deed, the trustee was to hold the securities, collect the interest and income thereof, and pay the same to Lines during his natural life, and, upon his decease, divide the bonds and stocks by transferring one half of them to certain of his nephews and nieces and the other half to

all the personal property from the state before the passage of the latter act, they could not be held liable for the tax. And in *Re Pettit*, 65 App. Div. 30, 72 N. Y. Supp. 469, affirmed in 171 N. Y. 654, 63 N. E. 1121, it was held that personal property within the state, belonging to the estate of a nonresident who died before the act of 1892, was not liable to the tax, although the property was not removed from the state until after that act became effective.

The equal protection of the laws was not denied by the imposition of the inheritance tax provided for by N. Y. Laws 1887, chap. 713, upon certain bequests of personalty by a nonresident decedent owning both real and personal property within the state because, under that statute, as construed by the state courts, the tax could not be collected if the only property belonging to the decedent situated within the state was personalty. *Beers v. Glynn*, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186.

The question as to when, under varying circumstances, personal property belonging to the estate of a nonresident will be deemed to be within the state so as to become subject to the payment of the tax, will be subsequently treated.

Reciprocity.

The Connecticut statute is framed upon the theory that domicile should be the exclusive criterion in laying the tax, but adds to the force of example the influence of reciprocity by permitting the exaction of the tax in respect of personal property within the state belonging to the estate of a nonresident, but foregoing its collection if the decedent was domiciled in a state which does not collect the tax from personal property therein, belonging to the estates of Connecticut decedents. (See *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699.)

The principle of reciprocity is also adopted by the Kansas statute which provides that an inheritance tax shall not be exacted where a similar tax has been paid in the state of the decedent's residence, "provided the law of that state contains a like

exemption." That provision was held in *State ex rel. Dawson v. Davis*, 88 Kan. 849, 129 Pac. 1197, to apply in case of intangible property (stock in a Kansas corporation) belonging to the estate of a New York decedent, since the exemption under the New York statutes (referring to the amended act of 1911, see *supra*, l. a) is like that of the Kansas statute so far as intangible property—the kind of property in question—is concerned, though, in the respect that it does not extend to tangible property, less liberal than the Kansas exemption.

English cases.

The English courts, contrary to the position now generally prevailing in this country, have taken the view that the legacy and succession duties, though the acts are broad enough in terms to cover all legacies or successions without reference to domicile or situs, are, so far as concerns personal property, laid solely according to the principle of domicile, and that therefore the tax is not payable in respect of personal property situated in England, belonging to the estate of one who was domiciled out of England. *Thomson v. Advocate General*, 12 Clark & F. 1, 13 Sim. 153, 9 Jur. 217; *Wallace v. Atty. Gen. L. R.* 1 Ch. 1, 35 L. J. Ch. N. S. 124, 11 Jur. N. S. 937, 13 L. T. N. S. 480, 14 Week. Rep. 116; *Re Bruce*, 2 Crompt. & J. 436, 1 L. J. Exch. N. S. 153, 2 Tyrw. 475.

And so, personal assets situated out of England at the time of the death of a nonresident, though subsequently remitted to England, are not subject to the tax. *Atty. Gen. v. Jackson*, 2 Clark & F. 48, 3 Tyrw. 982; *Logan v. Fairlie*, 2 Sim. & Stu. 291, 3 L. J. Ch. 152; *Arnold v. Arnold*, 2 Myl. & C. 256, 6 L. J. Ch. N. S. 218, 1 Jur. 255.

The principle that the succession tax is imposed only on movables which the successor claims under or by virtue of the law of the jurisdiction imposing the tax was applied in *Lambe v. Manuel* [1903] A. C. 68, 72 L. J. P. C. N. S. 17, 87 L. T. N. S. 460, 19 Times L. R. 68, to the Quebec succession

a putative son. The trust deed contained a clause which gave to Lines the right and power to alter, change, modify, or revoke the disposition to be made of the property, after his decease; but this right was never exercised. The trustee collected and paid over to Lines the income of the trust securities during his life, and after his decease, divided and distributed the corpus of the estate, consisting of the said securities, to beneficiaries entitled thereto according to the provisions of the deed. In holding that the commonwealth had a right to collect a collateral inheritance tax on these securi-

ties, it was said: "Mr. Lines was not only the beneficial owner of the securities prior to and at the time of his decease, but, under the reserved power of modification, revocation, etc., he had absolute control of the disposition to be made of the securities upon his decease. At any time prior thereto, he could have modified or revoked the trust in favor of the beneficiaries named in the deed. It is true the legal title to the securities was in the trust company, but aside from mere compensation for its services, as custodian of the property, the company had no beneficial interest therein.

duty act providing that all transmissions, owing to death, of property movable and immovable in the province, shall be liable to the tax; and it was accordingly held that the tax was not payable in respect of shares of stock in a Quebec bank belonging to the estate of a decedent who was domiciled in the province of Ontario. It does not appear where the stock was kept.

There is, however, an exception to the English rule when the final disposition of the property of a nonresident is superseded by an English trust, so that the final devolution of the property at the termination of the trust estate takes place by virtue of the law of England, and not by the law of the testator's domicile. In such case, upon the devolution of the property at the termination of the trust, it becomes liable to the succession duty. *Atty. Gen. v. Campbell*, L. R. 5 H. L. 524, 41 L. J. Ch. N. S. 611, 21 Week. Rep. 34, note; *Re Wallop*, 33 L. J. Ch. N. S. 351, 1 De G. J. & S. 656, 5 New Reports, 679, 10 Jur. N. S. 328, 10 L. T. N. S. 174, 12 Week. Rep. 587; *Re Capdevielle*, 2 Hurlst. & C. 985, 33 L. J. Exch. N. S. 306, 12 Week. Rep. 110, 10 Jur. N. S. 1155; *Re Smith*, 12 Week. Rep. 933, 10 L. T. N. S. 598; *Re Cigala*, L. R. 7 Ch. Div. 351, 47 L. J. Ch. N. S. 166, 38 L. T. N. S. 439, 26 Week. Rep. 257; *Re Lovelace*, 4 DeG. & J. 341, 28 L. J. Ch. N. S. 489, 5 Jur. N. S. 694, 7 Week. Rep. 575.

So, where a foreigner gave to an English company formed for that purpose certain stock and other securities in trust to pay him the income for life, and after his death to apply the property, subject to the provisions of the deed, for certain benevolent purposes, it was held that upon the grantor's death the property became subject to the English succession tax, although the principal part of it was composed of foreign securities situated abroad, the documents of title being also abroad, a small proportion only of the property subject to the deed being in England. *Atty. Gen. v. Jewish Colonization Asso.* [1901] 1 K. B. 123, 70 I. J. Q. B. N. S. 101, 65 J. P. 21, 49 Week. Rep. 230, 83 L. T. N. S. 561, 17 Times L. R. 106.

The principle established in England that legacy and succession duties are laid solely according to the principle of domicile has no application to probate duties, or estate

duties which supersede the probate duty so far as they cover the same ground.

The reason for the distinction, as declared by the Lord Chancellor in *Winans v. Atty. Gen.* [1910] A. C. 27, 101 L. T. N. S. 754, 26 Times L. R. 133, 79 L. J. K. B. N. S. 156, 54 Sol. Jo. 133, 47 Scot. L. R. 593, is that legacy and succession duties fall upon the benefit received by survivors on their accession upon a death, while the estate duty or probate duty falls upon the property passing upon death, apart from its destination.

b. Tangible personal property.

Obviously, unless a particular jurisdiction adopts the English view that the succession tax is laid solely according to the principle of domicile, tangible personal property belonging to the estate of a nonresident, if within the jurisdiction, will be subject to the tax; at least, unless it was there merely for a temporary purpose.

Thus, tangible personal property in Illinois, belonging to the estate of a nonresident decedent, is subject to the tax. *People v. Griffith*, 245 Ill. 532, 92 N. E. 313.

So, money of a nonresident in the hands of her New York attorney is subject to the tax. *Re Burr*, 16 Misc. 89, 38 N. Y. Supp. 811.

c. Securities within state for investment.

The New York decisions cited in this subdivision were rendered before the amendment of 1911 referred to *supra*, I. a.

Again, assuming that the particular jurisdiction is not committed to the English doctrine, it is clear that the tax is payable in respect of money or securities belonging to a nonresident, but kept within the jurisdiction in connection with a local business, or for the purposes of investment and reinvestment, since, under such circumstances, the property would have a local situs, even for the purpose of property taxes. (See notes in 2 L.R.A.(N.S.) 637, and 14 L.R.A.(N.S.) 493.)

Thus, stock, bonds, and other evidence of indebtedness belonging to the estate of a nonresident decedent, but which he had kept in the hands of an agent in Pennsylvania

In any proper sense of the term the securities were the personal property of Mr. Lines. They were his to enjoy during his lifetime, and his to dispose of, in any manner he saw fit at any time prior to his decease. He chose to leave the trust in favor of the beneficiaries unaltered and unrevoked, and, as he intended, it took effect, in enjoyment, immediately after his decease. Moreover, the securities were that kind of personal property, the situs of which follows the owner."

If Lines had been domiciled in New York, and the securities had been held for him by

a trustee here, they would not, on the correct reasoning of Mr. Chief Justice Sterrett, have been liable to collateral inheritance tax here. The estate of the Countess de Noailles in the hands of the trustees here is more than the converse of the Lines estate. The deed of trust was subject to her revocation at any time, and the entire fund, made up largely of accumulations, did not pass to any beneficiaries named in the deed, but directly to the ancillary administrators of her estate.

Decree affirmed, at appellant's costs.

for the purpose of transacting business with them, are, at least to the extent of "investment and reinvestment," subject to the payment of the tax. *Lewis's Estate*, 203 Pa. 211, 52 Atl. 205, distinguishing *Orcutt's Appeal*, 97 Pa. 179, on the ground that the securities there were not in the hands of the agent for the purpose of transacting business, but merely for temporary safe-keeping. In the *Lewis* case, it appeared that the executor and legatees had requested and consented that the complete administration and distribution of the whole estate comprehended in the account should be had in Pennsylvania and by a Pennsylvania court, and not, as is usual in mere ancillary accounting, transmitted to a foreign forum. And this agreement was urged by counsel and apparently regarded by the court as an additional reason why the property was subject to the tax, though apparently the result would have been the same in any case.

So, property of a nonresident, consisting of stock in a national bank doing business in Michigan, an executory land contract in relation to land in that state, and notes secured by mortgages upon land in that state, which were kept at an office in Michigan for the purposes of deposit and reinvestment, is property within the state and subject to the inheritance tax. *Re Stanton*, 142 Mich. 491, 105 N. W. 1122. In view of the decision in the subsequent case of *Re Merriam* (*Bradley v. Merriam*) 147 Mich. 630, 9 L.R.A. (N.S.) 1104, 118 Am. St. Rep. 561, 11 N. W. 196, 11 Ann. Cas. 119, it would seem that the mere fact that the notes were secured by mortgages upon land in Michigan would have been sufficient to subject them to the tax, even if the securities had not been physically within the state.

The judgment of the circuit court which was affirmed in *Re Stanton*, supra, determined that a certificate of capital stock of an Illinois corporation, belonging to the estate of a decedent domiciled in New York, was not property within the state, within the meaning of the Michigan inheritance tax law, although the certificate, together with other securities, was, at the time of the decedent's death, in an office maintained by her in Detroit, apparently for the purposes of collection, deposit, and reinvestment. The appeal, however, was by the 46 L.R.A. (N.S.)

estate only, and therefore there was no complaint of the decision on this point.

A bond belonging to the estate of a nonresident, secured upon real property in New York, and in the hands of a New York agent at the time of the decedent's death, is subject to the tax. *Re Burr*, 16 Misc. 89, 38 N. Y. Supp. 811.

The decision in *Re Enston* (*People v. Sherwood*) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87, that bonds secured by mortgages upon real property in New York, and promissory notes and bonds of municipal corporations, and stock and bonds of foreign corporations, belonging to the estate of a nonresident, were not subject to the tax, although they were apparently within the state for investment, was under the act of 1885, which was held not, under any circumstances, to embrace property of a nonresident.

A similar decision in *Re Tulane*, 51 Hun, 213, 4 N. Y. Supp. 36, was also under the act of 1885.

As to whether a tax is payable at the domicile of the decedent in respect of securities kept in another state for investment, see *infra*, II.

d. Securities within state for other purposes.

The New York cases cited in this subdivision were decided prior to the amendment of 1911, referred to *supra*, I. a.

There is more doubt whether securities belonging to a nonresident which are within the state merely for safe-keeping may be regarded as property within the state so as to subject them to the tax. In this connection it is to be observed that as to stock in a domestic corporation, its liability to the tax is not necessarily dependent upon the physical presence of the certificates within the state, and the fact that the corporation in question is a domestic one is, according to the prevailing view, sufficient to subject it to the tax, unless the terms of the statutes are clearly opposed, although there is some conflict on the point. (See notes in 19 L.R.A. (N.S.) 887, and 25 L.R.A. (N.S.) 384.)

In some cases the courts have apparently made a distinction between bonds of foreign corporations and bonds of domestic

corporations belonging to a nonresident, but within the jurisdiction for safe-keeping.

Thus, under the Illinois statute, substantially adopted from the New York statute, it has been held that stocks and bonds of an Illinois corporation belonging to the estate of a nonresident, but habitually kept in a safe-deposit box in Illinois for safe-keeping, were subject to the tax, but that stocks and bonds of foreign corporations also in such box were not subject to the tax. *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. This decision, which, it will be observed, is opposed to the decision in *Re Whiting*, *infra*, so far as the stocks and bonds of foreign corporations are concerned, was largely influenced by New York decisions which were rendered before the adoption of the Illinois statute, the decision in the *Whiting* Case having been rendered after that time.

In *People v. Griffith*, *supra*, the case of *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732, was relied on as supporting the contention that Illinois could not exact a succession tax in respect of securities belonging to a nonresident, which were in Illinois merely for the purpose of safe-keeping, but the court quoted from the opinion in that case as follows: "Cases arising under collateral inheritance or succession tax acts have been cited as affording foundation for the right to tax as herein asserted. The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property . . . and therefore the decisions arising under such inheritance tax cases are not in point."

Prior to the decision in the *Whiting* Case, *infra*, there was some doubt in New York whether the mere presence within the state for safe-keeping of securities belonging to the estate of a nonresident was sufficient to subject them to the tax, even after the amendment of 1887. After that amendment, it was held in *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759, that the property belonging to a nonresident, representing corporate stocks and bonds, a mortgage upon New York real estate, and pass books showing deposits in various banks in New York, all of the securities being at the time of the decedent's death, and for about three years prior thereto, in a box in a safety deposit company in New York, were subject to the tax. It does not appear, however, whether the stocks and bonds were of foreign or domestic corporations, though, for the reasons suggested below that would not seem to be material so far as the bonds were concerned.

The decision in *Re Schermerhorn*, 50 Misc. 233, 100 N. Y. Supp. 480, that United States bonds in the state, belonging to the estate of a nonresident who died in 1891, and thus before the passage of the act of 1892, which was held to exempt such bonds, were not subject to the tax, was upon the ground that, prior to the enactment of the statu-

tory construction law of 1892, the "bonds" themselves did not represent property.

The decisions in *Re James*, 144 N. Y. 6, 38 N. E. 961, that stock of a foreign corporation belonging to the estate of a nonresident decedent, on deposit in the state at the time of the decedent's death, was not subject to the tax; and in *Re Gibbes*, 84 App. Div. 510, 83 N. Y. Supp. 53, affirmed in 176 N. Y. 565, 68 N. E. 1117, holding the same as to bonds of foreign corporations left on deposit in a New York bank, though rendered after the amendatory act of 1892, were controlled by the act of 1887, the decedents having died before the act of 1892; and the court in the *Gibbes* Case noted that under the amendatory act of 1892, construed in the light of the statutory construction law, the court of appeals had held that bonds of a foreign corporation, left within the state by a nonresident, are taxable. (Referring to the *Whiting* Case.)

Under the New York statute as amended in 1892, bonds of a foreign corporation, as well as bonds and certificates of stock of domestic corporations, when deposited in a safety deposit vault within the state, although owned by a nonresident, were held to be "property within the state" and subject to the tax, although, so far as appears, they were present merely for safe-keeping. *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715. *Gray and Haight, JJ.*, dissented as to the bonds of the foreign corporation, upon the ground that the securities in question had no situs in New York. While, as above suggested, the result as to the certificates of stock in the domestic corporation would doubtless have been the same even if the certificates had not been within the state, it is clear that the liability of the other securities to the tax was dependent upon their physical presence within the state. If other evidence of this were needed it would be furnished by the holding at the same term of court in *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707 (a case only incidentally in point in this note), that bonds of a domestic corporation which are in another state, in possession of a nonresident, are not "property within the state" within the meaning of the transfer tax act. If this is true of bonds of a domestic corporation, it is *a fortiori* true of bonds of a foreign corporation. (See, however, *supra*, I. a, as to amendment of New York statute in 1911.)

So, promissory notes belonging to the estate of a nonresident, due from residents and nonresidents, and secured by mortgages on property in the state, the notes themselves being in a safety box in the city of New York at the time of the decedent's death, are liable to the tax. *Re Tiffany*, 143 App. Div. 327, 128 N. Y. Supp. 106, affirmed in 202 N. Y. 550, 95 N. E. 1140.

The court distinguished *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732, upon the ground that that related to a property tax, and

not to a succession tax. That it was the fact of the physical presence of the note within the state, and not the residence of some of the makers within the state, that was held to subject them to the tax, is apparent from the statement at the close of the opinion that the residence of the debtor cannot change the character of the property, or determine whether it is liable to an inheritance tax.

A negotiable promissory note or a bond, though belonging to the estate of a nonresident and secured by a mortgage upon land in another state, is liable to the tax if located in New York at time of decedent's death. *Re Gibbs*, 60 Misc. 645, 113 N. Y. Supp. 939. The particular circumstances of the presence of the securities in New York do not appear.

But stock in a foreign corporation, belonging to the estate of a nonresident, is not subject to the transfer tax law of New York, merely because the transfer agent of the corporation does business within that state. *Dunham v. City Trust Co.* 115 App. Div. 584, 101 N. Y. Supp. 87, affirmed without opinion in 193 N. Y. 642, 86 N. E. 1123.

The decision in *Re Pullman*, 46 App. Div. 574, 62 N. Y. Supp. 395, that stocks and bonds of New York corporations, belonging to the estate of a nonresident, the title to which was in New York creditors, who held them in that state as collateral, were not subject to the tax, was not upon the ground that they were not property within the state, but upon the ground that the creditors' security should not be diminished "at this time." The general liability of such securities belonging to the estate of a nonresident, when within the state, was recognized.

In *Re Fearing*, 200 N. Y. 340, 93 N. E. 956, holding that bonds secured by mortgages upon real estate in New York, passing under the will of a nonresident, were not subject to the tax, the bonds were not within the state, and the attempt to reach them was because of the location within the state of the property by which they were secured. Upon that point, see notes in 9 L.R.A.(N.S.) 1104 and 35 L.R.A.(N.S.) 784.

In *Re Bishop*, 82 App. Div. 112, 81 N. Y. Supp. 474, reversing 40 Misc. 64, 81 N. Y. Supp. 262, holding that stock in a foreign corporation belonging to the estate of a nonresident was not subject to the tax, it does not appear where the certificates of stock were held, but, as it was assumed that the question whether the stock was subject to the tax turned entirely on the question whether the decedent was domiciled in New York or elsewhere, it would seem that the certificates were not in New York.

Railroad bonds, bonds of municipalities outside of Massachusetts, and United States bonds, all of which were completely transferable by delivery and commonly bought and sold in the market in Massachusetts, when within that state, although belonging to the estate of a nonresident, are property within the state within the Massachusetts 46 L.R.A.(N.S.)

statute subjecting to the succession tax "all property within the jurisdiction of the commonwealth, and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the commonwealth regulating intestate succession. . . . *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176. The report in this case does not show under what circumstances the evidences of the obligations in question were within the commonwealth; the mere fact that they were there seems to have been regarded as subjecting them to the tax. The court expressed a doubt as to whether a note and mortgage upon land in another state, which seemed also to have been within the state, were subject to the tax; but it was not necessary to decide the point.

But the fact that United States bonds have been intrusted by the testator, a nonresident, temporarily for safe-keeping with a trust company in the state, does not subject them to the inheritance tax, where the testator was a nonresident. *Orcutt's Appeal*, 77 Pa. 179.

e. Bank deposits.

In this connection attention is called to the fact that the New York cases cited in this division were rendered before the amendment of the inheritance tax law (see *supra*, I. a).

Though a general bank deposit, strictly speaking, represents an indebtedness merely, it is, unless the statute declares otherwise, generally regarded as the equivalent of the money for which it stands so far as succession taxes are concerned. And so, whatever may be the rule as to an ordinary indebtedness from a resident to a nonresident (a question not within the scope of this note), it is very generally held in jurisdictions which adopt the view that the tax is payable in respect of personal property of a nonresident within the jurisdiction, that general deposits in local banks to the credit of nonresidents are subject to the tax.

Thus, money of a nonresident on deposit in an Illinois bank is subject to the Illinois transfer tax act. *People v. Griffith*, 245 Ill. 532, 92 N. E. 313.

In *Re Houdayer*, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718, holding that money of a nonresident, deposited by him in a bank within the state, although commingled with trust funds in an account opened by him as trustee, constitutes property "within the state" within the act of 1892, and thus liable to the payment of the tax, the court said that while technically the relation of creditor and debtor existed, practically the decedent had his money in the bank, and could come and get it when he wanted it.

So, deposits in a New York trust company and a New York bank, belonging to the estate of a nonresident decedent, were held in *Re Blackstone* to be subject to the New York inheritance tax law. *Re Blackstone*,

69 App. Div. 127, 74 N. Y. Supp. 508, affirmed in 171 N. Y. 682, 64 N. E. 1118. The decision of the court of appeals was affirmed by the United States Supreme Court in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. The latter court, however, merely passed upon the question of constitutional power, and not upon the question of statutory construction. Even before the decision in the *Blackstone Case*, it was held in *Re Clark*, 2 Connoly, 183, 9 N. Y. Supp. 444, that bank accounts to the credit of a nonresident were property within the state, within the meaning of the act of 1887, and so liable to the tax.

In *Re Myers*, 129 N. Y. Supp. 194, holding that the deposit by a nonresident in a New York trust company was liable to the tax, the court said that the contention that the deposit was in New York temporarily, for the purpose of investment, and therefore not subject to the tax, was untenable, as the property was on deposit for nearly two months before the date of the decedent's death.

So, a deposit in a New York savings bank, belonging to the estate of a nonresident decedent, is subject to the tax. *Re Burr*, 16 Misc. 89, 38 N. Y. Supp. 811. But see *contra*, *Allen v. Philadelphia Sav. Fund Soc.* Fed. Cas. No. 234, which, however, relied on *Re Kintzing*, 3 Nat. Bankr. Reg. 217, Fed. Cas. No. 7,833, which merely held that choses in action against the state, its corporations or inhabitants, belonging to the estate of a nonresident, were not subject to the tax under the Pennsylvania statute. The *Allen Case* failed to observe the distinction between an ordinary indebtedness and a bank deposit.

And a deposit to the credit of a nonresident owner was held to be within the state and subject to the tax in *Re Stanton*, 142 Mich. 491, 105 N. W. 1122. In this case, however, the decedent had an office in Michigan where her securities were kept for the purpose of collection, deposit, and reinvestment.

In *Re Daly*, 100 App. Div. 373, 91 N. Y. Supp. 858, affirmed without opinion in 182 N. Y. 524, 74 N. E. 1116, under the rule of the *Houdayer* and *Blackstone Cases* in relation to bank deposits, an inheritance tax was held payable in respect of a special deposit to the credit of a nonresident, representing the amount of a check drawn to his order, by a solvent resident of New York in payment of an entire indebtedness, only part of which was due, it appearing that the check, which was delivered to and indorsed by his secretary, was placed in the special account because the payee was not in a condition to transact business, it further appearing that he died without having affirmed or disaffirmed the transaction, but that the money was received by his executors as part of his estate. This decision was rendered upon the assumption that if the payee had disaffirmed the transaction, the money in the bank would have been payable to the drawer. A majority of the court were of the opinion that even treating

the money as an indebtedness of the drawer of the check, it would be subject to the payment of the inheritance tax, citing in this connection the opinion of the United States Supreme Court in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. This, however, suggests a point that is beyond the scope of the present note.

Money to the credit of a nonresident with a firm of New York bankers and brokers, representing a balance on the closing out of stock transactions conducted for him, and which was subject to his control, and payable on demand, or to be used for the purchase of stocks, as he might direct, the brokers in the meantime having the right to use the same in their business, paying interest thereon, was held in *Re Daly*, 100 App. Div. 373, 91 N. Y. Supp. 858, to be subject to the payment of the inheritance tax under the rule announced in *Re Houdayer* and *Re Blackstone* in relation to deposits. A majority of the court were of the opinion that it would be liable even if treated as debts in the ordinary sense. The latter ground, however, is not within the scope of this note.

But in *Re Leopold*, 35 Misc. 369, 71 N. Y. Supp. 1032, money of a nonresident, temporarily on deposit in New York to the credit of a syndicate formed for the purpose of purchasing the stock of a corporation, was held not subject to the tax, although the nonresident died before the transaction was completed.

And an indebtedness due from a nonresident to a nonresident is not subject to the tax, although the debtor did business in New York as a banker, and the debt is described in the inventory as "balance of account with bankers." *Re Bentley*, 31 Misc. 656, 66 N. Y. Supp. 95.

The decision in *Fidelity & Deposit Co. v. Crenshaw*, 120 Tenn. 606, 110 S. W. 1017, that a deposit in a Tennessee bank to the credit of a nonresident decedent was not subject to the tax, was not upon the ground that the deposit did not represent property within the state, but upon the ground that, by the law of Kentucky, where the decedent was domiciled, the mother was the sole distributee, and that the interest passing to her is not subject to the tax under the Tennessee statute; and it was so held notwithstanding that, by the law of Tennessee, part of the estate would have gone to the decedent's brother, and would have been subject to the tax.

As to whether the tax is payable at the domicile of decedent in respect of deposits in a bank in another jurisdiction, see *infra*, II.

f. Property held subject to trust.

As to liability of personal property within the jurisdiction, subject to a trust created by a nonresident, see also *supra* as to the English cases in relation to such trusts.

The maxim *Mobilia sequuntur personam* is applied in *RE HELENA* with the result of denying the liability to pay the tax in re-

spect of security belonging to the estate of a nonresident, held, at the time of her death, by trustees in Pennsylvania, subject to a deed of trust revocable by decedent at any time prior to her death, the trustees having no beneficial interest therein other than their right to compensation, even though the legal title to the securities may have been in their names.

However, securities consisting of stock trust certificates and certificates of stock transferred by revocable deed of trust of a nonresident to a Pennsylvania trust company, with discretionary power in the trustee "to sell the same and reinvest the proceeds in good securities," in trust to pay the income to the grantor for life, and after her death, to pay a certain designated portion of the principal to collaterals, were held in *Singer v. Guarantee Trust & S. D. Co.* 24 Pa. Super. Ct. 270, to be liable to the inheritance tax upon the death of the grantor, it not appearing that ancillary letters had been granted, nor alleged that the fund produced by the sale of the securities after the death of the testatrix was needed or had been claimed by executors for payment of debts, but, upon the other hand, it appearing that the trustees had paid over the fund, less the collateral inheritance tax, to the persons named in the deed of trust.

In *Com. v. Kuhn*, 43 Phila. Leg. Int. 280, the decision that stocks and other securities which the decedent transferred in her lifetime in trust were subject to the tax under the Pennsylvania statute, notwithstanding that after the creation of the trust the decedent became a resident of another state, was upon the ground that the situs of the property subject to the trust was established in Pennsylvania by the execution of the trust instrument, and was not affected by the change of domicile subsequently there-to.

As to whether a tax is payable at the domicile in respect of securities held in trust in another jurisdiction, see *infra*, II.

g. Interest of one decedent in estate of another.

It is to be observed that the cases cited in this subdivision assume that the property in question was subject to the tax as part of the estate of the original decedent, either because he was a resident of the jurisdiction, or the property was within the jurisdiction; and they deal merely with the question whether the property was subject to another tax as a part of the estate of the second decedent.

The interest of a nonresident at the time of his death in the estate of his deceased brother, a resident, within the state, consisting of bank stock and other stocks, bonds and cash, is property within the state, subject to the Maryland collateral inheritance tax. *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82.

The interest which a nonresident took by inheritance from a resident of Pennsylvania, the property being in the hands of

a guardian of the former, residing in Pennsylvania, is subject to the Pennsylvania inheritance tax, upon her death. *Com. v. Brenner*, 2 Legal Gaz. 413.

A fund inherited by a nonresident decedent shortly before his death, from a decedent who was domiciled in Pennsylvania, the fund never having been out of Pennsylvania, and being paid over by the administrator of one estate to the administrator of the other, is subject to the inheritance tax of Pennsylvania. *Weaver's Estate*, 4 Pa. Dist. R. 260.

But in *Re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330, affirmed in 143 N. Y. 641, 37 N. E. 823, where a nonresident who was a residuary legatee under the will of a resident, died while the resident's estate was unsettled, his interest was held not liable to the tax as a part of his estate, the legacy never having been paid to him, nor having been in the condition to be paid to him prior to his death. It does not appear where the property applicable to the residuary bequest was situated. It appears that a tax had been paid in respect of such property as a part of the estate of the resident, but of course the domicile of the original testator within the state would have subjected it to such tax, irrespective of its actual location. The court treated the right of the nonresident at the time of his death as a mere chose in action, and invoked the principle that the situs of a debt, even for the purposes of a succession tax, is at the domicile of the creditor, and not at the domicile of the debtor. That general principle is not within the scope of this note, but is considered in the note in 4 L.R.A.(N.S.) 953. It may be remarked, however, that the United States Supreme Court in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, seems to take the view that, for the purposes of a succession tax, at least, the situs of a debt, not evidenced by a negotiable instrument, may be regarded as at the domicile of the debtor.

And in *Re Zefita*, 167 N. Y. 280, 60 N. E. 598, where a daughter, a nonresident of New York, died before any accounting by the executors under the will of her mother, also a nonresident, the residuary legatee of the daughter was held liable to the payment of a transfer tax in respect of securities actually situated in New York, in which the daughter had a remainder interest subject to the life estate of her mother, and also in respect of the interest to which the daughter succeeded under a power of appointment exercised by her mother's will; but it was held that the estate of the daughter was not, at the time of the attempted appraisal, subject to the tax in respect of her residuary legacy in her mother's estate, that estate being still unsettled. In the appellate division. 44 App. Div. 340, 60 N. Y. Supp. 927, the court took occasion to state that it was not called upon to determine whether the property, after it shall have been paid over by the executor of the mother

to the executor of the daughter, must pay a transfer tax in his hands before it could be delivered to the residuary legatee of the daughter. There is a suggestion of a similar limitation in the statement of the court of appeals, that it is obvious that, at the time of the appraisal, neither the executor under the will of the daughter, nor her residuary legatee, was liable to pay a tax on the amount of an unascertained claim against the estate of the mother.

So, the interest as residuary legatee under the will of her husband (a nonresident), of a widow (also a nonresident), who died before the probate of his will, was not "property within the state," so as to subject to the inheritance tax, as a part of her estate, securities belonging to the husband that were within the state at the time of the death of both of them, but were subsequently removed to the domicile and there paid over to the executors by her husband's executors, in performance of the residuary legacy. *Re Lord*, 111 App. Div. 152, 97 N. Y. Supp. 553, affirmed in 186 N. Y. 549, 79 N. E. 1110. The decision was upon the ground that the widow, at the time of her death, had no right to the particular property, but merely a right to the balance of the proceeds of the husband's property after the payment of his debts and the expenses of administration. This case, so far as it involved property which passed to the widow under the exercise of a power of appointment by the husband, is set out in the note in 33 L.R.A.(N.S.) 240.

But in *Re Clinch*, 99 App. Div. 298, 90 N. Y. Supp. 923, affirmed in 180 N. Y. 300, 73 N. E. 35, it was held that stocks in a New York corporation, bonds, etc., passing to the decedent, a nonresident, under the will of his father, who was also a nonresident, the securities being in the hands of the executor of the father's estate in New York, were subject to the transfer tax after they had been set apart for the son's estate, and delivered over to his executors, notwithstanding that the executor of the father's estate had not accounted and had made no distribution of his estate at the time of the son's death. It was said in the opinion of the appellate division that it was not claimed, and, in view of the New York decisions, it could not well have been claimed, but that property of the kind in question is taxable under the New York law, but that the contention was based on the fact that the interest of the son in his father's estate had not been definitely determined and the property reduced to possession prior to the son's death. The appellate division conceded that prior to the time of the actual settlement of the father's estate and transfer of the securities, no tax could be imposed, but said that the property became subject to the tax when the father's estate was settled.

As to whether a tax is payable at the domicile in respect of decedent's interest 46 L.R.A.(N.S.)

in the estate of one who was domiciled in another jurisdiction, or had personal property in such jurisdiction, see *infra*, 11.

h. Miscellaneous.

Personal property belonging to the estate of a nonresident, and which, at the time of his death, was not in Pennsylvania, is not subject to a succession tax there, notwithstanding that, as directed by the will, it passed into the hands of Pennsylvania executors. *Shoenberger's Estate*, 221 Pa. 112, 19 L.R.A.(N.S.) 290, 128 Am. St. Rep. 737, 70 Atl. 579. But the provision of the Pennsylvania statute is to the effect that all property "situated within his state, whether the person or persons dying seised thereof be domiciled within or without the state," shall be subject to the tax. The court said that the domicile of the testator at the time of his death was the situs of his personal estate, and that situs, and not what he directed to be done with his estate, was the sole test of the right to tax it.

The interest of a nonresident in a limited partnership association whose business and property, real and personal, were in Pennsylvania, is within that state, within the meaning of the Pennsylvania inheritance act of 1887, declaring that all estates situated within the state, whether the person dying seised thereof be domiciled within or out of the state, shall be subject to the tax. *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28. So, shares of a nonresident in a joint stock association having its principal place of business in New York were held in *Re Willmer*, 153 App. Div. 804, 138 N. Y. Supp. 649, subject to a transfer tax upon that proportion of their value represented by property within the state.

So, shares of stock, so called, belonging to the estate of a nonresident, in "trust," the place of business of which is in Massachusetts, and all of the property of which, both real and personal, is in that state, the legal title to the property of the trusts being in the trustees, who have control over the property, with power to invest the whole personal property and distribute earnings among the shareholders, but no power to bind the shareholders personally,—represent property "within the jurisdiction of the commonwealth" within the meaning of the Massachusetts inheritance tax law, and are subject to the tax. *Peabody v. The Treasurer*, 215 Mass. 129, 102 N. E. 435.

In *Del Busto's Estate*, 6 Pa. Co. Ct. 289, holding that choses in action consisting of stocks of bonds of Pennsylvania corporations, and cash awarded to the accountant by the adjudication of the account of the decedent's deceased partner, were not liable to the Pennsylvania tax under the act of 1887, the court seems to have been of the opinion that only tangible personal property belonging to a nonresident could have a situs in the state.

In *Re Hillman*, 116 App. Div. 186, 101

N. Y. Supp. 640, bonds of a foreign corporation which, after the death of the non-resident decedent, were apportioned to his estate, pursuant to an agreement for the sale in consideration of such bonds, of the property of a corporation in which he was a stockholder, were held not subject to the tax, although the purchasing company had mortgaged its property to a New York trust company, to secure the bonds in question, they having, however, not been issued at the time of the decedent's death.

II. Personal property of resident's estate physically absent from taxing jurisdiction.

This part of the note being concerned solely with the question whether the physical absence of the property or the evidence thereof will prevent the exaction of a tax in respect thereof, at the decedent's domicile, is not concerned with cases which merely assert the right to exact the tax in respect to various items of property, such as debts due from nonresidents or stocks in foreign corporations, where the question was not affected by the situs or location of the evidence of the obligations. So the question whether property out of the state must be included in fixing exemptions is beyond the scope of the note. (See on that point, note, 39 L.R.A.(N.S.) 1024. And see Index to L.R.A. Notes, "Taxes," §§ 90-105, on various other questions of collateral interest.)

Although, as subsequently shown, there are some exceptions, it is generally held unless the terms of the statute forbid, that a succession or inheritance tax imposed by the state or country of the decedent's domicile is payable in respect of personal property, at least intangible property, not otherwise exempt, although the evidences thereof are physically absent from the jurisdiction. (The cases cited are subsequently set out in detail.) *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105, affirming 194 N. Y. 281, 87 N. E. 428; *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699; *Hopkins's Appeal*, 77 Conn. 644, 60 Atl. 657; *People v. Union Trust Co.* 255 Ill. 168, — L.R.A.(N.S.) —, 99 N. E. 377, Ann. Cas. 1913 D, 514; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; *Mann v. Carter*, 74 N. H. 345, 15 L.R.A.(N.S.) 150, 68 Atl. 130; *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593; *Re Hartman*, 70 N. J. Eq. 664, 62 Atl. 560; *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Re Merriam*, 141 N. Y. 479, 36 N. E. 503; *Re Dingman*, 66 App. Div. 228, 72 N. Y. Supp. 694; *Re Corning*, 3 Misc. 160, 23 N. Y. Supp. 285; *Lines's Estate*, 155 Pa. 378, 26 Atl. 723; *Milliken's Estate*, 206 Pa. 149, 55 Atl. 853; *Bullen's Estate*, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109. And see to the same effect English cases subsequently cited.

This is upon the ground that the devo-

lution of the property is governed by the law of domicile; and generally prevails even in those jurisdictions that hold the tax payable in respect of personal property within the jurisdiction belonging to the estate of a nonresident. As shown in the note in 15 L.R.A.(N.S.) 150, the resulting double taxation is not obnoxious to any constitutional provision.

Thus, all personal property belonging to the estate of a decedent domiciled in Connecticut, irrespective of its actual situs or location in other states, was held in *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699, and *Hopkins's Appeal*, 77 Conn. 644, 60 Atl. 657, to be subject to the inheritance tax under the Connecticut statute providing that "in all such estates any property within the jurisdiction of this state, and any interest therein, whether tangible or intangible, and whether belonging to parties in this state or not, which shall pass by will or by the inheritance laws of this state, . . ." shall be liable to the tax. The court took the view that the act was laid in view of the principle that personal property is bequeathed by will, and is descendible by inheritance according to the law of the domicile, and that the disposition of, and succession to, personal property, wherever situated, is to be governed by the laws of the state where the owner had his domicile at the time of his death.

In *Hopkins's Appeal*, supra, the personal property of a decedent domiciled in Connecticut, which was held liable to the payment of the tax, consisted of cash and credit on deposit in New York; shares of capital stock of corporations organized under the laws of Connecticut, New York, and other states, United States bonds, shares of stock of unincorporated associations, notes of residents of other states than Connecticut, secured by mortgage on land in such states, unsecured notes of residents of other states and bonds of North Carolina,—which securities were kept in New York by the testatrix at the time of her death.

So, in *People v. Union Trust Co.* 255 Ill. 168, — L.R.A.(N.S.) —, 99 N. E. 377, Ann. Cas. 1913 D, 514, it was held that personal property belonging to the estate of a decedent who was domiciled in Illinois, consisting of stocks and bonds of a non-Illinois corporation, held at the time of decedent's death in a safety deposit box in California, and a deposit in a California bank, were subject to the tax imposed by the Illinois statute, which, as the court said, was substantially adopted from New York after the decision in *Re Swift*, infra.

So, bonds and stock of foreign corporations, a certification of indebtedness of a foreign corporation, bonds secured by a mortgage on real estate in New Hampshire, the makers living in New York, and cash on deposit in savings banks in New York,—all of which had been in the hands of the agents in New York of a decedent who was domiciled in Massachusetts,—are property within the jurisdiction of the

commonwealth, within the Massachusetts inheritance tax law, and subject to a tax under it. *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623. The court alludes to the fact that there had been no administration in New York, but that apparently is not to be regarded as a necessary limitation of the decision.

So, deposits in a foreign savings bank belonging to a resident of the state are property within the jurisdiction of the state, within the meaning of the collateral inheritance tax statute. *Mann v. Carter*, 74 N. H. 345, 15 L.R.A.(N.S.) 150, 68 Atl. 130. The decision in part rested on the fact that the statute was adopted from Massachusetts, and that a similar construction had been previously placed upon the Massachusetts statute by *Frothingham v. Shaw*, supra.

And where one domiciled in Nebraska made a voluntary deed of settlement, directing a foreign trustee to hold certain stocks of a Nebraska corporation, paying the profits to the settlor during his life, and upon death, to transfer the stocks to certain beneficiaries, the stocks, upon their transfer to the beneficiaries upon the death of the settlor, were held subject to the transfer tax law of Nebraska, notwithstanding the contention that at the time of the settlor's death they were permanently located outside the limits and without the jurisdiction of the state. *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593. The court said that the complete devolution of the title must take place under the protection and according to the law of Nebraska, and that the succession is subject to the inheritance tax.

Under a statute substantially identical with the New York statute, it was held in *Re Hartman*, 70 N. J. Eq. 664, 62 Atl. 560, that personal property belonging to a decedent domiciled in New Jersey was subject to the tax in that state, notwithstanding that it was located in New York, and was subject to the succession tax law of that state. This apparently included both tangible and intangible property.

Under the New York act of 1887, amending the act of 1885, declaring subject to the tax "all property which shall pass by will . . . from any person who may die seised or possessed of the same, while a resident of this state . . ." it was held in *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096, reversing as to this point 64 Hun, 639, that all personal property of a resident decedent, wheresoever situated, whether within or without the state, including tangible personal property situated out of the state, was subject to the tax, since such tax was upon the right of succession. But see supra, *I. a.*, with regard to an amendment in 1911 of the New York statute, which seems to abrogate the effect of this decision so far as tangible personal property is concerned.

Stocks in a foreign corporation, belonging to the estate of a resident of New York, are subject to the inheritance tax law of 46 L.R.A.(N.S.)

that state. *Re Merriam*, 141 N. Y. 479, 36 N. E. 505. It does not appear where the certificates were held.

In *Re Keeney*, 194 N. Y. 281, 87 N. E. 428, affirmed in 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105, where stocks and bonds had been transferred upon a trust to pay the income to the decedent during her life, and disposing of the same after her death, an objection to the tax upon the ground that the property at the time of the testator's death was in another state, with the legal title in a trustee, was answered by the statement that the liability accrued at the time the trust was created, and that it was not claimed that the decedent was not then a resident of the state, or that the property was not then within the state.

Personal property is subject to a tax at the domicile of decedent notwithstanding that, at the time of his death, it was in another state, and was administered upon and distributed pursuant to the laws of such state, and delivered within such state to a legatee, who was a resident thereof. *Re Dingman*, 66 App. Div. 228, 72 N. Y. Supp. 694. The court said in effect that the question how the tax was to be collected was another matter.

Notes, bonds, and mortgages belonging to the estate of a resident, but in the hands of an agent in another state at the time of his death are subject to the tax. *Re Corning*, 3 Misc. 160, 23 N. Y. Supp. 285 (surrogate's decision). The land covered by the mortgage was also situated in the other state.

The decision in *Re Thomas*, 3 Misc. 388, 24 N. Y. Supp. 713, that the personal estate of a decedent resident in New York, consisting of her distributive share in the estate of a deceased sister, who was domiciled in Ohio, no part of which said estate came to the possession of the testatrix prior to her death, was not subject to the tax, was in effect overruled by the decision in *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096, reversing the decision in *Re Swift*, 2 Connolly, 644, 47 N. Y. S. R. 47, 16 N. Y. Supp. 193, so far as it related to personal property of a resident decedent, upon which the court in *Re Thomas* relied.

Under the Pennsylvania act of 1826, subjecting "all estates, real, personal, and mixed . . . passing from any person who may die seised or possessed of such estate, being within this commonwealth, . . ." it was held in *Com. v. Smith*, 5 Pa. 144, that it was not the person, but the estate within the commonwealth, on which the tax is levied. Though the decision in that case was that personal property within the state, belonging to the estate of a nonresident, was subject to the tax, it is clear that unless the statute had been amended, the result would have been that the tax could not have been exacted in respect of personal property out of the commonwealth, belonging to the estate of a resident. The act referred to, however,

was subsequently amended by declaring that the words "being within this commonwealth" shall be so construed as to relate to all persons who have been at the time of their decease, or now may be, domiciled within the commonwealth, as well as to estates. Under the amended statute, it was held in *Re Short*, 16 Pa. 63, that the tax was payable in respect of stocks and bonds of foreign corporations, and a deposit in a bank in another state, belonging to the estate of a resident, although the securities seem to have been without the state.

The Pennsylvania act of 1850 by which the inheritance tax was in effect extended to personal property out of the jurisdiction, belonging to the estate of a resident, was upheld in *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127, even as to the estate of a resident of Pennsylvania who died before the passage of the act.

The tax is payable in respect of bonds of a Missouri corporation and stock in a New Jersey corporation, notwithstanding that, at the time of the death of the decedent, a resident of Pennsylvania, they were in possession of a New York trust company upon a trust to pay the income to him, and after his death, to distribute to certain beneficiaries named in the trust deed, or such other beneficiaries as should be substituted therefor by will. *Re Lines's Estate*, 155 Pa. 378, 26 Atl. 728.

The distributive share of a resident of Pennsylvania in the estate of an intestate who was domiciled in New York, consisting of stocks, bonds and cash which, at the latter's death, was actually at his domicil, is subject to the tax, notwithstanding that the former died within two weeks after the death of the latter, and before the latter's estate had been settled, or the exact amount coming to the former therefrom had been determined. *Milliken's Estate*, 206 Pa. 149, 55 Atl. 853.

Securities consisting of stocks, bonds, notes, life insurance policies, etc., assigned in trust to an Illinois trust company by a resident of Wisconsin, who reserved the right to direct and control the distribution of the trust property, and to revoke the trust at any time during his lifetime, and who received the net income from the property during his lifetime, have such a situs in Wisconsin as to subject them to the inheritance tax law of that state, although the securities were at all times after the creation of the trust in the possession of the trust company, and never manually in Wisconsin. *Bullen's Estate*, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109. The Wisconsin statute under which this case was decided was adopted from New York, and provides that the tax shall be paid when the transfer is by will or by the intestate laws of this state, from any person dying possessed of the property while a resident of the state, or when the transfer is of property, made by a resident or by a nonresident, when such nonresident's

property is within the state, or within its jurisdiction, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death.

So, in England, personal property belonging to the estate of a domiciled Englishman is subject to a legacy duty wherever located. *Atty. Gen. v. Napier*, 6 Exch. 217, 20 L. J. Exch. N. S. 173, 15 Jur. 253; *Re Ewing*, 1 Cramp. & J. 151, 1 Tyrw. 92, 9 L. J. Exch. 37; *Re Coales*, 7 Mees. & W. 390, 10 L. J. Exch. N. S. 207.

The English cases involving probate and estate duties are not included.

In *Woodruff v. Atty. Gen.* [1908] App. Cas. 508, it was held that the power of the provincial legislature of Ontario being limited by the British North America act to "direct taxation within the province," it had no power to impose a "succession tax," so-called, upon the transfer *inter vivos* of movables consisting of bonds, debentures, etc., made by a person domiciled in the province, where the securities were in New York, and the transfer and delivery were made in that state. Upon these facts the decision in this case would not seem to reach a case of a succession upon the death of an owner, testate or intestate; but it was said in the opinion: "The pith of the matter seems to be that the powers of the provincial legislature being strictly limited to 'direct taxation within the province' (British North America act, 30 & 31 Vict. chap. 3, § 92, subsec. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence."

That statement gave rise to a conflict of views among the members of the Supreme Court of Canada in *Rex ex rel. Atty. Gen. v. Cotton*, 15 Can. S. C. 469, the majority being of the opinion that neither the decision nor the opinion of the privy council prevented the exaction by Quebec of a succession tax in respect of movables located out of the province, belonging to the estate of a decedent who was domiciled in the province. The majority were of the opinion that the decision in the *Woodruff Case* must be limited to the facts of that case, and that in any event the fact that the Quebec statute purported to lay the tax upon the transmission of the property, whereas the Ontario law, in terms, at least, purported to lay the tax upon the property itself, made a distinction which would save the Quebec law from the effect of the decision in the *Woodruff case*, even if that decision were to be construed to apply to succession by death as well as to transfers *inter vivos* under the Ontario statute then under consideration.

In some instances, however, either because of the terms of the particular statute, or upon general considerations, it has been held that the tax is not payable in respect of personal property belonging to estate of a resident, but not within the

jurisdiction. This, as already shown, was true of the early Pennsylvania statute.

And so, under the Iowa statute declaring that "all property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state . . . shall be subject to a tax," it was held in *Re Weaver*, 110 Iowa, 328, 81 N. W. 603, that the actual situs of the property, and not the domicile of the owner, was the criterion, and accordingly that cattle owned by a decedent domiciled in Iowa, but which were in another state, were not subject to the tax; nor did the proceeds of the sale of such cattle, when brought into Iowa, become subject to the tax. The power of the state to impose the tax on such property was conceded, and the decision rested upon the construction of the statute.

The North Carolina supreme court having, in *Alvany v. Powell*, 55 N. C. (2 Jones, Eq.) 51, adopted the view that the tax was laid according to the principle of actual situs, rejecting the English doctrine that the tax is laid according to the principle of domicile, and applied the former view with the result of holding the tax payable in respect of personal property within the state, belonging to the estate of a nonresident, with a degree of consistency not much emulated by the courts of other jurisdictions, except when constrained by the terms of the statute, applied the same view conversely in *State v. Brevard*, 62 N. C. (Phill. Eq.) 141, by holding that the tax was not payable in respect of personal property not within the state, devolving upon a citizen of North Carolina under the will of one who seems to have been domiciled in North Carolina. While it is not explicitly stated that the testator was domiciled in North Carolina, there would seem to be little doubt but that the case was decided on that assumption. In the first place, the opinion seems to regard the decision as the logical converse of the decision in *Alvany v. Powell*, supra, which would imply that the decedent in the *Brevard* Case was domiciled in North Carolina. The opinion also speaks of the "executors" having qualified in Lincoln county court, and of the property in Alabama having been sold by an "administrator" appointed in that state, from which it is fairly inferable that the domiciliary administration of the estate was in North Carolina.

In *Rex ex rel. Atty. Gen. v. Cotton*, 45 Can. supra, upon an equal division of the court, it was held that personal property consisting of securities located beyond the province were not taxable under the terms of the Quebec statute in force in 1902, providing that all transmission owing to death, of property in usufruct or enjoyment of movable or immovable property "in the province," shall be liable to a succession tax. The statute was subsequently amended so as to subject to succession duty all movable property

transmitted, "wherever situate, of persons having their domicile (or residing) in the province of Quebec at the time of their death;" and it was held that the amended statute covered property so circumstanced, it being further held as above shown, that, as so applied, the statute was within the power of the province.

In *Re Joylsin*, 76 Vt. 88, 56 Atl. 281, the court, contrary to the prevailing view in other states, took the position that only property within the probate jurisdiction is subject to the tax under a statute applying to "all property within the jurisdiction of this state . . . whether tangible or intangible, which shall pass by will or by the intestate laws of this state," and it was accordingly held that the tax was not payable in respect of personalty belonging to the estate of a resident, consisting of bonds and notes of nonresidents, secured by mortgages on lands in other states, and a deposit in savings banks in another state, —all of which securities were "physically absent from the state of Vermont."

But after the statute had been amended so as to declare that every person who shall receive any legacy or distributive share comprised of or arising from property or any interest therein passing "by will, the law of descent, or the decree of a court of this state . . ." shall be subject to the tax. It was held in *Re Howard*, 80 Vt. 499, 68 Atl. 513, that the tax was payable in respect of notes held by a resident decedent against nonresidents, secured by mortgages upon real estate without the state, where they were never administered in the other jurisdiction, but were collected by the Vermont administrator, and formed part of the assets passing under the final decree of the probate court.

In one instance the right of the state of the domicile to exact the tax was defeated as the result of proceedings in another state.

Thus, the conclusiveness attending, under the New Jersey practice, the probate of a will, the settlement of the executors' account, and the final distribution of the estate pursuant to orders which the court made, after having decreed that all those who had neglected to bring in their claims were forever barred from their action therefor against the executors, renders repugnant to the full faith and credit clause of the Federal Constitution—where no attack on the jurisdiction of the New Jersey courts was made—the subsequent assessment, under N. Y. Laws 1896, chap. 908, upon the personal estate of the decedent as a resident of New York, of a succession tax, which, under § 222 of that act, is made a lien on the property and a personal obligation of the transferees and executors. *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1.

In *Re Cummings*, 142 App. Div. 377, 127 N. Y. Supp. 109, where a decedent who was adjudged by the New York courts to have been domiciled in New York left personal property in that state and also in California, it was held that the tax imposed by

the New York statute was payable in respect of the personal property in California, notwithstanding that it was determined by a court of that state that the decedent was domiciled in California, and that the property in that state was distributed by a decree of the California court, to the heir at law (the trusts created by the will having been held invalid). The case was distinguished from *Tilt v. Kelsey*, *supra*, upon the point, *inter alia*, that the California decree did not purport to administer and distribute the entire estate, but only such part of it as was in California, and that it was not preceded by a decree forever barring all demands not duly presented. It is also to be observed that the assessment was made on the basis of intestacy, and not, as in the *Tilt Case*, on the basis of a will which derived its authenticity and capacity to transmit property from a foreign probate. The court pointed out that it was not claimed that the order imposing the tax would create a lien on the California property, or impose any liability on a citizen of that state not a party to the New York proceedings; that the comptroller only asked for an order fixing the tax which accrued to the state upon the death of the decedent, and that he would, of course, have to collect the tax from some person over whom, or from some property over which, the courts of New York have jurisdiction.

The conclusion in the last case was approved by the Illinois supreme court in *People v. Union Trust Co.* 255 Ill. 168, — L.R.A.(N.S.) —, 99 N. E. 377, Ann. Cas. 1913 D, 514, although the court remarked that it might not agree with all the reasoning. It was held in the latter case that a decree of a California court distributing the estate, and discharging an administrator with the will annexed, upon a finding that all claims presented against the estate had been paid, including taxes and inheritance taxes, did not, under the doctrine of *Tilt v. Kelsey*, prevent the exaction of an inheritance tax by Illinois in respect of personal property located in California, belonging to the estate of the decedent domiciled in Illinois. G. H. P.

CONNECTICUT SUPREME COURT OF ERRORS.

JENNIE O'BIERNE

v.

GEORGE A. STAFFORD, Appt.

(— Conn. —, 87 Atl. 743.)

Automobile — negligence of chauffeur — release of steering gear.

1. A chauffeur is negligent in taking his hands from the steering gear to adjust his hat while the car is running 30 miles an hour, although the road is level, smooth, and straight.

46 L.R.A.(N.S.)

Master and servant — servant riding in master's car — negligence of chauffeur — liability.

2. A domestic servant whose contract includes the right to be transported to church in the employer's automobile does not, while being so transported, retain the relation of servant to the master, so as to be a fellow servant of the chauffeur in charge of the car, and relieve the master from liability for injury due to the chauffeur's negligence.

(July 25, 1913.)

APPEAL by defendant from a judgment of the Superior Court for Fairfield County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Beers & Foster, for appellant: Jennie O'Bierne and John McAuliffe were fellow servants.

Pigeon v. Lane, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371; McGuirk v. Shattuck, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110.

The manifest injustice of the verdict in this case is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles.

Burr v. Harty, 75 Conn. 129, 52 Atl. 724; Birdseye's Appeal, 77 Conn. 625, 60 Atl. 111; Wyeman v. Deady, 79 Conn. 416, 118 Am. St. Rep. 152, 65 Atl. 129, 8 Ann. Cas. 375; Bradbury v. South Norwalk, 80 Conn. 300, 68 Atl. 321; Steinert v. Whitcomb, 84 Conn. 263, 79 Atl. 675.

Messrs. Richmond J. Reese and George E. Beers, for appellee:

The trial court should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion.

Steinert v. Whitcomb, 84 Conn. 263, 79 Atl. 675; Lewis v. Healy, 73 Conn. 137, 46

Note. — *Automobile owner's liability for injury to servant.*

While the liability of the owner of an automobile to an employee injured thereby depends upon the general principles governing a master's liability for injury to his servant, including the duty to furnish safe place and appliances, the fellow servant rule, assumption of risk, contributory negligence, etc., it has been thought that it might be of service to collect the cases involving the application of these principles where an employee has been injured by his employer's automobile. For the exposition and exemplification of these principles in many other kinds of cases, see numerous notes referred to in Index to L.R.A. Notes, "Mas-

Atl. 869; Stumm v. Goetz, 79 Conn. 314, 64 Atl. 810; Simsbury v. East Granby, 69 Conn. 302, 37 Atl. 678; Bulkley v. Waterman, 13 Conn. 332; Donovan v. Hartford Street R. Co. 65 Conn. 216, 29 L.R.A. 297, 32 Atl. 350; Lennon v. Rawitzer, 57 Conn. 587, 19 Atl. 334; Kaples v. Orth, 61 Wis. 535, 21 N. W. 633; Jensen v. The Joseph B. Thomas, 81 Fed. 578; Fay v. Hartford & S. Street R. Co. 81 Conn. 337, 71 Atl. 364.

There is here lacking the necessary element to the application of the fellow servant rule.

Sullivan v. New York, N. H. & H. R. Co. 73 Conn. 214, 47 Atl. 131; Whittlesey v. New York, N. H. & H. R. Co. 77 Conn. 100, 107 Am. St. Rep. 21, 53 Atl. 459; Zeigler v. Danbury & N. R. Co. 52 Conn. 543; 2 Labatt, Mast. & S. § 624, pp. 1827, 1830, 1832; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Orman v. Salvo, 54 C. C. A. 265, 117 Fed. 233.

Where an employee is riding out of working hours under such circumstances that his employer has no control over him,

ter and Servant," III. While there are as yet but few cases of the kind under consideration, they will doubtless soon become common.

It has been held that one who, at the time she was injured in a collision, was riding in an automobile with her employer's wife in the capacity of her maid assumed the risk of the negligence of her employer's chauffeur. *Erjauscheck v. Kramer*, 141 App. Div. 545, 126 N. Y. Supp. 289. The court said: "Assuming, as we must, that the plaintiff's presence in the automobile was incident to her employment, it is difficult to understand why, within the principle of all the cases on the subject, she did not assume the risk of the chauffeur's negligence. Certainly her employment subjected her to that risk. The fact that her duty differed from that of the chauffeur is of no consequence. The controlling fact is that, in the performance of her duty, she incurred the risk of injury from the chauffeur's negligence."

In *Coleman v. Minneapolis Street R. Co.* 113 Minn. 364, 129 N. W. 762, which was an action by an electrical engineer against his employers and a street railway, to recover for an injury resulting from a collision between the employers' auto truck and a street car while the employer was operating the truck and transporting the plaintiff to his work, the court held that the evidence in the record justified a finding that the concurrent negligence of the defendants acting independently was the proximate cause of the plaintiff's injury. The court said: "It is not questioned that appellants, having undertaken to convey plaintiff in an auto truck to his place of work, owed him, on the occasion in question, in respect to the operation and control of the

transportation being furnished under a contract made between the parties, the fellow servant doctrine does not apply.

Doyle v. Fitchburg R. Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611; *Louisville & N. R. Co. v. Scott* (Louisville & N. R. Co. v. Weaver) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674; *Pendergast v. Union R. Co.* 10 App. Div. 207, 75 N. Y. St. R. 1297, 41 N. Y. Supp. 927; *Harris v. City & E. G. R. Co.* 69 W. Va. 65, — L.R.A.(N.S.) —, 70 S. E. 859, Ann. Cas. 1912 D, 59, 2 N. C. C. A. 165; *Davis v. Chicago. St. P. M. & O. R. Co.* 45 Fed. 543; *Baird v. Pettit*, 70 Pa. 477; *Gillenwater v. Madison & J. R. Co.* 5 Ind. 340, 61 Am. Dec. 101; *O'Donnell v. Sargent*, 69 Conn. 484, 38 Atl. 216; *Cavanaugh v. Windsor Cut Stone Corp.* 80 Conn. 590, 69 Atl. 345.

Wheeler, J., delivered the opinion of the court:

The jury might reasonably have found these facts: The plaintiff was engaged in

truck, the duty of exercising reasonable care for his protection from injury likely to follow a negligent or improper management of the same; nor can it be questioned that the street car company owed plaintiff the duty of exercising reasonable care to avoid injury to him. As to plaintiff, both may be liable on the doctrine of concurrent negligence, though in a controversy between themselves one defendant might be exonerated because of the contributory negligence to the other. Plaintiff, in riding in the auto truck with a member of defendant firm, was not engaged in a joint enterprise, nor had he any control over the movements of the truck. A member of the firm was operating it, and his negligence cannot be attributed to plaintiff. So that, if there was negligence in the management of the truck, and in the operation and control of the street car, plaintiff may recover against both defendants, for no claim is made that he was guilty of any negligence contributing to the accident. If both were in a measure negligent, as to plaintiff they were joint wrongdoers. To entitle appellants to a reversal, therefore, it must appear that they were wholly free from fault. . . . We shall not discuss the evidence. It is sufficient to say that we have examined the record and find therein evidence reasonably and fairly tending to sustain the jury in finding negligence on the part of defendant, in the management of the truck by *Hellier*, a member of the firm, and, whether greater or less in degree than that of the street car company, sufficient to support the verdict for plaintiff. The driver of the truck was aware of the fact, on approaching the car track, that a street car might be approaching from one direction

the service of the defendant as a domestic servant, and as a part of the contract of employment the defendant contracted to take the plaintiff to church each Sunday in his automobile. The defendant's chauffeur, McAuliffe, was, at the time of the accident, taking the plaintiff to church in pursuance of the defendant's contract. He started late for church. At the time of the accident the car was traveling at a rapid speed of 30 miles an hour. The car was in good condition. It had descended a hill, and was at the foot, where the road was substantially straight and level and of macadam, in fairly good condition, when suddenly it left the highway and landed against some trees outside the highway; the car being at an angle of 45 degrees with the highway. As a consequence the car was badly damaged, and the plaintiff suffered the injuries complained of. A reasonably competent chauffeur, in the exercise of due care, ought to be able to keep a passenger automobile, which was in good condition, in the traveled way of an unobstructed highway which was level and

straight and in reasonably good condition. The cause of the automobile leaving the highway was due to the fact that the chauffeur took his hand from the steering wheel for a moment in order to pull his cap over his eyes and prevent the rays of the sun being reflected from the brass lamps of the car into his eyes, and the speed of the car was then so great that it, not being under control for a brief space of time, plunged off the highway. As soon as the rays of the sun thus blinded the chauffeur, as the jury might reasonably have found, it was his duty to have stopped the car; had he done so, the accident would have been avoided. The only logical conclusion to be drawn from the facts proven was that the cause of the accident was the driving of the car in a negligent manner. The defendant claimed upon the trial that the injuries to the plaintiff, if any, were occasioned by the acts of a fellow servant, and, as we understand the record, requested the court upon this ground to direct a verdict for the defendant.

The fellow servant defense cannot prevail

or another, and that unless he kept his truck under control a collision might occur, if the approaching street car was not also under control. The evidence tends to show that he observed the car in time to have avoided the collision, but, instead of stopping the truck or turning aside, as he could have done, he attempted to cross in front of the approaching car, and was struck just as the rear end of the truck was passing over the track. It is probable that if the motorman had been in control of his car, or had not been running the same at an excessive speed, the auto could have safely made the crossing. But this does not concern the plaintiff. As to plaintiff, the concurring negligence of defendants was the proximate cause of his injury."

In *Anderson v. Van Riper*, 128 N. Y. Supp. 66, a complaint was held insufficient on the ground that it failed to show negligence by the defendant, or sufficient facts in relation to the occurrence of the injury where it alleged only that the defendant hired the plaintiff as chauffeur and ordered him to go to the garage where the defendant's automobile was kept, stating that it was in good order; that, after examining the machine and satisfying himself that it was in running order as far as external appearances went, he pulled the starting lever, but that, owing to some latent defect not discernible by his examination, the handle flew back and injured his arm; and it further alleged that the injury was caused by the negligence of the defendant and her employees. The court said: "There is no fact stated to show the defendant to have been negligent. Allegations of conclusions cannot supply this deficiency. There is no duty cast upon the owner of an automobile, by the statutes of 44 L.R.A. (N.S.)

this state, to have the same inspected. But if there were a duty which the master owed to the servant, to make or cause to be made an inspection, it would be necessary to allege facts showing that the neglect to inspect the car was the proximate cause of the injury. In this case the complaint alleges that, 'owing to some latent defect not discernible by plaintiff's examination, the handle or lever flew back.' The plaintiff was an expert, having driven automobiles for four years, and if he could not discover the defect on an examination of the machine, it would appear that he had properly described the defect as 'latent'—that is, not visible or discernible by observation,—and hence would not have been discovered by the defendant's inspection. But, further, the complaint fails to state sufficiently the facts in relation to the occurrence. Did any portion of the machine break through a defect in the material? Had any portion of the machine become defective through lack of repair? If we were allowed to speculate as to the reason of the flying back of the lever, the supposition that it happened through the plaintiff's careless operation would be more in accord with the probabilities than that it happened by reason of some hidden or unexplained defect in the machine itself. No liability can be predicated on the allegation that defendant's agent stated that the automobile was in good order, for the reason that the plaintiff did not rely on the statement, but made his own examination, and no facts are alleged which tend to show that this statement was not true."

For other questions of law arising out of the use of automobiles, see notes cited in Index to L.R.A. Notes, "Automobiles."

J. T. W.

in this case, unless it appear from the evidence: First, that the plaintiff, Miss O'Bierne, was an employee of the defendant at the time of the accident; second, that the accident resulted from the negligence alleged of the chauffeur, McAuliffe; and, third, that the relation of McAuliffe to Miss O'Bierne at that time was that of fellow servant. *Sullivan v. New York, N. H. & H. R. Co.* 73 Conn. 203, 214, 47 Atl. 131.

We have already considered the second of these conditions. Let us examine briefly the third and first condition in this order. The character of the duty violated is the test of the master's responsibility. *McElligott v. Randolph*, 61 Conn. 157, 164, 29 Am. St. Rep. 181, 22 Atl. 1094.

Was the defendant bound to perform the duty toward Miss O'Bierne which McAuliffe neglected to perform? If so, the negligence of McAuliffe was his. *Peterson v. New York, N. H. & H. R. Co.* 77 Conn. 351, 59 Atl. 502, 17 Am. Neg. Rep. 455.

If the duty violated was the master's, the defense of fellow servant is never available. *Messinger v. New York, N. H. & H. R. Co.* 85 Conn. 407, 474, 83 Atl. 631. The master may perform his duty personally, or by another; in either case the failure to perform the duty with reasonable care will impose a liability upon the master for consequent damages. *McElligott v. Randolph*, supra. The law places upon the master a positive duty as to the place, appliances, instrumentalities, and collaborators he shall provide for his servant. He may, by his contract of employment, extend the range of his duty. The parties are not restricted in their right of contract save by law. Whatever the master contracts to do within the law he must perform; he cannot by delegation escape the consequences of his nonperformance.

Let us next ascertain if Miss O'Bierne, at the time of the accident, was an employee of the defendant. She was his house servant, and in one sense continued in his employ during the period of employment wherever she might be and whether upon her own or her master's business. Her churchgoing cannot be said to have been connected with that employment. It was no part of her duty as a servant to go to church. She was free to go or not, and to choose the church she would go to. She was under no obligation to ride in the car; she was performing no service for him in so doing. On the contrary, he was rendering her the service required by his contract. The defendant did not pay her to ride in his car; she paid the defendant for the ride. This was as much a part consideration for her services as the wages paid her. On 46 L.R.A. (N.S.)

the way to and from the church her time was her own. She was traveling for her own purposes, and the right of the defendant to her services at this time was not "merely dormant, but wholly suspended." As she was not engaged in the defendant's work when she was injured, she was not a coemployee with McAuliffe.

There are numerous cases of railroad employees whose contracts of employment included transportation to and from work, who, while so traveling, had been injured by the negligence of the employees operating the train. In the best reasoned of these opinions, and in the greater number, these employees have been held to have been passengers, and not engaged in a common employment with the negligent employee of the railroad.

In *McNulty v. Pennsylvania R. Co.* 182 Pa. 479, 38 L.R.A. 376, 61 Am. St. Rep. 721, 38 Atl. 524, the court held that one employed by a railroad at a certain wage and free transportation to and from his home was a passenger while traveling to his home after his day's work, saying: "In the case at bar, the transportation from and to his home, to which the deceased, McNulty, was entitled, was not in any sense a service, or connected with any service, that he was rendering to the defendant company, but it was a service which the latter, by the terms of its contract, was required to render to him. He was under no obligation to ride on the cars, but there was an obligation on the part of the company to afford him an opportunity of doing so, if he saw fit to avail himself of it; and when he exercised the right to which he was thus entitled, and entered the car for the sole purpose of being transported to Bristol, he was a passenger in the full sense of the word, and not an employee of the defendant." *Dickinson v. West End Street R. Co.* 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60, 9 Am. Neg. Rep. 293; *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770; *Hebert v. Portland R. Co.* 103 Me. 315, 321, 125 Am. St. Rep. 297, 69 Atl. 266, 13 Ann. Cas. 886; *Enos v. Rhode Island Suburban R. Co.* 28 R. I. 291, 12 L.R.A. (N.S.) 244, 67 Atl. 5; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 51 L.R.A. 886, 58 S. W. 861; *Peterson v. Seattle Traction Co.* 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, 65 Pac. 543; *State use of Abell v. Western Maryland R. Co.* 63 Md. 433, 441; *Labatt, Mast. & S.* 2d ed. § 624. *Pigeon v. Lane*, 80 Conn. 237, 244, 67 Atl. 886, 11 Ann. Cas. 371, cites several of these cases, and holds to their doctrine.

The two rulings on evidence complained of were correctly decided.

There is no error.

The other judges concur.

IDAHO SUPREME COURT.

ROBERT BROSE, Appt.,

v.

TWIN FALLS LAND & WATER COMPANY et al., Resp'ts.

(— Idaho, —, 133 Pac. 673.)

Joint creditor and debtor — nuisance — successive owners of ditch.

A joint action for damages cannot be

Note. — Joint liability of successive owners of property for nuisance maintained thereon.

While there are many cases on the liability for a nuisance of the erector and of his grantee, but few cases discuss the question of their joinder.

For liability of one erecting or creating a nuisance upon his land for continuance of same after he has parted with the title, see the note to *Mansfield v. Tenney*, 25 L.R.A.(N.S.) 731; for necessity of notice to make owner of premises liable for continuing nuisance created by his predecessor, see the note to *Chicago, R. I. & P. R. Co. v. Martin*, 27 L.R.A.(N.S.) 164; for liability of a landlord to a third person for the condition of premises in the possession of a tenant, see the note to *Lee v. McLaughlin*, 26 L.R.A. 197; for connection with or participation in nuisance as essential to render one responsible therefor, see the note to *Adler v. Pruitt*, 32 L.R.A.(N.S.) 889.

Kinds of action—old remedies.

The consideration of this subject requires a word as to the kinds of action for a nuisance. The old common-law remedies by action were two: "(1) *Quod permittat prosternere*. This was in the nature of a writ of right, and therefore subject to great delays. It commanded the defendant to permit the plaintiff to abate the nuisance, or show cause against the same; and plaintiff could have judgment to abate the nuisance, and for damages against the defendant. (2) An assize of nuisance, in which the sheriff was commanded to summon a jury to view the premises, and, if they found for the plaintiff, he had judgment to have the nuisance abated, and for damages." *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085. See also *Waggoner v. Jermaine*, 3 Denio, 306, 45 Am. Dec. 474; *Brown v. Woodworth*, 5 Barb. 550; *Cogswell v. New York, N. H. & H. R. Co.* 105 N. Y. 319, 11 N. E. 518; 29 Cyc. 1214. 46 L.R.A.(N.S.)

maintained against one who constructs a ditch and operates it for a time and his grantee who continues the operation, for injuries to abutting property because of percolation from the ditch, even though a statute provides that every successive owner of property who neglects to abate a continuing nuisance thereon created by a former owner is liable therefor in the same manner as the one who first created it.

(June 18, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Lincoln County in defendants' favor in an action brought to recover damages for injury to plaintiff's land alleged to have been caused by defendants' negligence in permitting seepage and percolating waters to flow thereon. Affirmed.

The facts are stated in the opinion.

By the statute of Westminster, II., 13 Edw. I. chap. 24, where the erector of a nuisance had conveyed away the property, a writ of assize would lie against grantor and grantee jointly. *Baten's Case*, 9 Coke, 53b; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Brown v. Woodworth*, 5 Barb. 550; *Brady v. Weeks*, 3 Barb. 157.

While the assize of nuisance has been occasionally employed in this country see *Maris v. Parry*, 3 Rawle, 113; *Livezey v. Gorgas*, 2 Binn. 192; *Barnet v. Ihrie*, 17 Serg. & R. 174, the two old writs became practically obsolete long before the American Revolution (*Clark v. Storrs*, 4 Barb. 562; *Kintz v. McNeal*, 1 Denio, 436; 3 Bl. Com. 221; 29 Cyc. 1214), and the usual remedy was an action on the case, in which form of action there could be simply a judgment for damages, as in such a case the nuisance could not be abated. (3 Bl. Com. 222). But resort was also had to equity. (Revisers Notes to N. Y. Revised Statutes.)

Although the writ of *quod permittat prosternere* was abolished in New York by the act of 1787 (*Clark v. Storrs*, 4 Barb. 562), the writ of nuisance was preserved by that statute, which substantially re-enacted the statute of 13 Edw. I. chap. 24, and gave the form of the writ against both grantor and grantee (*Brown v. Woodworth*, 5 Barb. 550). And the legal remedy by writ of nuisance for the recovery of damages and an abatement of the nuisance was retained by the Revised Statutes (which required both erector and grantee to be named as defendants, 2 Rev. Stat. 332, *Brady v. Weeks*, 3 Barb. 157), but thereafter the proceeding by writ of nuisance was abolished, the same relief being provided for in a special action under the Code (*Cogswell v. New York, N. H. & H. R. Co.* 105 N. Y. 319, 11 N. E. 518), which provides that these Code provisions shall not affect an action where damages only are demanded, and also provides that "a person by whom the nuisance has been erected, and a person to whom the real property has been transferred, may be joined as defendants in such

Messrs. Longley & Hazel and Taylor Cummins, for appellant:

Defendants were jointly liable.

38 Cyc. 483, 486-488; Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 782; Cleveland, C. C. & St. L. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; Drown v. New England Teleph. & Teleg. Co. 80 Vt. 1, 66 Atl. 801; Walton v. Miller, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458; Nordhaus v. Vandalia R. Co. 242 Ill. 166, 89 N. E. 974; Probst v. Hinesley, 135 Ky. 64, 117 S. W. 389; Slater v. Mersereau, 64 N. Y. 138; Carterville v. Cook, 129 Ill. 152, 4 L.R.A. 721, 16 Am. St. Rep. 252, 22 N. E. 14; Peru Heating Co. v. Lenhart, 48 Ind. App. 319, 95 N. E. 680; Allison v. Hobbs, 96 Me. 26, 51 Atl. 245; Fortmeyer v. National

Biscuit Co. 116 Minn. 158, 37 L.R.A. (N.S.) 569, 133 N. W. 461; Straubal v. Asiatic S. S. Co. 48 Or. 100, 85 Pac. 230, 20 Am. Neg. Rep. 465; Yealy v. Fink, 43 Pa. 212, 82 Am. Dec. 556; Jones v. Spokane, P. & S. R. Co. 69 Wash. 12, 124 Pac. 142; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Pilcher v. Smith, 4 Ala. App. 444, 58 So. 672; Wisecarver v. Chicago, R. I. & P. R. Co. 141 Iowa, 121, 119 N. W. 532; Cleveland, C. C. & St. L. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A. (N.S.) 167, 53 S. E. 776; Haubelt Bros. v. Hirsch, — Tex. Civ. App. —, 131 S. W. 435.

Messrs. Sweeley & Sweeley and Bowen & Porter, for respondents:

The canal company is not liable for dam-

an action." (Robinson v. Smith, 3 Silv. Sup. Ct. 490, 7 N. Y. Supp. 38).

While in Pennsylvania, after some doubt, the courts adapted the old writ to modern forms (Barnet v. Ihrie, 17 Serg. & R. 174; the old writ is now superseded by the act of 1836; Pennock v. Octoraro Water Co. 15 Pa. Dist. R. 742), it was held in New York before the Code that one bringing a writ of nuisance must bring himself strictly with the ancient rules (Kintz v. McNeal, 1 Denio, 436), and it was later held that this was so of an action under the Code, as that was a substitute for the writ (Ellsworth v. Putnam, 16 Barb. 565), and that, therefore, as the writ ran only against freeholders, a joint action would not lie against one who built a building across the plaintiff's right of way and the person to whom the builder transferred the building, when it was not alleged that the defendants,—or either of them, were freeholders (Hess v. Buffalo & N. F. R. Co. 29 Barb. 391).

—modern remedies.

In so far as the ancient actions for nuisance have not been taken away by statute they are still available. 2 Wood, Nuisances, § 843; see also as far as concerns a writ of nuisance or assize of nuisance, 3 Farnham, Waters, p. 2815.

The other modern remedies are an action on the case for damages, an action in equity, and, in some jurisdictions at least, a special statutory action.

Joinder in various kinds of action.

The reader will understand that this note presupposes that an action would lie against either defendant separately, and it does not include cases where the ground of the decision was that one of the defendants was not liable at all.

For cases on joining landlord and tenant, see *infra*, "Joinder of landlord and tenant."

—writ of nuisance.

It is clear that in the jurisdictions where 46 L.R.A. (N.S.)

the statutes have not interfered with the writ of nuisance or assize of nuisance, the erector and his grantee would be properly joined in such writ under the statute of 13 Edw. I. chap. 24.

—action on the case for damages.

The decision in *BROSE v. TWIN FALLS LAND & WATER CO.*, declining to permit the erector and his grantee to be joined as defendants in an action for damages on account of a nuisance, was followed in the similar case of *Partridge v. Twin Falls Land & Water Co.* — Idaho, —, 133 Pac. 677, where the nuisance was water overflowing and escaping from the grantee's lands.

And in *Hess v. Buffalo & N. F. R. Co.* *supra*, where there being no allegation that the defendants (who were erector and grantee) were freeholders, the court held that the action could not be sustained as an action for a nuisance under the New York Code, and that disregarding the demand for abatement and considering the action simply as an action on the case for damages, it could not be sustained, as it united several causes of action.

On the other hand in *Hyde Park Thomson-Houston Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206, affirming 64 Ill. App. 152, the court, in sustaining a judgment in an action on the case against the grantee of the concern which had erected the nuisance, said: "When appellant acquired the plant and placed it in operation, the adjoining property owners who were damaged, and who had received no compensation for the damages they had sustained, were entitled to sue either the party who erected the plant or the one who operated it, or both, as they might elect; but there could be but one recovery."

—actions in equity.

In *Karns v. Allen*, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 543, an action in equity to abate the nuisance and for damages, it was held that judgment for abatement was proper against the erectors and

ages sustained prior to its ownership, management, and control of the canal, and if that company cannot be so held, then the defendants are improperly joined.

Sutherland, Damages, 3d ed. § 1059; Watson v. Colusa-Parrot Min. & Smelting Co. 31 Mont. 513, 79 Pac. 14; Karns v. Allen, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 343; Kinney, Irrigation, 2d ed. § 1685; Pom. Code Remedies, 4th ed. §§ 208, 209; Wallace v. Drew, 59 Barb. 413; Bonte v. Postel, 109 Ky. 64, 51 L.R.A. 187, 53 S. W. 536; Swain v. Tennessee Copper Co. 111 Tenn. 430, 78 S. W. 93; Miller v. Highland Ditch Co. 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Livesay v. First

Nat. Bank, 36 Colo. 526, 6 L.R.A. (N.S.) 598, 118 Am. St. Rep. 120, 86 Pac. 103; 15 Enc. Pl. & Pr. 562; Keyes v. Little York Gold Washing & Water Co. 53 Cal. 724, 14 Mor. Min. Rep. 95; Smith v. Day, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055; Blaisdell v. Stephena, 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599; Sedgwick, Damages, 9th ed. § 36a; Post v. Hartford Street R. Co. 72 Conn. 362, 44 Atl. 547.

Allshie, Ch. J., delivered the opinion of the court:

This is an appeal from the judgment. The court sustained a demurrer to the complaint, on the ground that there was a misjoinder of parties defendant. Plaintiff declined to

continuer of the nuisance, and that the continuer was not liable for anything before the sale to it by the erectors, but that the erectors being the officers of the continuer, which was a corporation and their grantee, and they, as such officers, having maintained the nuisance after the sale, in the same manner as before, they were personally liable for the damages.

—actions under special statute.

In Cobb v. Smith, 38 Wis. 21, it was held that the erector of a nuisance, and the transferee, who was a trustee, and the *cestui que trust*, were properly joined as defendants in an action under the Wisconsin statute for an abatement of the nuisance and for damages since a certain date to which they had theretofore recovered; and that judgment was properly entered against all of them for a certain sum for injury since said date, and that the nuisance be abated, or that, in the alternative, upon the payment of a certain larger sum, the plaintiffs be enjoined from disturbing the nuisance, and the defendants be entitled to continue it.

But in an action for damages and to abate a dam under the same statute, it was held error to require the plaintiff to bring in the defendant's grantees of a perpetual right to use a certain amount of water, or else to dismiss his action as far as the abatement was concerned, as the plaintiff might at his election sue only some of the tortfeasors (and if they desired their interests protected they might pay for the property injured, and then they might come into court and resist a judgment of abatement). Newell v. Smith, 26 Wis. 582.

Joinder of landlord and tenant.

Cases arising under general statutes permitting landlord and tenant to be joined as joint tortfeasors are excluded.

The only difficulty in joining landlord and tenant where each is liable is in relation to the damages. If the practice permits of a separate assessment of damages 46 L.R.A. (N.S.)

there ought to be no objection to such joinder. See Taylor v. Metropolitan Elev. R. Co. *infra*.

—actions for damages on account of nuisance.

There are numerous cases in which it has been held that the landlord and tenant are properly joined in an action for damages on account of a nuisance.

This has been held in the case of:—

—the owner and lessee of a railroad on account of water seepage. Canon City & C. C. R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. 1127;

—the builder and lessee of an elevated railroad in a city. Taylor v. Metropolitan Elev. R. Co. 18 Jones & S. 340;

—maintaining a privy which was a nuisance. McCallum v. Hutchison, 7 U. C. C. P. 508.

In Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 296, it was held that the lessor, his assignee, and the lessee and his subtenants, were all jointly liable in an action on the case for a nuisance in erecting and maintaining a fence across the plaintiff's right of way (and the court excluded any proof of damages except by the ordinary occupation).

In Gordon v. Peltzer, 56 Mo. App. 599, the court said (*obiter*): "If . . . the landlord shall erect a nuisance and let the same to a tenant, then both will be held liable for the consequent injuries,—the one for the creation and the other for the maintenance. They are considered as joint tortfeasors."

Where a railroad company has raised its tracks in a street in front of the plaintiff's premises and so committed a nuisance, the company and its lessee continuing such nuisance are properly joined in an action for damages, and both are liable for the permanent injury, and for the temporary injury occurring after the making of the lease. Little Miami R. Co. v. Hambleton, 40 Ohio St. 496.

In Taylor v. Metropolitan Elev. R. Co. *supra*, an action for damages against the

amend, and judgment of dismissal was entered.

The action is prosecuted for recovery of damages caused by seepage and percolating waters from the canal owned by the Twin Falls Canal Company. The complaint, among other things, alleges that the plaintiff is the owner of certain lands in Twin Falls county under the canal system, owned by the Twin Falls Canal Company. The complaint charges that the defendant Twin Falls Land & Water Company, in the years 1905 and 1906, constructed an irrigating canal, commonly known as the "High-Line Canal of the Twin Falls Canal System," over and across the plaintiff's land, and that it owned, was in the possession of, and operated the canal and system until the 30th day of November, 1909, on which date the

land and water company sold and transferred the entire canal system to its co-defendant, the Twin Falls Canal Company, and that the latter company thereupon acquired the title to the property and entered into possession and control thereof.

For convenience we will hereafter refer to the Twin Falls Land & Water Company as the Land & Water Company and to the Twin Falls Canal Company as the Canal Company.

The complaint then charges that the land & water company in the construction of the canal negligently failed to take such means as were necessary to prevent the water flowing in the canal from percolating, seeping, and flowing into and upon the lands of the plaintiff, and that from the time of the construction of the canal until the trans-

builder of an elevated railroad and its lessee was held properly brought against both defendants, and that the most that the lessee could ask was that the damages should be severed and separately assessed.

So, also, the action has been maintained against landlord and tenant jointly where the nuisance has inflicted personal injury.

This has been done in case of:—

—an unguarded area near the sidewalk. *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503;

—a coal hole in the pavement. *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 503;

—bad condition of a wharf. *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620;

—falling trough injuring plaintiff. *Keeler v. Lederer Realty Corp.* 26 R. I. 524, 59 Atl. 855, 17 Am. Neg. Rep. 715;

—explosion of gunpowder on premises used for its storage. *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761.

"There can be no doubt," said the court in *Irvine v. Wood*, supra, "that they were properly sued together. The landlord rented the nuisance and took rent for it. The tenants used it and paid rent, and hence they must all be considered as continuing and responsible for the nuisance."

"If the owner lets the premises with the nuisance upon it, and the tenant allows it to remain, they are jointly and severally liable for injuries occasioned thereby." *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503.

See also as recognizing the principle of joinder, *Morris v. Brower*, *Anthon*, N. P. 2d ed. 268.

—actions in equity.

There would seem to be no reason why landlord and tenant should not both be joined in an action in equity.

Thus, in *O'Sullivan v. New York Elev. R. Co.* 7 N. Y. Supp. 51, it was held that it was necessary that all parties having a substantial interest in the structure and its use should be made parties to an action in equity for an injunction against the nuisance. 46 L.R.A. (N.S.)

sance until compensation be paid for operating the elevated railroad built by one of the defendants and leased to the other, and also for damages.

So, in *Mazza v. Heister*, 5 Ohio Dec. Reprint, 430, it was held that the landlord should be made a defendant as a necessary party to the full determination of the question in an action against tenants to remove a building erected across an alleged private alley (the form of action not appearing, but it was probably in equity).

In *Brady v. Weeks*, 3 Barb. 157, it was held that an injunction should be granted against the erector of a nuisance and his lessee and a sublessee, but that a lessee who had assigned his lease without reserving rent and without any covenant for quiet enjoyment could not be a proper party to the bill.

—actions under special statutes.

In *Greene v. Nunnemacher*, 36 Wis. 50, it was held that a landlord and successive tenants could not be joined in an action for damages and abatement of a nuisance under the Wisconsin statute, where the nuisance was erected by the landlord, as the tenants could not be held liable for damages caused by him before the commencement of their term; nor should they be held liable for each other when in no way connected; and therefore there were several causes of action which could not be united.

In *Robinson v. Smith*, 3 Silv. Sup. Ct. 490, 7 N. Y. Supp. 38, it was held that an action for damages and for an abatement of a nuisance under the New York Code was properly brought against both landlord and tenant, but as an injunction perpetually enjoining the nuisance was granted, it would seem that the court overlooked the decision in *Cogswell v. New York, N. H. & H. R. Co.* 105 N. Y. 319, 11 N. E. 518, holding that such an action was one in equity, and was not to be considered as the special action for a nuisance provided for by the Code.

B. B. B.

fer of the same to the canal company, the land & water company was the sole owner and in full control of the property, and that from the time of the transfer until the commencement of this action the canal company was the owner and in full control of the property, and that both defendants at all times since the construction of the canal, by one continuous negligent act, participated in by both of defendants during the periods aforesaid, negligently caused the water to flow in said canal so as to permit the same to percolate, seep, and flow onto the lands of the plaintiff to his damage in the sum of \$5,000. The complaint also alleges that the land & water company knew that the canal was not properly constructed, and that the waters were seeping and percolating into and upon the lands of the plaintiff and injuring and damaging the same, and that the canal company at the time it acquired title to and took possession of the property knew of the defects in the system, and that damage was being done to the plaintiff, and that it continued to maintain and operate the canal without repairing or improving the same. The complaint contains a second count for the same tort and injury, but it is unnecessary to here recite any of the allegations of that count. The trial court sustained a demurrer to this complaint, upon the ground that it improperly united two causes of action, in that it united a cause of action against the land & water company alone with a cause of action against the canal company alone, and that the two companies were not jointly liable on either cause of action.

The only question presented for our consideration is whether the land & water company and the canal company are jointly liable for the tort and damage alleged in the complaint. In determining this question, it is important to understand clearly the cause of action alleged. When reduced to its last analysis, the complaint charges that the land & water company constructed this canal, and was the sole owner thereof and operated the same until November 30, 1909, and that on the latter date it sold and transferred the entire system and the possession and control thereof to the canal company. It then alleges that this injury and damage has been continuing from the time the land & water company began to run water through the canal up to the time of the commencement of this action.

The general rule of law with reference to the joint liability of trespassers and tortfeasors is well established and everywhere recognized, but it has proven one of the most difficult rules of application on account of the infinite diversity and variety of circumstances under which these wrongs

are committed or which lead up to their commission.

The supreme court of Indiana in *Cleveland, C. C. & St. L. R. Co. v. Hilligoss*, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485, have stated the rule as to those cases in which joint liability will attach as follows: "When more persons than one unite in the commission of a wrong, each is responsible for the acts of all, and for the whole damage; also, where separate and independent acts of negligence by different persons concur in causing a single injury, each is fully responsible for the trespass. Courts will not undertake to apportion the damages in such cases among the joint wrongdoers. The injured party has at his election his remedy against all or any number. 1 Cooley, Torts, 3d ed. 153. He may elect to look to one only, and, if he accepts from that one a benefit or property in satisfaction and release, he can go no further."

On the other hand, the supreme court of Oregon, in *Strauh v. Asiatic S. S. Co.* 48 Or. 100, 85 Pac. 230, 20 Am. Neg. Rep. 465, have stated the converse of this rule as follows: "To make tortfeasors liable jointly there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury."

The same proposition is stated from another angle by the supreme court of California in *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875, as follows: "In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability."

In 38 Cyc. 484, the author says: "The fact that it is difficult to separate the injury done by each from that done by the others furnishes no reason for holding that one tortfeasor should be liable for the acts of others with whom he is not acting in concert. Furthermore, if defendant's act was several when it was committed, it cannot be made joint because of a consequence which followed in connection with the result of the same, or a similar act done by others."

In *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, the court of appeals of New York said: "Where different parties pollute a stream by the discharge of sewage therein, each from his own premises, and each acting separately and independently of the

others, one of the number is not liable for all the injury suffered by another because of the nuisance thus created. Each is liable only to the extent of the wrong committed by him."

Mr. Kinney in volume 3 of his work on Irrigation & Water Rights, at § 1685, under the subject of "Joint and Several Tortfeasors," says: "It is a well-settled principle of law of procedure that an action at law for damages cannot be maintained against several persons as parties defendant when each acted independently of the others and there was no concert or unity of design or action between them. It is held that in such a case the tort of each defendant is several when committed, and that it does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons. If the rule were otherwise, the authorities hold that one defendant, however little he might have contributed to the injury of the plaintiff, would be liable for all the injury caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter, because no contribution can be enforced between tortfeasors."

The following are some of the many authorities which support the general rule above stated: *Walton v. Miller*, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458; *Wiscarver v. Chicago, R. I. & P. R. Co.* 141 Iowa, 121, 119 N. W. 532; *Verlinda v. Stone & W. Engineering Corp.* 44 Mont. 223, 119 Pac. 573; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523, 7 Mor. Min. Rep. 599; *Miles v. Du Bey*, 15 Mont. 340, 39 Pac. 313; *Pom. Code Remedies*, 4th ed. § 209; *Sutherland, Damages*, 3d ed. §§ 137, 141.

Counsel for appellant cite a number of cases in support of their contention, but place their chief reliance on the case of *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762. That was an action for damages resulting from a personal wrong and injury. In that case the action was prosecuted for damages against the plaintiff's seducer and a physician who attended her later. As we read and understand that case, there is no similarity between the facts of the case there considered and the case at bar. There it appeared that each contributed to the wrong and injury, and that the act of each was ratified and approved by the other, so that both could well be termed and dealt with as joint wrongdoers and co-conspirators. In discussing the law applicable to such a case, the court said: "If each had acted independently, the plaintiff might have been compelled to pursue them separately, although the consequences of their acts united. But Kimball was the hand of Gunder in further-

ing Gunder's wrong. The consequences of the operation were necessarily intermingled by Kimball with the natural consequences of Gunder's sexual intercourse with plaintiff. When Gunder came to Kimball, the incident was not closed, and Kimball willingly joined in and helped on a wrong that was not completed,—a wrong that constituted, when completed, but one cause of action against Gunder. And so, if Kimball chose to come in at any stage, he, too, is liable for the whole; for the law will not undertake to apportion damages in such cases."

Let us now revert to the facts of the present case to see if they bring it within the rule of law recognized by the foregoing authorities. The land & water company constructed this canal and operated it alone and independent of the canal company up to the time of the transfer November 30, 1909. Indeed, it was stated on the argument that the canal company was not in existence during the greater portion of this period, and was not organized until shortly before it acquired this property. Whatever damage was done by the land & water company during its ownership and operation of this system and up until the 30th day of November, 1909, when it parted with its ownership and possession, was a separate and independent act for which appellant might maintain his action for the damages sustained by reason of that act, and the damages sustained by reason of that act could have been computed and ascertained with reasonable certainty. To this injury the canal company in no way contributed and in no way aided, abetted, or advised therein. The liability and responsibility of the canal company commenced only when it acquired title and took possession of this property, and began to operate it and run water through the canal, and allowed the same to percolate through and upon the lands of the appellant. The canal company might have immediately repaired this defect in the canal, and prevented the seepage and percolation which was causing damage to appellant, and thereby have avoided doing any injury to appellant or subjecting itself to liability for damages. The land & water company was in no respect liable or responsible for the continuation of any injury on account of seepage and percolation after it parted with title and right of possession. The acts of the two companies are severable and separable, and the wrong of the one did not carry over into the act of the other. In other words, there was no concurrence either in point of time or act; there was no community of action, and there was no joint action by these two companies. So far as we have been able to discover from the authorities, they all require that, in order to hold defendants jointly li-

able, there must be some joint or concurrent act, or community of action or duty, or neglect of some common duty, or that the several wrongful acts of the defendants done at different times concurred in their effects as one single act to produce the injury complained of.

It seems clear to us that the respondents, the land & water company and the canal company, are not shown to have acted either jointly and concurrently to produce the injury of which appellant complains, nor have they neglected a duty that was common to them both at one and the same time, nor have they so acted that the several acts of the two have at any one time joined and concurred to produce a single injury. When the canal company's first duty arose to repair or improve this canal so as to prevent water seeping and percolating onto appellant's land, the like duty which had previously devolved upon the land & water company ceased, and the same duty was never incumbent upon both at the same time.

It has been suggested that under the provisions of § 3660 of the Revised Codes, "every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it." It is contended that under this statute a man who purchases property containing a nuisance is liable for the damage previously inflicted by that nuisance. This statute does not impose such a liability. It was enacted for the purpose of rendering the purchaser of a property that contains a nuisance liable to an action to abate the nuisance in the same manner as if he had created the nuisance, and to render him liable for all subsequent damages the same as if he had created the nuisance. In other words, it was intended to preclude the purchaser of property containing a nuisance defending against an action for damages or to abate the same, on the ground that he did not create the nuisance, and that he was not responsible for its creation. It was never intended, however, to render the purchaser liable for damages previously incurred. *Pierce v. German Sav. & L. Soc.* 72 Cal. 180, 1 Am. St. Rep. 45, 13 Pac. 478; *Castle v. Smith*, — Cal. —, 36 Pac. 859; *Ahern v. Steele*, 115 N. Y. 203, 5 L.R.A. 449, 12 Am. St. Rep. 778, 22 N. E. 193; 34 Am. St. Rep. note at page 267; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333.

The demurrer to the complaint was properly sustained, and the judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondents.

Sullivan and Stewart, JJ., concur.
46 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE, Appt.,
v.

LORAIN HAYDEN, by Next Friend.

(154 Ky. 258, 157 S. W. 4.)

Municipal corporation — safe sidewalk — duty as to area covering.

1. The duty of a municipal corporation to keep its sidewalks safe does not require it to keep a covering of a stairway leading from the sidewalk to the cellar of an adjoining building safe as a standing place for persons wishing to look through the windows of the building.

Negligence — unsafe property — covering of cellar way.

2. Trustees of a church are not bound to keep the covering of an opening leading from the sidewalk to the cellar of the church safe for persons who attempt to make use of it to look into the church windows.

(June 4, 1913.)

APPEAL by defendant from a judgment of the Common Pleas Branch of the Circuit Court for Jefferson County, Second Division, in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Bennett H. Young, Huston Quin, and Marlon W. Ripy, for appellant:

A municipal corporation cannot be compelled to respond in damages for conditions existing outside of the traveled or dedicated way.

Mitchell v. Brady, 124 Ky. 411, 13 L.R.A. (N.S.) 751, 124 Am. St. Rep. 408, 99 S. W. 266; *Temby v. Ishpeming*, 140 Mich. 146, 69 L.R.A. 618, 112 Am. St. Rep. 392, 103 N. W. 588; *Taylor v. Mt. Vernon*, 129 N. Y. 651, 29 N. E. 1032; *Thomp. Neg.* § 6006.

A municipal corporation is not responsible for latent defects in the highway, or for such defects as could not be observed through the use of ordinary care and diligence.

Elliott, Roads & Streets, § 807; *Thomp. Neg.* § 5973; *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130; *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249; *Jones v. Sioux Falls*, 18 S. D. 477, 101 N. W. 43; *Lohr v. Philipsburg*, 165 Pa. 109, 30 Atl.

Note. — Generally, as to liability of municipality for injury from opening maintained in sidewalk by abutting owner or occupant, see note to *Sherwin v. Aurora*, 43 L.R.A. (N.S.) 1116.

822; McGrail v. Kalamazoo, 94 Mich. 52, 53 N. W. 955.

The cellar door in question was put to such an extraordinary use at the time of the accident as that the defendant city cannot be held responsible, because it is not required to anticipate such a use.

Bell v. Henderson, 24 Ky. L. Rep. 2434, 74 S. W. 206; Stickney v. Salem, 3 Allen, 374; Blodgett v. Boston, 8 Allen, 237; Sykes v. Pawlet, 43 Vt. 446, 5 Am. Rep. 295.

The alleged defective condition of the cellar door was not the proximate or efficient cause of plaintiff's injury.

Louisville & N. R. Co. v. Keiffer, 132 Ky. 419, 113 S. W. 433; Logan v. Cincinnati, N. O. & T. P. R. Co. 139 Ky. 202, 129 S. W. 575; Cooley, Tort, 3d ed. p. 99.

Messrs. O'Doherty & Yonts for appellee.

Hobson, Ch. J., delivered the opinion of the court:

The Calvary Baptist Church maintains a mission on the north side of Walnut street, west of Twenty-eighth street, in Louisville, for colored people. The building sets back about 3 feet from the line of the street, and there is a cellar door extending from the building out upon the sidewalk; the cellar door being about 5 feet long, and about 25 inches of the door being, according to the weight of evidence, within the line of the street. The cellar door is higher at the building than at the other end. There are no hinges upon it; the end next to the church rests upon timbers nailed to the side of the wall, and when the door is used it is simply lifted off. In June, 1909, they were holding a religious revival, and it was customary for people in the neighborhood, both white and colored, to gather around the church and look in at what was going on; in order to see better they frequently stood on the cellar door. On the night of June 24th quite a crowd had gathered there for some time, and about 9 o'clock among them was Loraine Hayden, a little girl about five or six years old. Loraine was standing on the cellar door near the building, and near her was Mrs. Minnie Bessels, who weighs something over 200 pounds. There were two or three other persons standing on the door or standing on the frame on which it rested. The door gave way at the end next to the building and fell through into the cellar. The little girl and Mrs. Bessels fell into the hole. The child was seriously hurt, and this suit was brought against the city of Louisville and the trustees of the church to recover damages for her injuries. At the conclusion of all the evidence the court instructed 46 L.R.A. (N.S.)

ed the jury peremptorily to find a verdict in favor of the trustees of the church, and submitted the case to the jury as to the city. The jury returned a verdict in favor of the child for \$1,000. The court entered judgment on the verdict, and overruled the city's motion for new trial, and the city appeals.

According to the evidence for the plaintiff, the cellar door was in a rotten, decayed condition, and this by casual inspection a passer-by could readily discover; and according to the plaintiff's evidence Mrs. Bessels and the child were the only two people on the door, but according to the evidence for the city there were other people on the door, so that the entire weight upon it was about 800 pounds, and this forced off the timber nailed to the wall upon which the door rested, and thus caused it to fall. There was sufficient evidence of the rotten condition of the door to take the case to the jury, if the accident had happened in the ordinary use of the street. The proof conduces strongly to show that the child was really standing beyond the line of the street; but, as there is some confusion in the evidence on this subject, we will treat the case as though she was within the line of the street, but was using the cellar door to stand on for the purpose of looking into the windows of the church.

The question is, Was the city liable to a person who was injured by such a use of the cellar door? In Dillon on Municipal Corporations, § 1711, 4th ed., it is said: "From what has already been said, that negligence is the ground of the liability, it follows that a municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and whether they are so or not is a practical question to be determined in each case by its particular circumstances."

In Ryther v. Austin, 72 Minn. 24, 74 N. W. 1017, an electric light pole had been put up in a cement sidewalk so as to leave a space of 4 or 5 inches between the pole and the curb. Ryther hitched his horse to the pole; the horse began pawing and finally got one of his feet fastened in the hole between the pole and the curb, and was so injured that he had to be killed. Holding the city not liable, the court said: "We are of opinion that these facts do not tend to prove negligence on the part of the city, and hence that the court erred in not directing a verdict for the defendant. The

poles were not erected or designed for hitching posts, and the plaintiff was aware of that fact. He understood the situation, and all the risks, if any, of hitching horses to the poles, as fully as any of the city officials did. If he saw fit, for his own convenience, to use the pole as a hitching post, he took it as it was, and assumed all the risks. If he had been driving along the street at night and collided with the pole in the dark, a very different case would have been presented."

In *Stickney v. Salem*, 3 Allen, 374, the plaintiff stopped near a railing for ten or fifteen minutes to talk to a friend, and, while standing there talking to his friend, leaned against the railing, which gave way, and he was injured. The city was held not liable. The court said: "The legal obligation of keeping a sufficient railing upon a highway is imposed only when it is necessary to mark the limits of that part of the road within which persons may safely travel, or to furnish a guard against dangerous places, so that proper protection may be afforded to those who, in the exercise of due care as travelers, while passing or standing on the way, might otherwise be exposed to accident or injury. If a person, without fault or negligence on his part, is forced against a railing, or takes hold of it to aid his passage, or falls against it by accident, or has occasion to use it in any way in furtherance of the lawful and reasonable exercise of his right as a traveler, and by reason of any defect or insufficiency it gives way and causes an injury, a town or city would be liable to make full compensation for the damages thereby occasioned. But this is the extent of the liability. A city or town is not bound by law to erect and maintain railings for persons to sit upon or lean against. They are not intended to be used for the convenience and accommodation of those who seek for a place of rest, while they stop in the highway to lounge, or to recover from fatigue, or to engage in conversation. If a person uses them for such purposes, he does it at his own risk. A town or city cannot be held liable for damages which are sustained by persons in consequence of improper or unauthorized uses of the highway, which occasion or contribute to accidents."

The same ruling was made in *Blodgett v. Boston*, 8 Allen, 237, when a boy who was playing "old man on the castle" on a plank sidewalk, in starting away, got his foot caught between the planks. The court, after pointing out that the duty imposed on the city is to keep the highway safe and convenient for travelers, said: "It has accordingly been held that towns and

cities are not liable for damages occasioned by defects in highways to persons who were not travelers thereon at the time the injury to themselves or their property was suffered."

A like ruling was made in *Sykes v. Pawlet*, 43 Vt. 447, 5 Am. Rep. 295, where the plaintiff had left the highway and gone under a shed, and, in attempting to get from out of the shed and back to the highway, sustained an injury from a deep hole left by the side of the highway. The court said: "Again, the duty of the town in reference to the margins of highways has never been extended beyond the requirement that they should be kept in a reasonably safe condition as against such accidents as are likely to, and actually do, occur in using the highway for the purpose of travel. In this case the backing into the gulf was not the result of an accident that occurred in using the highway for travel, but it resulted from using a shed by the side of the highway, in an interval of cessation from travel, and attempting to get back into the road after a voluntary departure from it."

The same principle has often been applied in suits between master and servant where the servant used something not intended to bear the weight which he put upon it. Thus in *Saunders v. Eastern Hydraulic Pressed Brick Co.* 63 N. J. L. 554, 76 Am. St. Rep. 222, 7 Am. Neg. Rep. 90, 44 Atl. 630, the master was held not responsible to a servant who went upon a roof and put his foot upon a mullion of a window intended as a skylight; it being held that the mullion was intended to support the skylight, and not for the purpose of a man standing upon it. In *Crebarry v. National Transit Co.* 77 Hun, 74, 28 N. Y. Supp. 291, the plaintiff was injured while leaning against a stay lath of a scaffold, the lath being intended only to keep the post upright. In *Schmidt v. Leistikow*, 6 Dak. 386, 43 N. W. 821, a miller was injured by the giving way of a spout in the mill, used for passing mill stuff from one part of the mill to another, he having climbed upon it to reach a certain place. And in *Kentucky Wagon Mfg. Co. v. Gossett*, 142 Ky. 842, 135 S. W. 394, a recovery was denied where a painter trusted his weight to a small guy wire used to keep steady the post upon which the tank rested.

We do not see how this case can be distinguished from those cited. While the city was under obligation to keep its streets reasonably safe for the ordinary purposes of travel, it was not required to see that a cellar door was safe for the purpose of persons standing upon it and watching the proceedings in the church. The cellar door

was not intended for this purpose. It inclined from the ground up, and, while it would give persons standing on it an advantage to see what was going on in the church, it was plainly not constructed for this purpose, and persons who used it for such purposes, and were injured while so using it, have no right of action against the city or the trustees of the church.

For the reasons indicated, the circuit court properly instructed the jury peremptorily to find for the church trustees; but he erred for the same reasons in refusing to instruct the jury peremptorily to find for the city.

The judgment as to the trustees of the church is affirmed; but the judgment as to the city is reversed, and the cause remanded for further proceedings not inconsistent herewith.

MASSACHUSETTS SUPREME JUDICIAL COURT.

SALISBURY LAND & IMPROVEMENT COMPANY

v.

COMMONWEALTH OF MASSACHUSETTS.

(215 Mass. 371, 102 N. E. 619.)

Eminent domain — acquisition of summer resort — private leases.

1. The legislature cannot establish a commission with powers of eminent domain to

Note. — Constitutionality of statute authorizing the taking of more property than is intended to be used for a public purpose.

The rule is well established that a reasonable necessity must be shown to exist to authorize the condemnation of property by a corporation to which the power of eminent domain has been delegated, and the moment the appropriation goes beyond the reasonable necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain. 15 Cyc. 632; note in 22 L.R.A.(N.S.) 55.

The legislature cannot authorize a municipal corporation to secure, by the power of eminent domain, land in excess of that required for public streets, to be leased to merchants for the promotion of the commercial interests of the municipality. Opinion of Justices, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405.

Statutes empowering municipalities to condemn land for the opening or widening of streets, which authorize the corporations to take the whole of a lot when it is deemed expedient to do so, when a part only is needed for the improvement, and to sell the residue for the benefit of the improvement, 46 L.R.A.(N.S.)

acquire and manage for the public an ocean beach resort occupied with cottages, hotels, stores, and places of amusement, with authority to sell or lease such lands or rights in lands as are not needed by the public.

Statute — unconstitutional in part — destruction of whole.

2. The whole statute must fall, where an unconstitutional part is inextricably woven with the portions which might otherwise be valid.

(June 19, 1913.)

REPORT by the Land Court for Essex County for the opinion of the Supreme Judicial Court of an action to register a land title in which there was an intervention to condemn the land for alleged public purposes. Condemnation disallowed.

The facts are stated in the opinion.

Messrs. Horace I. Bartlett, Walter Coulson, and H. Christopher Chubb, for petitioner:

The act authorizes and permits the taking of land not for a public use.

Boston v. Talbot, 206 Mass. 89, 91 N. E. 1014; Opinion of Justices, 211 Mass. 624, 42 L.R.A.(N.S.) 221, 98 N. E. 611, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405, 204 Mass. 616, 91 N. E. 578.

It authorizes and permits the taking of land from one person for the purpose of selling or leasing to another.

Talbot v. Hudson, 16 Gray, 417; 2 Kent, Com. 339, 340; Cooley, Const. Lim. 7th ed. 763; Sanborn v. Van Dyne, 90 Minn. 215, 96 N. W. 41; Belcher Sugar Ref. Co. v.

are unconstitutional in so far as they authorize the taking of more land than is necessary for the improvement, and to that extent they are unenforceable against the will of the landowner. Re Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Bennett v. Boyle, 40 Barb. 551; Gregg v. Baltimore, 56 Md. 256.

So, in Dunn v. Charleston, Harp. L. 189, it was held that a statute authorizing a city to condemn adjoining lots for the purpose of widening the streets must be construed to relate only to such portions thereof as shall be actually necessary for the street, since a construction that would authorize the taking of the whole lot when a part only was necessary would render the statute unconstitutional.

A similar objection was raised against an ordinance providing for the condemnation of land in Baltimore v. Clunet, 23 Md. 449, in which the rule announced in the above cases is affirmed; but in that case it was pointed out that the city was not authorized to take more land than was necessary for the improvement, except by the consent of the owner, but that it was required to take the whole when the owner desired it to do so, so that the surrender by the owner

St. Louis Grain Elevator Co. 82 Mo. 121; Gilman v. Milwaukee, 55 Wis. 328, 13 N. W. 286; 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 500.

The constitutional validity of an act depends upon what may be done under it.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Gilman v. Tucker, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506.

It authorizes the taking of land for a mixed public and private use.

Tacoma v. Nisqually Power Co. 57 Wash. 424, 107 Pac. 199; Miller v. Pulaski, 109

Va. 137, 22 L.R.A. (N.S.) 552, 63 S. E. 880; Re Eureka Basin, Warehouse & Mfg. Co. 96 N. Y. 42; Lewis, Em. Dom. 2d ed. § 206; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379; Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Harding v. Goodlett, 3 Yerg. 41, 24 Am. Dec. 546.

It authorizes the taking of land, of which only a part is needed for the public use, and allows the remainder to be applied to a private use.

Re John Street, 19 Wend. 659; Re Albany Street, 11 Wend. 149, 25 Am. Dec.

of the portions of lots not required for the improvement, and the sale thereof by the city, was not a taking of the same under the power of eminent domain; but was simply a mode devised by the ordinance for ascertaining the just compensation to be paid to the owner for the property actually taken for the public use.

In Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, it was held that, while it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes, if, in the erection of a public dam for a public purpose, there is a surplus of water which may be used for manufacturing purposes, the state may retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. The court said: "So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal, and was not a colorable device for creating a water power, the agents of the state are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection, if there be no reason to doubt that they were animated solely by a desire to promote the public interests; nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circumstances of this case, we think it within the power of the state to retain within its immediate control such surplus as might incidentally be created by the erection of the dam."

Generally, as to the combination of public and private purposes as affecting the power of eminent domain, see note to Wisconsin River Improv. Co. v. Pier, 21 L.R.A. (N.S.) 538.

While not strictly in point, Clendaniel v. 46 L.R.A. (N.S.)

Conrad, — Del. —, 83 Atl. 1036, is of interest in this connection, where it appeared the statute authorized boulevard corporations to condemn a strip of land 200 feet in width, and required them to construct only a vehicular road 30 feet in width, and further provided that every boulevard corporation organized under the provisions of the statute should have full power and authority to use that portion of its boulevard or strip of land not devoted to the road for vehicular travel, for any other purpose that may be desired, provided such purpose is not unlawful. It was held that the company's acceptance of the benefits of the statute, with the power and exercise of the right of eminent domain, imposed upon it the obligation of public use or service, and that the provisions of the statute itself indicated a legislative intent that the boulevard and all its elements should be for the use and accommodation of the public, and that the public should have the right to such use, or to the benefits thereof. As to the contention that more land was authorized to be taken than was necessary, the court said that the quantity of land necessary for the public use is a question for the legislature to decide, though it was also said that the courts might interfere where there has been a gross abuse of legislative discretion, or manifest fraud in the passage of the statute.

It was also objected in the above case that the land sought to be taken could not be regarded as taken for public use when there was no requirement that it should ever be used other than the 30-foot road, but the court said: "It is a sufficient answer to such objections to say that, even if there is in the statute no express requirement that the 170 feet of land shall at any time be devoted to public use, there is an obligation imposed upon the corporation by the statute, and the acceptance of its provisions, to so use the said land in a reasonable time. The word 'boulevard' imports public use in its entirety. The public must be entitled to the use, or the benefit of the use, of the property taken. Such use cannot be indefinitely postponed, and we do not understand that this is denied by the defendant corporation."

A. L. R.

618; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325.

It authorizes the taking of more land than is needed for a public use.

Bennett v. Boyle, 40 Barb. 551; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379; *Buckingham v. Smith*, 10 Ohio, 288; *Cooper v. Williams*, 5 Ohio, 391, 24 Am. Dec. 299; *Heyward v. New York*, 7 N. Y. 323.

It authorizes and permits the taking of land of which the public will not have a free and unrestricted use.

Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; *McQuillen v. Hatton*, 42 Ohio St. 202; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194.

It authorizes the state to engage in the real estate business.

Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142, 182 Mass. 605, 60 L.R.A. 592, 66 N. E. 25; 211 Mass. 624, 42 L.R.A.(N.S.) 221, 98 N. E. 611.

It authorizes the imposition of taxes for the support of an enterprise not primarily public.

Spaulding v. Lowell, 23 Pick. 71; *Whelock v. Lowell*, 196 Mass. 220, 124 Am. St. Rep. 543, 81 N. E. 977, 12 Ann. Cas. 1109.

Messrs. James M. Swift, Attorney General, and Essex S. Abbott, for the Commonwealth:

The taking of land for a public reservation is an appropriation to a public use, within the meaning of the Constitution.

The public have no rights on the beach until this taking.

Butler v. Atty. Gen. 195 Mass. 79, 8 L.R.A.(N.S.) 1047, 80 N. E. 688.

The legislature may authorize a taking in fee for one purpose, and afterward change the purpose.

Higginson v. The Treasurer (Higginson v. Slattery) 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523.

The power to sell or lease public property has been on the statute book for many years, with no question of the constitutionality.

Moore v. Sanford, 151 Mass. 285, 7 L.R.A. 151, 24 N. E. 323; *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014; *Higginson v. The Treasurer*, supra; *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793; *Newton v. Perry*, 163 Mass. 319, 39 N. E. 1032; *Burnett v. Boston*, 173 Mass. 173, 53 N. E. 379; *Manning v. Bruce*, 186 Mass. 282, 71 N. E. 537; 46 L.R.A.(N.S.)

Hellen v. Medford, 188 Mass. 42, 69 L.R.A. 314, 108 Am. St. Rep. 459, 73 N. E. 1070; *Winnisimmet Co. v. Grueby*, 209 Mass. 1, 95 N. E. 293.

The act is constitutional, and the taking valid.

Boston v. Talbot, 206 Mass. 82, 91 N. E. 1014; *Browne v. Turner*, 174 Mass. 150, 54 N. E. 510; *Paine v. Boston*, 124 Mass. 486.

Rugg, Ch. J., delivered the opinion of the court:

The question presented is the constitutionality of Stat. 1912, chap. 715, entitled "An Act to Make Salisbury Beach a Public Reservation and to Establish the Salisbury Beach Reservation Commission." Its several sections provide for the appointment of a commission and the machinery by which land may be taken, money raised, and a public reservation managed. The ground of attack upon its validity is that it authorizes the taking of land for a private, rather than a public, use. In order to pass intelligently upon its constitutionality in this respect, the physical facts to which it is applicable may be considered to ascertain what may be its practical operation. The property which may be taken under the statute is known as Salisbury Beach, and consists of sand dunes and beach in the town of Salisbury extending from the New Hampshire line about 3½ miles by the sea to the mouth of the Merrimac river. A street railway has been constructed along the length of the beach. On the ocean side there are cottages for summer occupancy, and on the westerly line of the dunes a large number of houses have been built, and hotels, shops, boarding houses, places of amusement, and other buildings have been constructed, and a summer community has been established, with a system of water and gas pipes, electric lights, sewers, and telephones, all of which, including the street railway, were leased by the petitioner or its predecessors in title.

Streets were laid out or provided for by agreement with the town, plans were drawn showing the property divided into house lots, and many lots were leased to cottage owners and others. The property was owned by the commoners of Salisbury until 1903, when it passed into private ownership, and finally has come to the petitioner. Since the acquirement of the property by the petitioner many leases have expired, and they have not generally been renewed except in a few instances and at a substantial increase in rent.

The material portions of the act are printed in a footnote.¹

It is a familiar principle of constitutional law that every presumption is made in favor of the validity of a statute. It is not to be held a violation of the fundamental charter established by the people in their Constitution, unless so clearly outside the power conferred upon the legislature as to be free from reasonable doubt in that regard. It must be assumed that the legislature intended to act within its lawful bounds, and this assumption cannot be overthrown unless the statute unmistakably oversteps these bounds by manifest and plain terms. On the other hand, when it is clear that the statute transgresses the authority vested in the legislature by the Constitution, it is the duty of the court,—a duty from which they cannot shrink without profaning their oaths of office,—to see and to declare the invalidity of the statute. The judicial department of government cannot surrender its judgment respecting the validity of statutes to that of either of the other departments, and, when the occasion arises, must refuse to enforce a statute which does not conform to the requirements of the fundamental law of the land. The statute must be construed as a whole. That which, by fair intendment, its terms may confer power to accomplish, must be ascertained by a broad consideration of the entire act, bearing constantly in mind the presumption in favor of its validity.

The establishment and maintenance of public parks and reservations out of moneys raised by taxation, and the exercise of the power of eminent domain for their acquirement, plainly are within the power of the legislature. It requires no discussion to demonstrate that this is a public purpose. Nor can it be contended reasonably in view of many of our decisions, that the taking of the fee rather than an easement in land to this end is not permissible. *Higginson v. The Treasurer* (*Higginson v. Slattery*) 212 Mass. 583, 591, 42 L.R.A.(N.S.) 215, 99 N. E. 523, and cases cited. The acquire-

ment of beaches by eminent domain and at the public expense, for bathing and other purposes of general utility, has never been questioned in this commonwealth. That it is a legitimate exercise of the sovereign power is not open to doubt. See *Re Metropolitan Park Comrs.* 209 Mass. 381, 95 N. E. 866. Looking alone at § 4 of the act now under consideration, the power conferred does not appear to go beyond the right of acquiring and maintaining land and rights in land for a public park or reservation. But this section must be read in connection with other sections, in order to understand the full scope of the act. Section 10 authorizes the commission "to sell or lease any lands or rights in land taken" "by it, which are not needed as a public reservation." These words are not restricted as to time. They form a part of the original act, and are operative contemporaneously with all its other provisions. There is nothing to require a determination that, by reason of changed conditions, land deemed necessary at the time of taking has become no longer needed. These words in connection with § 4 undertake to enable the commission to take "any and all land" within the designated area, and at the same moment to determine that some of the lands thus taken "are not needed," and immediately to proceed "to sell or lease" such lands. Thus, there may be an adjudication that lands are needed for the public use, which involves a payment for them out of moneys raised by taxation, coupled with a determination not to devote some of these lands to the enjoyment of the people at large, but to sell or lease them for private occupation. There are no words in this or the other sections which limit this broad power. It is not stated expressly or by implication that such sales or leases can be only of property once needed and used for the public resort, but which, through changed conditions, have become useless therefor; nor confining the right to trifling and almost

¹ Section 4 authorizes the commission "to acquire in fee, by purchase, gift, or by right of eminent domain, in the name of the commonwealth, and thereafter to maintain and make available for the inhabitants of the commonwealth as a public reservation for the use, exercise, and recreation of the inhabitants of the commonwealth, any or all of the land, or any or all of the rights in any land, in" a specific portion of the town of Salisbury bounding on the Atlantic ocean and Merrimac river.

Section 10: "Said commission may sell or lease any lands or rights in land taken or acquired by it, which are not needed as a public reservation for the use, exercise, and recreation of the inhabitants of the common-

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wealth, with or without restrictions as to its use, as it may deem advisable, and may make sales of the grass, sand, and other materials in said reservation. The town of Salisbury shall levy, assess, and collect a tax on all buildings and personal estate in said reservation not owned by the commonwealth, in the same manner as if the said reservation had not been created, and shall collect a tax on all land in said reservation not taken, acquired, or used by said commission for the purposes of this act."

Section 11: "The town of Salisbury shall have the general charge and supervision of the education of the children resident in the reservation as in the case of other children resident in the said town."

negligible remnants of estates which would be unsuitable for private use after the part actually needed for public use has been appropriated. That this wide power of taking for private use was intended by the present act is confirmed by reference to the latter part of § 10, to the effect that the town of Salisbury may tax "all buildings and personal estate in said reservation not owned by the commonwealth, . . . and shall collect a tax on all land in said reservation not taken, acquired, or used by said commission for the purposes of this act." The first part of this sentence seems to contemplate that buildings and personal property shall be and remain in private ownership upon the reservation to such an extent as to be substantial subjects of taxation, while the final clause appears to provide for the taking and holding by the commission of substantial areas of land not for the public purposes set forth in the act. No land can be "in said reservation" until taken or acquired by the commission under the authority of the act. The evident design of § 11 is that upon the reservation shall be such a considerable settlement of inhabitants that special provision was thought to be needed for the education of the children in the public schools of Salisbury. This would be impossible if a reservation of this size were devoted wholly to the public. Whatever may be said of the force of any one of these several provisions standing alone, taken in conjunction and construed together they authorize the taking not only of the seashore and other lands purely for reservation purposes, but also of other tracts in the designated territory to be sold or leased to private individuals, or held without appropriation to the use of the public, which means inferentially a holding for private uses. When applied to the subject-matter, namely, an existing summer resort with all its equipment of cottages and other appurtenances, it is difficult to say which of these two is the dominant aim.

The construction put by the commission upon the powers conferred by the act as revealed by their conduct is in accordance with this interpretation. It merely indicates the natural meaning of the act. The taking, which is made a part of the record, shows generally a careful exclusion of most of the lots not owned by the petitioner, even though in numerous instances this results in an interruption of the shore line, and in many others leaves small lots owned by individuals surrounded by land taken. The impression created by looking at the plan of the taking was not inaccurately described in argument as a "checker board" effect. It was found by the land court that

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the commission interpreted the act to authorize them legally to "take such lands as they did take for the purpose of carrying out the intent of the law, which, for the protection of the present cottage owners and people who in the future may become cottage owners or occupants, was to be done by leasing or selling the lands taken." This statement aptly summarizes the effect of the act. It authorizes the taking of land a part of which may never be intended for any public purpose, but for lease or sale for private use. It would be possible for the commissions, although strictly following the terms of the statute, to take this entire summer colony with its numerous houses and other buildings, and substitute themselves for the petitioner as landlord, and lease all the cottages and buildings indefinitely, or ultimately to sell them. The statute would enable the establishment of what in essence would be a scheme for utilizing and developing a seashore summer resort for the benefit of cottagers on a scale of some magnitude. This being the meaning of the statute, it remains to inquire whether it is within the scope of legislative power.

The acquisition of land under the power of eminent domain to be devoted to private uses has been recently considered and discussed somewhat at length. It has been said that the exercise of the power of the state, either through taxation or eminent domain, to take land from one person with the intent of handing it over to another person, is not a public purpose, and is contrary to basic and essential principles of free government. *Opinion of Justices. 204 Mass. 607, 27 L.R.A. (N.S.) 483, 91 N. E. 405.* The underlying objection is that the main end of legislation for this purpose is a private utility rather than the general good. While incidentally it may be an advantage to the public that private persons prosper, if the essential character of the transaction in its direct object is private benefit to individuals, the purpose is not public. In a general sense it is of public interest that the people be well housed, but this does not authorize the state to become the general landlord. That subject is a proper one for the exercise of the police power, but not of eminent domain. It was said by the court, speaking through Mr. Justice Harlan in *Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 251, 49 L. ed. 462, 25 Sup. Ct. Rep. 251. 256:* "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle

. . . grows out of the essential nature of all free governments."

Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed, or which is so framed that it may be utilized, to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose, is unconstitutional. It would enable that to be achieved by indirection which by plain statement would be impossible. These principles have been expounded at length in early decisions and recent opinions of this court with affluent citation of authorities. It is not necessary to do more than refer to a few of them. The case at bar is indistinguishable from them. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Wilkins v. Jewett*, 139 Mass. 29, 29 N. E. 214; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Opinion of Justices*, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405; *Opinion of Justices*, 204 Mass. 616, 91 N. E. 578; *Opinion of Justices*, 211 Mass. 624, 42 L.R.A.(N.S.) 221, 98 N. E. 611. See also *Hairston v. Danville & W. R. Co.* 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; *Sanborn v. Van Duyne*, 90 Minn. 215, 96 N. W. 41; *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

The statute in the case at bar differs materially from others where the right to sell portions of real estate taken by eminent domain has been conferred. The metropolitan water act (Stat. 1895, chap. 488, § 11) authorizes the sale of land "no longer needed for the waterworks," and the lease of "property not then so needed." Property acquired for the metropolitan sewerage system "no longer needed" therefor may be sold (Stat. 1892, chap. 251, § 1), while the metropolitan park commission, "for all purposes not inconsistent with the purposes specified in the act establishing said commission," are given certain modified rights of granting interests in lands. Statutes like these, where the right to sell or lease manifestly is purely incidental to the chief public end, and is confined by fair intentment to land or buildings either once actually needed and used, which have ceased so to be needed, or which by lease may promote the general public aim, afford no support to the broad powers here attempted to be created. See *Boston v. Boston Elev. R. Co.* 215 Mass. 41, 102 N. E. 79. The same is true of the right to develop and sell power as incidental to a public undertaking. Stat. 895, chap. 46 L.R.A.(N.S.)

488, § 3; *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 72, 73, 57 L. ed. 1063, 1079, 33 Sup. Ct. Rep. 667. An absolute and unqualified power to sell and lease such as the present statute confers is different in kind from the carefully guarded powers conferred by the statutes to which we have referred. Moreover, a right to sell, when no longer needed, property taken or used for a public enterprise requiring extensive works of construction, where during the period of excavation or building land might be needed which would have no use on the completion of the work, is quite distinguishable from land taken for park or reservation purposes.

The taking here is not of a vast extent of wild or unsurveyed land whose agricultural and other possibilities are undiscovered. It is in one of the oldest towns of the state, is relatively small in area, and is a settled community with a large number of cottages, and all its characteristics thoroughly capable of easy comprehension. It requires no discussion to distinguish the power conferred by the present statute from that given to the metropolitan park commission and other like officers to construct or lease buildings manifestly in furtherance of the convenient use by the people of the parks and reservation. A shelter or a restaurant or a bath house, to which all have access on equal terms, do not stand on the same basis as a resort to a considerable extent devoted to cottages to be leased to private families, and from which when leased or sold the public must be excluded.

The cases relied upon by the commonwealth plainly are distinguishable. In *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014, the dominant purpose of the act under consideration was the construction of the tunnel in Boston. Its terms did not permit a taking of land with a contemporaneous knowledge and purpose that a definite and separable part was not necessary for the public use. The authority to sell land taken was conferred only when, in the judgment of the transit commission, it "shall cease to be needed," plainly implying an adjudication that once it had been needed, but by reason of changed conditions was no longer required. The real estate there in question consisted in large part of horizontal planes of a building, a substantial part of one floor of which was used permanently for the tunnel, and considerations of economy in taking an entire estate were weighty in sustaining the statute. The reasoning of that opinion shows a wide divergence from the arguments urged on behalf of the commonwealth, and a reliance upon quite different facts. The only one there relied on

which seems to us to have any connection with the case at bar is that it may be cheaper to take the entire estate of the petitioner with the power to sell or lease a part of it, than to take the part intended to be used for a reservation. The dominant purpose of this act affords no justification for the application of that principle. Here no excavations or constructions are contemplated which warrant the inference that any property would be injured in such a way as to cause real apprehensions of future danger which might prove groundless in actual experience or embarrassment in the assessment of damages. Any taking of a part of the property of the petitioner apart would present the ordinary questions of assessment of damage, which are of common occurrence. *Moore v. Sanford*, 151 Mass. 285, 7 L.R.A. 151, 24 N. E. 323, upheld the constitutionality of a statute which authorized the taking and filling of flats adjacent to flats of the commonwealth, and the subsequent sale of the filled land. But this was on the express ground that it was for the improvement of Boston Harbor, to which was annexed the reclamation of property of little or no worth without such improvement. The principle of development of lands substantially useless under private control, compared with their potential value as part of a general scheme of public improvement through the regulation of the common interests of owners, always has been relied on with caution, although it was held to be constitutional in our early case of *Talbot v. Hudson*, 16 Gray, 417, and has been applied in supporting the numerous statutes establishing irrigation districts. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. See *Otis Co. v. Ludlow Mfg. Co.* 186 Mass. 89, 104 Am. St. Rep. 563, 70 N. E. 1009, s. c. 201 U. S. 140, 50 L. ed. 696, 26 Sup. Ct. Rep. 353; *Turner v. Nye*, 154 Mass. 579, 582, 14 L.R.A. 487, 28 N. E. 1048; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086. But this principle has no relation to the case at bar. *Hellen v. Medford*, 188 Mass. 42, 69 L.R.A. 314, 108 Am. St. Rep. 459, 73 N. E. 1070, affords no support to the contention of the commonwealth. The statute there under consideration was held to be unconstitutional, but the plaintiff was not in a position to take advantage of it, a principle frequently applied, but having no bearing upon the issues here raised, where the petitioner from the beginning has as- 46 L.R.A.(N.S.)

sailed this statute and has done nothing to waive its rights.

It is impossible to separate the valid from the invalid parts of this statute. The power of the commission to take land is inextricably interwoven with the power to sell and lease land so taken. It cannot be determined how the legislature would have dealt with the subject-matter if its attention had been directed specifically to the point that land and buildings, including a large number of dwelling houses, could not be taken for the purpose of lease and sale under the changed conditions of being in the neighborhood of a public reservation, and the expense of the undertaking lessened by the revenue to be derived therefrom. Different financial and other questions would have been presented, which might have caused the general court to have refrained from action, or to have enacted a statute of other tenor. *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *Com. v. Hana*, 195 Mass. 262, 267, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514.

We feel constrained to pronounce the statute unconstitutional. It becomes unnecessary to pass upon the other questions raised by the report.

Case remanded to the Land Court for further proceedings in accordance with this opinion.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK
EX REL. JOHN MITCHELL, Appt.,
v.
WILLIAM SOHMER, State Comptroller.
Respt.

(209 N. Y. 151, 102 N. E. 593.)

Officers — vacancy — ad interim power of appointment — resignation after adjournment of senate.

Under a statute providing that an office shall be deemed vacant for the purpose of

Note. — Right of governor or President to make an ad interim appointment to an office whose fixed term expires before the senate's adjournment, where the incumbent is authorized to hold over until his successor is appointed.

This note does not include cases on the question whether, when a new office is created by a legislature or by Congress, the governor or President may invoke his ad interim power of appointment after the adjournment of the legislative body.

The few cases coming within the scope of

choosing a successor after the expiration of the term, the governor cannot, where the term expires while the senate is in session, appoint a successor upon the resignation of the incumbent after its adjournment, although under the statute he held over until his successor was appointed, where other portions of the statute provide that a vacancy occurring in the office of one appointed by the governor, with the advice of the senate, shall be filled in the same manner as the original appointment was made, but giving the governor *ad interim* power of appointment if the vacancy occurs other than by expiration of the term while the senate was not in session, and declaring

that an office may become vacant by resignation before expiration of the term.

(Cullen, Ch. J., and Werner, J., dissent.)

(June 20, 1913.)

A PPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County denying a writ of mandamus to compel the state comptroller to pay to relator the salary of the office of commissioner of labor. Affirmed.

this note involve neither the resignation of a hold over nor constitutional or statutory provisions similar to those of the New York statute. The cases referred to uniformly hold that where an officer is legally authorized to hold over and discharge the duties of the office until his successor is appointed, no vacancy arises from the expiration of the term which will warrant the executive exercise of his special or provisional power of appointment. Those cases, unlike *PEOPLE EX REL. MITCHELL v. SOHMER*, rest upon the theory that so long as there is a legal incumbent there can be no vacancy, and that this theory applies where the incumbent is a hold over. The *SOHMER CASE*, it will be observed, though holding that there was no vacancy warranting an executive appointment, is based upon the ground that the expiration of the fixed term of office *ipso facto* created a vacancy, notwithstanding the statutory provision for holding over, and thus forestalled the creation of a vacancy by the resignation of the hold over. Therefore, apart from the statutory provisions involved, the *SOHMER CASE* would seem opposed to the other decisions on theory, since the logical conclusion to be drawn from the other cases would seem to be that as there was no vacancy upon the expiration of the term, the resignation of the hold over would create a vacancy which might justify executive action.

But there is a fundamental theory which the *SOHMER CASE* has in common with the others, and that is that the various statutory and constitutional provisions indicate clearly a purpose to circumscribe the appointing power of the governor or President so far as it can be done consistently with the public welfare; but it is also a fundamental theory recognized by the courts, that the makers of Constitutions and statutes were just as much influenced by a desire to provide against all contingencies which might result in the existence of an office without an incumbent. In the main it may be said that the executive's power of provisional appointment is given for, and only for, the purpose of providing against the temporary lapse of a governmental function as a result of there being in office no legal incumbent to exercise that function. It would seem, therefore, that whenever possible, the statutory and constitutional pro-

visions should be so construed as to diminish rather than increase the possibility of official vacancies.

It has already been stated that the courts are quite generally agreed that, so long as there is in office a person legally authorized to hold the same and discharge its duties, whether he be one lawfully elected or appointed for a fixed term or whether he be a hold over, there is no vacancy within the meaning of statutory or constitutional provision authorizing special or temporary appointment by the executive. As an illustration of the attitude of the courts on this more general question, reference may be had to an early New York case denying the right of the governor to appoint, even where the term expired after the legislative adjournment, and holding that the sole object of such an *ad interim* appointment was to prevent a public injury through want of an incumbent until an appointment could be made in the regular mode, and that where there was a hold-over provision there was no vacancy entitling the governor to appoint. *Tappan v. Gray*, 9 Paige, 507, affirmed in 7 Hill, 259.

So it is, when the courts come down to the question as to *ad interim* appointments where the term expires during a session of the legislature, but the statute provides for holding over. In such circumstances the courts hold in the case of an officer appointed by the legislature or either body thereof, or by the governor, with the advice and consent of the legislature or either body, that there is no vacancy at the end of the term, since the "hold-over" provision is expressly designed to meet such a contingency, and that the governor cannot exercise his special power of appointment when the term of office expires during a legislative session. It is so held where the constitutional or statutory provision relating to *ad interim* appointments provides that when an officer ordinarily appointed with the consent of the legislature shall, during the recess, die or his office in any manner "become vacant," the governor shall have power to fill, etc. (*People ex rel. Ewing v. Forquer*, 1 Breece [Ill.] 68); or under a constitutional or statutory provision that where the power is to be exercised when the vacancy "occurs or happens"

Statement by Chase, J.:

The relator applied to the supreme court for a writ of mandamus to compel the state comptroller to issue his warrant for the payment of salary to which the relator asserts he is entitled by virtue of his incumbency of the office of state commissioner of labor, to which he claims to have been appointed by the governor on May 16, 1913; and the question is whether the relator was legally appointed to the office of commissioner of labor. At special term the writ was denied, and in the appellate division there was an affirmance by a divided court. The facts are undisputed.

Prior to January 1, 1913, John Williams held the office of state labor commissioner under a regular appointment for a term of four years, which expired on December 31, 1912. On April 21, 1913, the legislature then being in regular session, the governor nominated John Mitchell for the office and sent his name to the senate for confirmation. On May 2, 1913, the senate notified the governor of its refusal to confirm the nomination. On May 3, 1913, the governor again nominated Mitchell and sent his name to the senate. The senate at once acted adversely upon the nomination and adjourned *sine die*. On the 16th day of May, 1913,

when the legislature is not in session (State ex rel. Carson v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; State ex rel. Lyon v. Bowden, 92 S. C. 393, 75 S. E. 866). To the same effect is State ex rel. Atty. Gen. v. Rareside, 32 La. Ann. 934, in which the court states that such a result is demanded by the Louisiana constitutional and statutory provisions, but does not disclose their language. Indeed, a like result was reached in State ex rel. Tredway v. Lusk, 18 Mo. 333, under a constitutional provision that when any office shall become vacant the governor shall fill such vacancy. The same is true of State ex rel. Wagner v. Compson, 34 Or. 25, 54 Pac. 349.

In Re District Attorney, 7 Am. Law Reg. N. S. 786, Fed. Cas. No. 3,924, denying the President's right to make an *ad interim* appointment where the term expired during a session of the Senate, the court expressed the opinion that the provision of the tenure of office at that certain appointive officers should hold office until their successors should be appointed did not, in view of a further provision that nothing in the act should be construed to extend any term of office limited by law, be regarded as extending the term so as to warrant an *ad interim* appointment of a successor whose fixed term expired during a session of the Senate, under the constitutional provision giving the President power to fill all vacancies that might happen during the recess of the Senate, by granting commissions which should expire at the end of their next session. But in reaching its decision it seems that the court laid greater stress on the fact that the person whose successor was sought to be appointed in the case was in office at the time of the enactment of the tenure of office act, and that therefore the "hold-over" provision did not apply, irrespective of the effect of the provision that nothing in the act should be construed to extend any fixed term of office. It is also to be noted that the court construed the word "happen" in the constitutional provision giving the President power of *ad interim* appointment to mean not merely "happen to exist," but to be confined to cases in which a vacancy should for the first time occur during the recess of the Senate.

So, where one is, under constitutional
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authority, appointed to fill an unexpired term of an elective judgeship whose incumbent has resigned, he takes the latter's right to hold over until the election of the successor, and the governor therefore has no right at the expiration of the regular term to make an appointment. State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N. E. 738.

Attention is also directed to Brady v. Howe, 50 Miss. 607, holding that where a fixed term will expire during a recess of the senate, the governor cannot make an *ad interim* appointment to which the Constitution requires the consent of the senate, where it is provided by statute that the governor shall appoint by and with the consent of the senate where the term is about to expire.

In view of the fact that in numerous jurisdictions the courts have been called upon to decide whether a hold-over provision is a limitation upon the power of choosing a successor, it may well be that the New York legislature, in providing that "after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor," merely intended to dispense with the necessity of a judicial construction in New York, and to make it clear that the hold-over provision should not prevent the selection of a successor in the regular mode; that is, with the consent and advice of the senate. While it is true that under the express provision of the statute there was a vacancy in a sense upon the expiration of the term, it is to be observed that in the prevailing opinion in the *SOHMER CASE* no reference is made to that provision of § 5 which declares that an officer holding over for one or more entire terms shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such term. This latter provision is said by Judge Cullen in his dissenting opinion to make it clear that the words, "expiration of the term," as used in the statute, meant not merely the period of time for which the officer is in the first instance appointed, but the time which, under the law, he has a right to serve, and that in the true sense of the word all of that period constituted the incumbent's term.

L. A. W.

Williams sent his resignation to the governor, which was accepted, and thereupon Mitchell was appointed to fill the vacancy which is claimed to have been thus created.

Mr. D. Cady Herrick, for appellant:

The governor has the right to fill a vacancy in an office of an officer appointed by the governor by and with the consent of the senate when such vacancy occurs or exists otherwise than by the expiration of a term, while the senate is not in session. In this case there was no vacancy occurring or existing while the senate was in session except for the purpose of appointing a successor to the then incumbent.

23 Am. & Eng. Enc. Law, 2d ed. 348, 349; Throop, Pub. Off. 1892, ed. § 413, p. 419; Stocking v. State, 7 Ind. 326; Collins v. State, 8 Ind. 344; State ex rel. Carson v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; State v. Howe, 25 Ohio St. 588, 18 Am. Rep. 321; Tappan v. Gray, 9 Paige, 507; People ex rel. Brown v. Woodruff, 32 N. Y. 355; People ex rel. Melony v. Whitman, 10 Cal. 38; People ex rel. Simpson v. Van Horne, 18 Wend. 515; People ex rel. Wood v. La Combe, 34 Hun, 405; People ex rel. Davis v. Gardner, 45 N. Y. 816; People ex rel. Woods v. Crissey, 91 N. Y. 616; People ex rel. Kehoe v. Fitchie, 76 Hun, 80, 28 N. Y. Supp. 600.

Williams' resignation was made to the governor in writing, and the moment it was made his office became vacant.

Olmsted v. Dennis, 77 N. Y. 378.

The resignation created a vacancy which it was the duty of the governor to fill. People ex rel. Jackson v. Potter, 47 N. Y. 385.

Williams was not compelled to hold over after his term had expired and his successor appointed and qualified.

People ex rel. Hanrahan v. Board of Metropolitan Police, 26 N. Y. 326; Re Farrow, 3 Fed. 112; State ex rel. Fritts v. Kuhl, 51 N. J. 191, 17 Atl. 102.

Messrs. Joseph A. Kellogg, Claude T. Dawes, and Thomas Carmody, Attorney General, for respondent:

When a term of office, appointment to which is by the governor with the consent of the senate, has expired, there is no power in the governor to make an appointment during a recess of the senate.

People ex rel. Jackson v. Potter, 47 N. Y. 375; People v. Tilton, 37 Cal. 614; Tappan v. Gray, 9 Paige, 506.

After a term has expired the governor may not, without the consent of the senate, appoint in recess to an office requiring the consent of both, when the hold over is discharging the duties of the office.

People v. Bissell, 49 Cal. 407; People v. Parker, 37 Cal. 639; People ex rel. Laine 46 L.R.A. (N.S.)

v. Tyrrell, 87 Cal. 475, 25 Pac. 684; State ex rel. Atty. Gen. v. Rareside, 32 La. Ann. 934; State ex rel. Wagner v. Compson, 34 Or. 25, 54 Pac. 349; State ex rel. Carson v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; Smoot v. Somerville, 59 Md. 84; State ex rel. Richardson v. Henderson, 4 Wyo. 550, 22 L.R.A. 751, 35 Pac. 517; People ex rel. Brown v. Woodruff, 32 N. Y. 355.

Mr. Mitchell, not having been validly appointed commissioner of labor, can make no claim to the salary of the office.

Demarest v. New York, 147 N. Y. 203, 41 N. E. 405; Martin v. New York, 176 N. Y. 371, 68 N. E. 640; Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168; People ex rel. Morton v. Tieman, 30 Barb. 193; People ex rel. Ryan v. French, 91 N. Y. 265; Stemmler v. New York, 179 N. Y. 473, 72 N. E. 581.

Chase, J., delivered the opinion of the court:

The question involved on this appeal is not intricate. It is very simple, and depends upon a construction of the public officers law. Did the office of commissioner of labor become vacant at the expiration of the term of commissioner Williams, and remain so vacant within the meaning of that law for the purpose of choosing a new incumbent for that office? The office did become and was vacant, that is, empty, unoccupied, without an incumbent after the expiration of Commissioner Williams' term, "for the purpose of choosing his (the incumbent's) successor." That is the express provision of the statute. It is urged that the words quoted should not be construed to prevent an *ad interim* appointment in case of an actual "vacancy occurring or existing" in an office when the senate is not in session, although the actual vacancy occurs after the expiration of such term of office. The statute does not so qualify its general language.

We are not referred to any decision construing the statute now in force upon the exact question in controversy. Most of the decisions discussed by counsel were rendered when other statutes were in force. The words of § 5 of the public officers law (Consol. Laws, chap. 47) as follows: "After the expiration of such term (term of office), the office shall be deemed vacant for the purpose of choosing his successor,"—were new in § 5 of chapter 681 of the Laws of 1892, from which § 5 of the public officers law was taken. Neither the words quoted nor any similar language were included in the Revised Statutes (part 1, chap. 5, title 6), although it was therein provided that every public officer appointed, with certain named exceptions, "shall con-

tinue to discharge the duties thereof, although his term of office shall have expired, until a successor in such office shall be duly qualified." Section 9.

The following, among other decisions in this state, relied upon by the relator, were rendered prior to said statute of 1892 in the construction of statutes existing at the time when the several decisions were rendered: *Tappan v. Gray*, 9 Paige, 507; *People ex rel. Simpson v. Van Horne*, 18 Wend. 515; *People ex rel. Brown v. Woodruff*, 32 N. Y. 355. The commissioners of statutory revision in their notes say that "the provisions of § 5 as to appointment of successors of officers holding over after expiration of term will clear the law on the subject of its present ambiguity." The decisions of other states and in the Federal courts, called to our attention, are each based upon the particular statutes under consideration. The question involved on this appeal is without controlling precedent.

What did the legislature intend by the words, "The office shall be deemed vacant for the purpose of choosing his successor?" It did not mean that the office was wholly vacant for all purposes, because the language quoted is used in connection with the provision that every officer, with the exceptions named, who enters upon the duties of his office, shall, "unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualify." It intended that the office be deemed vacant in every respect so far as it relates to a new incumbent as fully as if the provision for a hold over had not been therein included.

The statute deals with vacancies occurring in an office when the incumbent is appointed for a prescribed term. A vacancy by expiration of the term of office is a certain event to occur at a known time. The statute also deals with vacancies that may arise before the expiration of the term of office by death or other event, the time of which is not known. It provides for filling vacancies in the two classes of cases. I quote from the statute:

"§ 39. A vacancy which shall occur during the session of the senate, in the office of an officer appointed by the governor by and with the advice and consent of the senate, shall be filled in the same manner as an original appointment. Such a vacancy occurring or existing otherwise than by expiration of term, while the senate is not in session, shall be filled by the governor for a term which shall expire at the end of twenty days from the commencement of the next meeting of the senate."

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"§ 30. Every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof: (1) The death of the incumbent; (2) his resignation; (3) his removal from office; (4) his ceasing to be an inhabitant of the state, or, if he be a local officer, of the political subdivision or municipal corporation of which he is required to be a resident when chosen; (5) his conviction of a felony, or a crime involving a violation of his oath of office; (6) the judgment of a court declaring void his election or appointment, or that his office is forfeited or vacant; (7) his refusal or neglect to file his official oath or undertaking, if one is required, before or within fifteen days after the commencement of the term of office for which he is chosen, if an elective office, or, if an appointive office, within fifteen days after notice of his appointment, or within fifteen days after the commencement of such term; or to file a renewal undertaking within the time required by law, or, if no time be so specified, within fifteen days after notice to him in pursuance of law, that such renewal undertaking is required. When a new office or an additional incumbent of an existing office shall be created, such office shall, for the purposes of an appointment or election, be vacant from the date of its creation, until it shall be filled by election or appointment."

"§ 5. Every officer except a judicial officer, a notary public, a commissioner of deeds, and an officer whose term is fixed by the Constitution, having duly entered on the duties of his office, shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by reason of a predecessor holding over shall be for the residue of the term only."

It is assumed without controversy that Commissioner Williams' term of office expired during the session of the senate, and although he remained in office as a hold over, as prescribed by § 5 that section also provides that "the office shall be (is) deemed vacant for the purpose of choosing his successor." Such vacancy continues until a new incumbent is chosen. It does not end with the adjournment of the senate, to occur again when the senate reconvenes.

For the purpose of determining whether the statute contemplates another and different vacancy arising by reason of some uncertain event affecting a hold-over incumbent after the expiration of a fixed term of office, the first words of § 30 are important. That section provides that "every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof." The same is true of the language of § 39 as follows: "A vacancy occurring or existing otherwise than by expiration of term, while the senate is not in session, shall be filled by the governor" as therein provided.

The statute, as we have seen, deals with vacancies occurring by reason of the expiration of a term of office, which is a certain event, and a vacancy occurring before the expiration of the term of office, which is an uncertain event. The occurrence of any of the events mentioned in § 30 after the expiration of the term does not create a vacancy for the purpose of an appointment of a successor incumbent, to be filled temporarily by the governor, because the vacancy for the purpose of choosing a successor has existed by reason of the statute from the date of the expiration of the term. The right to choose a successor incumbent depends upon the statute, and not upon the event which removed the hold over incumbent.

It is plain as an abstract proposition, apart from the words of any provision in regard thereto, that no vacancy can be wrought in any office by the act or fault of the incumbent after the expiration of the term for which he was first entitled to hold it. *People ex rel. Jackson v. Potter*, 47 N. Y. 375. The governor's power to make an *ad interim* appointment is confined to cases of actual vacancies arising from events occurring before the expiration of the term of the incumbent of an office. In all cases other than a vacancy occurring before the expiration of the term of office, the vacancy, for the purpose of appointing a successor incumbent, is deemed to exist from the date of the expiration of the term of office.

In view of the general purpose and express language of the statute, it appears that it was not the intention of the legislature, in providing when an office shall be deemed vacant, to qualify or restrict the purpose in any way so far as it relates to choosing a new incumbent, nor did it intend to permit a temporary or *ad interim* appointment by the governor if an actual vacancy occurs after the expiration of the term in an office occupied by a hold over. By such construction, force and effect is given to the language of the statute and to 46 L.R.A. (N.S.)

the purpose of revising it as expressed by the commissioners of statutory revision.

The public service is not endangered by the provisions of the statute. It is provided by § 41 of the labor law (Consol. Laws, chap. 31), in substance, that the duties of an office in case of an actual vacancy devolve upon the deputy. If the governor considers an occasion extraordinary, he can call the senate together to consider an appointment by him. Const. art. 4, § 4.

The order should be affirmed, with costs.

Willard Bartlett, Collin, Cuddeback, and Hogan, JJ., concur.

Cullen, Ch. J., dissenting:

In 1912 John Williams was commissioner of labor, the duration of whose office was four years, which expired December 31, 1912. The office is one created by statute (Laws 1909, chap. 36, § 40, as amended by Laws 1913, chap. 145), which provides that the officer shall be appointed by the governor with the consent of the senate. A successor to Williams has never been appointed; the first step for that purpose having been taken on April 21, 1913, when the governor sent the name of John Mitchell, the relator, to the senate for confirmation as commissioner of labor, but the nomination was rejected. On May 3, 1913, the governor against nominated the relator to the office and again the relator was rejected. Under the Constitution the legislature convened on January 1, 1913, and the senate continued in session until May 3d, when it adjourned *sine die*. Mr. Williams, despite the expiration of the period for which he had been appointed to office, under the provisions of the public officers law (§ 5) continued to hold his office till May 16th, on which date, after the adjournment of the senate, he resigned his office, and thereupon the governor appointed the relator to fill the vacancy. The relator duly qualified. At the expiration of the month the comptroller declined to pay the relator his official salary on the ground that his appointment was made by the governor without authority of law, and thereupon the relator applied for a mandamus to compel such payment. The special term held that it was invalid and denied his application for the writ, and that decision has been affirmed by the appellate division by a divided court.

The only question in the case is the validity of the relator's appointment. The Constitution (article 10, § 5) prescribes that the legislature shall provide for filling vacancies in office. Therefore the determination of this proceeding depends solely upon the statute law on the subject, the material parts of which are the following sections of

the public officers law (Consol. Laws, chap. 47):

Section 5: "Every officer except a judicial officer, a notary public, a commissioner of deeds, and an officer whose term is fixed by the Constitution, having duly entered on the duties of his office, shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by reason of a predecessor holding over shall be for the residue of the term only."

Section 30: "Every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof: (1) The death of the incumbent; (2) his resignation; (3) his removal from office; (4) his ceasing to be an inhabitant of the state, or, if he be a local officer, of the political subdivision or municipal corporation of which he is required to be a resident when chosen; (5) his conviction of a felony, or a crime involving a violation of his oath of office; (6) the judgment of a court, declaring void his election or appointment, or that his office is forfeited or vacant. . . ."

Section 31: "Public officers may resign their offices as follows: 1. The governor, lieutenant governor, secretary of state, comptroller, attorney general, state engineer, and surveyor, to the legislature; (2) all officers appointed by the governor alone, or by him with the consent of the senate, to the governor; . . . every resignation shall be in writing addressed to the officer or body to whom it is made. If addressed to an officer, it shall take effect upon delivery to him at his place of business or when it shall be filed in his office. . . ."

Section 38: "If an appointment of a person to fill a vacancy in an appointive office be made by the officer, or by the officers, body or board of officers, authorized to make appointments to the office for the full term, the person so appointed to such vacancy shall hold office for the balance of the unexpired term. . . ."

Section 39: "A vacancy which shall occur during the session of the senate, in the office of an officer appointed by the governor by and with the advice and consent of the senate, shall be filled in the

same manner as an original appointment. Such a vacancy occurring or existing otherwise than by expiration of term, while the senate is not in session, shall be filled by the governor for a term which shall expire at the end of twenty days from the commencement of the next meeting of the senate."

It will be seen that by § 39, so far as it applies to officers of the character of the one in this controversy, the governor's power to fill a vacancy is subject to only a single exception (that is, a vacancy by expiration of term); and the power is given whether the vacancy occurs or exists when the senate is not in session, though in this case when Williams resigned the senate was not in session. The decision of the controversy before us depends upon the determination of what was the vacancy which the governor's appointment on May 16th was operative to fill. The learned courts below have held, and the attorney general contends, that the only vacancy in the office claimed by the relator is the vacancy created by the expiration, with the end of the year 1912, of the period for which Williams had been appointed to office. If this position is correct, then the appointment of the relator was invalid, and right here is the crux of the whole controversy. By § 5 of the public officers law, hitherto quoted, it is provided that every officer, with certain exceptions (which do not include the one before us), shall hold over and continue the discharge of the duties of the office after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified. If the section ended here, there would be no room for controversy. The failure to appoint or elect his successor in office, or a failure of such successor to duly qualify, would not create a vacancy, because despite of such failures there would be a person entitled by law to continue in the office and discharge its duties. The scheme of officials holding over despite the expiration of the original term has prevailed in this state from early times, and also is prevalent in other states.

The decisions are uniform both in this state and in the other states so far as they are cited to us by the attorney general, that where there is a provision for a holding over there can be no vacancy in the office. In *Tappan v. Gray*, 9 Paige, 507, the complainant was a flour inspector appointed by the governor, with the consent of the senate, to hold office for two years. There was a failure to appoint his successor, and, under a provision substantially the same as that extant to-day, authorizing the governor to fill vacancies by temporary

appointments expiring twenty days after the commencement of the next meeting of the senate, the defendant had been appointed to the office to fill the vacancy. Then, as now, the statute law was that every officer, with few exceptions, should hold over until a successor in office should have been duly appointed and qualified. The chancellor held that there was no vacancy in office because the hold over was the legal incumbent of the office. The same rule was declared by the supreme court in *People ex rel. Simpson v. Van Horne*, 18 Wend. 515, 518, where Chief Justice Savage said: "It will be seen, too, that the word 'vacancies' is applicable to cases where officers have been duly chosen or appointed, and not to the cases where there has been an omission to elect at the annual town meeting. In such cases there is, in fact, no vacancy, because the officers of the preceding year hold the offices until others are chosen or appointed in their places and have qualified." The decisive authority on this point is the case of *People ex rel. Brown v. Woodruff*, 32 N. Y. 355. In that case the statute had authorized the comptroller of the city of New York to appoint three commissioners of taxes and assessments of the city of New York, who should hold office for the term of five years or until others were appointed in their places. Any vacancy in said board, by death, resignation, or otherwise, was to be filled by said comptroller. No authority was given to appoint their successors. The relator was one of the original appointees. After the expiration of his term the defendant was appointed by the comptroller in his stead. It was urged that, even if the power conferred by the statute upon the comptroller was not continuous, still the appointment of the defendant was valid under the authority given the comptroller to fill vacancies. It was held that there was no vacancy, as the original appointees were authorized to hold over until others were appointed in their places. The doctrine was recognized in *People ex rel. Woods v. Crissey*, 91 N. Y. 616, and *People ex rel. Kehoe v. Fitchie*, 76 Hun, 80, 28 N. Y. Supp. 600. In *People ex rel. Lovett v. Randall*, 151 N. Y. 497, 45 N. E. 841, the rule was held to apply to the case of a failure to elect by reason of a tie vote. The cases cited by the learned attorney general from other states are to the same effect (*People v. Bissell*, 49 Cal. 407; *State ex rel. Carson v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; *Smoot v. Somerville*, 59 Md. 84), as are the textbooks. *Mechem*, Pub. Off. § 128; *Throop*, 46 L.R.A. (N.S.)

Pub. Off. § 330. The concluding portion of the sentence, "but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor," does not change the rule. It does not declare that the office shall be vacant, but that it shall be deemed vacant for one particular purpose, and one only, for the purpose of choosing his successor. *Expressio unius exclusio alterius*. It is just at this point that, in my opinion, the learned judge at special term erred. He considered that expiration of Williams' term without the legal appointment of his successor rendered the office wholly vacant. As already shown, that view conflicts with the uniform current of authority both in this and other states.

If, therefore, the office has become vacant at all, it has been occasioned by the subsequent resignation of Williams. It is urged by the attorney general that the act of Williams in resigning the office cannot increase the power granted the governor by the statute, and authorize him by his sole act, without confirmation by the senate, to appoint a successor to Williams. That is undoubtedly true. A claim to the contrary would be preposterous. But in appointing the relator the governor has not appointed Williams' successor but only a person to fill the office until Williams' successor is appointed according to law, subject, however, to the further limitation that the appointment will expire twenty days after the session of the senate next after his appointment convenes, whether a successor to Williams has been legally appointed at that time or not.

It is contended that Williams could not resign the office, because at the time of his resignation he had nothing to resign, and *People ex rel. Jackson v. Potter*, 47 N. Y. 375, is cited as authority for the proposition. That case involved the title to the office of justice of the supreme court. It has no application to the present case, for judicial officers do not hold over after the expiration of the term for which they are chosen, and, hence, clearly have nothing to resign. A little reflection will dispose of the point. It is conceded that on May 15th Williams lawfully held office, and that on May 17th he was not in office. Williams did not die nor remove from the state, nor was he convicted of a felony. What possible thing effected his removal from office between May 15th and May 17th, except his resignation on May 16th? This would seem to render further discussion unnecessary. If the contention is right, then there has been no provision in the statute

since 1892, and possibly never, for filling a vacancy in office caused by the death or resignation of a hold over. There are all the constitutional officers of counties and municipalities whose successors cannot constitutionally be filled save by an election. In case of the death or resignation of one of these, the office must remain vacant till the next election. The report of the revisers who prepared the law of 1892 states that the change in the section was not to change the law hitherto prevailing, but merely "to clear the law on that subject of its present ambiguity."

It is further contended that, as by § 30 of the public officers law the event which renders an office vacant must happen before the expiration of the term, the resignation of Williams did not render the office vacant within the meaning of the statute. This is too narrow a construction of the law. Though at common law office was considered a burden, not an advantage, and though even now as to some town offices, such as commissioner of highways and others, a refusal to serve subjects the person elected to a penalty, the law of this state empowers any incumbent to resign his office, and by such resignation the office is vacated *ipso facto*. *Olmsted v. Dennis*, 77 N. Y. 378, 387. It requires no acceptance, but takes effect on delivery to the person to whom it is addressed. Pub. off. law, § 31. Williams, therefore, had the same right to resign while holding over that he had during his original term. The events which render an office vacant must be equally applicable to the case of a hold over as to one serving his original term. One is his ceasing to be an inhabitant of the state or, if he be a local officer, of the political subdivision of which he is required to be a resident. Another, the conviction of the incumbent of a felony. Surely, if these things should disqualify an incumbent from serving his original term, equally they should disqualify him from serving as a hold over. When the expression is used in the statute, "before the expiration of his term," it means not merely the period of time for which the officer is in the first instance elected or appointed, but the time which under the law he has the right to serve, and in the true sense of the word all of that period is the incumbent's term. This is made clear by the concluding provision in § 5, which provides that "an officer so holding over for one or more entire terms shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms."

Indeed, it is conceded in the brief for the 46 L.R.A. (N.S.)

attorney general that "Mr. Williams' resignation transforms not at all the appointing power from governor and senate to governor. It does have this effect, however, that of creating a natural vacancy." That concession disposes of the case. It is the actual vacancy, and only the actual vacancy, which is contemplated by the Constitution and the statutes in the various provisions as to the filling vacancies in office. Here again I quote from a case cited by the attorney general (*State ex rel. Carson v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384); "The word 'vacancy,' as applied to an office, has no technical meaning." It is urged that such a situation is met by the provision that the deputy of an officer shall possess the powers and perform the duties of his principal during the absence or inability to act of his principal, or during a vacancy in his principal's office. Pub. off. law, § 9. In many cases an officer has no deputy, and in the present case the power of the deputy of the commissioner of labor is restricted by excepting from the power conferred upon him that of removing his subordinates. But this claim is disposed of by authority. A county clerk died. At the time of his death he had appointed, as was required by law, a deputy under a statute which provided when the office of any county clerk shall become vacant his deputy should perform all the duties, and be entitled to all the emoluments, and be subjected to all the penalties, pertaining to the office of the county clerk of a county and until a new clerk should be elected or appointed for such county and duly sworn. The governor made an appointment to fill the vacancy. The deputy claimed that the case was excepted from the statute relating to vacancies because of the power conferred upon him to discharge the duties of the clerk. It was held that the claim was untenable and that the appointment by the governor was valid. *People ex rel. Smith v. Fisher*, 24 Wend. 215. To the same effect, see *People ex rel. Henderson v. Snedeker*, 14 N. Y. 52. It follows that the relator has got good title to the office until twenty days after the commencement of the session of the senate first succeeding his appointment.

The orders of the special term and of the appellate division should be reversed, and the application for a writ of mandamus granted, with costs in this court and \$10 costs of motion.

Werner, J., concurs with Cullen, Ch. J.

OREGON SUPREME COURT.

CITY OF PORTLAND

v.

INMAN POULSEN LUMBER COMPANY
et al.

(— Or. —, 133 Pac. 829.)

Estoppel — upon municipality to open street.

1. A city is estopped to open streets through property upon which a great industrial plant has been placed at its solicitation, so long as they are occupied for the purpose of such plant, where its mayor, upon inquiry by the owners of the plant as to streets, the existence of which through the property was doubtful, informed them that if they existed they were of no use

Note. — Estoppel of municipality to open or use street.

- I. In general, 1211.
- II. Doctrine that municipality cannot be estopped, 1211.
- III. Doctrine that municipality may be estopped.
 - a. In general, 1212.
 - b. Requisites of estoppel.
 1. In general, 1213.
 2. Mere possession, 1213.
 3. Possession not adverse, 1214.
 4. Duration of elements of estoppel, 1215.
 - c. Particular cases, 1216.

I. In general.

The note has, in general, been confined to the question of estoppel as it affects a municipality in opening up a street through a plat or tract where no street has existed except on paper, and does not in general include cases in which there is an obstruction of a public street and an attempt to remove it by the municipality, such as *Fresno v. Fresno Canal & Irrig. Co.* 98 Cal. 179, 32 Pac. 943, involving the obstruction of a public street by a canal; *Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197, *infra*, involving the obstruction of a public street by a mill race.

Although it is held by some courts that the statute of limitations may run against a municipality so as to prevent it claiming for street purposes land in the adverse possession of private parties, yet the weight of authority is to the effect that the statute does not apply to a municipal corporation in its public capacity, and that land set apart for street purposes cannot be acquired by adverse possession. 1 Cyc. 1118; Dill. Mun. Corp. 5th ed. §§ 1189, 1193. See also note in 26 L.R.A. 449, referred to below. That question, however, is beyond the scope of this note.

To avoid the operation of a doctrine that might work a hardship in certain cases by permitting a municipality to claim land as a street after improvements had been erect-

and would never be claimed by the city, upon which information the proprietors acted in establishing the plant.

Pleading — estoppel — sufficiency.

2. Failure to plead a technical estoppel is not fatal in equity if all facts necessary to constitute it are pleaded, and no objection is made to the form of pleading.

(Burnett, J., dissents.)

(July 15, 1913.)

CROSS APPEALS from a judgment of the Circuit Court for Multnomah County in defendants' favor in a suit to enjoin the obstruction of certain streets; plaintiff appealing from so much of the decree as denied its right to immediate re-

ed thereon by one claiming the land as private property, or after a long-continued user of the same as private property with no claim on the part of the municipal authorities of the land as a street, the doctrine of equitable estoppel has been applied by some courts, and where it would be inequitable for the municipality's claim to prevail, it has been held estopped from claiming the land for street purposes, although it may have been dedicated and never abandoned.

As to estoppel of the municipality to assert true line where abutting owner has made improvements with reference to what was erroneously supposed to be street boundary line, see note to *Oliver v. Synhorst*, 7 L.R.A. (N.S.) 243.

And see also on another phase of estoppel of municipalities, the note to *Bangor v. Bay City Traction & Electric Co.* 7 L.R.A. (N.S.) 1187, as to the effect of acquiescence or consent by town or municipality to construction or use of a railroad in street or highway, to estop it from objecting thereto.

See note to *Maire v. Kruse*, 26 L.R.A. 449, as to abandonment of a highway by nonuser or otherwise than by the act of the public authorities, and especially subdivision IV. thereof, on equitable estoppel.

See note to *Meyer v. Graham*, as to rights acquired as against the public by adverse possession of highway or city street, 18 L.R.A. 146.

II. Doctrine that municipality cannot be estopped.

That a municipality may be estopped has been vigorously denied in *Webb v. Demopolis*, 95 Ala. 116, 21 L.R.A. 62, 13 So. 289, where there had been a dedication of land as a public street, but the same had not been used by the public for more than forty years, and there was held to be nothing to prevent the municipality from opening the street at any time it desired. "No statute of limitations," says the court, "or principle of repose, obtains here; neither the statute of limitations, nor the rule which carries title to adverse possession,

lief, and defendants appealing from so much as recognized a public right in the streets when defendants' particular use of the property ceased. Affirmed.

Statement by McBride, Ch. J.:

This is a suit brought by the city of Portland to restrain defendants from obstructing certain streets situated in what was formerly known as Stephen's addition to the city of East Portland, which, by the consolidation of the two cities, has become a part of the present city of Portland. The pleadings with their exhibits would occupy several hundred pages of the Oregon reports, and are therefore omitted; it being sufficient to state that they are broad enough in their scope to cover all the con-

tentions of the parties, and that the evidence adduced fully justified the findings of fact made by the circuit court.

Said findings are as follows:

"(1) That the city of Portland is a municipal corporation within Multnomah county, state of Oregon.

"(2) That the city of East Portland was incorporated by an act of the legislative assembly of the state of Oregon on the 29th day of October, 1870.

"(3) That Inman-Poulsen Lumber Company, at the times mentioned in the complaint, was, and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon.

"(4) That on the 8th day of June, 1869, James B. Stephens and Elizabeth Stephens

nor the doctrine of staleness, equitable estoppel, or prescription, can be invoked or applied against the right of the city of Demopolis and of the public to have this street opened from end to end and from side to side. . . . The city never had any alienable title or right in the street. It could never have granted it, or any part of it, away, for any purpose whatever. Having no power of direct alienation, it could not pass title indirectly by submitting, for the statutory period, the private possession, claim, and use."

It is not clear that the question of estoppel received much consideration in *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217, 9 So. 21. The only contention with reference to estoppel that was made in that case was that the city was estopped by the collection of taxes on the land in question. This contention was denied, but it is not clear whether on the ground that estoppel does not exist against a municipal corporation, or on the ground that it did not exist in this particular case. See further statements as to this case *infra*, III. b.

A borough was held not estopped from opening up a street across a railroad right of way, by a permission given previously by some of the borough officials to the railroad company to inclose a part of the street, and the act of some borough official in indicating, by placing curbing and replacing the same across the street, that the use of the street as a highway was abandoned, where the borough officials have no power to confer a right upon anyone to inclose a public highway against the public, in *Seabright v. Central R. Co.* 73 N. J. L. 625, 64 Atl. 131, apparently the decision is on the theory that estoppel does not exist against a municipality. See *Tainter v. Morristown*, 19 N. J. Eq. 46, discussed in the note in 7 L.R.A.(N.S.) 249.

That estoppel does not apply to a municipality to prevent its claiming land dedicated as a street is also decided in *Krause v. El Paso*. — Tex. Civ. App. —, 101 S. W. 828, a case not within the scope of the present note.

See also discussion of *Ralston v. Wes-* 46 L.R.A.(N.S.)

ton, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326, in note in 7 L.R.A.(N.S.) 243.

III. Doctrine that municipality may be estopped.

a. In general.

The greater number of courts that have considered this doctrine have held it applicable to municipal corporations, and have held estoppel to exist or not to exist according to the facts of the particular case.

The elements that are essential to create an estoppel against a municipality, to prevent the opening or use of a street, have not been separated so that it can be stated with certainty just what elements will and what will not work an estoppel. There are usually several elements in a case, and these are treated together in determining whether the estoppel exists. In South Carolina the only criterion is whether it would be inequitable to allow the municipality to open and use the street.

Thus the courts of this state take the view that where possession is accompanied by other circumstances which, as stated above, would render it inequitable for the municipality to assert its right to gain possession of the streets, the municipality may be estopped from asserting such right. *Crocker v. Collins*, 37 S. C. 327, 34 Am. St. Rep. 752, 15 S. E. 951.

As to whether in a particular case it would be inequitable to allow the municipality to open the streets was held to be a question of fact in *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800, 36 S. E. 3, an action for injunction, and also for damages on account of the destruction of a number of shade trees on the land in question.

That estoppel may exist against a municipality is recognized also in *Simplot v. Chicago, M. & St. P. R. Co.* 5 McCrary, 158, 16 Fed. 350.

The court, in *Sacramento v. Clunie*, 120 Cal. 29, 52 Pac. 44, states that it is only in exceptional cases that the doctrine of

were the owners and in possession of a certain portion of the James B. Stephens donation land claim, and he, the said James B. Stephens, filed a plat of said portion and designated the same as Stephens's addition to East Portland, and that on said plat there was shown the shore line of Stephen slough, and on said plat there were shown certain dotted lines within the bounds of said Stephens slough.

"(5) That said Stephens slough as shown upon said plat or map was surrounded by a high bank about 50 feet above the level of the water in said slough on the north bank, and 35 feet above the level of the water on the south bank thereof; and on said map or plat the portion of said slough containing water was shown with blue coloring, the

same as the portion shown of the Willamette river, which likewise was shown with blue coloring, and the same was and is recorded in Book 1 at page 529, Records of Deeds of Multnomah county, Oregon.

"(6) That the premises hereinafter described were situated within the bounds of the city of East Portland after its incorporation.

"(7) That among the other various powers granted to the city of East Portland were the following: Article 4, § 1, subd. 3, enumerating the powers of the board of trustees: 'To prevent and remove nuisances. 11th. To remove all obstructions from the public highways or streets.'

"(8) That on July 30, 1885, there was passed by the city of East Portland Ordinance

equitable estoppel may be invoked against a municipality, and indicates that on the facts of that case, which show that possession had been maintained by the defendant and his grantors for forty years, and during this time large sums of money had been expended upon the property in permanent improvements, estoppel would not be allowed. The city in this case based its right to recover upon an alleged dedication by the owners to the public as streets, and this was found against the municipality by the trial court and affirmed by the supreme court, and the decision is based upon this ground.

Where one highway has been substituted for another, and such other has been inclosed with adjoining land so that, if it were opened, it would pass through the walls of buildings, orchards, and cultivated land, to the great injury of the farm, the court, in *Almy v. Church*, 18 R. I. 182, 26 Atl. 58, held that the old right had been transferred to the new way, so that the municipality would be prevented from opening the old highway, and then adds: "Judge Dillon puts it upon the ground of an estoppel *in pais*, but the principle of substitution appears to us to be a stronger ground."

b. Requisites of estoppel.

1. In general.

Estoppel exists against a municipality, to prevent the opening or use of land for street purposes, where there is long-continued nonuser by the municipality, together with the possession by private parties in good faith and in the belief that its use as a street has been abandoned, and the erection of valuable improvements thereon without objection from the municipality, which has knowledge thereof, so that to reclaim the land would result in great damage to those in possession. *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759; *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230. See also, III. c. infra, for cases supporting this general proposition.

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2. Mere possession.

The mere fact of possession, however, by private parties and nonuser by the municipality, will not create an equitable estoppel. *El Paso v. Hoagland*, 224 Ill. 263, 79 N. E. 658; *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230; *Burroughs v. Cherokee*, 134 Iowa, 429, 109 N. W. 876. See *Taraldson v. Lime Springs*, 92 Iowa, 187, 60 N. W. 658, *infra*.

Neither is mere silence on the part of the city, and indulging the adjoining landowner, who had knowledge of all the facts, in the use of the street for a time, although it induces the belief that the street would not be opened, sufficient to work an estoppel against the municipality. *Solberg v. Decorah*, 41 Iowa, 501.

Thus, in *Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197, where the city had simply remained silent and done nothing to encourage a mill owner in constructing a mill race in the street under a claim of right, and had allowed him to maintain possession for more than ten years, there was held to be no estoppel against the city.

Although *Solberg v. Decorah*, *supra*, seems to require some affirmative action on the part of the municipality, such has not been made a requirement in subsequent cases in this state. Affirmative action on the part of the municipality appears in some of the cases in which an estoppel was held to exist. These affirmative acts are of various kinds. The collection of assessments (*Simplot v. Dubuque*, 49 Iowa, 630), or taxes (*Uptagraff v. Smith*, 106 Iowa, 385, 76 N. W. 733), or an attempted vacation (*Blennerhasset v. Forest City*, 117 Iowa, 680, 91 N. W. 1044), are affirmative acts in cases in which estoppel was held to exist against the municipality.

It does not appear that the land had been dedicated and accepted as a street in *Simplot v. Dubuque* and *Uptagraff v. Smith*, *supra*, nor that there had been an acceptance of the street in *Blennerhasset v. Forest City*, but in the last named case this was treated unimportant in view of the facts of the case.

nance No. 501, defining the duties of street commissioners, which provides, 'The street commissioner shall keep an office at the council chamber at which he shall attend at least once each day to receive and act on such petitions and business as may be brought before him; he shall keep himself thoroughly informed of the condition of all streets and highways, alleys, etc.; he shall see that no obstructions are allowed to remain upon the streets, alleys, or sidewalks; he shall cause the removal of all nuisances on the streets and public grounds,' which ordinance was in force and effect from said date to the time of the consolidation of the cities of East Portland and Portland.

"(9) That the city of East Portland in 1885 established all street grades at that

time, and did not establish any street grade or grades through any of the premises described in the complaint or answer herein, being the property in controversy, but established grades at that time all around the said premises so described. That neither the city of East Portland nor the city of Portland has ever established any street grades within the bounds of the premises described in the answer in this proceeding in paragraph 1 thereof. That the said city of East Portland never accepted, acknowledged, or claimed that any streets existed within the bounds of the premises described in said answer, and that the said city of Portland never accepted the dedication of any street within the bounds of said premises, and never intimat-

Although it is alleged in *Weber v. Iowa City*, 119 Iowa, 633, 93 N. W. 637, that the city collected taxes on the land in question, the effect of this taxation was not determined in the opinion, which was allowed to rest on the long-continued use of the land without interference by the city, and the making of improvements thereon. Though there is no affirmative action on the part of the city leading the landowner to believe that the street had been vacated, appearing in this case, it does appear that the owner made an attempt at vacating the plat previously to going into possession. The decision is placed upon the ground of abandonment and estoppel, and no satisfactory distinction between the two theories is made.

And where there has been no dedication, or the dedication has never been accepted by the municipality, so that there is in fact no street, an affirmative act on the part of the municipality is not necessary to work an estoppel. *Cambridge v. Cook*, 97 Iowa, 599, 66 N. W. 884; *Burroughs v. Cherokee*, 134 Iowa, 429, 109 N. W. 876. At least, an estoppel was held to exist in *Cambridge v. Cook*, where there was no dedication, without an affirmative act on the part of the municipality appearing; and likewise without any affirmative act existing, estoppel was held to exist in *Burroughs v. Cherokee*, where there had been no acceptance until after the municipality was estopped.

In *Arnold v. Volkman*, 123 Wis. 54, 101 N. W. 158, an action between private parties, it is stated that where the claimant to land did no act and paid out no money in reliance upon any act or refusal to act on the part of the city, but on the contrary had not changed his position, the mere non-use of a strip of land by the public for street purposes for nearly fourteen years does not effect an estoppel against the municipality.

Where a claimant has gone into possession of the land with full knowledge of the existence of an alley, and has improved his land as if no alley were in existence, and has maintained possession for about fifteen

years, the municipality is not estopped from claiming the land as an alley, although the opening thereof would separate a barn from a house and would necessitate the moving of some buildings. The moving of the buildings, however it spoken of as a matter not of serious importance. *Taraldson v. Lime Springs*, 92 Iowa, 187, 60 N. W. 658. Nothing is said in this case as to knowledge on the part of the city of the claim as to the alley, and it appears that the alley was not necessary for public use until the attempt to open the same was made.

3. Possession not adverse.

Where the occupation is not adverse to the public,—estoppel does not exist against the municipality.

The inclosure by the owner of lots, of a street with such lots, intending the inclosure to exist until such time as the municipality should need the street, and the possession of the lot and street as thus inclosed, by his grantee thereafter for about fifteen years, including the time from 1861 to 1867, when the statute of limitations was suspended, do not work an estoppel against the municipality. *Sims v. Chattanooga*, 2 Lea, 694. Buildings had been erected on the lot which encroached slightly upon the street in question, but nothing is said as to the effect of this upon the estoppel.

Injunction to restrain a city from opening up streets was denied in *Burroughs v. Cherokee*, 134 Iowa, 429, 109 N. W. 876, where the city had delayed for fourteen or fifteen years in accepting the dedication of streets, and during all this time the possession was maintained by private parties who conveyed the lots as numbered on the recorded plat, and residences were erected thereon, so that to close the streets claimed would make cul-de-sacs of those on which the residences were located, and where no taxes were charged or paid on the land dedicated as streets. It was further shown in this case that the platted land including the streets in question was fenced, but that gates were placed at the

ed or claimed that any streets so existed until the month of September, 1907.

"(10) That on the 15th day of February, 1888, James B. Stephens conveyed to George W. McCoy and M. M. Clinton all the property in controversy lying west of Grand avenue, which was then known as Fifth street, together with other property, and that at said time said premises contained part of Stephens slough, as heretofore stated, which was an impassable slough about 20 to 30 feet in depth below the surface of the water, and from 30 to 50 feet from the surface of the water to the top of the banks surrounding said slough, and the high ground lying to the south of said slough was rough ground, covered with stumps, trees, logs, and thick underbrush;

and said grantees thereupon began to clear the same, and cleared the said tract south of said slough, irrespective of, and, without reference to, or consideration of, any street or streets, and surrounded the premises lying south of said slough and west of Grand avenue, shown on the map of Stephens's addition as blocks 29, 32, 49, 50, 31, and parts of 32 and 51, with a high board fence, and erected in the southwestern portion of said inclosed premises a grand stand and conducted baseball games thereon, and used the said premises as a baseball park, and excluded the public therefrom otherwise than by the payment of an admission fee, and said baseball park and said fence included that portion shown on said maps as

street crossings, so that the public could use the streets if they desired to do so, and that a sanitarium and grounds were constructed on the land, and that part of one building and a lake were situated on the land dedicated as streets; and these are stated to be the only circumstances occurring in the case which were inconsistent with the right to acquire the streets by acceptance. Apparently, the doctrine of estoppel was urged against the city in this case, as this doctrine is discussed in the opinion, and it is apparently on the theory that no estoppel exists against the municipality in this case that relief is denied.

The facts in *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759, in which an estoppel was held not to exist against the municipality, do not clearly appear further than that the original dedicatory remained in possession of the land, but disclaimed hostility to the public. Apparently, a public square was the only property of which possession was sought in this case, and no streets were involved.

4. Duration of elements of estoppel.

As to the length of time the elements necessary to work an estoppel must continue, it was laid down in an early Iowa case that they must extend over a period of at least ten years in analogy to the statute of limitation. *Davies v. Huebner*, 45 Iowa, 574, approved in *Orr v. O'Brien*, 77 Iowa, 213, 14 Am. St. Rep. 277, 42 N. W. 183. And in all the Iowa cases within the scope of the present note, there was a nonuser by the municipality and possession by private parties for at least ten years. The length of time necessary to work an estoppel varies, however, in a majority of the jurisdictions, according to the facts of the particular case. An examination of the cases discloses, however, that the possession was maintained for long periods.

The existence of an estoppel was held to be a question of fact in *Chafee v. Aiken*, 57 S. C. 507, 35 S. E. 800, 36 S. E. 3, and the test of the existence of an estoppel to be whether it would be inequitable for the municipality to set up its claim to the

street. Accordingly, it was held in this case that it could not be said as a matter of law that silence of the city for twenty years, while the landowner was improving the property, would work an estoppel.

Where the municipality has attempted to vacate the street, although it may not have power to do so, the element of long-continued nonuser by the municipality and possession by the private parties is not so important. *People ex rel. Friend v. Wieboldt*, 233 Ill. 572, 84 N. E. 646. In this case there was between two and three years' occupation, valuable improvements had been erected, and the landowner had dedicated other land to connect the ends of the alley on either side of the vacated portion with other streets.

It seems that in Wisconsin there can be no estoppel effected against a municipality before the street is required for public use.

The court in *Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417, lays down the broad proposition that until a street is required by the public use, no mere nonuser for any length of time will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount rights of the public. The court then held that, in the absence of evidence, it will be presumed that the public authorities who are attempting to open a street did so as soon as public necessity required, and denied an injunction to one who was in possession of the land claimed as a street. While the doctrine of equitable estoppel is referred to in the case, it is not made clear whether, in the opinion of the court, there could be no equitable estoppel against a municipality in the absence of a necessity for the public use of the street as to which the estoppel is claimed. However, in *State v. Leaver*, 62 Wis. 387, 22 N. W. 576, an action to recover a penalty for obstructing a street by a barn erected within the limits of the street, the fact that, before a street was required for public use, the municipal authorities had paid a part of the expense of removing a store out of one street, leaving it still in the street of which complaint was made, paid rent

streets within the bounds of said baseball park.

"(11) That in the year 1889 J. T. Stewart was the mayor of the city of East Portland, and appeared anxious to encourage the establishment of manufacturing plants on the east side of the Willamette river and in the city of East Portland, and that he delivered a message to the council requesting the encouragement of enterprises within the bounds of East Portland, and that before and about said time said defendants R. D. Inman and Johan Poulsen were looking for a site upon which to locate a sawmill, and, pursuant to such message of the said mayor and the request of the city council of East Portland, councilman Hardie, then a member of said council of East Portland,

invited the said defendants R. D. Inman and Johan Poulsen to locate and establish their proposed sawmill on the east side of the river. Subsequent to said time said defendants had negotiated with George W. McCoy and Richard Clinton with a view toward locating a sawmill on the premises now occupied by the defendant Inman-Poulsen Lumber Company, and that, pursuant to the invitation and encouragement of said councilman Hardie, the defendant Johan Poulsen, in the month of August, 1889, interviewed said J. T. Stewart, who was then the mayor of said city of East Portland, and said defendant informed said mayor that he and his associates were about to acquire the said premises herein described, and that they intended to locate

for a part of that street for use as a pound and lock-up, taxed the adjoining lots by metes and bounds to the section line in the center thereof, and required the adjoining owner to bear the cost of a sidewalk in front of his store within the limits of the street, was expressly held to work no estoppel against the municipal authorities.

That estoppel will not run against a municipality until the land is needed for street purposes is indicated in *Taraldson v. Lime Springs*, 92 Iowa, 187, 60 N. W. 658, but the real basis of that decision is that there were no equities against the municipality and in favor of the claimant. See this case *infra*.

But where some affirmative act is taken by the municipality, estoppel may result, even though the public necessity does not require the opening of the street.

Thus, where a lumber company and its grantor have been in possession of land for more than thirty years, and for more than twenty years after the municipal council refused to open the street, have used it and the adjoining premises as a lumber yard, filling the same up and grading it so that it could be used, erecting buildings upon the land claimed as a street at a considerable expense, and all openly and with the knowledge of the officers of the city, the city is estopped from opening the street. *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.

c. Particular cases.

In *Jordan v. Chenoa*, 166 Ill. 530, 47 N. E. 191, where the adjoining landowner had inclosed the land claimed as an alley, with his land, and had been in the open and notorious possession of the same for more than twenty years, had trees growing thereon and a house standing on a part of it, and a hedge fence growing across the end of the strip, and had used it as his own property without objection from any quarter, the municipality was held estopped to claim the ground as a street.

Where a city allowed private parties to occupy the premises claimed as a street

for more than sixty years, and received taxes on at least a portion of the disputed premises, and the parties so occupying the premises erected buildings on a part thereof, and with the consent of the city authorities constructed docks on the premises, the municipality is estopped to claim the land as a street. *Peoria v. Central Nat. Bank*, 224 Ill. 43, 12 L.R.A.(N.S.) 687, 79 N. E. 296.

Where the officers of a municipality know that the streets and alleys in a plat are inclosed with the adjoining land, and that the owner for more than twenty-five years has been making valuable improvements thereon without objection from these officers to the use of the property in such a manner, inconsistent with the assertion of any right thereto on the part of the city, the city is estopped from thereafter asserting any right to the streets and alleys. *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605.

In determining upon the merchantability of a title in *Baldwin v. Trimble*, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176, the court holds that where the city has abandoned a street, although no action has been taken to vacate the same, and the street has been built up by private parties with buildings, and such possession by private parties has been maintained for about twenty-five years, the city is equitably estopped from claiming the land as a street.

In *Cambridge v. Cook*, 97 Iowa, 599, 66 N. W. 884, a municipality was held estopped from proceeding to open up an alley in the defendant's exclusive possession, in which it had acquiesced for more than fifteen years after its incorporation, and the public had stood by and seen the defendant erect valuable improvements thereon, including an orchard and a barn, and had seen him fence and cultivate it for nearly thirty years.

Where certain streets marked on the plat of an addition to a city were never used by the public as streets for a period of over twenty years, and surrounding streets were vacated by the city for railroad and other purposes, and finally the streets in question were inclosed by a substantial fence

a sawmill upon the same, and that they intended to manufacture lumber and use the premises now occupied by them for their manufacturing plant, and requested that if said city claimed any interest or right in said premises or any portion thereof, or for the use of the public as a street or otherwise, that the same should be vacated; and he was informed by the said mayor that the said city of East Portland did not and would not claim any of said premises as a public street or highway, except that the city claimed Fifth street, now Grand avenue, as a public street. That thereupon said defendant Johan Poulsen obtained legal advice as to whether the public had any rights within the premises now occupied by defendant Inman-Poulsen Lumber Com-

pany, and was assured that no public rights existed therein. That said defendants Johan Poulsen and R. D. Inman, in good faith and with reliance upon the statements and encouragement of the mayor and council of the city of East Portland, began and completed the erection of a large sawmill, planing mill, and lumber plant upon said premises, and erected and built wharves and docks in the Willamette river abutting upon said premises, and proceeded to fill said Stephens slough, and to erect such other buildings as were necessary and convenient for the general manufacture of lumber, and duly completed the erection of such lumber mill in the year 1890, and erected its buildings irrespective of the existence of any streets, and in good faith,

and otherwise improved and used as private property, a dwelling house being erected on one of them, and it is further shown that the ground could be made fit for street purposes only by the expenditure of a large amount of money in filling and grading, the city will be estopped from claiming the ground as a street. *John Mouat Lumber Co. v. Denver*, 21 Colo. 1, 40 Pac. 237.

A city was held estopped in *Edwardsville v. Barnsback*, 66 Ill. App. 381, where a private person and those under whom he claimed had been in peaceable, open, and adverse possession of the land claimed as a street for more than fifty years, and during that period had inclosed it, and uninterruptedly used a part of it as a house lot, and had on it buildings, a well, orchard, fences, and fruit trees, all within the actual knowledge of the municipality.

Where there is some doubt as to whether a street was ever dedicated, and for more than twenty years the city has, without objection, permitted a private person to occupy the street and at considerable expense place permanent improvements thereon, the removal of which and the opening of the street would cause him great injury, and also segregate a portion of his premises from the remainder, the city will be estopped from opening the street. *Von Tobel v. Lewistown*, 41 Mont. 226, 137 Am. St. Rep. 733, 108 Pac. 910.

Where a rolling mill company has possession of a tract of land through which streets had been laid out in a dedication made prior to the land becoming a part of the city, and erected thereon, including the land claimed as a street, railroad tracks and buildings necessary to its business, and the municipality for over forty years acquiesced in this use of the land, not claiming it as a street, such municipality is equitably estopped from claiming the land for street purposes. *Chicago v. Illinois Steel Co.* 229 Ill. 303, 120 Am. St. Rep. 258, 82 N. E. 286. It would have been necessary in this case to have reconstructed the entire plant if the land claimed as a street had been allowed to the city, and the city, having allowed such improvements

to be made costing millions of dollars, on the faith and belief that there was no street in existence where the improvements were made, was held to be equitably estopped from claiming the land for street purposes.

Where a city acquiesced in the use of a street by a private corporation to the exclusion of the public for about fifty years, and such corporation erected a mill on an adjoining tract of land, and constructed a mill pond on substantially the entire street, so that to open the street would require the rearrangement and reconstruction of the mill pond and yard, the city is estopped from opening the street. *Reichert Mill Co. v. Freeburg*, 217 Ill. 384, 75 N. E. 544.

On the contrary, in *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217, 9 So. 21, the right of a city to open a street which had been regularly established was affirmed as against a manufacturing company which had maintained possession of the tract for more than thirty years, and had erected vaults and fences thereon, the moving of which would be rendered necessary by the opening of the street. It is not clear that the doctrine of estoppel received much consideration in the decision of this case. The city had collected taxes on the property, and it was urged that the assessment and collection of taxes by the city operated as an estoppel to open the street, but further than this nothing is said as to estoppel. See reference to this case under subdivision II. *supra*.

Estoppel has been held to exist with reference to highways also.

The total abandonment of a public highway by the public, together with actual, open, notorious, and adverse holding of possession by an adjoining landowner for about twenty-five years, works an estoppel against the public from claiming any right in the highway. *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 277, 42 N. W. 183.

The failure of the public to assert any right to land claimed as a highway for nearly thirty years, and the possession of the land by an adjoining landowner and his grantors during this time, adverse to

and expended in the erection of said lumber mill and plant large sums of money, and that during the period between September, 1889, and the present date, the said defendants and Inman, Poulsen, & Company, a corporation, occupied all of said premises now occupied by them, openly, continuously, notoriously, and adversely, and have excluded the public from said premises, and during all of said time conducted the business of a sawmill under claim of right, and believing in good faith that no street easement whatsoever existed within the boundary of the premises now occupied by them. That valuable and extensive improvements were made by said

all other claimants, estop the public from asserting any right to the land in question. *Smith v. Gorrell*, 81 Iowa, 218, 46 N. W. 992.

See also *Almy v. Church*, 18 R. I. 182, 26 Atl. 58, supra.

So, estoppel has been held to exist where some affirmative action on the part of the municipality is shown, together with the possession and improvements.

The doctrine of equitable estoppel was applied in *Boisé City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148, and a municipality was denied the right to recover ground which had formerly been a street where the municipality gave a deed therefor after the legislature had attempted to abandon the street (an act which it had no power to do), and the grantee and his successors had possession of the land for a period of forty years, had erected valuable improvements thereon, and the street was never used as a street, but was always recognized by the municipal authorities as private property.

Although a municipality may not have had power to vacate a street, yet where it has attempted to do so and obtained from the adjoining landowner the dedication of a portion of his lot for alleys to connect the unvacated portions of the alley with other streets, and has granted to such lot owner a permit to construct buildings on the vacated land, and such buildings have been constructed at an expense to the landowner, the city is estopped to evict him from the portion of the street vacated. *People ex rel. Friend v. Wieboldt*, 233 Ill. 572, 84 N. E. 646.

Where a municipality has made an attempt to vacate an alley, which attempt is irregular, but thereafter an adjoining landowner has inclosed the alley with his land and continuously used and occupied the same under a claim of right for nineteen years, and has set out trees which have grown to a considerable size, planted shrubbery, built a summer house, dug a well, erected valuable fences, constructed a private driveway, and otherwise beautified and enhanced the value of the entire premises, and during all this time the municipality has taken no action to prevent it, but has apparently relied on its efforts at vaca-

defendants and by said Inman, Poulsen, & Company over the whole of said premises having the appearance of streets as shown on the map of Stephens's addition to East Portland, and erected buildings across the same, and made fills with thousands of yards of materials, and built adjuncts to said lumber mill and plant, and erected landings and platforms and all things necessary and convenient for the use of a large lumber manufacturing plant.

"(12) That on the 27th day of November, 1906, the whole plant of Inman, Poulsen, & Company and the defendants herein was completely destroyed by fire. Said fire occurred at night and created great excite-

tion, the municipality is estopped from claiming the alley. *Blennerhassett v. Forest City*, 117 Iowa, 680, 91 N. W. 1044.

Where the municipality has attempted to vacate an alley, but by an error the wrong block is described, and thereafter the adjoining owner fences up the alley and erects buildings on different parts thereof, and so holds possession for over twenty years, the municipality is estopped from claiming the land as the street. *El Paso v. Hoagland*, 224 Ill. 263, 79 N. E. 658.

But where a city council made an ineffectual attempt to vacate certain streets, and subsequently entered into an *ultra vires* contract with a railroad company again to vacate the streets, but, before any improvements were placed upon the streets or any changes made, repealed the ordinance of attempted vacation, the city is not estopped from claiming the land as streets, notwithstanding there were subsequent improvements placed thereon by the railroad company. *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101; *Ashland v. Northern P. R. Co.* 119 Wis. 204, 96 N. W. 688.

See also *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108, supra.

Where the city has levied and collected assessments upon the land claimed as a street, which was held by the claimant for more than thirty years, and improvements erected thereon during the time, the city is estopped from claiming the land as a street. *Simplot v. Dubuque*, 49 Iowa, 630.

A city was held estopped to claim land as streets in *Smith v. Osage*, 80 Iowa, 84, 8 L.R.A. 633, 45 N. W. 404, where the land had been platted and streets indicated thereon and the plat filed, but the owner continued in possession thereof as farm land for thirty years, eighteen of which were after the municipality was organized as a city, and the city made no attempt during the time to open the streets, but on the contrary taxed the land dedicated as streets as private property.

Where the city has taxed property and levied special assessments upon it for thirty years, and the defendant has occupied it under a claim of right for nineteen years before the commencement of the action,

ment in the city of Portland, and that it was generally known and published within the said city that said plant had been destroyed, and it was generally known and published, and was known by the officials of the city of Portland, that said Inman, Poulsen, & Company were rebuilding a larger and more complete plant than the plant destroyed by fire as aforesaid, and that they continued the building of said plant without objection from the city of Portland or its officials, and have completed on said premises in controversy a sawmill and lumber plant with the greatest capacity of any sawmill in the world, and ever since have conducted on said premises said lum-

bering plant and sawmill, and have occupied the whole of said premises hereinafter described, with notice to all of the officials of the city of Portland; that the defendant Inman-Poulsen Lumber Company has continued to enlarge its plant, and has succeeded to all of the interests of its predecessors in title, and now has upon said premises a lumbering plant and sawmill of an actual annual capacity of 151,000,000 feet of lumber, and that it is necessary for the practical and proper operation of said plant to occupy the whole of the premises now occupied by them, and that during the operation and extension of defendants' plant, the defendant Inman-Poulsen Lumber Company

during which time the land has been treated as private property, the municipality is estopped from claiming the land as a street. *Davenport v. Boyd*, 109 Iowa, 248, 77 Am. St. Rep. 536, 80 N. W. 314.

The mere fact, however, that a city has collected taxes and levied and collected an assessment upon a strip of land dedicated as a street, and also, in widening the streets connected by the street in question, has condemned the ends of the strip of land, does not estop the city from claiming the land as a street, where the strip of land is used by the public as a street. *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

In some of the Iowa cases, no satisfactory distinction is made between the theories of abandonment, adverse possession, and estoppel. This doubtless arises from the holding in an early Iowa case (*Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729) that a private party may acquire the right to hold a public square by adverse possession. That land held for the public cannot be acquired by adverse possession against the municipality is the generally accepted doctrine of subsequent cases in this state, and a limitation was placed upon *Pella v. Scholte* in *Davies v. Huebner*, 45 Iowa, 574, —but the doctrine has caused some confusion in the Iowa cases.

In *Smith v. Osage*, 80 Iowa, 84, 8 L.R.A. 633, 45 N. W. 404, supra, the court, after holding that the city could not claim land dedicated as a street apparently on the theory of estoppel, adds: "We reach the conclusion that the action is barred by the statute of limitations, and that defendant is estopped to set up the claim of the public to the land in controversy."

Where the dedicator of a plat made an ineffectual attempt to vacate the same, including the street in question, and thereafter went into possession of the land under a claim of right, and held the same for more than ten years, for eight or nine of which taxes were levied and paid by him, and the property used for agricultural purposes, the city is estopped from thereafter claiming the street. *Uptagraff v. Smith*, 106 Iowa, 385, 76 N. W. 733. Although the opinion states that the person in possession of the street was entitled to 46 L.R.A. (N.S.)

relief against the municipality by virtue of her adverse possession under a claim of right for more than ten years, it seems that the term "adverse possession" is used in a somewhat loose sense, and refers to the estoppel against the municipality rather than to adverse possession as that term is strictly construed.

In *Weber v. Iowa City*, 119 Iowa, 633, 93 N. W. 637, the right of a municipality to open a street was denied where the landowner, after an ineffectual attempt at vacation, entered into possession of the land, inclosed it with fences, and made other valuable improvements thereon, remaining in possession, claiming and using the land as his own for more than thirty years, with the knowledge of and without objection by the city. The ground of this decision is not made clear by the opinion. In one part, the city is treated as having abandoned the street, and therefore not entitled to claim it; in another part, the ground is that of estoppel. These theories are treated by the court as at least similar, as, after referring to the theory of abandonment, it is stated that "parallel with cases thus holding, and largely along the same lines of reasoning, are the numerous decisions which apply to the doctrine of estoppel to municipal corporations, to prevent the assertion of public right to a street where the exercise of such right would be inequitable."

The court in *Taraldson v. Lime Springs*, 92 Iowa, 187, 60 N. W. 658, states that "the plea of an estoppel presents the question of the statute of limitations," and also refers to some earlier cases in which the doctrine of estoppel was applied with reference to an easement in the nature of a public highway. The latter cases are distinguished from the case at bar by stating that they were cases of neglect to use property in which the public had an easement, while the case at bar was one which, according to the Iowa doctrine, vested a fee simple in the public. The real decision in this case, however, seems to be based upon the fact that there were no equities in favor of the claimant, and therefore no ground for an equitable estoppel.

W. A. E.

their successors, or assigns, in the peaceable possession of said premises for the purposes for which they are now used or may be used as a lumber manufacturing plant.

"(18) That on the 24th day of November, 1908, the city of Portland caused six complaints to be filed against defendants Inman-Poulsen Lumber Company and Johan Poulsen, accusing them of violating said Ordinance No. 7,130, and that in each case said defendants were arrested and were charged with wilfully and unlawfully maintaining and keeping buildings and structures standing within and upon certain public streets, and that said alleged streets were within the bounds of the premises heretofore described. That said defendants appeared in said actions in the municipal court of the city of Portland, county of Multnomah, state of Oregon, and defended the same, and, the title to said real estate being involved, each of said actions were certified to the circuit court for further proceedings. That on the 9th day of April, 1909, said defendants were charged with violating an ordinance providing that no street should be filled or improvement made without a permit from the city, and a complaint was filed against said defendants in the municipal court of the city of Portland, Multnomah county, state of Oregon, making such charges against the defendants, and that said defendants appeared in said court and defended said action in said court, and, the title to real estate being involved, the same was certified to the circuit court for further action, and that the same was duly set down for trial on motion of the city of Portland for the 5th day of January, 1911, and that the said city of Portland dismissed the same complaint. That in the month of January, 1911, eleven complaints were filed in the municipal court for the city of Portland, county of Multnomah, and state of Oregon, charging defendants with obstructing alleged streets, and that defendants were arrested and appeared in said actions in said court, and, the title to real estate being involved, all of said actions were certified to the circuit court for further proceedings. That all of said actions are still pending against these defendants for the obstruction of alleged streets through the premises heretofore described, and none of the same have been brought to trial, and they are now pending, and have not been dismissed. That all of said actions involve the same questions of title as are involved in this suit, and that the plaintiff has had ample time and opportunity to bring said actions on for trial, and has neglected to do so."

46 L.R.A. (N.S.)

heard this day upon motion of defendants for a decree in accordance with equities of the cause and the findings of fact and conclusions of law heretofore made and entered herein, plaintiff appearing by Wm. C. Benbow, deputy city attorney, and defendants appearing by Geo. S. Shepherd, their attorney, and it duly appearing to the court after hearing the testimony adduced at the trial in this cause, together with arguments of counsel, that the defendants are entitled to a decree as prayed for, it is therefore ordered, adjudged, and decreed that defendants Inman-Poulsen Lumber Company is the owner and in the lawful possession of the following described premises situated in Multnomah county, state of Oregon, to wit: Beginning at a point sixty (60) feet north of the northwest corner of block B, in Kern's addition to the city of Portland, in Multnomah county, Oregon, and running thence east along the north line of Division street to the west line of Grand avenue; running thence north along the west line of Grand avenue to the southerly line of the right of way of the Oregon & California Railroad Company, now occupied by the Southern Pacific Company; from thence running northwesterly along the southerly line of said right of way to the north line of Lincoln street if extended westerly; thence west to the low-water mark of the Willamette river; thence southeasterly along the low-water mark of the Willamette river to the intersection of low-water mark with the north line of block A, Kern's addition, if extended; thence east to a point thirty (30) feet south of the point of beginning; thence thirty (30) feet north to the point of beginning, saving and excepting therefrom a small portion of said real estate and premises in the northerly and westerly corner thereof now occupied by the Portland Railway, Light & Power Company as a power and lighting plant, and saving and excepting the right of way of said Portland Railway, Light & Power Company across a portion of said premises. The wharfage rights and the right to wharf out from said premises at right angles with the harbor line to the established harbor line of the Willamette river, and the right to erect and maintain docks, wharves, and other structures between the harbor line of the said Willamette river and the low-water mark thereof, and all riparian rights and privileges incident and appurtenant to said real estate. Beginning at the northwest corner of block D, in Kern's addition to Portland, in Multnomah county, Oregon; running thence north 87.67 feet for a point of beginning;

